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**THE INVESTMENT TREATY REGIME AND PUBLIC INTEREST REGULATION IN GHANA:
PERSPECTIVES IN CONSTITUTIONALISM AND GENERAL INTERNATIONAL LAW**

BY

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**A THESIS SUBMITTED IN FULFILMENT OF THE REQUIREMENTS OF THE DEGREE OF DOCTOR
OF PHILOSOPHY IN LAW, THE UNIVERSITY OF AUCKLAND, 2015**

Abstract

There is extensive literature on conflict of legal norms and interests in international investment law. The dominant discourse is on the implications of treaty-based investment protection for sovereign regulatory autonomy. Mainstream scholarship critical of the scope and effect of investment treaties has taken the legal status of these treaties for granted. Little systematic attention has been paid to the capacity of states to make investment treaties and the obligations states can or cannot agree to under those treaties in light of their public interest obligations.

Yet, this issue is of fundamental importance for three reasons. First, the case for states' regulatory autonomy arises out of their primary duty to regulate in the public interest. This duty has its legal justification in national constitutions and international law. Second, treaty obligations are founded on the existence of legal norms necessary for the treaty to come into existence and which define the juridical consequences attached to the conclusion of the treaty. These matters are also determined by national constitutions and international law. Third, the limitations inherent in state-specific defences in international investment disputes settlement compel a proactive rethink of the conclusion of investment treaties and how they are interpreted.

The question this thesis assesses with reference to Ghana then is: does a state that is legally required to act both under the terms of its constitution and international law in the public interest have the capacity to conclude investment treaties that expressly prevent or abridge the exercise of its public interest regulatory powers, and how should treaties adopted in breach of these obligations be interpreted?

To address this question, three areas of public interest regulation that have featured prominently in investment arbitration serve as case studies: the jurisdiction of municipal courts, environmental protection and development policy. Based on the impact and potential limitations of standards of investment protection on these areas, the thesis argues that some treaties are incompatible with the public interest regulation obligations of Ghana under the Constitution and international law. The core proposition of the thesis is that the legal source and public purpose of the State's powers prevent it from concluding agreements that directly prohibit public interest regulation or indirectly achieve that effect. Accordingly, the thesis proposes that the express and implied limitations on the duty to regulate in the public interest placed on investment treaty making powers of the State must inform the making of investment treaties and their interpretation. By its approach, this thesis establishes a principled basis for reflection on the limits to the State's capacity to conclude investment treaties and on how they should be interpreted.

Dedication

Talata, Ndoombe, Wumborti & Nignentim

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The idea of doing research on international investment law and public interest regulatory autonomy dawned on me in 2009 when I attended a training workshop organised by the Ministry of Justice and Attorney-General's Department for state attorneys in Accra, Ghana. I re-joined the Ministry in June 2009 upon my return from leave in the United States where I had studied for my Master of Laws degrees. The training was titled *Workshop on the Business Law Reform Programme*. One of the topics treated at the workshop was titled "The Law Regulating Foreign Direct Investment." It was handled by my former Lecturer in International Law at University of Ghana, Mr. Emmanuel Benneh. Based on the materials I read from this workshop, I framed two topics I thought were worth scholarly attention: "The Legal and Regulatory Framework for the Promotion and Protection of Foreign Investment in Ghana" and "The Legal and Regulatory Frameworks for the Control, Promotion and Protection of Foreign Investment in Ghana: Striking a Balance between Investor Protection and National Sovereignty Prerogatives." These titles reflect the thinking that informed my decision to undertake PhD research on the issues underlying this thesis. I am grateful to the organisers and facilitators of the workshop who provided the context that prompted me to think around the issues pursued by this thesis.

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Table of Treaties, Declarations and Resolutions

- African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), entered into force 21 October 1986
- African Convention on Conservation of Nature and Natural Resources, adopted 15 September 1968, entered into force 16 June 1969, revised and adopted 11 July 2003
- Agreement between the People's Republic of China and the Government of the Republic of Ghana Concerning the Encouragement and Reciprocal Protection of Investments (signed 12 October 1989, entered into force on 22 November 1991)
- Agreement between the Kingdom of Denmark and the Government of the Republic of Ghana Concerning the Promotion and Protection of Investments (signed 13 January 1992, entered into force 6 January 1995)
- Agreement between the Government of the Republic of Ghana and the Government of Malaysia for the Promotion and Protection of Investments (signed on 8 November 1996, entered into force 18 April 1997)
- Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Ghana (signed 31 March 1989, entered into force 1 July 1991)
- Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Promotion and Protection of Investments (signed 22 March 1989, entered into force 25 October 1991)
- Agreement between the Government of the United Kingdom of Great Britain and Northern-Ireland and the Government of Sri Lanka for the Promotion and Protection of Investments entered into force 18 December 1980
- Agreement for Reciprocal Promotion and Protection of Investments between Spain and the USSR, entered into force on 28 November 1991
- Agreement on the Reciprocal Promotion and Protection of Investments, entered into force for both countries on December 18, 1996
- Agreement between the Government of the Republic Indonesia and the Government of the Kingdom of the Netherlands on Promotion and Protection of Investments, adopted on 6 April 1994
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, adopted on 22 March 1989
- Charter on Economic Rights and Duties of States, UNGA Res 29/3281 (1974) UNGA 29th Session Agenda Item 48 UN Doc A/RES/29/
- Charter of the United Nations, signed in San Francisco, 26 June 1945 and entered into force 24 October 1945
- Constitutive Act of the African Union, adopted by the Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Government at Lome, Togo, 11 July 2000
- Convention on the Settlement of Investment Disputes between States and Nationals of Other States, entered into force 14 October 1966
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Entry into force 7 June 1959
- Declaration on the Right to Development, GA Res 41/128, 4 December 1986

International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, entered into force 23 March 1976

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3, entered into force 3 January 1976

North American Free Trade Agreement, entered into force 1 January 1994

Pakistan and Federal Republic of Germany Treaty for the Promotion and Protection of Investments, signed at Bonn, on 25 November 1959

Permanent Sovereignty over Natural Resources, GA Res 1803 (XVII), 17 UN GAOR Supp (No17) 15 UN Doc A/5217 (1962)

Rio Declaration on Environment and Development, 31 ILM 874 (1992)

Stockholm Convention on Persistent Organic Pollutants, adopted by the Conference of Plenipotentiaries on 22 May 2001 in Stockholm, Sweden, entered into force on 17 May 2004

Treaty between the Federal Republic of Germany and the Republic of Ghana for the Encouragement and Reciprocal Protection of Investments, signed 24 February 1995, entered into force on 23 November 1998

Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment, signed on 14 November 1991, entered into force since 20 October 1994

Treaty on the Mutual Protection and Promotion of Investments between the Federal Republic of Germany and the Argentine Republic, dated 9 July 1991

Treaty Establishing the African Economic Community, Signed, 3 June 1991

United Nations resolution on the human right to water and sanitation, General Assembly Res 64/292, 28 July 2010

United Nations Convention on Climate Change, opened for signature on 9 May 1992, entered into force on 21 March 1994

Universal Declaration of Human Rights, Proclaimed by the United Nations General Assembly in Paris on 10 December 1948, GA Res 217 A (III)

Vienna Convention on the Law of Treaties, done at Vienna on 3 May 1969, entered into force 27 January 1980

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Companies Act 1963 (Act 179)
Constitution of the Republic of Ghana 1992
Courts Act 1993 (Act 459)
Export and Import Act 1995 (Act 503)
Environmental Protection Agency Act 1994 (Act 490)
Environmental Assessment Regulations 1999 (LI 1652)
Foreign Exchange Act 2006 (Act 723)
Ghana Export Promotion Authority Act 1969 (Act 396)
Ghana Investment Promotion Centre Act 2013 (Act 865)
Internal Revenue Act 2000 (Act 592)
Minerals and Mining Act 2006 (Act 703)
National Board for Small-Scale Industries Act 1981 (Act 434)
The Public Procurement Act 2003 (Act 663)

Table of Abbreviations

AG	Attorney-General
B EGL	Balkan Energy (Ghana) Ltd
BIT	Bilateral Investment Treaty
CECNA	Commission for Environmental Cooperation of North America
CP	Construction Pioneers
ECJ	European Court of Justice
EPA	Environmental Protection Agency
EPA	Economic Partnership Agreement
EU	European Union
FACL	Faroe Atlantic Co Ltd
FET	Fair and Equitable Treatment
FPS	Full Protection and Security
GIPCA	Ghana Investment Promotion and Centre Act
GTCL	Ghana Telecommunication Company Ltd
GLR	Ghana Law Reports
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IIA	International Investment Agreements
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
IEL	International Economic Law
ILC	International Law Commission
IMF	International Monetary Fund
ISDS	Investor-State Dispute Settlement
JC	Joint Commission
JRP	Joint Review Panel
JVA	Joint Venture Agreement
MNCs	Multinational Corporations
MDGs	Millennium Development Goals
MTBE	Methyl Tertiary-butyl Ether
MFN	Most-Favour-Nation
NAFTA	North American Free Trade Agreement
NDPC	National Development Planning Commission
NGOs	Non-governmental Organisations
OECD	Organisation for Economic Cooperation and Development
PCIJ	Permanent Court of International Justice
PPA	Power Purchase Agreement
PCB	Polychlorinated Biphenyl
SCGLR	Supreme Court of Ghana Law Reports
TMB	Telekom Malaysia Berhad

US	United States
USD	United States Dollar
UNCITRAL	United Nations Commission on International Trade Law
UN	United Nations
UNCTAD	United Nations Conference of Trade and Development
UNDP	United Nations Development Programme
VAT	Value Added Tax
VCLT	Vienna Convention on the Law of Treaties
WCED	World Commission on Environment and Development

INTRODUCTION

In *World Investment Report 2012: Towards a New Generation of Investment Policies*, Ban Ki-moon, Secretary-General of the United Nations, stated that the “[p]rospects for foreign direct investment ... continue to be fraught with risks and uncertainties.”¹ These “risks and uncertainties” relate, in part, to the range of policies and regulatory actions that stand to be challenged by foreign investors as breaching standards of investment protection. Indeed, from its inception, and in particular since the 1990s, the international investment regime has generated debate among scholars and policymakers about the applicable law and standards of investment protection and the challenge the regime poses to states’ regulatory autonomy. Existing scholarship in international investment law predominantly focuses on how investment treaties and arbitration limit regulatory autonomy. For example, in his most recent book on the subject, *Resistance and Change in the International Law on Foreign Investment*,² Muthucumaraswamy Sornarajah ably describes and analyses the nature of conflict and change in international investment protection founded on treaties. However, no systematic attention has been paid to states’ powers to enter into such treaties and the implications of that for existing and future treaties. This is the task with which this thesis is concerned.

National constitutions are supreme in the hierarchy of legal norms within the domestic context, and governmental actions, including the making of investment treaties, are governed by these fundamental legal norms. Do or should national constitutions and the rights they preserve limit the powers of states in investment treaty making? This thesis explores this question with particular reference to Ghana. The constitutional rights and duties in Ghana require specific actions and the Government of Ghana has inherent discretion as to the sort of measures that can be adopted to fulfil its constitutional obligations towards citizens. Ghana is also a party to a large number of international human rights treaties and international environmental treaties which make a case for the protection of the public interest. These treaties, therefore, reinforce the Constitution of the Republic of Ghana 1992 (the Constitution) as to the duty of the State of Ghana (the State) in the protection of the public interest. In order to address this question it is necessary to examine in the first place whether or not the investment treaties of Ghana are capable of constraining or have the potential to constrain policies, legislative enactments and the discretion needed to meet constitutional and general international law requirements pertaining to the protection of the public interest in Ghana. It is only by establishing the constraining effects of investment treaties that the issue of whether the Constitution permits such constraining effects arises.

To address the question of the constitutional and general international law implications for investment treaty making and interpretation in Ghana, the thesis develops *The Constitutional-General*

¹ Ban Ki-moon, “Preface” in UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies* (United Nations, 2012) at iii.

² M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015).

International Law Imperatives Theory (The Imperatives Theory) based on an analysis of the Constitution. The basic premise of The Imperatives Theory, which is applicable to Ghana and countries with similar constitutional imperatives as in Ghana, is that the primary role of the State under the Constitution and general international law is to protect the public interest. Thus, these legal norms which justify the powers of the State must determine what the State can or cannot do with those powers and the legal and juridical consequences to be attached to the State acting outside of those norms or in a manner that prevents it from attaining the purposes for which the powers are entrusted to it. The legal validity or effect of legal enactments made or legal commitments undertaken by the State, whether national or international, must be determined by how they effectively deprive the State of its ability to act in fulfilment of the objectives of legal norms from which the State derives its powers.

The thesis argues that the State's need for autonomy to regulate in the public interest in the areas of development, human rights and the environment must limit the type of standards of investment protection the State can undertake through an investment treaty. Accordingly, the State must not agree to treaties that directly or indirectly prevent the performance of functions required in the public interest.

It also proposes that the express and implied limitations placed on the investment treaty making powers by the duty to regulate in the public interest must inform the interpretation of investment treaties. The search for regulatory autonomy in international investment law, the thesis argues, will elude states unless they stop making investment treaties at all or only make the treaties that respect and preserve the very norms within the domestic context for which that autonomy is needed. Equally, the resolution of investment disputes (especially by arbitral tribunals) cannot guarantee states that autonomy unless the legal norms that govern foreign investment reserve the autonomy of states to regulate in the public interest.

The challenge is how those imperatives can be implemented in relation to existing and future treaties, given the constraints of customary international law.

1.1 THE CHALLENGE INVESTMENT TREATY REGIME POSES TO REGULATORY AUTONOMY

1.1.1 Rationale for the Investment Treaty Regime

Investment treaties and international investment agreements (IIAs) are generally premised on two related rationales.

The first conventional supposition is that foreign investment leads to development and that investment treaties are necessary to protect and thereby attract foreign investment.³ The text of the first investment treaty, reached between Germany and Pakistan in 1959, was premised on the states' conviction that it was likely to promote investment, encourage private industrial and financial enterprise and increase the prosperity of both states.⁴ The Convention on the Settlement of

³ M Somorajah, *The International Law on Foreign Investment* (3edn, Cambridge University Press, 2010).

⁴ Pakistan and Federal Republic of Germany Treaty for the Promotion and Protection of Investments, signed at Bonn, on 25 November 1959, <http://www.iisd.org/pdf/2006/investment_pakistan_germany.pdf>.

Investment Disputes between States and Nationals of Other States of 1966 (ICSID Convention) was founded on the idea that there was a need for international cooperation and private international investment for the attainment of economic development.⁵ According to Kofi Annan, former United Nations Secretary-General, foreign investment “is a vital factor in the long-term economic development”⁶ of developing countries because it has the potential to create jobs, raise productivity, enhance exports and transfer technology. Annan also states that foreign investment offers an additional avenue for developing countries to link up to global markets and production systems. These investments, if managed properly, could help firms to access markets, natural resources, foreign capital, technology or various intangible assets that are essential to their competitiveness.⁷

Investment treaties, it is claimed, can attract foreign investment by establishing standards of investment protection such as fair and equitable treatment, full protection and security, national treatment, most-favoured-nation treatment and expropriation. To ensure that these standards are ‘effectively’ enforced, investment treaties make provision for investment arbitration which is used to settle disputes between states and foreign investors. In 1965, the Executive Directors of the World Bank stated that:⁸

The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.

As Sornarajah states in *The Pursuit of Nationalized Property*, the internationalisation of investment protection by concession agreements, joint ventures, production sharing agreements, management and service contracts and investment treaties have all been influenced by the neoliberal idea that foreign investment leads to development.⁹ Today, investment treaties have become the dominant international legal mechanisms for the protection of investment.¹⁰ By the end of 2014, bilateral investment treaties (BITs) and free trade and economic partnership agreements with investment provisions reached 3,268.¹¹

The growth in the number of investment treaties shows how dominant this perception has become. For example, in 2007 Ghana and the European Union (EU) entered into A Stepping Stone Economic Partnership Agreement¹² and in February 2014 sixteen West African states, including Ghana, concluded negotiations with the EU for an Economic Partnership Agreement (EPA) to promote trade between the two regions. The Heads of State of the Economic Community of West African States

⁵ *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 4 ILM 524 (entered into force 14 October, 1966), preamble para 1.

⁶ Kofi Annan, “Foreword” in UNCTAD, *World Investment Report 2003. FDI Policies for Development: National and International Perspectives*, (United Nations, 2003) at iii.

⁷ *Ibid.*

⁸ *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* para 9, <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf>

⁹ M Sornarajah, *The Pursuit of Nationalized Property* (Martinus Publishers, 1986) at 42.

¹⁰ Andrew Guzman, “Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties” (1997) 38 *Virginia Journal of International Law* 639 at 640.

¹¹ UNCTAD, *Recent Developments in IIAs and ISDS* (IIA Issues Note No 1, United Nations, February 2015) at 1.

¹² European Commission, *Economic Partnership Agreement (EPA) Ghana – European Union: A New Partnership for Trade and Development* (April 2014), <http://eeas.europa.eu/delegations/ghana/documents/press_corner/2014/ghana_eu_epa_brochure_15_april_2014_en.pdf>

endorsed the EPA at a summit in Accra, Ghana, in July 2014.¹³ Ghana has also entered into twenty-six investment treaties, eight of which are in force.¹⁴ Only the investment treaties with China,¹⁵ Denmark,¹⁶ Malaysia,¹⁷ Netherlands¹⁸ and United Kingdom¹⁹ are the subject of analysis by this thesis because they are the only treaties in English.²⁰ Their preambles suggest they were intended to create favourable conditions to attract foreign investors to bring about increased economic prosperity and development, to stimulate productive use of resources and strengthen cooperation between Ghana and its contracting parties.

These conventional views are seriously suspect. Studies show that other reasons drive foreign investment.²¹ Further, the claims fail to acknowledge that the decision to enter into a treaty may be influenced by factors, such as the unequal power of the states involved. Most important for this thesis, the views do not address the negatives associated with the protection of foreign investment by treaties, such as their restraint on the right to regulate in the public interest.²²

The second argument is that host states' judicial systems cannot provide adequate protection for foreign investors. It had been argued that local bias is a serious barrier to obtaining redress in some host-country courts. International arbitration was, therefore, meant to serve as an insurance against local prejudice.²³ Efficiency of local courts was identified as another of the many concerns of foreign investors, because "developing countries" are said to "lack responsive, robust legal systems capable of effectively adjudicating complex claims".²⁴ Such a claim is ethnocentric in the sense that the proponents of the view are judging the judiciary in the developing world by standards of the developed world. The claim is also over generalised because it does not speak to the reality of how the judiciary functions in each developing country.

1.1.2 International Arbitration and Public Interest Regulation

By the end of 2014, the number of investor-state dispute settlement claims reached 608 with 101 states as respondents.²⁵ The United Nations Conference on Trade and Development (UNCTAD) points out that investor-state arbitration has become "the most controversial issue in international

¹³ European Commission, Economic Partnership Agreement with West Africa - Facts and Figures (23 July 2014), <http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152694.pdf>

¹⁴UNCTAD, Ghana: Bilateral Investment Treaties, <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/79?type=c#iialInnerMenu>>

¹⁵ *Agreement between the People's Republic of China and the Government of the Republic of Ghana Concerning the Encouragement and Reciprocal Protection of Investments* (signed 12 October 1989, entered into force on 22 November 1991)

¹⁶ *Agreement between the Kingdom of Denmark and the Government of the Republic of Ghana Concerning the Promotion and Protection of Investments* (signed 13 January 1992, entered into force 6 January 1995).

¹⁷ *Agreement between the Government of the Republic of Ghana and the Government of Malaysia for the Promotion and Protection of Investments* (signed on 8 November 1996, entered into force 18 April 1997.)

¹⁸ *Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Ghana* (signed 31 March 1989, entered into force 1 July 1991).

¹⁹ *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Promotion and Protection of Investments* (signed 22 March 1989, entered into force 25 October 1991).

²⁰ United States Department of State, *Investment Climate Statement – Ghana* (June 2012), <<http://www.state.gov/e/eb/rls/othr/ics/2012/191155.htm>>

²¹ Karl Sauvant and Lisa Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Inflows* (Oxford University Press, 2009).

²² Sornarajah, *Nationalized Property*, above n 9, at 45-47 and 88-90

²³ Christopher Dugan et al, *Investor-State Arbitration* (Oxford University Press, 2008) at 13.

²⁴ *Ibid* at 15.

²⁵ UNCTAD, above n 11, at 5.

investment policymaking.”²⁶ States and policymakers are mainly concerned about the range of policy issues, the volume of cases being initiated against them and the amount of damages.

There is a long list of policy and regulatory measures which may be considered essential for development and the protection of the environment and human rights which have been challenged under investment treaties. They include: regulating ownership in joint ventures in the interest of local populations;²⁷ abolition or modification of tariffs set in contracts for utilities;²⁸ regulation of management structures of business entities in which foreign investors have interest;²⁹ revocation of banking licenses;³⁰ the exercise of regulatory and administrative authority;³¹ revocation of free trade zone certificates or licenses;³² enactment³³ and amendment³⁴ of legislation that affects investment; restrictions on free transfer of funds;³⁵ requisition of concessionaires and the revocation of concession contracts;³⁶ the imposition of tax on investment operations;³⁷ denial of duty exemptions;³⁸ refusal to grant or revocation of licenses and permits;³⁹ rezoning land;⁴⁰ the termination of service agreements and modification of a contractual relationship;⁴¹ suspending work for lack of a permit;⁴² and granting other businesses opportunities in an area related to foreign investor’s area of operation.⁴³

These measures have applied to diverse areas where governments have public interest responsibilities including: agricultural activities;⁴⁴ tourism, hospitality, housing and real estate development;⁴⁵ banking, financial services and securities;⁴⁶ the utilities and energy sector;⁴⁷ minerals and mining;⁴⁸ highways and air transport;⁴⁹ national identification cards;⁵⁰ media and broadcasting services;⁵¹ wood and wood production;⁵² insurance;⁵³ and waste management and sanitation services.⁵⁴

²⁶ UNCTAD, *World Investment Report 2014: Investing in SDGs: An Action Plan* (United Nations, 2014) at 126.

²⁷ *Tradex Hellas SA v Albania*, ICSID Case No ARB/94/2, Award, 29 April 1999.

²⁸ *Compañía de Aguas del Aconquija SA v Argentina*, ICSID Case No ARB/97/3, Award, 20 August 2007; and *BG Group Plc v. Argentina*, UNCITRAL, Final Award, 24 December 2007.

²⁹ *Wena Hotels Limited v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award, 8 December 2000.

³⁰ *Genin v Republic of Estonia*, ICSID Case No ARB/99/2, Award, 25 June 2001.

³¹ *PSEG Global Inc v. Turkey*, ICSID Case No ARB/02/5, Award, 19 January 2007; and *Siemens v Argentina*, ICSID Case No. ARB/02/8, Award, 6 February 2007.

³² *Goetz v Burundi*, ICSID Case No ARB/95/3, Award on Liability and Amicable Settlement 10 February 1999; and *Middle East Cement Shipping and Handling Co SA v. Egypt*, ICSID Case No ARB/99/6, Award, 12 April 2002.

³³ *ADC Affiliate Limited v Hungary*, CSID Case No ARB/03/16, Award, 2 October 2006; and *Wintershall Aktiengesellschaft v Argentina*, ICSID Case No ARB/04/14, Award, 8 December 2008.

³⁴ *Archer Daniels Midland Company v. United Mexican States*, ICSID Case No ARB(AF)/04/5, Award, 21 November 2007; and *BG Group Plc v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007.

³⁵ *Joy Mining Machinery Limited v. Egypt* ICISD Case No. ARB/03/11, 6 August 2004.

³⁶ *Gemplus v United Mexican States*, ICSID Case Nos ARB(AF)/04/3 & ARB(AF)/04/, Award, 16 June 2010.

³⁷ *Cargill, Incorporated v. United Mexican States*, ICSID Case No ARB(AF)/05/2, Award, 18 September 2009; and *Feldman v. Mexico*, ICSID Case No ARB (AF)/99/1, Award, 16 December 2002.

³⁸ *Duke Energy Electroquil Partners v Ecuador*, ICSID Case No ARB/04/19, Award, 18 August 2008.

³⁹ *RSM Production Corporation v Grenada*, ICSID Case No ARB/10/6, Award, 10 December 2010.

⁴⁰ *MTD Equity Sdn v Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004.

⁴¹ *CME Czech Republic BV (the Netherlands) v Czech*, Partial Award, 13 September 2001.

⁴² *Biloune v. Ghana Investments Centre and the Government of Ghana*, Award on Jurisdiction and Liability, 29 October 1989.

⁴³ *Waste Management v Mexico*, Case No. ARB(AF)/00/3, Award, 30 April 2004.

⁴⁴ *Gustav F W Hamester GmbH & Co KG v Ghana*, ICSID Case No. ARB/07/24, Award, 10 June 2010.

⁴⁵ *Wena Hotel v Egypt*, above n 29.

⁴⁶ *Joy Mining v Egypt*, above n 35.

⁴⁷ *Duke Energy v Ecuador*, above n 38.

⁴⁸ *Goetz v Burundi*, above n 32.

⁴⁹ *ADC Affiliate Limited v Hungary*, above n 33.

⁵⁰ *Biloune v Ghana*, above n 42.

⁵¹ *CME v Czech*, above n 41.

⁵² *Pope & Talbot Inc v. Canada*, UNCITRAL, Award on Merits, 10 April 2001.

⁵³ *Continental Casualty Company v Argentina*, ICSID Case No ARB/03/9, Award, 5 September 2008.

⁵⁴ *Jan de Nul NV Dredging International NV v. Egypt* ICSID Case No ARB/04/13, Award, 6 November 2008.

Crippling monetary awards, legal costs and compound interest that flow from the cases can have devastating impacts on development. The highest known monetary award in the history of investor-state dispute settlement was made in *Yukos Universal Limited v Russia*⁵⁵ where Russia was found to be liable to pay unprecedented damages for seizing and transferring Yukos assets and interfering with the management of the company. Russia was also ordered to bear the costs of the jurisdiction and merit phases of the arbitration which amounted to EUR8.44 million.⁵⁶ The costs for legal representation and assistance of the investor amounted to USD79.63 million and Russia was ordered to pay USD60 million of these costs to the investor.⁵⁷ In total, Russia had to pay USD50 billion to cover the damages, costs of arbitration and the investor's costs for legal representation. Russia puts its own legal costs at USD27 million.⁵⁸ This award is a major burden for Russia; it would be unbearable for a country like Ghana.

Other massive awards have been made against very poor countries. The second highest known monetary award was made in *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador*,⁵⁹ involving an amount of USD1.77 billion for termination of a concession contract. The third, awarded in *Abdulmohsen Al-Kharafi & Sons Co v Libya*⁶⁰ for cancellation of a land-lease for development of a resort, amounted to USD935 million plus interest.

The range of issues that foreign investors have challenged and the amount of compensation involved which has to be paid out of public funds support the proposition that claims for breach of investor protections involves elements of the public interest. Moreover, foreign investment "is linked to protection of the environment, human rights and public welfare."⁶¹ The challenge of investment protection by treaty and arbitration to regulatory autonomy has raised concerns among advocacy groups, academic commentators and governments about the extent the investment treaty regimes, to put it in the words of Amokura Kawharu, "tip the balance too far in favour of freer capital flows and against the ability of governments to regulate in the public interest."⁶² So there is reason for each state that is party to this treaty-based investment protection regime to be concerned about the regime's implications for its autonomy to regulate in the public interest.

1.2 THE CONFLICTING OBLIGATIONS ON THE STATE OF GHANA

1.2.1 Constitutional Rights and Obligations

The Constitution in Article 1(1) not only recognises or endorses the principle that sovereignty resides in people, it also requires the powers of the Government to be exercised to promote the welfare of the

⁵⁵ *Yukos Universal Limited v Russia*, PCA Case No. AA 227, Final Award, 18 July 2014.

⁵⁶ *Ibid* para 1866 and 1869.

⁵⁷ *Ibid* para 1887.

⁵⁸ *Ibid* para 1874.

⁵⁹ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012.

⁶⁰ *Abdulmohsen Al-Kharafi & Sons Co v Libya*, Final Arbitral Award, 22 March 2013.

⁶¹ Amokura Kawharu "International Law Protection of Foreign Owned Property and Regulatory Freedom" at 5, <http://www.nzcel-conf.auckland.ac.nz/papers/Kawharu_Amokura.pdf>

⁶² *Ibid* at 7.

people of Ghana. This thesis focuses on three areas of the Constitution: the supreme authority of the courts in a system based on separation of powers, environment protection and development policy.

The Constitution in Article 125(3) and (5) vests the judiciary with exclusive jurisdiction in all matters, civil and criminal. It is, therefore, within the province of the courts of Ghana to decide upon legal disputes relating to constitutional rights and matters even when foreign legal persons are involved.

The Constitution recognises the importance of environmental and natural resources to human existence and development. It asserts national ownership of natural resources and requires the State to take appropriate measures to protect and safeguard the environment for posterity and to cooperate with other states and bodies to protect the wider international environment.⁶³ The Constitution vests minerals in the President and requires relevant state institutions to regulate and manage the utilisation of natural resources, namely, minerals, forestry resources and fisheries.⁶⁴ The Constitution in Chapter Five provides for the protection of various human rights for whose enjoyment and full realisation the exercise of governmental powers is necessary. Those human rights include the right to life, health, security of person, dignity and a standard of living adequate for health and well-being.⁶⁵ Environmental protection and the jurisdiction of municipal courts are fundamental for the realisation of these rights.

The Constitution also preserves certain economic and social values that are pertinent to development. Those values are reflected in Article 36(1) which requires the State to manage the economy to maximise the rate of economic development and secure the maximum welfare, freedom and happiness of every person in Ghana. This provision also requires the State to provide adequate means of livelihood, suitable employment and public assistance to the needy. The State must also take all necessary steps to establish a sound and healthy economy that assures the basic necessities of life and appropriate measures to promote the development of agriculture and industry, as required by Article 36(2)(e) and (3). In accordance with Article 36, the State must afford equality of economic opportunity to all citizens and guarantee the health, safety and welfare of all persons in employment.

1.2.2 General International law Rights and Obligations

Borrowing from Elihu Lauterpacht, the thesis uses the concept of *general international law* to refer to “the body of rules of conduct ... which confer rights and impose obligations primarily ... upon sovereign states as expressed in custom and treaties”,⁶⁶ in particular as they pertain to the jurisdiction of municipal courts, the environment, development and other fundamental human rights. In this broad sense, the concept is used to include customary international law principles that have been incorporated into Ghana law. In a narrower sense, general international law in this thesis consists of the international human rights treaties, international environmental treaties and other public interest-

⁶³ *Constitution of the Republic of Ghana 1992*, art 36(9).

⁶⁴ *Ibid* arts 257(6) and 269(1).

⁶⁵ *Ibid* arts 12, 13, 15, 17, 26, 30 and 37(2).

⁶⁶ Elihu Lauterpacht (ed) *International Law: Volume 1, The General Works: Being the Collected Papers of Hersch Lauterpacht*, E Lauterpacht (ed) (Cambridge University Press, 1970) at 9.

oriented treaties Ghana is a party to which recognise the above constitutional rights and values and impose corresponding duties on the State.

1.2.3 Investment Arbitration Disputes Involving Ghana

A number of known investor-state cases involving Ghana point to the potential for investment treaties and other international agreements to narrow regulatory autonomy in Ghana. The most direct confrontation with the State's powers and responsibilities under the Constitution involved the cases of *Balkan Energy Limited (Ghana) v Ghana*,⁶⁷ and *Bankswitch Ghana Ltd (Ghana) v Ghana*.⁶⁸ *Balkan Energy v Ghana* concerned a foreign investor's claim of the State's breach of a power purchase agreement (PPA) for the refurbishment and commissioning of fired (diesel and gas) barge and associated facilities. *Bankswitch v Ghana* concerned an agreement for an investor to provide a secure document management system for the Government of Ghana. Both disputes involved investment agreements that provided for the settlement of disputes by arbitration, so they are relevant to investment treaty arbitration.

In *Balkan Energy v Ghana* the State argued that the PPA was not valid because it had not received parliamentary approval in accordance with Article 181(5) of the Constitution, which requires an "international business or economic transaction" to be approved by Parliament. A similar issue arose in *Bankswitch v Ghana*, namely whether the agreement between the State and the company constituted an international business or economic transaction and had to be approved by Parliament.

The interpretation of the Supreme Court of Ghana of the meaning of an "international business or economic transaction" under Article 181 of the Constitution was disregarded by both investment tribunals, even though they found the Court's approach was one possible way of interpreting the provision. The tribunal adopted their own interpretations and by doing so not only usurped the judicial powers of the Supreme Court under the Constitution but also sought to render the Court's decisions otiose.

Previous known disputes had mixed outcomes. In 1996, Telekom Malaysia Berhad (TMB), a Malaysian telecommunication company, invested USD38 million in Ghana Telecommunications Company Limited (GTCL) and acquired 30% of shares, and control over and management GTCL. In 2001, a dispute arose between the parties as to TMB's interest in GTCL and TMB initiated arbitration proceedings for purported breaches by Ghana of its BIT with Malaysia. The investor claimed damages for expropriation of its investment in GTCL. The case was settled on terms that are not public.

In *Biloune v Ghana*,⁶⁹ the State was found liable for expropriation for terminating an agreement with a Syrian national for the construction of a hotel resort complex in Accra. The State claimed the investor had not procured a construction permit. Damages were awarded against Ghana in the

⁶⁷ *Balkan Energy Limited (Ghana) v Ghana*, UNCITRAL, PCA Case No. 2010-7, Interim Award, 22 December 2010.; and *Balkan Energy Limited (Ghana) v Ghana*, UNCITRAL, PCA Case No. 2010-7, Award on the Merits, 1 April 2014.

⁶⁸ *Bankswitch Ghana Ltd (Ghana) v Ghana*, PCA 118294, UNCITRAL, Award Save as to Costs, 11 April 2014.

⁶⁹ *Biloune v Ghana*, above n 42.

following terms: payment to Biloune of USD334,637, £61,811 and DM430; payment of USD100,000 to counsel for the investor; and payment of arbitration costs and fees of \$84,781.

In *Vacuum Salt Products Ltd v Ghana*,⁷⁰ the claimant was incorporated in Ghana under the Companies Act 1963 (Act 179). Twenty per cent of the shares in the company were held by a Greek national. The company entered into a thirty-year lease agreement with the Government in 1988 for salt production and mining in Ada-Songor Lagoon. The company instituted arbitration proceedings against the Government alleging it “suffered both a breach and progressive expropriation of its contractual rights” to produce the salt when the Government breached and terminated the lease agreement.⁷¹ The Government objected to the jurisdiction of the Tribunal on the ground that the company was a national of Ghana and not of Greece. In 1994, the Tribunal upheld Ghana’s submission and dismissed the claim for want of jurisdiction. The Tribunal decided each party was to bear its own expenses in connection with the proceedings and the fees and expenses of the arbitration were to be borne in equal shares.

*Gustav FW Hamester GmbH & Co KG v Ghana*⁷² concerned a dispute submitted to ICSID on the basis of an investment treaty between Germany and Ghana and a Joint Venture Agreement (JVA) between a German investor and Ghana Cocoa Board. The dispute related to a cocoa beans processing facility. The investor claimed damages for alleged breaches by Ghana of the BIT, specifically the fair and equitable treatment, full protection and security and national treatment standards. The investor claimed the State had imposed a ban on the export of the company’s products and a price agreement on the company, and had usurped the management of the company in which it had made the investment.⁷³ The Tribunal held that Ghana Cocoa Board is a separate legal entity whose acts could not be attributed to the State. Each party had to pay arbitration costs of USD305,000 and its own legal and other costs expended in connection with this arbitration.⁷⁴

In December 1996, the Government of Ghana and CP Construction Pioneers (CP) entered into an agreement by which CP was to construct and rehabilitate some roads in southern Ghana. The agreement provided that the parties would submit disputes between them to arbitration before the International Chamber of Commerce (ICC). The law of Ghana was the governing law and Accra in Ghana was the venue for arbitration proceedings. In 2001, a new government took power in Ghana. The new government began an investigation into alleged fraud surrounding the previous government’s dealings with CP. The Government later that year suspended payments to CP on the basis of the alleged fraud. This action resulted in CP initiating arbitration proceeding, *CP Construction Pioneers Baugesellschaft Anstalt v The Government of the Republic of Ghana*, in March 2002 with the ICC Arbitral Tribunal against the Government seeking payment under the contract. The Government objected to the jurisdiction of the Tribunal relying on section 27(2) of the repealed Arbitration Act 1961 of Ghana. According to that provision, where a difference giving rise to a dispute between the parties involved whether one of the parties was guilty of fraud, a court had powers to declare the agreement to arbitrate void and to give leave to revoke the authority of any arbitrator

⁷⁰ *Vacuum Salt Products Ltd v Ghana*, ICSID Case No. ARB/92/1, Award, 16 February 1994.

⁷¹ *Ibid* para 2

⁷² *Gustav FW Hamester GmbH & Co KG v Ghana*, ICSID Case No. ARB/07/24, Award 18 June 2010.

⁷³ *Ibid* paras 70-74.

⁷⁴ *Ibid* para 361.

appointed on the basis of the agreement. While the jurisdictional issue was pending, the Government on 7 April 2003 submitted an application to the High Court to revoke the authority of the Tribunal. Both parties appeared in a hearing before the High Court on the matter. The High Court ordered that the agreement to arbitrate had no effect and granted leave to the Government to revoke the authority of the arbitrator. On 8 May 2003, the Government informed the Tribunal that there were no further proceedings pending before it. The Tribunal nevertheless went ahead and issued a partial award to the effect that it had jurisdiction, reasoning that the decision of the High Court was arbitrary. Then on 3 August 2004, the Tribunal issued a partial final award of approximately 24 million Euros and 22 billion cedis (Ghana currency) in favour of CP. The Government later submitted an application to the High Court to set aside this partial award. While this case was pending, CP filed a petition in the United States District Court for the District of Columbia to confirm the partial award against the Government. That case was adjourned under Article VI of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1959. The US Court reasoned that adjournments pending the completion of set-aside proceedings were an integral part of such proceedings and that since the case involved Ghana law the issue could more properly be decided by a court in Ghana.⁷⁵

A Commission of Inquiry established in 2012 by the Government of President John Mahama to inquire into payments made from public funds arising from judgment debts, arbitration awards and negotiated settlements found that as at October 2002, the total outstanding claim by CP against the Government arising out of the arbitration awards had reached DM55,092,545 and GhØ2,747,166, a total equivalent of €27,547,272. This was in addition to an amount of DM117 million which the Government had to pay to CP as an out-of-arbitration settlement in respect of a different dispute involving Accra City Roads Project. The Commission found that the Government, because of the suspicion of either fraud or corruption or both, refused to settle the amount made in favour of CP until it lost power in 2009. By that time the liability of the State had grown to €162,609,600.89 and was accruing interest at the rate of €12,787 a day. The then Attorney-General, Betty Mould-Iddrisu, negotiated for a settlement of the amount down to €94 million. Payment of two final installments on this amount was suspended in 2012 because the Parliamentary Public Accounts Committee was undertaking hearings on payments made out of the public accounts. The non-payment of these installments also became a subject of arbitration in which CP claimed the outstanding amount and interest thereon.⁷⁶ As the Government itself has noted, not only “there is a limit to how much the Government can pay,” these “judgments against the State are invariably judgments against the Ghanaian taxpayer.”⁷⁷

⁷⁵As contained in *CP Construction Pioneers v Government of the Republic of Ghana*, Civil Act No 1:04-01564 (LFO), <https://jenner.com/system/assets/assets/4919/original/CPC_20v_20Ghana_20Aug_2012_20decision.pdf?1320332149>.

⁷⁶*White Paper on the Report of The Commission of Inquiry into Payments from Public Funds Arising from Judgment Debts & Akin Matters (C.I. 79/2012)*, http://ghana.gov.gh/images/documents/govwhite_paper.pdf at 35-36.

⁷⁷ *Ibid* at 46

1.3 THE OBJECT AND CONTRIBUTION OF THE THESIS

1.3.1 The Research Question

By the Constitution, the Government of Ghana must regulate in the public interest by acting constructively and decisively to protect values. Yet, in order to secure the protection of foreign investment, investment treaties impose constraints on the ability of the Government to act freely by prohibiting specified measures (such as discrimination in favour of nationals or performance requirements) and by requiring an award of damages in favour of foreign investors for the adoption of measures that substantially reduce the value of that investment, even if the measure is required under domestic law.

It is the duty of states to make policies, enact laws and take all measures to protect society at large. The very essence of government is the protection of the public interest. Jean-Jacques Rousseau underscored this point when he posed and disposed of a fundamental question: "What is the object of any political association? It is the protection and the prosperity of its members."⁷⁸ This edict is reflected in Article 1(1) of the Constitution, which states that "[t]he Sovereignty of Ghana resides in the people of Ghana in whose name and for whose welfare the powers of government are to be exercised in the manner and within the limits ... in this Constitution." Therefore, the Government of Ghana needs to retain regulatory autonomy to meet its human rights, environmental and development obligations when it pursues business-related policy objectives with other states and multinational business entities.⁷⁹

The thesis explores the actual and potential legal implications of Ghana's constitutional and general international law obligations to protect the public interest for its investment treaty regime. It emphasises the central role of the state for several reasons.

First, development theories that advocate a one-size-fits-all development policy, with macroeconomic policies that are linked to liberalisation and privatisation and investment openness, have failed. That is well documented, in light of major financial crises and economic stagnation or even the economic collapse of willing adherents such as Argentina.⁸⁰ More recently, the 2008 financial crisis has revitalised the legitimate role of the state in the economy.⁸¹ According to UNCTAD, governments "have become decidedly less reticent in *regulating* and *steering* the economy. More and more governments are moving away from the hands-off approach to economic growth and development that prevailed previously".⁸² There are growing calls for what Albert Cho and Navroz

⁷⁸ Jean-Jacques Rousseau, *The Social Contract* (Maurice Cranston (Translator), Penguin Books Ltd, 2004) at 99.

⁷⁹ Commission on Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (United Nations, 2011) Principle 9.

⁸⁰ Albert Cho and Navroz Dubash *Will Investment Rules Shrink Policy Space for Sustainable Development? Evidence from the Electricity Sector* (South Centre Trade Related Agenda Development and Equity Working Paper 16, December 2003) at 4; and Joseph Stiglitz "Challenging the Washington Consensus - An Interview with Lindsey Schoenfelder" 9 *The Brown Journal of World Affairs*, (2003) 33 at 40.

⁸¹ UNCTAD, *World Investment Report 2012*, above n 1, at 99.

⁸² *Ibid* at 100 (emphasis original).

Dubash describe as “heterogeneous and strategic development policies”⁸³ and “domestic institutional innovations”.⁸⁴

Secondly, governments, the public’s expectations and preferences, and development policies change over time. The state must be free to act because every reduction of its legal authority “limits future domestic political control ... and exposes governments who wish to change direction to potentially crippling economic, legal and moral sanctions.”⁸⁵

In reviewing the compatibility of Ghana’s investment treaty obligations with its constitutional and general international law obligations, the thesis examines what the goals of Ghana’s investment treaties are, how much policy space and regulatory autonomy are retained under them, and whether the standards of investment protection by treaty can constrain constitutional norms relating to judicial sovereignty, environmental protection, development policymaking and implementation and human rights. It assesses whether or not Ghana has, to borrow from Kojo Yelpaala, “treaty making authority to waive, undermine or abrogate positive or negative constitutional protections to life, health and safety of its citizens”⁸⁶ in favour of investment protection.

There are five interrelated key research questions:

1. Are Ghana’s standards of investment protection by treaty compatible with the State’s obligations to protect the public interest under the Constitution and general international law?
2. Can the Government of Ghana bargain away its obligations under the Constitution and general international law with respect to development policymaking and implementation and the protection of fundamental human rights and the environment in pursuit of foreign investment?
3. Does the constitutional need to protect the public interest and attain development goals in Ghana require some restrictions or qualifications on the standards of investment promotion and protection in investment treaties?
4. Under the Constitution does the State of Ghana have the competence to agree to a mechanism that exempts foreign investors from the jurisdiction of municipal courts?
5. How can these issues be addressed within the constraints of customary international law, as embodied in the Vienna Convention on the Law of Treaties, in relation to Ghana’s existing investment treaties and the entry into any future investment treaties?

1.3.2 The Contribution of the Thesis to the Literature

The thesis contributes to on-going discussion on where and how to draw the line between national regulation and policy measures aimed at protecting the public interest, for which compensation to foreign investors may not arise, and regulation and policy measures affecting foreign investment for which compensation may be required. The research issues underlying this thesis are timely because

⁸³ Cho and Dubash, above n 80, at 4.

⁸⁴ Ibid.

⁸⁵ Jane Kelsey, *The New Zealand Experiment: A World Model for Structural Adjustment?* (Auckland University Press with Bridget Williams Books, 1995) at 367.

⁸⁶ Kojo Yelpaala, “Fundamentalism in Public Health and Safety in Bilateral Investment Treaties Part I” (2008) 3(1) *Asian Journal of WTO and International Health Law and Policy* 235 at 240.

concerns over the implications of investment treaties for the jurisdiction of municipal courts, environmental and development policy choices, human rights, and over the activities of multinational business entities, are now very high on the public policy agenda of states, business and international organisations.⁸⁷

Ghana's investment treaty obligations are incompatible with the legal obligations of the State to protect the public interest under the Constitution and general international law, and are being pursued without due regard to their restraining effects on government policy space and legislative actions.

The compatibility is measured by assessing existing and prospective policies and legislative requirements which, if implemented or undertaken to protect the public interest, could conflict with Ghana's investment treaty regime. The thesis identifies actual and potential points of friction between investment treaty obligations and constitutional obligations.

Well-established and renowned academics have made various proposals as to how states can recapture or retain regulatory autonomy in international investment law.⁸⁸ The focus of this thesis on the constitutionality of investment treaties adds new insights to international investment law scholarship. There is a lack of comprehensive and systematic country-specific studies on the compatibility of standards of investment protection by treaty with constitutional *and* general international law standards on public interest regulation, and on the nature of the standards of investment protection that states can or cannot undertake in investment treaties.

In his ground-breaking article, *Fundamentalism in Public Health and Safety in Bilateral Investment Treaties Part II*,⁸⁹ Kojo Yelapaala does address the issue of the constitutional and general international law implications for the making and interpretation of investment treaties. Yelapaala strongly argues that there is the need to “*return to first principles of sovereignty, constitutionalism and international law on the issues of sovereign authority with respect to domestic policy relating to security and other critical social policies.*”⁹⁰ His core concern is the situation where a state's authorities lack the competence to commit a state to obligations under treaties such as investment treaties, which restrain the state from adopting measures in the interest of public health. Yelapaala's starting point is the fundamental rights protected by a constitution, although the issue can be addressed from an international law perspective as well.⁹¹

However, Yelapaala's study is rather general. As he states, “a casual examination of the relevant issues concerning the relationship between constitutional law doctrines and theories of BITs provisions suggests complexity deserving deeper analysis than can be undertaken in this study.”

⁸⁷ John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises Business and human Rights: Towards operationalizing the “Protect, Respect and Remedy” Framework* (2009) (A/HRC/11/13) para 30.

⁸⁸ M Sornarajah and Leo Trakman, “A Polemic: The Cases for and Against Investment Liberalization” in Leon Trakman and Nicola W Ranieri (eds), *Regionalism in International Investment Law* (Oxford University Press, 2013) 499 at 500; Sornarajah, *Law on Foreign Investment*, above n 3, at 110, 275 and 296-297; Jane Kelsey, *How the Trans-Pacific Partnership Agreement Could Heighten Financial Instability and Foreclose Governments’ Regulatory Autonomy* (2010) 8 *New Zealand Yearbook of International Law* 41 at 75; Gas Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007) at 152 and 168; David Schneiderman, *Resisting Economic Globalization: Critical Theory and International Investment Law* (Palgrave Macmillan, 2013) at 1-13; David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise* (Cambridge University Press, 2008) at 225 and 235; and Philippe Sands “Searching for Balance: Concluding Remarks” (2002-2003) 11 *New York University Environmental Law Journal* 198 at 202

⁸⁹ Kojo Yelapaala, *Fundamentalism in Public Health and Safety in Bilateral Investment Treaties Part II* (2008) 3(2) *Asian Journal of WTO & International Health Law and Policy* 465

⁹⁰ *Ibid* (emphasis original).

⁹¹ *Ibid* at 475 and 479.

Yelpaala's goal was to raise the "larger and more fundamental questions in the interpretation of BITs provisions when constitutional law questions are implicated" in order "to redirect the debate to the fundamental constitutional law issues so far not addressed in the emerging debate over the implications of BITs."⁹² In order to engage the issues in a more specific yet deeper, detailed, comprehensive, systematic and practical manner, this thesis focuses on a specific constitution, international human treaties, international investment treaties to which a state is a party.

With particular reference to Ghana, the thesis questions whether national constitutional and general international law obligations do or should regulate the conduct of Ghana in investment treaty making. It does this with reference to the jurisdiction of municipal courts, the right to a clean environment and the right to development in Ghana. By giving considerable attention to the limits that the duty of the State towards the public places on the investment treaty making powers of Ghana, it addresses the issue of conflict of legal norms and interests in international investment law from its roots, rather than from its impacts or resultant effects alone.

This thesis is original not only in approach, but also because it uses the specific case of Ghana to add new insights, perspectives and value to existing discourse on international investment law and the right to regulate. The legal and regulatory issues associated with international investment protection by treaty have not been explored since Ghana signed its first investment treaty with the United Kingdom in 1989, which came into force in 1991. A review of the kind undertaken in this thesis is a prerequisite for rethinking those legal relationships.

With reference to developing countries generally, Sornarajah points out that "there is little understanding of the effects of treaties that are entered into at the instigation of international organizations that may make such treaties a condition for assistance."⁹³ According to him, while the constitutionality of investment treaties has been studied in developed countries including Canada and United States, "[p]eople within the developing states are seldom concerned with low visibility instruments such as investment treaties."⁹⁴ Ordinary persons on the streets in the developing world do not know that their countries have tied up their sovereignty in order to protect foreign investment. The developing country elites who supposedly do know stand to profit from the system and are less inclined to challenge it.⁹⁵ Thus, there is a pressing need for legal scholarship in Africa and the developing world generally that can contribute to an understanding of the nature and effects of investment treaties and arbitration for domestic public interest values protected under national constitutions and general international law from an indigenous perspective. The UNCTAD emphasised the importance of this approach in 2007:⁹⁶

International investment rulemaking poses particular challenges for developing countries. One consequence of this situation is the growing need for policy research and analysis ... to help developing countries in assessing the implications of different policy options before entering into new agreements.

⁹² Ibid.

⁹³ Sornarajah, "Polemic," above n 88, at 509.

⁹⁴ Ibid at 512.

⁹⁵ Ibid.

⁹⁶ UNCTAD, *International Investment Rule-Setting: Trends, Emerging Issues and Implications*, (United Nations, 2007) para 56.

1.4 THE SCOPE AND METHODOLOGY OF THE INQUIRY

The protection of foreign investment by treaty and arbitration raises a number of questions which are of policy and practical significance. These include: whether investment treaties attract foreign investment; whether foreign investment leads to development; how policy coherence can be established in investment treaties with overlapping obligations and with national legal and policy frameworks; and how a state might address any incompatibilities between its public interest obligations under its constitution and general international law and investment treaties' obligations.

The last two issues in particular are addressed in this thesis. The thesis focuses on the jurisdiction of municipal courts, environmental and human rights protection and development policy implications of international investment law because they are core functions that the Constitution has specifically assigned to the Government and are the areas of public interest that raise the most concerns in the international investment regime. The public interest is defined here as interests members of a community or state have in common, with particular reference to environment, development, human rights and national institutional autonomy.⁹⁷

The job of a lawyer is *interpretive* in nature: determining the meaning, scope and legal effect of the words and phrases used in a legal text. Ronald Dworkin made this point when he stated that "legal practice is an exercise in interpretation not only when lawyers interpret documents or statutes but also generally."⁹⁸ Aharon Barak observed that interpretation involves a number of legal activities. The first is resolving contradictions or real doubts and ambiguities in a given legal text. This involves imparting meaning to legal texts which requires resolving internal contradictions *within the text itself*.⁹⁹

Second, interpretation comprises the art of resolving contradictions or conflicts between *different legal texts* either on the same normative level or on a different normative level, such as constitution and statute, statute and contract, contract and will, and international law and municipal law.¹⁰⁰ Giving meaning to legal texts either alone or in relation to another legal text constitutes an interpretive activity.¹⁰¹ Third, interpretation may be understood as filling a lacuna or gap in a legal text.¹⁰²

The legal texts and sources analysed in this thesis are the Constitution, statutes, investment treaties, international human rights treaties, international environmental treaties, customary international law and case law. When examining the actual and potential contradictions between investment treaties and the rest, the method is interpretive, analytical, descriptive and evaluative.

There are limited known arbitral awards involving Ghana and foreign investors that are relevant to this thesis. However, Ghana's investment treaty terms are substantially the same as those of other countries involved in the arbitral cases that were selected for analysis because they directly involved similar policy issues and measures to those required by the Constitution and domestic legislation in Ghana.

⁹⁷ Barry M Mitnick, "A Typology of Conceptions of the Public Interest" (1976) 8 *Administration & Society* 5.

⁹⁸ Ronald Dworkin, 'Law as Interpretation' (1982) *Texas Law Review* 529.

⁹⁹ Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press, Princeton, 2005).

¹⁰⁰ at 5.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

The choice of Ghana for this study is informed by the author's familiarity with the key legal instruments and the importance of these issues for the nation, Africa and the developing world. Recent arbitral disputes reveal the tension between investment treaty obligations and constitutional obligation of Ghana to act within the terms of the Constitution and general international law. The fact that Ghana's investment treaties do not make exception for public interest regulation without the need to pay compensation to foreign investors increases the potential for the investment treaty regime to limit the State's regulatory autonomy. The status of the Constitution as the supreme law of Ghana has been argued by the State in defence of measures challenged by foreign investors.

Given this context, it becomes imperative to ascertain the extent to which Ghana needs to comply with the Constitution in entering into investment treaties. How that imperative might be met in relation to future treaties and what can be done about existing treaties, raise different but related legal arguments. This inquiry is of broader practical value given the debates happening around IIAs and regulatory autonomy and ongoing efforts of states to reform their IIAs framework to accommodate public interest regulation.¹⁰³

1.5 THE ORGANISATION OF THE ARGUMENT

The argument of the thesis is that as the Constitution is supreme in the hierarchy of legal rules within the domestic context, just as peremptory norms of general international law are in the international plane, the competence of Ghana to make investment treaties and the legal effect of treaties so made should be judged in terms of the implications of the treaties for public interest regulation. It also argues that in interpreting investment treaties, normative priority should be given to the Constitution and general international law when they both protect public interest pursued by the measure giving rise to the dispute since the State of Ghana derives its powers from these norms for the public good. In such a case, the State may not be liable for adopting the measure concerned. If regulation is justified and liability arises nevertheless, the award of damages must have regard to that justification in terms of mitigating any damages. Building on these themes as the foundation, the thesis is presented in four substantive chapters and a concluding one as follows.

Chapter two develops the theoretical and analytical framework applied in the thesis based on theories on constitutionalism and the role of the state. To do this effectively, it reviews and interprets the basic standards of investment protection under Ghana's investment treaties and the duties of the State under the Constitution and general international law. It lays bare the nature of the potential conflict between the State's obligations under the investment treaty regime and obligations under the Constitution and general international law. It also assesses the limitations inherent in state-specific defences, such as the principle of proportionality, the defence of necessity and margin of appreciation, so as to justify the need for alternatives.

It then introduces the theory of constitutionalism, which emphasises the constitutional guarantee and recognition of fundamental rights, and the corresponding obligations of the State to fulfil those rights in the public interest, and the limits to the exercise of governmental powers in Ghana. Drawing

¹⁰³ UNCTAD, *International Investment Rule-Setting*, above n 96.

on theories on constitutionalism and the role of the state, the chapter emphasises the central role of the Government of Ghana in protecting the public interest, which must limit its competence in investment treaty making. The chapter argues that in general, the problem of international investment law in terms of the challenge it poses to regulatory autonomy in Ghana lies squarely in the State concluding investment treaties without having regard for their implications for constitutional norms and other national interests which govern the exercise of the powers of government. It argues that the competence of the State to conclude investment treaties must be guided by its duty to regulate in the public interest as guaranteed under the Constitution and general international law.

Chapter two also addresses the issue of how the challenge posed by international investment law to regulatory autonomy might be addressed in the interpretation of investment treaties. In this respect the chapter argues for the need to interpret investment treaties with reference to general international law so that public interest regulation can be accommodated in international investment law.

Chapter three analyses how investment treaty arbitration can affect the exercise of judicial authority of the courts in Ghana. It questions whether the State has the competence to agree to investor-state arbitration which permits foreign investors to bypass municipal courts in Ghana, since the Constitution assigns original, appellate and final jurisdiction over legal disputes to municipal courts. The chapter also establishes that foreign investors do not have an automatic right under general international law to access international dispute resolution without at least an attempt to exhaust local remedies. Therefore, the direct right to investment arbitration cannot be justified under general international law, without showing by empirical evidence that foreign investors cannot have effective remedy before municipal courts. In this regard, the chapter questions the competence of the State to agree to international arbitration in light of customary international law. The right of international arbitration under existing treaties must be interpreted as arising only when foreign investors have legitimately made a case that they do not have remedy before municipal courts. The proposal for the future is that constitutional norms with respect to the jurisdiction of the courts must guide the State in making decision whether to agree investor-state arbitration given its potential to undermine judicial independence and potency of the courts' decisions.

Chapter four focuses on environmental regulation of foreign investment. The environment is protected, in part, by the enforcement of environmental laws and policies and enactment of new legislation. The Constitution and some of the international environmental treaties to which Ghana is a party recognise environment-related rights and impose a duty on the State to protect and safeguard the environment. However, evidence shows that the activities of businesses (including foreign investors) in the mining industry have contributed to environmental damage in Ghana, threatening people's right to food, health and wellbeing.

The chapter assesses how investment treaties restrict the adoption of measures aimed at protecting Ghana's environment. The main legal means by which environmental laws and regulations are enforced include the termination, cancellation and suspension of environmental permits and imposition of fines for non-compliance with environmental regulations. These measures can be challenged as breaching various standards of investment protection under Ghana's investment treaties. In this regard, the investment treaties stand to compromise environmental protection and

realisation of the right to a clean and safe environment. This chapter argues that the duty to protect the environment is both constitutional and emanates from international environmental treaties. So the right to clean and safe environment and corresponding duty of the State place limitations on the standards of investment protection by treaty the State can undertake.

Chapter five explores the implications of investment treaties for development policymaking and implementation in Ghana. The chapter shows there is a right to development in Ghana and a corresponding duty of the State to adopt policy and regulatory measures to ensure the realisation of this right. Although development is claimed to be an objective of the investment treaty regime, the actual terms of the treaties can conflict with the adoption of broader development policies when they affect an investment interest. Specifically, the standards of investment protection, such as national treatment and guarantees on repatriation of investment and returns, limit the constitutional powers of the State to adopt targeted social and economic policies and to regulate exchange transactions for currency stability to promote development. The adoption of these measures can result in investment treaty claims for breach of the applicable investment treaty standards as evidenced by relevant arbitral case law. This chapter argues that the duty to make and implement development policies under the Constitution and general international law limits the competence of the State in investment treaty making and must guide the State in concluding investment treaties taking into consideration their implications for the autonomy to regulate in discharge of that duty.

Chapter six concludes that there is the need for the standards of investment protection to be reconciled with the constitutional and general international law duty of the State to protect the environment and human rights and to initiate and implement development policy and in light of judicial sovereignty. It is only by being guided by constitutional norms which justify regulatory autonomy in making investment treaties that that autonomy can be retained. This requires that Ghana does not enter into investment treaties at all or existing treaties must be revised and certain terms must be excluded from or qualified in future investment treaties. In so stating, it is acknowledged as pointed out by Sornarajah that “[t]here is an absence of perfect equality in knowledge, negotiating power, and lack of coercion to support the view that there is voluntary surrender of sovereignty”¹⁰⁴ in disregard of constitutional law and general international law guaranteeing that sovereignty. However, it is equally the case as Jane Kelsey states, that “[t]he globalisation of national economies is, at least, a fact of life. *But there is choice in how far* a particular state embraces it, and how much room that leaves for manoeuvre if (or when) the expansion of trans-national enterprise proves ecologically, economically, politically or socially unsustainable.”¹⁰⁵

¹⁰⁴ Sornarajah, “Polemic,” above n 88, at 509.

¹⁰⁵ Kelsey, *The New Zealand Experiment*, above n 85, at 369 (emphasis added).

TOWARDS THE CONSTITUTIONAL-GENERAL INTERNATIONAL LAW IMPERATIVES THEORY*

2.1 INTRODUCTION

A plurality of legal norms at the national and international planes often gives rise to conflict between those norms. This happens particularly where municipal law and international legal norms deal with the same subject matter or issue.¹

From the very inception of the legal regime of foreign investment protection, there has been concern and contestation among states, investment scholars, policy makers and international organisations about standards of investment protection under international law and municipal law. The concerns relate to the restraining effects of treaties on the making and implementation of regulatory measures aimed at protecting human rights, the environment and other welfare interests.² The issue is the extent to which governments may affect the value of foreign investors' property by regulation, particularly in the context of general regulation for a public purpose, without having to compensate an affected foreign investor.³ On one hand, there is the need to protect legitimate foreign investment. On the other hand, if states are required to pay compensation in all cases in which regulation adversely affects foreign investment, they may not only lose huge sums of public money, but regulation for public purposes may also be restrained by the fear of international arbitration. In such a case, international investment law would become an instrument for the exploitation of host states.⁴ In light of these issues, Sornorajah rightly stated in 2010 that "[m]uch rethinking will need to be done on recapturing the regulatory space that has been sacrificed as a result of the treaties and the encroachments on this space made by arbitral tribunals".⁵ The question is: how is this to be done?

International investment law scholarship on the subject of conflict between international investment law and domestic policy options might be divided into two broadly opposing camps. On one hand, there are those who believe that a liberalized investment regime will spur development in countries with otherwise bleak development prospects. They seem to

* This chapter is derived in part from Dominic N Dagbanja, "Conflict of Legal Norms and Interests in International Investment Law: Towards The Constitutional-General International Law Imperatives Theory" (2015) 6(3-4) *Transnational Legal Theory* 518, available online: <<http://dx.doi.org/10.1080/20414005.2015.1126110>>

¹ Michel Rosenfeld, "Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism" (2008) 6 *International Journal of Constitutional Law* 415 at 45-416.

² OECD, *International Investment Law: A Changing Landscape: A Comparative Volume to International Investment Perspectives* (OECD Publishing, 2005) at 44.

³ *Ibid.*

⁴ M Sornarajah, "The Case against a Regime on International Investment Law" in Leon Trackman and Nicola Ranieri (eds), *Regionalism in International Investment Law* (Oxford University, 2013) 475 at 501 and 506.

⁵ M Sornarajah, *The International Law on Foreign Investment* (3edn, Cambridge University Press, 2010) at 82.

equate foreign investment with development. Ignaz Seidl-Hohenveldern, for example, is of the view that “there must be private foreign investment to meet the needs of newly-developing countries” and that they “must encourage the flow of such investments by making them more secure.”⁶ Conventional works on international investment protection, as Sornarajah puts it, “seek to analyse this area as if there is nothing wrong that is taking place.”⁷

Sornarajah not only says there is “no evidence to show that investment treaties have led to greater inflows of foreign investment into states making them”,⁸ but he also describes the international law on foreign investment as “law of greed”.⁹ This, according to him, is because “it is built on accentuating only one side of the picture of foreign investment so as to benefit the interests of multinational corporations which exist to seek profits for their shareholders.”¹⁰ He argues that “[t]he case for an international body of investment law can be made only on the basis that there is but one way towards economic development that serves all mankind. Unfortunately, neither in practice nor in economic theory can such a case be made.”¹¹

On the other hand, there are scholars who seriously caution against the use of investment treaties and arbitration to protect foreign investment, given their limiting impact on public interest regulation.¹² Jane Kelsey, argues that “[t]he current orthodoxy of ... investment liberalization leaves no space to talk of social and environmental justice, indigenous rights, healthy communities, eradicating poverty or redistributing power.”¹³

International investment lawyers such as Sornarajah, Kelsey, Kojo Yelpaala,¹⁴ David Schneiderman,¹⁵ Gus Van Harten,¹⁶ and other scholars¹⁷ have focused on the limiting impact of investment treaties and arbitration on regulatory autonomy of host states. One of the basics that has not been comprehensively and coherently considered in this scholarly inquiry is the question of the capacity of states to make investment treaties and the obligations states can or cannot assume under these treaties in light of their public interest obligations under

⁶ Ignaz Seidl-Hohenveldern “The ABS-Shawcross Draft Convention to Protect Private Foreign Investment: Comments on the Round Table” (1961) 10 *Journal of Public Law* 100.

⁷ M. Sornarajah, “Evolution or Revolution in International Arbitration? The Decent into Normlessness” in Chester Brown and Kate Miles (eds) *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) 631 at 656

⁸ Sornarajah, *Law on Foreign Investment*, above n 5, at 299.

⁹ M. Sornarajah, “A Law for Need or a Law for Greed?: Restoring the Lost Law in the International Law of Foreign Investment” (2006) *International Environmental Agreements* 329 at 331.

¹⁰ *Ibid* at 331.

¹¹ Sornarajah, ‘Case against Investment Law’, above n 4, at 504.

¹² Jane Kelsey, “Global Economic Policy-Making: A New Constitutionalism?” (1999-2000) 9 *Otago Law Review* 535; Jane Kelsey (ed), *No Ordinary Deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement* ((Bridget Williams Books Ltd, 2010); David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise* (University Press, 2008); Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007).

¹³ Jane Kelsey, “International Economic Agreements and Environmental Justice” in Klaus Bosselmann and Benjamin J. Richardson (eds) *Environmental Justice and Market Mechanisms: Key Challenges for Environmental Law and Policy* (Kluwer Law International, 1999) 154.

¹⁴ Kojo Yelpaala, “Fundamentalism in Public Health and Safety in Bilateral Investment Treaties Part I (2008) 3(2) *Asian Journal of WTO & International Health Law and Policy* 235; and Kojo Yelpaala, “Fundamentalism in Public Health and Safety in Bilateral Investment Treaties Part II” (2008) 3(2) *Asian Journal of WTO & International Health Law and Policy* 465.

¹⁵ Schneiderman, above n 12; David Schneiderman, *Resisting Economic Globalization: Critical Theory and International Investment Law* (Palgrave Macmillan, 2013).

¹⁶ Hartan, above n 12.

¹⁷ Michael Waibel et al (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010).

national constitutions and general international law. Yet, such an inquiry is of fundamental importance because, as Alfred Von Verdross argues:¹⁸

each treaty presupposes a number of norms necessary for the very coming into existence of an international treaty. *These are the norms determining which persons are endowed with the capacity to act in international law, what intrinsic and extrinsic conditions must be fulfilled that an international treaty may come into existence, what juridical consequences are attached to the conclusion of an international treaty.* These principles concerning the conditions of the validity of treaties cannot be regarded as having been agreed upon by treaty; they must be regarded as valid independently of the will of the contracting parties. That is the reason why the possibility of *norms of general international law, norms determining the limits of the freedom of the parties to conclude treaties,* cannot be denied *a priori*.

The conflict between investment treaty norms, on one hand, and municipal law and international legal duties concerning the protection of the public interest, on the other, is both about the lack of protection in investment treaties for the right to regulate and the capacity of states to make investment treaties that undertake any type of obligation, irrespective of its effect on regulatory autonomy. The conflict is also about interpretation; that is, whether in settling investor-state disputes investment tribunals should interpret investment treaties as excluding or abridging the right to regulate and giving rise to liability for compensation when in fact the treaties do not expressly exclude or abridge that right. The point of emphasis of this chapter, with particular reference to Ghana, is that the analysis of conflict of legal norms and interests in international investment law must start with an examination of the limits to the legal obligations states can assume under investment treaties.

This is because most countries, Ghana included, have constitutions which create and define the framework for governance and the protection of basic human rights.¹⁹ Most states are also parties to the major international human rights treaties and international environmental conventions and other norms on development and good governance. By the Constitution of Ghana, the State of Ghana has the legal authority to make policies and laws and implement or enforce them in the public interest. Article 35(1) of the Constitution states that the “sovereignty of Ghana resides in the people of Ghana from whom Government derives all its powers and authority through this Constitution.” Articles 1 and 73 requires the Government of Ghana to promote the welfare of the people, exercise governmental powers within constitutional limits and conduct its international affairs in accordance with accepted principles of general international law.

In investment arbitration, Ghana and other states commonly invoke their powers to regulate in the public interest under their constitutions and general international law to justify

¹⁸ Alfred von Verdross, “Forbidden Treaties in International Law: Comments on Professor Garner’s Report on “The Law of Treaties” (1937) 31 *American Journal of International Law* 571 at 572, (emphasis added).

¹⁹ Chris Thornhill, *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective* (Cambridge University Press, 2013).

their non-liability for adopting measures challenged by foreign investors.²⁰ This fact shows that states recognise their right to regulate in the public interest as deriving from these legal norms. This chapter argues that these legal norms and the higher values of society contained in them concerning the public interest must define and shape the investment treaty making powers of Ghana and must inform the interpretation of its investment treaties.²¹

The Constitutional-General International Law Imperatives Theory (The Imperatives Theory) is developed as a framework for explaining and dealing with this conflict of legal norms and interests in international investment law in Ghana. The issue addressed by The Imperatives Theory in relation to Ghana is whether the fundamental obligations of the State towards citizens under the Constitution and general international law do or should limit its competence in investment treaty making and should guide tribunals in investment treaty interpretation.

It concludes they should do so, for a number of several reasons. First, the State derives its powers from the people through the Constitution to be exercised in the name of and for the good of the people and within constitutional limits. The public source of the State's powers and public purpose for which the powers to govern are entrusted to the State limit it from entering into legal agreements that directly and explicitly restrain or have the effect of restraining sovereign regulatory autonomy. For example, national treatment and most-favoured-nation treatment directly and explicitly limit the regulatory autonomy of the State by requiring it to extend treatment accorded to domestic investors to foreign investors of a contracting party or third state when under national legislation the rights and activities of foreign investors can be curtailed and special treatment can be accorded to domestic investors. Expropriation requirements also directly limit regulatory autonomy by requiring compensation even for general regulation when national laws prohibit compensation for such regulation.

Second, investment treaties presuppose the existence of norms necessary for them to come into existence and to have legal effect. The Constitution and general international law specify who has the capacity to make treaties and the procedures for treaty making. As investment treaties are required to be made in accordance with the Constitution and general international law and not just for investment protection *per se*, their validity and legal effect should be determined by the Constitution and general international law. This reasoning is extended to the interpretation of investment treaties.

The chapter is organised as follows. Section 2.2 reviews the nature and scope of the State's obligations to protect foreign investment under investment treaties and obligations to protect the public interest under the Constitution so as to clearly outline the competing obligations that are the source of conflict.

²⁰ See for example, *CMS Gas Transmission Company v Argentina*, ICSID No. ARB/01/8, Award, 12 May 2005 paras 113-114; *Continental Casualty Company v. Argentina*, ICSID Case No ARB/03/9, Award, 5 September 2008, para 74; *Tecnicas Medioambientales Tecmed SA v Mexico*, Case No. ARB (AF)/00/2, Award, 23 May 2003 para 70; *Saluka Investments BV (The Netherlands) v Czech Republic*, Partial Award, 17 March 2006 para 289; and *Compañía Del Desarrollo De Santa Elena, SA v Costa Rica*, Case No. ARB/96/1, Final Award, 17 February 2000 paras 35, 40 and 62.

²¹ Sornarajah, *Law on Foreign Investment*, above n 5, at 231.

Section 2.3 discusses existing state-specific defences or principles that have been canvassed or applied by investment scholars and tribunals to address the conflict of legal norms and interests in international investment law.

Section 2.4 develops The Imperatives Theory for addressing the challenge posed by international investment law for Ghana's regulatory autonomy. The Imperatives Theory focuses on whether public interest regulation in Ghana, such as for purposes of human rights and environmental protection or to advance a specific development objective, should limit the competence of the State of Ghana in investment treaty making in light of the fact that the State's primary obligations are owed towards citizens.

Section 2.5 shows that even if the Constitution did not limit the powers of the State in investment treaty making, there is a legal case for and value to interpreting investment treaties with reference to general international law and where appropriate municipal law.

Section 2.6 distils the basic postulates of The Imperatives Theory which are a set of theoretical premises based on an analysis of the Constitution on how to address the challenge international investment law poses to regulatory autonomy in Ghana.

2.2 THE STANDARDS OF INVESTMENT PROTECTION AND PUBLIC INTEREST REGULATION IN GHANA

Charles Shea in *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* articulated the nature of conflict of legal norms and interests in international investment protection. According to Shea, international law "like all systems of law, evolves to meet conflicts of interests. In few areas of relations in the international level is there a more real clash of interests than in the relations between the state and citizens of foreign states."²² The international law governing the relation between the host state and foreign citizens and their property has been "one of the most highly controversial",²³ being engulfed by conflict over the standards of investment protection since its beginning.²⁴

In most parts of the world, investment protection took place in the context of colonisation and there was no question as to which law governed the regulation of imperial investors within the colonies; imperial laws of the colonisers had their way. Antony Anghie even argues that the superiority of international law over municipal law is traceable to colonisation, imperialism and neo-colonisation.²⁵

In other parts of the world, investment protection was very much regional in character; for example, being confined to investment relations between the United States of America and Latin America. That encounter resulted in conflict over standards of investment protection and the applicable law. The United States sought to externalise the norms that governed aliens and their property by arguing that there existed international minimum standards of customary

²² Charles Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (University of Minnesota Press, 1955) at 3.

²³ *Ibid* at 3

²⁴ Sornarajah, "Evolution or Revolution," above n 7 at 634

²⁵ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005)

international law in accordance with which aliens and their property were to be protected.²⁶ In contrast, Latin American countries denied the existence of any such customary international law minimum standard and asserted that foreign investors were not entitled to greater or better protections than that accorded to domestic investors under municipal law.²⁷ The dominant proponent of “not more favourable” treatment of foreign investors and the proposition that “a government’s liability can be no greater toward foreigners than that which it has toward its own subjects”²⁸ was Carlos Calvo, whose writings gave birth to what is today described as the “Calvo Doctrine”.²⁹

That conflict was universalised following decolonisation, as the former colonial powers subscribed to the ‘customary international law minimum standard’ and the newly independent states supported regulation of foreign businesses based on domestic law.³⁰ International investment law since then has “never been settled because of the interests at conflict”,³¹ as reflected in the current controversy in international investment protection now founded largely on investment treaties. In the following passages, the core standards of investment protection under these investment treaties are discussed.

2.2.1 Investment Protection in Investment Treaties of Ghana

The stated aim of Ghana’s investment treaties is to create favourable conditions to attract foreign investors so as to bring about increased economic prosperity and development, and to stimulate productive use of resources and strengthen cooperation between Ghana and its contracting parties.³² The substantive obligations in these investment treaties are standards that are routinely included in other investment treaties. There is a voluminous literature on these standards.³³ For the purposes of this thesis, the focus is not on the legal interpretations as applied by various investment tribunals, but instead on their potential conflict with the State’s obligations and the implications for how the rules might or should be interpreted.

²⁶ Sornarajah, *Law on Foreign Investment*, above n 5 at 36

²⁷ Surya P Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing, 2012) at 12-18.

²⁸ Alwyn V. Freeman, “Recent Aspects of the Calvo Doctrine and the Challenge to International Law” (1946) *American Journal of International Law* 121 at 132.

²⁹ Carlos Calvo, *International Law of Europe and America in Theory and Practice* (1868).

³⁰ Sornarajah, “Evolution or Revolution,” above n 7 at 634

³¹ *Ibid.*

³² See the preambles to Ghana-United Kingdom Investment Treaty; Ghana-Netherlands Investment Treaty; Ghana-Denmark Investment Treaty; Ghana-Malaysia Investment Treaty; and Ghana-China Investment Treaty.

³³ Jeswald W Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2010); Kenneth J Vandeveld, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press, 2010); Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008) and Reinisch August (ed), *Standards of Investment Protection* (Oxford University Press, 2008).

2.2.1.1 Fair and Equitable Treatment

Jeswald Salacuse describes the obligation to “at all times” accord investments “fair and equitable treatment” (FET)³⁴ as “vague and ambiguous ... Its undefined and potentially elastic nature has made it a favourite of aggrieved investors”.³⁵ Broadly, FET has been equated to either the customary international law minimum standard of treatment of aliens³⁶ or an autonomous standard additional to protection under general international law.³⁷ There is no unitary jurisprudence on this issue, especially as investment tribunals are not bound by strict precedent.

Some investment tribunals have ruled that a failure to provide a stable and predictable legal environment for business breaches the legitimate expectations of investors that the actions, conduct, laws, policies and regulations investors relied on to make investment will not subsequently be changed to their detriment.³⁸ This means for example that amendments to existing laws could be found to breach FET. Other elements used to determine a breach include: a state’s failure to act transparently towards an investor;³⁹ arbitrariness and discrimination towards investors or covered investment;⁴⁰ denial of justice and due process of law;⁴¹ actions taken in bad faith;⁴² and a wilful neglect of duty or an insufficiency of action to protect investment.⁴³ The FET obligation is, therefore, very broad. Its scope of application may cover all forms of measures and regulation that impair investment, intentional or unintentional.

The case for the stability and predictability of the legal environment for foreign investment assumes that the economic, political and social conditions in the host state remain constant. As this is not the case, founding the FET obligation on an investor’s expectation of a stable and predictable legal environment is neither justifiable nor reasonable. Governments have an inherent right to make new laws and to amend or repeal existing ones. Foreign investors are aware of this inherent function of governments. Their ‘legitimate’ expectation must recognise the responsibility of governments to make new laws and amend or repeal existing laws as the

³⁴ Ghana-United Kingdom Investment Treaty, art 3(1); Ghana-Netherlands Investment Treaty, art 3(1); Ghana-Denmark Investment Treaty, art 3(1); Ghana-Malaysia Investment Treaty, art 3(1) ; and Ghana-China Investment Treaty, art 3(1).

³⁵ Salacuse, *Law of Investment Treaties*, above n 33, at 218

³⁶ *Ibid* at 222-223; *Genin v Estonia*, Case No. ARB/99/2, Award, 25 June 2001, para 367; and *Occidental Exploration and Production Co v Ecuador*, LCIA Case No UN3467, Award, 1 July 2004, paras 189-190.

³⁷ Salacuse, *Law of Investment Treaties*, above n 33, at 226-228; *Azurix Corporation v Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, paras 345 and 361.

³⁸ *International Thunderbird Gaming Corporation v The United Mexican States*, UNICITRAL, 26 January 2006, paras 147-148; *CME Czech Republic B.V. (The Netherlands) v Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, para 611; and *Tecnicas Medioambientales Tecmed SA v The United Mexican States*, Case No. ARB (AF)/00/2, Award, 29 May 2003, paras 88, 122 and 154.

³⁹ *Metalclad Corporation v The United Mexican States*, Case No. ARB(AF)/97/1 Award, 30 August 2000 paras 99-100.

⁴⁰ *Genin v Estonia*, Case No. ARB/99/2, Award, 25 June 2001 para 371; *LG & E Energy Corporation v Argentina*, Decision on Liability, ICSID Case No ARB 02/1, 3 October 2006 paras 155-160.

⁴¹ Jan Paulson, *Denial of Justice in International Law* (Cambridge University, 2005); *Metalclad Corporation v The United Mexican States*, Case No. ARB(AF)/97/1 Award, 30 August 2000 para para 91; and *Middle East Cement Shipping and Handling Co SA v Egypt*, Arbitration ARB/99/6, Award, 12 April 2002, para 147.

⁴² *Mondev International Ltd v United States of America*, Award, ICSID Case No. ARB(AF)/99/2, 11 October 2002, para 116; and *Genin v Estonia*, Case No. ARB/99/2, Award, 25 June 2001, para 371.

⁴³ *Ibid Genin v Estonia* para 367.

economic, political and social conditions of the time demand, provided states are not doing so merely to affect the interests of an investor.

Even if there has been a formal promise to not change the law on which the investor relied to make an investment, a case cannot be made that the law cannot be changed because of that promise where there is a compelling reason to do so. If, for example, such a promise was made during a stable economic and financial situation, it should not bind a government's response to an unpredictable economic and financial crisis that affects everybody and demands governmental action to restore the society to normalcy. To not make or amend the law in such circumstances would be unfair and inequitable. Strengthening justice for foreign investors must not undermine justice for all. Where there is compelling need for legislation that affects the value of investment, compensation to an affected investor, if any, must take account of that need.

2.2.1.2 Full Protection and Security

The State also has an obligation to provide *full protection and security* (FPS) to investors and investments, typically in the same treaty provision as the obligation to provide FET.⁴⁴ This standard of investment protection is also open to varying interpretations.⁴⁵ Some tribunals have interpreted the FPS as protecting foreign investors and their investment from *physical* injury or harm (for example, injury to the investor or looting or forceful seizure of property) by governments, government agents or third parties.⁴⁶ That obligation means that a host state must exercise due diligence, taking reasonable well-administered measures to prevent physical harm to an investor or investment.⁴⁷ The scope of FPS in this respect extends to “an obligation to provide adequate mechanisms and legal remedies for prosecuting the State organs or private parties responsible for the injury caused to the investor”.⁴⁸

Other tribunals have expanded the FPS to include protection of foreign investors and their investment from non-physical injury.⁴⁹ In *Biwater Gauff Ltd v Tanzania*, the Tribunal stated that FPS “implies a State's guarantee of stability in a secure environment, physical, commercial and legal.”⁵⁰ In *Azurix Corporation v Argentina* the Tribunal stated that it was:⁵¹

persuaded of the interrelationship of fair and equitable treatment and the obligation to afford the investor full protection and security. The cases ... show that full protection and security was understood to go beyond protection and security ensured by the police. It is not only a matter of

⁴⁴ Ghana-United Kingdom Investment Treaty, art 3(1); Ghana-Netherlands Investment Treaty, art 3(2); Ghana-Malaysia Investment Treaty, art 2(2).

⁴⁵ Salacuse, *Law of Investment Treaties*, above n 33, at 132

⁴⁶ *Ibid*; *BG Group v Argentina*, Final Award, 24 December 2007 paras 324-326; *Elettronica Sicula S.p.A. (ELSI)*, (U.S. v. Italy), ICJ Reports 1989 para 108; and *Suez, Sociedad General de Aguas de Barcelona SA v Argentina*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, paras 162-163 and 179.

⁴⁷ *Suez, Sociedad General de Aguas de Barcelona SA v Argentina*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010 para 163.

⁴⁸ *Ibid* para 173.

⁴⁹ *Siemens AG v Argentina*, ICSID Case No ARB/02/8, Award, 6 February 2007, para 303.

⁵⁰ *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para 729.

⁵¹ *Azurix v Argentina*, above n 37, para 408.

physical security; the stability afforded by a secure investment environment is as important from an investor's point of view ... [W]hen the terms 'protection and security' are qualified by 'full' and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security.

2.2.1.3 National Treatment

The *national treatment* standard requires that foreign investors and investments be treated not less favourably than domestic investors and their investments.⁵² The standard thus focuses on nationality. It seeks to prevent differential treatment that is adverse to the investor, for example, where governments provide assistance, such as tax exemptions, to domestic businesses or other advantages through laws, policies, regulations or administrative actions that are not made available to foreign businesses protected under the applicable investment treaty. The goal is to place covered investors and their investments on at least the same footing in terms of competition or some other business advantage as domestic investors.

The application of national treatment depends on the articulation of the obligation in the treaty and facts of each case. To determine whether the host State has breached the national treatment clause, the tribunal in *Total SA v Argentina* said the investor.⁵³

(i) has to identify the local subject for comparison; (ii) has to prove that the claimant-investor is in like circumstances with the identified preferred national comparator(s); and (iii) must demonstrate that it received less favourable treatment in respect of its investment, as compared to the treatment granted to the specific local investor or the specific class of national comparators ... Different treatment between foreign and national investors who are similarly situated or in like circumstances must be nationality driven. Accordingly, a foreign investor who is challenging measures of general application as *de facto* discriminatory has to show a *prima facie* case of nationality-based discrimination.

Some investment tribunals also consider the policy justification for measures that have a discriminatory effect. If the measure is not intended to give preferential treatment to domestic investors, a tribunal may find no breach of national treatment.⁵⁴ The tribunal in *Pope and Talbot Inc v Canada* stated that:⁵⁵

Differences in treatment will presumptively violate [national treatment] unless they have a reasonable nexus to rational government policies that (1) do not distinguish on their fact or *de facto*, between foreign-owned and domestic companies, and (2) not otherwise unduly undermine the investment liberalizing objectives.

⁵² Ghana-United Kingdom Investment Treaty, art 4(1); Ghana-Netherlands Investment Treaty, art 3(2) and Ghana-Denmark Investment Treaty, art 4(1); and Ghana-United Kingdom Investment Treaty, art 4(2). Ghana-Denmark Investment Treaty, art 4(2).

⁵³ *Total SA v Argentina*, ICSID Case No ARB/04/1, *Decision on Liability*, 27 December 2010, paras 211-212.

⁵⁴ *Pope & Talbot v Canada*, NAFTA, Award on the Merits of Phase 2, 10 April 2001, para 79.

⁵⁵ *Ibid* para 78.

The national treatment standard is extremely broad in terms of the investments it seeks to protect, the nature of the treatment of the investments that is prohibited, and the subject matter of governmental regulation that may come under the standard. The typical provision as reflected in Article 4(1) of the Ghana-United Kingdom investment treaty states that “[n]either contracting party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party ... to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments” or “as regards their management, maintenance, use, enjoyment or disposal of their investments.” The investment treaties also entitle foreign investors as regards restitution, indemnification, compensation or other settlement to treatment “no less favourable” than that accorded to nationals whose investments suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot.⁵⁶

The phrases “no less favourable treatment” and consequential “losses suffered” have been interpreted by arbitral tribunals very broadly. In *Asian Agricultural Products Ltd v Sri Lanka*,⁵⁷ for example, a claim was made for compensation for the total loss of the investor’s investment in Sri Lanka. It was alleged that the loss resulted from a military operation by governmental forces against an insurgent group. The claim was made under the 1980 Sri Lanka-United Kingdom investment treaty. Article 4 required compensation or settlement on terms *no less favourable* than the host country accorded its own nationals for *losses suffered* from the specified events. The Tribunal interpreted the phrase “losses suffered” as including “all property destruction which materializes due to any type of hostilities enumerated in the text”.⁵⁸ According to the Tribunal the mere fact that such losses exist is by itself sufficient to render the provision “applicable, without any need to prove which side was responsible for said destruction, or to question whether the destruction was necessary or not.”⁵⁹ The investment treaty had no restriction on the scope of application of national treatment. The Tribunal interpreted “no less favourable treatment” under the treaty to “cover all possible cases in which the investments suffer losses owing to events identified as including ‘a state of national emergency, revolt, insurrection, or riot’”.⁶⁰

The national treatment requirement under Ghana’s investment treaties does not specify the industry or subject matter in respect of which it may apply. The treaties also do not define phrases like “losses suffered” and “no less favourable treatment.” This can lead to a situation where any form of regulation in favour of the domestic industry can be attacked by foreign investors if such favourable regulation is not extended to foreign investors who may feel disadvantaged.

⁵⁶ Ghana-China Investment Treaty, art 4; Ghana-Malaysia Investment Treaty, art 4; Ghana-Denmark Investment Treaty, art 7; Ghana-Netherlands Investment Treaty, art 7; and Ghana-United Kingdom Investment Treaty, art 5.

⁵⁷ *Asian Agricultural Products Ltd v Sri Lanka*, ICSID Case No ARB/87/3, Final Award, 27 June 1990.

⁵⁸ *Ibid* para 65.

⁵⁹ *Ibid*.

⁶⁰ *Ibid* para 66.

The effect of national treatment is to require changes in existing laws and policies favouring domestic business entities or discriminating against foreign investors,⁶¹ and prohibit prospective laws and policies that might be intended to address the specific situation of domestic businesses only (if there are foreign investors in like circumstances), as with Ghana's constitutional and statutory provisions analysed below. Thus, national treatment in investment treaties is most significant:⁶²

because host state measures that discriminate in favour of domestic firms are often tied closely to national development goals and are politically very sensitive. Most host states have some programmes that grant advantages exclusively to domestic businesses in order to encourage their growth and their ability to compete with foreign investors.

The national treatment standard limits the discretion of Ghana to implement policies and measures the way it deems fit for the benefit of citizens. The standard also places extra regulatory and resource burdens on the State by expanding the role of the State towards citizens to include foreign investors engaged in the same or similar business or making like investments.

2.2.1.4 Most-Favoured-Nation Treatment

Most-favoured-nation treatment (MFN) seeks to prevent discrimination between foreign investors from different countries by demanding that foreign investment or investment returns of the applicable treaty partner shall be treated no less favourably than foreign investors and investments and returns of any third state.⁶³

By the MFN provisions, a country that is not able to negotiate a desired standard with a treaty partner may gain the protection of that standard for its investors and their investments if the treaty partner grants that higher standard of protection to investors and investment of a third country in another treaty.⁶⁴ The obligation is established by reference to the host state's treatment of other foreign investors so that any new and more favourable treatment of third state foreign investors increases the level of treatment that the host state must provide to its contracting party foreign investors.⁶⁵ This standard therefore broadens the scope of the host state's obligations as to volume of the measures and persons who may claim rights. Anthony VanDuzer, Penelope Simons and Graham Mayeda have argued that the "level of protection for foreign investors who benefit from an MFN provision may increase over time as the treatment of foreign investors from other countries improves."⁶⁶ This standard of investment

⁶¹ Salacuse, *Law of Investment Treaties*, above n 33, at 246.

⁶² J. Anthony VanDuzer, Penelope Simons and Graham Mayeda, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries* (Commonwealth Secretariat, August 2012) at 112.

⁶³ Ghana-United Kingdom Investment Treaty, art 4(1); Ghana-Netherlands Investment Treaty, art 3(2). Ghana-Denmark Investment Treaty, art 4(1); Ghana-United Kingdom Investment Treaty, art 4(2); Ghana-Netherlands Investment Treaty, art 3(1); Ghana-Denmark Investment Treaty, art 4(2).

⁶⁴ Salacuse, *Law of Investment Treaties*, above n 33.

⁶⁵ VanDuzer, Simons and Mayeda, above n 62, at 127.

⁶⁶ *Ibid.*

protection can defeat the very purpose for which a state did not agree to a particular investment treaty term with a particular treaty partner.

2.2.1.5 Expropriation

Investment treaties also prohibit Ghana from directly or indirectly expropriating investments or subjecting them to measures that have an effect equivalent to expropriation, except for a public purpose related to internal needs, under due process of law and subject to compensation.⁶⁷ Some of Ghana's investment treaties extend this protection to domestic companies in which foreign investors have interests through ownership of shares.⁶⁸ The treaties do not specify the level of share ownership that must be met before this requirement applies.

Expropriation has been interpreted very liberally to cover measures that directly or indirectly have a substantial adverse effect on the economic value of investment. A classic statement on the scope of expropriation is contained in *Telenor Mobile Communications AS v Hungary*.⁶⁹

Expropriation can take various forms. Direct expropriation involves the seizure of the investor's property. But expropriation may also be indirect, as where, without the taking of property, the measures of which complaint is made substantially deprive the investment of economic value. Moreover, it is not necessary to show a single act or group of acts committed at one time ... [T]here may be 'creeping' expropriation involving a series of acts over a period of time none of which is itself of sufficient gravity to constitute an expropriatory act but all of which taken together produce the effects of expropriation. Phrases such as 'equivalent to expropriation' and 'tantamount to expropriation' ... are usually taken to indicate that the BIT covers indirect as well as direct expropriation, thus looking at the substance of the measures in question rather than the label attached to them by government, and the same is true of 'measures having a similar effect.'

The Tribunal in *Santa Elena v Costa Rica* stated that⁷⁰:

there is a wide spectrum of measures that a state may take in asserting control over property, extending from limited regulation of its use to a complete and formal deprivation of the owner's legal title. Likewise, the period of time involved in the process may vary—from an immediate and comprehensive taking to one that only gradually and by small steps reaches a condition in which it can be said that the owner has truly lost all the attributes of ownership ... There is ample authority for the proposition that a property has been expropriated when the effect of the measures taken by the state has been to deprive the owner of title, possession or access to the benefit and economic use of his property.

⁶⁷Ghana-United Kingdom Investment Treaty, art 7(1) Ghana-Netherlands Investment Treaty, art 6(1)(a) and (b).; Ghana-Denmark Investment Treaty, art 6(1)(a)-(d); Ghana-Malaysia Investment Treaty, art 5(a)(c) and Ghana-China Investment Treaty, art 4(1), 4(2) and art 4(3).

⁶⁸Ghana-United Kingdom Investment Treaty, art 7(3); Ghana-Netherlands Investment Treaty, art 6(1)(a).

⁶⁹ *Telenor Mobile Communications AS v Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, para 63.

⁷⁰ *Santa Elena v Costa Rica*, above n 20, para 76.

The scope of expropriation depends on the specific wording of the provisions and any interpretive annex. The key elements of expropriation include the permanence of an interference with investment, the impact of a measure on investment and the proportionality between the purpose of a measure and its impact on investment.⁷¹ These very broad definitions of expropriation illustrate the desire of the investment treaty regime to protect foreign investment against predictable and unpredictable forms of regulation that may adversely affect the value of investment. The overly broad wording of expropriation provisions and ensuing interpretations have led to a more qualified wording of recent model investment treaties.⁷² However, Ghana's investment treaties were signed before such refinements were included.

2.2.1.6 Repatriation of Investment and Returns

Provisions on the *repatriation of investment and returns* guarantee foreign investors the right to transfer their investments and returns to the country where they reside or their home countries. Typically, transfers are permitted in respect of profits, dividends, interests, technical assistance and technical fees, proceeds from the total or partial liquidation of any investment, and funds in repayment of borrowings and loans. They also include the net earnings and other compensation of investors and foreign persons who are employed and allowed to work in connection with an investment. Further, transfers must be allowed in respect of royalties and funds necessary for the acquisition of raw or auxiliary materials or to replace capital assets in order to safeguard the continuity of an investment.

In Ghana's investment treaties, transfers of currency must be made in the convertible currency in which the investment has been made or in any currency agreed by the investor, and at the official rate of exchange at the date of transfer. Transfers are to be permitted without unreasonable or undue delay. While some of the investment treaties permit unrestricted right to transfer investment and returns, others guarantee the right of transfer subject to conditions that may be imposed by municipal laws, regulations and policies.⁷³ Recent model investment treaties permit state parties to prevent a transfer provided that is done equitably, is non-discriminatory and in good faith.⁷⁴

⁷¹ Jane Kelsey, "How the Trans-Pacific Partnership Agreement Could Heighten Financial Instability and Foreclose Governments' Regulatory Autonomy" (2010) 8 *New Zealand Yearbook of International Law* 41 at 57.

⁷² 2012 U.S. Model Bilateral Investment Treaty, art 6(5), <<http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>>

⁷³ Ghana-United Kingdom Investment Treaty, art 8; Ghana-Netherlands Investment Treaty, art 5; Ghana-Denmark Investment Treaty, art 8(a)-(d); Ghana-Malaysia Investment Treaty, 6; Ghana-China Investment Treaty, arts 5 and 6.

⁷⁴ Ghana Model BIT, art 7(6), <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2866>>; and 2012 US Model Bilateral Investment Treaty () art 7(4).

2.2.1.7 The Settlement of Investment Disputes

Beyond the foregoing substantive standards of investment protection, investment treaties also provide for the settlement of investor-state disputes related to covered investments.⁷⁵ If an investor's complaint cannot be resolved through mutual discussion with the State within a specified period, it has to go to international arbitration. The available arbitral forums are usually specified in the treaty. The most common are the International Centre for the Settlement of Investment Disputes (ICSID)⁷⁶ and *ad hoc* arbitration tribunals appointed under either the Arbitration Rules of the United Nations Commission on International Trade Law⁷⁷ (UNCITRAL) or the Arbitration Institute of the Stockholm Chamber of Commerce.⁷⁸

An investor-state dispute is defined under Ghana's investment treaties as any dispute between a contracting state and a national of the other contracting state "concerning *an obligation ... in relation to an investment*".⁷⁹ The jurisdiction of investment tribunals is limited to disputes concerning alleged breaches of the above standards of investment protection and, where applicable, an umbrella clause which requires states to observe any other agreements that they may have entered into with investors. The Tribunals are, therefore, required to apply the treaties and not to determine their validity.

Investment tribunals must resolve disputes *within* their mandates, which means they should interpret investment treaties and apply relevant principles of general international law in a manner that leads to a fair, equitable and even-handed resolution of investor-state disputes. Disputes between contracting parties concerning the validity of treaties can be resolved only by domestic courts, state-state dispute investment tribunals established for that purpose and the International Court of Justice (ICJ) as the case may be.⁸⁰ Ghana's investment treaties provide that state-to-state disputes between contracting parties are limited to those related to the *interpretation* or *application* of the treaties and are to be settled through diplomatic channels, failing which they can be settled by an arbitral tribunal specifically established to handle state-to-state disputes.⁸¹ It can be argued then that an issue concerning the validity of an investment treaty can be settled through state-to-state dispute mechanisms including an arbitral tribunal the contracting parties may establish specifically for that purpose.

The primary purpose of the substantive standards of investment protection, supplemented by investor-state dispute settlement, is to ensure that governmental regulation accommodates the interests of foreign investment promotion and protection by restricting government

⁷⁵ Ghana-United Kingdom Investment Treaty, art 10; Ghana-Netherlands Investment Treaty, art 9; Ghana-Denmark Investment Treaty, art 10(1) and 10(3); ; Ghana-Malaysia Investment Treaty, art 7(1) and 7(2)(a) and (b); and Ghana-China Investment Treaty, art 10.

⁷⁶ See *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 4 ILM 524 (entered into force 14 October, 1966).

⁷⁷ See UNCITRAL Arbitration Rules (GA Res 65/22, (United Nations, 2010), <<http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>>

⁷⁸ Arbitration Rules and the Rules entered into force on 1 January 2010, <http://www.sccinstitute.com/media/40120/arbitrationrules_eng_webbversion.pdf>

⁷⁹ Ghana-Malaysia Investment Treaty, art 7(1); Ghana-Denmark Investment Treaty, Art 10(1); Ghana-Netherlands Investment Treaty, art 9(1); and Ghana United Kingdom Investment Treaty, art 10(1).

⁸⁰ Verdross, "Forbidden Treaties," above n 18.

⁸¹ Ghana-United Kingdom Investment Treaty, art 11; Ghana-Netherlands Investment Treaty, art 13; Ghana-Denmark Investment Treaty, art 13; Ghana-Malaysia Investment Treaty, art 8; and Ghana-China Investment Treaty, art 9.

regulation that will affect the value of investments. These investor protections and enforcement powers are the primary source of conflict between the investment treaty regime and the constitutional and general international duties of states, as reviewed in the case of Ghana below.

2.2.2 The Public Interest Obligations of Ghana

The municipal and international legal duty of Ghana to regulate in the public interest necessarily implies some measure of discretion in the exercise of powers to perform that duty. For example, the Constitution states in Article 1 that:

The Sovereignty of Ghana resides in the people of Ghana in whose name and for whose welfare the powers of government are to be exercised in the manner and within the limits laid down in this Constitution.

The Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void.

This emphasises the supremacy of the Constitution over all laws (including treaties) made by the legislature and the executive. It also underscores the source of sovereignty and purpose of public power entrusted to the State of Ghana, namely the people, in whose name and for whose interests the powers of government shall be exercised. Article 1 expresses a constitutional meta-norm expressed in Latin by Marcus Cicero⁸² as *ollis salus populi suprema lex esto*, meaning “let the safety or good of the people be the supreme law”.⁸³

In this regard, the positions of John Locke and Jean-Jacques Rousseau provide relevant background to the specific point about the State’s constitutional obligations taken in this thesis. In his *Second Treatise of Government*, Locke treats *salus populi* as the *basic norm* for governance and the exercise of governmental powers. According to Locke, political power is the “right of making laws ... for regulating and preserving of property and of employing the force of the community in the execution of such laws ... *all this only for the public good*.”⁸⁴ Rousseau underscored this point about the role of government when he posed and disposed of a fundamental question: “What is the object of any political association? It is the protection and the prosperity of its members.”⁸⁵

The Constitution protects fundamental human rights and freedoms, including the right to health and life, and requires state institutions and all natural and legal persons in Ghana (which includes foreign investors) to uphold and respect these fundamental human rights.⁸⁶ It is the constitutional responsibility of the Government of Ghana to take steps “to ensure ... the

⁸² Marcus Cicero, *de Legibus* III, <<http://www.thelatinlibrary.com/cicero/leg3.shtml>>

⁸³ Bryan A. Garner (Ed-in-Chief), *Black’s Law Dictionary* (9edn, West 2009) at 1870.

⁸⁴ John Locke, *Two Treatises of Civil Government* (JM Dent and Sons, 1924) at 118 (emphasis added).

⁸⁵ Jean-Jacques Rousseau, *The Social Contract* (Maurice Cranston (Translator), Penguin Books Ltd, 2004) at 99.

⁸⁶ *Constitution of Ghana* art 12(1).

realization of basic human rights, a healthy economy, the right to work, the right to good health care, and the right to education,” and the President must report to Parliament at least once a year on such steps taken.⁸⁷ The Constitution also requires in Article 37(2)(b) that laws be enacted and enforced in Ghana to “assure the protection and promotion of all ... human rights and freedoms.” According to Article 36(1) the State:

shall take all necessary action to ensure that the national economy is managed in such a manner as to maximize the rate of economic development and to secure the maximum welfare, freedom and happiness of every person in Ghana and to provide adequate means of livelihood and suitable employment.

According to Article 36(9), steps must also be taken to safeguard and protect the environment for posterity. These constitutional provisions place the public interest at the centre of the exercise of the powers of government in Ghana.

Ghana is also a party or signatory to a number of international human rights treaties and international environmental treaties, including the Charter of the United Nations,⁸⁸ the International Covenant on Civil and Political Rights,⁸⁹ International Covenant on Economic, Social and Cultural Rights⁹⁰, the Universal Declaration of Human Rights,⁹¹ the African Charter on Human and Peoples’ Rights⁹² and African Convention on Conservation of Nature and Natural Resources.⁹³ These international legal instruments directly or indirectly recognise or guarantee various fundamental human rights, including the right to development and the right to clean environment, and impose corresponding obligations on the State. Article 33(5) of the Constitution extends fundamental human rights and corresponding duties of the State of Ghana to include those rights inherent in a democracy and intended to secure the freedom and dignity of human beings. The Supreme Court of Ghana held in *Republic of Ghana v High Court, Ex Parte the Attorney-General* that ratified international conventions which have been “incorporated into Ghanaian law by appropriate legislation”⁹⁴ have legal effect and are enforceable as internal law in Ghana.⁹⁵

By Articles 40(a) and (c) and 73 of the Constitution, the Government in its dealings with other nations must promote and protect the interests of Ghana, promote respect for international law and treaty obligations, and “conduct its international affairs in accordance with the accepted principles of public international law and diplomacy in a manner consistent with the national interests of Ghana.” For Ghana, then, accepted principles of public international law include principles of customary international law and international human

⁸⁷ Ibid art 34(2).

⁸⁸ signed in San Francisco, 26 June 1945 and entered into force 24 October 1945.

⁸⁹ General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

⁹⁰ General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976.

⁹¹ Proclaimed by the United Nations General Assembly in Paris on 10 December 1948, General Assembly Res 217 A (III).

⁹² Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

⁹³ Adopted 15 September 1968, entered into force 16 June 1969, revised and adopted 11 July 2003.

⁹⁴ *The Republic of Ghana v High Court, Ex Parte the Attorney-General; NML Capital & the Republic of Argentina*, Case No. J5/10/2013, Judgment of 20 June 2013 at 2, <www.pca-cpa.org/showfile.asp?fil_id=2336> (*Ex parte: Attorney-General*).

⁹⁵ Ibid at 5 and 7.

rights and environmental treaties to which Ghana is a party. Both the Constitution and the general international law conventions place primacy on fundamental rights of citizens and corresponding obligations of the State. These legal principles are the foundation of The Imperatives Theory.

The Constitution specifically seeks to retain the State's regulatory autonomy in relation to foreign investment when it states in Article 36(4) that "[f]oreign investment shall be encouraged within Ghana, subject to any law for the time being in force regulating foreign investment in Ghana." This provision requires the entry of foreign investment and its substantive protection thereafter to be done in consonance with laws in force governing foreign investment in Ghana. Those laws include the Constitution itself, which in Article 17(4)(c) empowers Parliament to enact laws "reasonably necessary for the imposition of restrictions on the acquisition of land by persons who are not citizens of Ghana or on the ... economic activities of such persons and for other matters related to such persons" (emphasis added). So the admission and substantive protection of foreign investment must be consistent with the Constitution and other domestic legislation on foreign investment, including the Ghana Investment Promotion Centre Act 2013 (Act 865), the primary legislation on foreign investment.

The fundamental issue then is whether a state such as Ghana, the Constitution of which requires it to act both within the terms of its constitution and accepted principles of general international law with respect to public interest regulation, nevertheless has the capacity to enter into investment treaties that directly and explicitly abridge or confine its public powers, or require the payment of compensation for adopting measures required under the Constitution and/or general international law. The analysis of the implications of investment treaties for regulatory autonomy and the resolution of foreign investment disputes must be grounded or contextualised in the fundamental rights of citizens and the corresponding constitutional and general international law obligations of the State, because it is these legal norms that define what the State can or cannot do with public power.

Chapter one highlighted the challenge investment treaty law poses to the ability of states to fulfil their public interest obligations. The next Section analyses the substance and limitations of defences that have been advocated as means to address this challenge.

2.3 THE STATE-SPECIFIC DEFENCES IN INVESTMENT ARBITRATION

2.3.1 The Scope and Efficacy of the Defences

2.3.1.1 The Principle of Proportionality

International investment law scholars and tribunals have invoked the principle of proportionality, which they say can be used to strike a balance between the rights of investors and states' right to regulate in the public interest.⁹⁶

The proportionality principle as an interpretive tool requires "a reasonable relationship of proportionality between the charge or weight imposed" on "the foreign investor and the aim sought to be realized ... by any measure".⁹⁷ According to the European Court of Justice (ECJ), the proportionality principle "requires that measures implemented ... be appropriate for attaining the ... objectives pursued by the legislation at issue and must not go beyond what is necessary to achieve them."⁹⁸ Thus the tribunal must determine whether: the means used by the state are suitable to achieve the aim pursued (*suitability*); the means adopted are necessary to achieve the aim involved (*necessity*); and the burden borne by the individual is not excessive having regard to the benefits secured by the state (*proportionality stricto sensu*).⁹⁹

According to Jansen Calamita, proportionality requires "an identification and qualification of that which is to be balanced, that is, the rights and interest at stake."¹⁰⁰ If there existed objective means of weighing those interests and the interests were of equal value, proportionality could provide a very fair way of evenly protecting the competing interests. However, the requirement for weighing is the fundamental weakness of proportionality theory.

The problem centres on how to weigh or place value on the competing interests. In some cases it is simply not possible to do so. It may be possible to assess the monetary value of an investment and how governmental regulation affects that value. However, it may not always be possible, for example, to assess or quantify environmental contamination and its effect on human health and life arising from the operations of a business entity, given both the immediate and long-term effects of such contamination. For example, in 1984 a gas leak from a facility owned by Union Carbide India Limited in Bhopal, India, led to the deaths of 4,000 human beings between 1984 and 1992. Between 30,000 and 40,000 people were maimed and about 200,000 people were estimated to have been affected by the disaster.¹⁰¹ According

⁹⁶ Jasper Krommendijk and John Morijn, "'Proportional' by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration" in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 422 at 450.

⁹⁷ *Teched v Mexico*, above n 38, para 122.

⁹⁸ Case C-58/08 *Vodafone Ltd v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR I-4999 para 51.

⁹⁹ N. Jansen Calamita, "International Human Rights and the Interpretation of International Investment Treaties: Constitutional Considerations" in Freya Baetebis (ed), *Investment Law within International Law: Integrationist Perspectives* (Cambridge University Press, 2013) 164 at 175.

¹⁰⁰ *Ibid* at 175

¹⁰¹ *Ibid*.

to Sornarajah, many of the people affected by the disaster have not been compensated.¹⁰² Moreover, the right of investors to make profit cannot be placed on the same level with the human rights of health and life. Investment activities in natural resource extraction, for example, can have serious implications for the environment, water pollution and human health as shown in chapter four. As the sanctity and dignity of human life must precede everything, it sounds inappropriate to say that human right to health and life must be weighed against the right to make profit for private gain.

Further, Calamita argues that the principle of proportionality does not address the problem of “textual void” in international investment law. Investment treaties, such as those of Ghana, do not expressly make room for public interest regulation without the need to pay compensation to affected foreign investors. The investment treaties focus solely on investment protection. Since investment tribunals interpret these treaties based on the texts, “in searching for a basis for the identification of rights and interests, which might be included in a balancing of textually identified investor rights ... one is left with a textual void.”¹⁰³

By its insistence on the suitability and necessity of the measures taken and means adopted to implement the measures, proportionality subjects governmental decision making to evaluation on the basis of standards or preferences chosen by the investment tribunals. In addition, the fluid nature of the yardsticks of the proportionality principle means the boundaries of the principle cannot be known in advance of measures to be undertaken. In fact, Krommendijk and Morijn argue that tribunals “have adopted different approaches to the process of balancing and to the use of the proportionality principle.”¹⁰⁴ So governments cannot always predict the legality of their actions against the elements of proportionality.

‘Balancing’ does not exist if it always begins with the measures adopted by the government and not with the claims made by the foreign investor. To be evenhanded, tribunals would also need to begin with an assessment of the proportionality of the investors’ claims against the measures giving rise to the claims. Proportionality as it stands now is, therefore, not proportional because it ignores questions as to how the weighing of interests is to be carried out and who gets the last word, the state or the investment tribunal (or the investor).¹⁰⁵ Proportionality is not an effective tool for deciding on the right to regulate and investor rights. On the basis of the foregoing analysis, the chapter adopts the perspective expressed by Calamita that:¹⁰⁶

Proportionality in the end is nothing more than a technical framework by which one may organise an argument. Absent an infusion of normative content from external sources [which infusion is largely absent in investment treaty arbitration], proportionality simply functions as a scale without weights. Thus, even if we assume that a rational and principled process of balancing is possible, and we are able to identify in general terms that which is to be balanced, we do not (and cannot)

¹⁰² Sornarajah, *Law on Foreign Investment*, above n 5, at 147

¹⁰³ *Ibid.*

¹⁰⁴ Krommendijk and Morijn, above n 96, at 439.

¹⁰⁵ Evan J Criddle and Evan Fox-Decent, “A Fiduciary Theory of Jus Cogens” (2009) 34 *Yale Journal of International Law* 331 at 386.

¹⁰⁶ Calamita, above n 99, at 181

know how the balance called for by the principle of proportionality will be struck until we know the identity of the interests we intend to recognise, what weight they are to be given and to whom we intend to entrust the balancing ... Absent such criteria for determining what goes on the scales and what does not, we are beset with indeterminacy, subjectivity and an absence of consensual validation. Proportionality simply provides no answers to these concerns and, indeed, may actually obfuscate the importance of the political process of contesting and establishing constitutional values.

2.3.1.2 The Defence of Necessity

Acts of a state illegal under international law entail the international responsibility of that state, except where some valid defence such as “necessity” in general international law or in a specific treaty can be made.¹⁰⁷ Necessity shields states from the wrongfulness of acts which are not in conformity with an international obligation. Thus, in international investment law a state may place reliance on necessity as an excuse for not complying with an investment treaty obligation.

However, necessity provides limited scope as a defence mechanism by the very nature of its standards. Necessity under general international law may only be invoked if the act is the only way a state can safeguard an “essential interest” against “a grave and imminent peril”. Necessity is also permitted only if the carrying out of the act does not seriously impair an essential interest of any other state towards which the obligation exists or that of the international community as a whole.¹⁰⁸ It is not applicable if the international obligation in question excludes its application or where a state contributed to the situation that has given rise to the claim of necessity.¹⁰⁹

Necessity does not apply in respect of any act which breaches an obligation arising under a peremptory norm of general international law, such as those on slave trading.¹¹⁰ Moreover, circumstances precluding the wrongfulness of state conduct do not necessarily free a state from paying compensation for any material loss caused by the conduct in question. It is for the investment tribunal to decide whether necessity excuses the state for an act that is otherwise wrongful in international investment law. Therefore, the discretion that states are supposed to enjoy even under the defence of necessity is subject to scrutiny by an investment tribunal.

Investment tribunals tend to emphasise the predictability and stability of the legal environment for business, even where necessity is invoked as a defence. Therefore, necessity has not proved to be an effective defence mechanism, even in economic and financial emergencies or changed circumstances that require the repeal or amendment of existing laws and policies governing foreign investment. Daniel Kalderimis reviewed various

¹⁰⁷ International Law Commission, Draft Article on *Responsibility of States for Internationally Wrongful Acts* (2001) art 1, <http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_8_2006.pdf>

¹⁰⁸ Ibid art 25(1).

¹⁰⁹ Ibid art 25(2).

¹¹⁰ Ibid art 26

cases in which Argentina invoked necessity as a defence in investment arbitration and came to the conclusion that “necessity has not generally been a winning defence.”¹¹¹

Thus, the uncertainty surrounding the scope and efficacy of necessity as a defence is exemplified by the situation of Argentina, which went through an economic and financial crisis in the late 1990s and early 2000s. The Argentine government allegedly derogated from municipal law and investment treaty obligations in order to address the crisis. The government removed the parity between US dollar and the Argentine peso and terminated the pegging of tariffs in government contracts to inflation-adjusted dollars.¹¹² Emergency laws and regulations were also made to give effect to these changes. These measures were said to have affected or disadvantaged foreign investors who made investments in the public sector, such as water concessions following privatisation in Argentina in the 1990s. The investors held extensive US dollar-denominated debts and were compelled to collect tariffs from customers in Argentine peso which had devalued. Following the crisis, and the adoption of these and other measures in response to the crisis, no fewer than fifty-three arbitral cases have been brought by foreign investors against Argentina.¹¹³

In defending arbitral suits against the adoption of these measures, Argentina argued that the measures were implemented in response to a national emergency resulting from a severe financial crisis which threatened its very existence as a country and the lives of very poor citizens. Argentina relied on the necessity defence and the treaty-based emergency exceptions.¹¹⁴ Despite the large similarity in the facts, tribunals have differed in their findings on breach of the applicable investment treaties.¹¹⁵ For example, *LG & E Energy Corporation v Argentina*¹¹⁶ accepted Argentina’s defence of necessity over the period December 2001 and April 2003. The Tribunal reasoned that during the relevant period, the conditions in Argentina constituted an emergency which made it necessary for Argentina to enact measures to maintain public order, restore civil order, stop the economic decline and protect its essential security interests within the meaning of the emergency clause under the applicable investment treaty.¹¹⁷

However, *CMS Gas Transmission Company v Argentina*,¹¹⁸ *Sempra Energy International v Argentina*¹¹⁹ and *Enron Corporation Ponderosa Assets LP v Argentina*¹²⁰ found Argentina in

¹¹¹ Daniel Kalderimis, “Systemic Integration and International Investment Law – Some Practical Reflections”, Society of International Economic Law Third Biennial Global Conference, National University of Singapore Faculty of Law Centre for International Law (Society of International Economic Law Working Paper No. 2012/46, 6 July 2012 at 7.

¹¹² Christina Binder, “Changed Circumstances in Investment Law: Interfaces between the Law of Treaties and the Law of State Responsibility with a Special Focus the Argentine Crisis” in Christina Binder et al (eds) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, Oxford, 2009) 608 at 610.

¹¹³ UNCTAD, *Recent Developments in Investor-State Dispute Settlement* (Issue Note No. 1, 7 April 2014) at 8.

¹¹⁴ *CMS Gas v Argentina* above n 20, para 200; *Enron Corporation Ponderosa Assets LP v. Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007 para 288ff; and *Sempra Energy International v. Argentina*, ICSID Case No ARB/02/16, Award, 28 September 2007, para 325.

¹¹⁵ Binder, above n 112, at 609.

¹¹⁶ *LG v Argentina*, above n 40.

¹¹⁷ *Ibid* paras 228-241.

¹¹⁸ *CMS Gas v Argentina*, above n 20. The decision of the Tribunal that Argentina failed to observe the obligations entered into with regard to the investment guaranteed was annulled in *CMS Gas Transmission Company v Argentina*, ICSID Case No. ARB/01/8, (Annulment Proceeding), Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, para 163.

breach of the applicable investment treaties. The *CMS Gas Transmission* Tribunal tilted the scales of justice in favour of investor protection and found Argentina in breach of the FET.¹²¹ It reasoned that the standard requires the maintenance of a stable legal framework for investment and that the measures the investor complained of entirely transformed or dispensed with the legal and business environment under which the investments were made.¹²² Another illustration of tribunals' contradictory decisions on the application of the defence of necessity is the disagreement of an annulment committee with the finding in *Enron Corporation v Argentina* that Argentina was not entitled to rely on the defence.¹²³

These divergent positions on the defence of necessity illustrate the uncertainties surrounding its scope. More important for the purposes of policy space and regulatory autonomy, whether or not a measure is necessary is "non-self-judging". This means the state adopting the measures in question is not "the sole arbiter of the scope and application of ... the invocation of necessity".¹²⁴ It is for a tribunal to evaluate whether impugned measures are necessary,¹²⁵ and to "establish how grave an economic crisis must be so as to qualify as an essential security interest"¹²⁶ defence.

The necessity defence has the potential to provide some breathing space for states in the sense that their determination of the existence of a state of necessity may be affirmed by investment tribunals.¹²⁷ However, Avidan Kent and Alexandra Harrison are right when they argue that "the application of the necessity doctrine's conditions is generally made in 'black and white' terms" and "portends the unjust failure of the necessity doctrine in many future cases."¹²⁸ The defence of necessity is also of limited relevance because it applies only to emergencies and does not address the obligations on the state in general.

2.3.1.3 The Margin of Appreciation Doctrine

International legal norms, including investment treaties, often give review powers to international tribunals and courts over national decision-makers. The margin of appreciation doctrine is applied in international dispute settlement to accommodate states' rights to make and implement policies, decisions and laws at the domestic level. The doctrine allows international courts and tribunals to scrutinise the decisions of states and their instrumentalities, but with a measure of deference. Two elements may be identified. The first is judicial deference, by which international courts and tribunals are expected to grant

¹¹⁹ *Sempra v Argentina*, above n 104. The Sempra Award was annulled on the ground of manifest excess of powers in *Sempra Energy International Argentina*, ICSID Case No. ARB/02/16, (Annulment Proceeding), Decision on the Argentine Republic's Request for Annulment of the Award, 29 June 2010, para 229.

¹²⁰ *Enron v Argentina*, above n 114.

¹²¹ *CMS Gas v Argentina*, above n 20, para 281.

¹²² *Ibid* paras 274-275 and 277.

¹²³ *Enron Creditors Recovery Corp Ponderosa Assets, L.P v Argentina*, ICSID Case No. ARB/01/3, (Annulment Proceeding), Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, paras 359-395.

¹²⁴ *CMS Gas v Argentina*, above n 20, para 366.

¹²⁵ *Ibid* para 189.

¹²⁶ *Ibid* para 361.

¹²⁷ *BG Group v Argentina*, above n 46, paras 409-410.

¹²⁸ Avidan Kent and Alexandra R. Harrison, "The Plea of Necessity under Customary International Law: A Critical Review in Light of the Argentine Cases" in Brown and Miles, *Evolution in Investment Treaty Law*, above n 7, 246 at 269.

governments some degree of deference and to respect their discretion on how to execute their national and international law obligations. The second element is normative flexibility, which operates on the premise that international norms are open-ended or unsettled and provide limited conduct-guidance for states. Therefore, these norms preserve space within which states are free to operate.¹²⁹

However, Yuval Shany argues that “the margin of appreciation afforded to states is never unlimited – i.e., there is no total deference to the national decision-making process.”¹³⁰ For the doctrine to apply, it must be shown that the state has exercised its discretion in good faith. More important, it is ultimately for tribunals to determine whether national decisions are reasonable. Reasonableness is measured by the conformity of a course of action selected by the state with the object of the governing norm.¹³¹

In investment arbitration, states have invoked the margin of appreciation doctrine to defend measures challenged by foreign investors. Arbitral decisions support the proposition that the doctrine does not guarantee with certainty that merely because a state is entitled to exercise discretion its sense of judgement is final. At the end of the day, states’ need for policy space and regulatory autonomy may or may not be guaranteed under the margin of appreciation doctrine.

This uncertainty is evidenced by *Quasar de Valores SICAV SA v Russia*,¹³² where the investor claimed compensation under the Russia-Spain investment treaty for expropriation arising from tax enforcement measures. Russia defended its actions arguing that it was entitled to a wide margin of appreciation. The Tribunal stated that “measures are bona fide, unless there is convincing evidence that, upon a true characterisation, they constitute a taking”.¹³³ However, it held that “foreigners may invoke a higher standard of protection than nationals”.¹³⁴ While human rights conventions establish minimum standards to which all individuals are entitled, irrespective of any act of volition on their part:¹³⁵

investment-protection treaties contain undertakings which are explicitly designed to induce foreigners to make investments in reliance upon them. It therefore makes sense that the reliability of an instrument of the latter kind should not be diluted by precisely the same notions of ‘margins of appreciation’ that apply to the former.

The notion that states have a considerable margin of discretion in enacting and enforcing tax laws should not lead to any confused idea that they have ... discretion as to whether or not to comply with an international treaty.

¹²⁹ Yuval Shany, “Towards a General Margin of Appreciation Doctrine in International Law?” (2005) 16 *European Journal of International Law* 907 at 909-910.

¹³⁰ *Ibid* 910-911.

¹³¹ *Ibid* 910-911.

¹³² *Quasar de Valores SICAV SA v Russia*, SCC, Award, 20 July 2012.

¹³³ *Ibid* para 181.

¹³⁴ *Ibid* para 21.

¹³⁵ *Ibid* paras 22 and 179.

These propositions point to the extremely narrow window for the application of the margin of appreciation doctrine. Again, in *Continental Casualty Company v Argentina*¹³⁶ the Tribunal held that effective interpretation of a bilateral treaty founded on reciprocity requires an accommodation of the different interests and concerns of the parties to the treaty. In the Tribunal's view, there is the need for "a significant margin of appreciation for the State applying the particular measure"¹³⁷ in "a time of grave crisis".¹³⁸ Nevertheless, the Tribunal stated that, although the provision in the Argentina-United States investment treaty allowing measures necessary for the essential security interests or public order:¹³⁹

involves naturally a margin of appreciation by a party invoking it caution must be exercised in allowing a party unilaterally to escape from its treaty obligations in the absence of clear textual or contextual indications. This is especially so if the party invoking the allegedly self-judging nature of the exemption can thereby remove the issue, and hence the claim of a treaty breach by the investor against the host state, from arbitral review. This would conflict in principle with the agreement of the parties to have disputes ... settled compulsorily by arbitration.

2.3.2 Rethinking the Search for Regulatory Autonomy in International Investment Law

The foregoing review shows that various state-specific defences are available in international investment dispute settlement aimed at providing the basis for the recognition of states' right to regulate. Where these defences are successfully invoked, a state may not have to pay compensation to foreign investors for measures that adversely affect the value of their investments. The analysis, however, leads to the conclusion that these defences do not provide realistic, tangible and easily measurable standards on which states can safely rely to assert their policy space and regulatory autonomy. The defences are of limited efficacy because their standards are uncertain and their applicability ultimately resides in the wisdom of the court or tribunal. Because of the inherent limitations of these defences, the core issue is whether states should continue to assume the currently applicable standards of investment protection. A principled basis for responding to this issue is to examine the role the Constitution and general international law in the search for regulatory autonomy in international investment law.

The *constitutional-general international law imperatives test* proposed by this chapter provides more clarity and objectivity than do its alternatives for deciding whether Ghana can or should assume certain investment treaty obligations and for the resolution of investment disputes. The reason for this position is that Ghana's investment treaties are premised on the theory that they are *sine qua non* for the attraction of investment, which it is claimed can advance a public interest objective such as development. It should follow then that if

¹³⁶ *Continental v Argentina*, above n 20.

¹³⁷ *Ibid* para 181.

¹³⁸ *Ibid* para 181.

¹³⁹ *Ibid* para 187.

investment treaties are necessary for development, their terms must not be agreed to if they will undermine development objective in general. Where the public interest regulation giving rise to investor-state dispute is justified by both the Constitution and general international law it should take precedence and command much more obedience than investment treaties which seek to limit even public interest regulation in order to attain absolute investment protection. Since international human rights treaties and international environmental treaties Ghana is a party to protect human rights, the environment and the right to development as does the Constitution, these treaties should take precedence over investment treaty obligations in the event of conflict. The substantive standards of investment protection are recognised solely under the investment treaties and not under the Constitution (except direct expropriation which the Constitution recognises). The legal validity and effect of investment treaties, given their absolute and sole focus on private investment interests, should be determined based on their impact on the right to regulate in the public interest as required by international human rights treaties and international environmental treaties which protect the interests of the international community. In this regard, Sornarajah questions:¹⁴⁰

whether matters of international concern relating to the environment or human rights are *ius cogens* principles which trump the rights of foreign investors under investment treaties unilaterally to institute arbitral proceedings. The argument can credibly be made that there are some values in international environmental law and human rights law that are so fundamental that the propositions of investment treaties which are designed to protect large multinational corporations should give way to them.

The Vienna Convention on the Law of Treaties (VCLT)¹⁴¹ provides for very limited scope for voiding treaties or escaping from their binding effect. Because of this, states can hardly free themselves from treaty obligations. This is the more reason why states must be cautious as to treaty terms they agree to. This chapter argues that public interest regulation is justified by national constitutions and general international law. These norms are the primary legal basis on which states can claim that they are entitled to regulate in the public interest. Therefore, both the competence of states to agree to certain terms in investment treaties and the validity and binding effect of those terms ought to be judged on the basis of the terms' limiting impact on the exercise of those powers in the public interest. Unless in concluding investment treaties states are restrained by the very legal norms which justify public interest regulation and which states actually rely on as legal justification for challenged measures in investment arbitration, regulatory autonomy cannot be effectively recaptured or retained. These arguments can hardly be accommodated in existing orthodoxy on the making of treaties and the validity and binding effect of those treaties as reflected in the VCLT Articles 26-27, 46 and 53. The postulates developed in this chapter are intended to provide a fundamental framework for rethinking the making and interpretation of investment treaties in Ghana. In

¹⁴⁰ Sornarajah, *Law on Foreign Investment*, above n 5, at 231.

¹⁴¹ Vienna Convention on the Law of Treaties, concluded in Vienna 23 May 1969, entry into force 27 January 1980.

providing that framework, there would be the need, as reflected in the analysis that follows, to expand or stretch the argument beyond the contours of existing theory and discourse in order to provide fresh input into the debate.

2.4 THE MAKING OF INVESTMENT TREATIES IN GHANA

This Section sets out and interprets the analytical and theoretical foundations on which The Imperatives Theory is constructed. The Section establishes that constitutionalism is entrenched in Ghana. Therefore, to retain its autonomy to regulate in the public interest, the State must act within the procedural and substantive constitutional limits governing the exercise of governmental powers and respect constitutional rights and obligations. This Section shows that the power of the Government of Ghana to make treaties is limited by the Constitution.

2.4.1 Constituent Power, Constitutionalism and the Making of Investment Treaties in Ghana

The legal limits to the exercise of the powers of the Government of Ghana can be explained in terms of the concept of *constituent power*. According to Martin Loughlin, the primary function of the concept of constituent power “is to specify in constitutional language the ultimate source of authority in the state.”¹⁴² Constituent power:

rests on two conditions: recognition that the ultimate source of political authority derives from an entity known as ‘the people’ and acceptance of the idea of a constitution as something that is created. The concept comes into its own only when the constitution is understood as a juridical instrument deriving its authority from a principle of self-determination: specifically, that the constitution is an expression of the constituent power of the people to make and re-make the institutional arrangements through which they are governed.

Thus constituent power establishes a constitution and determines the nature of institutional arrangements to meet the purposes for which a constitution is established. Sovereign people define the mode of their political existence by adopting a constitution and allocating governmental powers to various institutions of government.¹⁴³ Constituent power creates agency and delegation in the sense that someone else (the constituted actor) is given the power to represent and make decisions on behalf of and for the benefit of the source of the power, the people. That real sovereignty, *majestas realis*, resides in or is vested in the people is reflected in Article 1(1) of the Constitution of Ghana wherein it is stated that the “[s]overeignty of Ghana resides in the people of Ghana in whose name and for whose welfare the powers of government are to be exercised in the manner and within the limits laid down in

¹⁴² Martin Loughlin, “The Concept of Constituent Power” (2014) 13(2) *European Journal of Political Theory* 218 at 219

¹⁴³ *Ibid* at 224 and 225.

this Constitution.” Indeed, the preamble to the Constitution shows that “the People of Ghana,” adopted the Constitution in exercise of their “natural and inalienable right to establish a framework of government which shall secure for [themselves] and posterity the blessing of liberty, equality of opportunity and prosperity.” In this sense, constituent power in Ghana, to put it in the words of Chris Thornhill, “forms part of an original and *pre-legal* wellspring for legitimate political order, in the exercise of which the sovereign subject of the people (or the nation) first enacts and authorizes laws (the constitution) by which the people is then publicly and objectively bound.”¹⁴⁴ Sovereignty, sovereign will and constituent power have thus become “submerged” in the concept of *the people* “as an organic unity.”¹⁴⁵

The representational nature of the status and authority of the constituted actors gives rise to what is described as the *paradox of constitutionalism*,¹⁴⁶ where a state as well as its agency is established through a constitutive process and yet it may become unaccountable to those who created it. As Rainer Nickel argues, constituent power “has always been a hybrid creature in modern constitutional theory, with its character oscillating between legally unbound sovereignty, on the one hand, and the paradox of the legal force of a constitution, on the other.”¹⁴⁷ The *paradox of constitutionalism* is reflected in the idea that the people who are the source of the constituent power cannot exercise sovereignty by themselves; governmental action is undertaken primarily by those who act in the name of the people so that the power the people possess can be exercised through constitutional forms.¹⁴⁸ The paradox of constitutionalism “is underpinned by two fundamental though antagonistic imperatives: that governmental power ultimately is generated from the consent of the people and that, to be sustained and effective, such power must be divided, constrained, and exercised through distinctive institutional forms.”¹⁴⁹

In the Ghanaian context, the idea of unbound sovereignty is unknown in the sense that “the tension between the constituent power of the sovereign people and constitutional forms that are intended to express and check this power”¹⁵⁰ is addressed by constitutional provisions governing the exercise of powers by the constituted actors. The primacy of constituent power over the constituted actors is reflected in Article 1 which specifies the people as the source of the powers of government and the people’s welfare as the purpose for the exercise of those powers and establishes the supremacy of the Constitution. This provision is given practical significance by Article 2 of the Constitution which gives citizens the standing to bring an action in the Supreme Court if they believe that an enactment or *any* act or omission of *any person* is in contravention of a provision of the Constitution. The provision empowers the Court to make orders and give directions so that effect can be given to any

¹⁴⁴ Chris Thornhill, “Contemporary Constitutionalism and the Dialectic of Constituent Power” (2012) 1(3) *Global Constitutionalism* 369 at 369-370.

¹⁴⁵ Loughlin, above n 142 at 225.

¹⁴⁶ Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007) (*Paradox of Constitutionalism*).

¹⁴⁷ Rainer Nickel, “Private and Public Autonomy Revisited: Habermas’ Concept of Co-originality in Times of Globalization and the Militant Security State” in *Paradox of Constitutionalism*, above n 146, 147 at 148

¹⁴⁸ Martin Loughlin and Neil Walker, “Introduction” in *Paradox of Constitutionalism*, above n 146 at 1.

¹⁴⁹ *Ibid.*

¹⁵⁰ Stephen M Griffin, “Constituent Power and Constitutional Change in American Constitutionalism” in *Paradox of Constitutionalism*, above n 146 at 49.

declaration it makes pursuant to an action. Any person to whom an order or direction is addressed must duly obey and carry out the terms of the order or direction. A failure to do so is a high crime subject to appropriate penalties. In this regard, exercising power in an unconstrained and unlimited manner in Ghana is inconsistent with the very source and purpose of the powers of government, particularly in relation to specific constitutional-general international law imperatives such as the protection of fundamental human rights. The protection of constitutional rights in Ghana could be weakened because of international agreements that Ghana has entered into. These agreements not only impose substantive legal obligations on Ghana, they also provide for international dispute settlement mechanisms and require national courts to ensure compliance with transnational norms. The position of this chapter is that if constitutionalism is to retain its status in the regulation of the actions of constituted actors in Ghana, the Constitution and the very rights, interests and values it preserves should dictate the contents of international agreements that Ghana enters into.

2.4.1.1 Constitutionalism: Meaning and Legal Effect

At its most basic level, Albert Dicey defines a “constitution” as comprising “rules which directly or indirectly affect the distribution of or the exercise of the sovereign power in the state.”¹⁵¹ According to Dicey, constitutions define the holders of sovereign power, regulate the relations among institutions of the state, and determine the manner in which sovereign power shall be exercised.¹⁵² Kelsen describes a constitution as “the positive norm or norms which regulate the creation of general legal norms” and “represents the highest level of positive law.”¹⁵³ Leslie Burn and Pauli Murray state that constitutional supremacy “is the doctrine applied to written constitutions which create the various organs of government and mark out the limits of their respective powers.”¹⁵⁴ In Kelsen’s language, a norm, such as a constitution, which is the reason for the validity of another norm, is called a “*basic norm (Grundnorm)*”¹⁵⁵ or “higher norm”.¹⁵⁶

In *Marbury v Madison*,¹⁵⁷ the Supreme Court of the United States held that it is the people who have the original right to establish for government the principles that are most conducive to their own happiness. The principles so established by the people are fundamental. Where the powers of government are limited, the limitations so imposed will not serve their purposes for the people or otherwise if they may be bypassed by those intended to be restrained.¹⁵⁸ The theory underlying the supremacy of the constitution is “constitutionalism”. According to De Smith, constitutionalism is the principle that the exercise of political power is to be done

¹⁵¹ Albert V. Dicey, *Introduction to the Study of the Law of the Constitution* (10edn, ECS Wade (ed), Macmillan & Co, 1959) at 23.

¹⁵² *Ibid.*

¹⁵³ Hans Kelsen, *The Pure Theory of Law*, Max Knight (Translator), University of California Press, 1967) at 222.

¹⁵⁴ Leslie Burn and Pauli Murray, *The Constitution and Government of Ghana* (Sweet and Maxwell, 1961) at 52.

¹⁵⁵ Kelsen, above n 153, at 8.

¹⁵⁶ *Ibid* at 193.

¹⁵⁷ *Marbury v Madison* 1 Cranch (US) 137 at 176-177.

¹⁵⁸ *Ibid* at 177.

within rules that determine the validity of legislative and executive actions by “prescribing the procedure according to which it must be performed or by delimiting its permissible content”.¹⁵⁹

For Ghana, the principles of constitutional supremacy and constitutionalism are entrenched in the Constitution. Article 1(1) states that the Constitution is “the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void.” The preamble shows that the Constitution was enacted by the people of Ghana in the exercise of their “natural and inalienable right to establish a framework of government which shall secure for [themselves] and posterity the blessings of liberty, equality of opportunity and prosperity”. The people, then, are the source of the legal validity of the Constitution and governments created under the Constitution must work to advance the interests of the people and act within the limits laid down in the Constitution. In the celebrated case of *Tuffuor v Attorney-General*, the Supreme Court of Ghana, per Justice Sowah, underscored the supremacy and importance of the Constitution, stating that:¹⁶⁰

A written Constitution ... is not an ordinary Act of Parliament. It embodies the will of a people. It also mirrors their history. Account, therefore, needs to be taken of it as a landmark in a people's search for progress. It contains within it their aspirations and their hopes for a better and fuller life ... It is the fountainhead for the authority which each of the three arms of government possesses and exercises. It is a source of strength. It is a source of power. The executive, the legislature and the judiciary are created by the Constitution. Their authority is derived from the Constitution. Their sustenance is derived from the Constitution.

The Constitution, in Chapter Five, guarantees and protects various fundamental human rights, including the rights to life and health. The powers of government are to be exercised to give effect to the full realisation and enjoyment of these rights.¹⁶¹ The Constitution expressly requires that the Government shall exercise its powers in the name, and for the welfare, of the people of Ghana in the “manner and within the limits laid down in this Constitution”.¹⁶² In Ghana then, the established legal order is constitutionalism; that is, a government not of absolute power that can do whatever pleases it, but of limited power that must exercise its powers within legal limits and for the public good.¹⁶³

The Constitution requires by Article 75 that treaties executed by or under the authority of the President are ratified by an Act of Parliament or by a resolution of Parliament supported by the votes of more than one-half of the members of Parliament. The requirement for parliamentary approval of treaties executed by the President is intended both to bring about transparency and to ensure that treaties entered into by the State are consistent with the goals of the Constitution and the national interests of Ghana. Accordingly, the Executive does

¹⁵⁹ S. A. De Smith, “Constitutionalism in the Commonwealth Today” (1962) 4 *Malaya Law Review* 205.

¹⁶⁰ *Tuffuor v Attorney-General* [1980] GLR 637 at 647-648.

¹⁶¹ *Constitution of the Republic of Ghana 1992*, art 34(2).

¹⁶² *Ibid* art 1(1).

¹⁶³ Richard L. Sklar, “On the Study of Constitutional Government in Africa” in Okon Akiba (ed), *Constitutionalism and Society in Africa* (Ashgate Publishing, 2004) 43.

not have the power to conclude treaties that come into force without the need for parliamentary ratification and incorporation into Ghanaian law by way of legislation.¹⁶⁴

The reference to “treaties”, “agreements” and “conventions” in Article 75 of the Constitution is broad, so as to capture all forms of international agreements, including loan agreements, memoranda of understanding, investment treaties, multilateral trade and investment agreements, and other international executive agreements to the extent that they seek to impose binding and enforceable obligations on Ghana. In *France v Commission of the European Communities*,¹⁶⁵ the ECJ defined an “agreement” within the context of Article 228 of the Treaty establishing the European Economic Community signed in Rome in 1957 as “any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation.”¹⁶⁶

In *The Republic v High Court: Ex Parte; Attorney-General*¹⁶⁷ the Supreme Court held that customary international law is part of the law of Ghana “incorporated by weight of common law case law ... However, treaties, even when the particular treaty has been ratified by Parliament, do not alter municipal law until they are incorporated into Ghanaian law by appropriate legislation.”¹⁶⁸ In other words, ratification of a treaty either by an Act of Parliament or by resolution of Parliament does not mean that it is incorporated into Ghanaian law. It follows that a treaty that has not been incorporated into Ghanaian law “may come into force and regulate the rights and obligations of the State on the international plane without changing rights and obligations under municipal law.”¹⁶⁹ There is “need for legislative incorporation of treaty provisions into municipal law before domestic courts can apply those provisions”¹⁷⁰ Treaties cannot alter rights and obligations under domestic law unless the treaty is incorporated into domestic law by legislation.¹⁷¹ The obligations of the State to promote respect for international law and treaty obligations and conduct its international affairs in consonance with accepted principles of public international law in Articles 40 and 73 of the Constitution do not alter the dualist stance of Ghanaian law requiring the need to incorporate treaties into domestic law for them to have effect.¹⁷² These provisions equally “do not authorize the courts to enforce treaty provisions that change rights and obligations in the municipal laws of Ghana without legislative backing. If the law were otherwise, it would give the Executive an opportunity to bypass Parliament in changing the rights and obligations of citizens and residents of Ghana.”¹⁷³

However, since the President can execute a treaty before parliamentary ratification, the treaty may have effect in international law without having effect in municipal law, that is, in terms of being recognised and adjudicated upon in municipal courts. To avoid a situation

¹⁶⁴ *Ex Parte the Attorney-General*, above n 94, at 2.

¹⁶⁵ *France v Commission of the European Communities*, Case C-327/91, Judgement of the European Court of Justice, 9 August 1994.

¹⁶⁶ *Ibid* para 27.

¹⁶⁷ *Ex Parte the Attorney-General*, above n 94

¹⁶⁸ *Ibid* at 2.

¹⁶⁹ *Ibid* at 4.

¹⁷⁰ *Ibid* at 5.

¹⁷¹ *Ibid* at 5.

¹⁷² *Ibid* at 6-7.

¹⁷³ *Ibid* at 7.

where a treaty has effect in international law when the constitutional requirements for the execution of treaties have not been fully complied with, it is proposed that parliamentary debate and approval of a treaty must come first before presidential execution of the treaty. This will allow for consensus on the constitutionality and compliance of the treaty with the national interests of Ghana before the treaty is entered into. In any case, the requirement for parliamentary approval or ratification of a treaty executed by the President means that the President cannot execute a self-executing treaty, that is, a treaty that is capable of judicial application municipally and internationally without implementing legislation or without the need for parliamentary endorsement.

The central point of this Subsection, as elaborated in Subsection 2.4.1.3 below, is that the power of the State of Ghana exists for the benefit of the people. The institutions of the State derive their public authority from the Constitution to be exercised in the public interest. Christian Lund posits that the exercise of authority (public or private) “is intimately linked to the legitimacy of the particular institution. Not only in the sense that an institution has to be legitimate to exercise authority, but especially because the actual exercise of authority also involves a specific claim to legitimacy.”¹⁷⁴ In *A Theory of Justice*, John Rawls defines institutions as:¹⁷⁵

a public system of rules which defines offices and positions with their rights and duties, powers and immunities ... These rules specify certain forms of action as permissible, others as forbidden ... An institution may be thought of in two ways: first as an abstract object, as possible forms of conduct expressed by a system of rules; and second, as the realization in the thought and conduct of certain persons at a certain time and place of the actions specified by the rules.

According to Rawls, an institution “exists at a certain time and place when the actions specified by it are regularly carried out in accordance with a public understanding that the system of rules defining the institution is to be followed.”¹⁷⁶ In this regard, “the constitutive rules of an institution, which establish its various rights and duties” and the “strategies and maxims for how best to take advantage of the institution for particular purposes”¹⁷⁷ are interrelated and interdependent. Two ways to determine the legitimacy of public authority of public institutions then are to determine the source of the public authority (that is the rules establishing the institutions) and whether those vested with public authority to act in the public interest actually do represent or act in the public interest and within the terms of the source of the authority. In part, this issue can be addressed by examining the constraining effects of international agreements the State enters into for the performance of functions essential for the realisation of the rights of members of the public. In this respect, whether state institutions which are required by the Constitution to act in the public interest actually do represent the

¹⁷⁴ Christian Lund, “Twilight of Institutions: Public Authority and Local Politics in Africa” (2006) 37(4) *Development and Change* 685 at 693

¹⁷⁵ John Rawls, *A Theory of Justice* (Revised edn, Oxford University Press, 1999) at 47-48.

¹⁷⁶ *Ibid* at 48.

¹⁷⁷ *Ibid* at 49.

public interest can be determined, for example, by examining the legitimacy of the authority of state institutions to agree to certain terms under investment treaties in light of the implications of those terms for the discharge of public interest obligations. In this regard, various authorities have analysed the legitimacy of the investment treaty regime in relation to national constitutions.

As Ernst-Ulrich Petersman argues in *International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods*, “international trade, financial, investment and environmental regulation remain dominated by government bureaucracies and their business advisors without adequate representation and legal protection of general citizen interest in consumer welfare and protection of fundamental human rights.”¹⁷⁸ For example, the Bretton Woods Articles of Agreement¹⁷⁹ establishing the World Bank and International Monetary Fund (IMF) focus on regulation of economic and financial policy issues such as international balance of payment, sovereignty over the issuance of money, international regulation of exchange rates and development assistance.¹⁸⁰ According to Petersman, diplomats of the World Bank and IMF, “often justify their neglect for human rights and constitutional rights in intergovernmental economic regulation by the claim” that these agreements “focus on regulation of economic policy issues.”¹⁸¹ James Gathii argues in similar terms that the World Bank “bases its position on its constituent instrument ... to support the view that human rights are a political issue which fall outside the Bank’s mandate unless it can be defined in a technical or functional mode, to fit within the economic and financial goals of the Bank. This means that the Bank, as well as human rights supporters working within and outside the Bank, must reconcile human rights initiatives with the Bank’s economic and financial goals.”¹⁸² The Articles of Agreement of the World Bank and IMF, like investment treaties, which are interpreted to exclude public interest issues such as human rights are made by states. Such a state of affairs manifests a failure of institutions vested with public powers to act for the common good for which the powers have been vested in them. It is in this regard that this thesis argues that since it is the Constitution that specifies what the public interests are and the corresponding obligations of the State in relation to them, then constitutional norms should determine the content of investment treaties which as they largely are now turn to limit public interest obligations of the State.

Petersman argues in similar terms from a constitutional perspective that “universal human rights obligations of all UN member states call for stronger constitutional and judicial protection of individual rights of citizens in IEL [international economic law] whenever governments restrict or distort mutually beneficial cooperation among citizens across

¹⁷⁸ Ernst-Ulrich Petersman, *International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (Hart Publishing Ltd, 2012) at 18

¹⁷⁹ *International Bank for Reconstruction and Development Articles of Agreement*, United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, 1-22 July 1944, entered into force 1945 (as amended effective 27 June 2012) <http://siteresources.worldbank.org/BODINT/Resources/pdf/1215526322295/IBRDArticlesOfAgreement_English.pdf>

¹⁸⁰ Petersman, *International Economic Law*, above n 178 at 18.

¹⁸¹ *Ibid.*

¹⁸² James Thuo Gathii, “Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law” (1999) 5 *Buffalo Human Rights Law Review* 107 at 120.

frontiers.”¹⁸³ The human rights obligations of UN member states are based on universally recognised ‘principles of justice. Thus there is the need to respect, protect and promote the rights of citizens and people all over the world. Multilevel human rights “constitute equal rights of citizens” and thereby “limit the power of all governments as ‘agents’, coordinate national and international legal regimes and promote ‘principled’ conflict resolution, legal coherence and synergies among national and international government policies for the benefit of citizens.”¹⁸⁴

Accordingly, “economic regulation needs to be justified also in terms of ... constitutional ... theories.”¹⁸⁵ This means that as “rules of and institutions for public goods shape the infrastructure and welfare of states, the production, design, enforcement and justification of international public goods cannot be left to intergovernmental power politics and piecemeal engineering.”¹⁸⁶ As “multilevel governance of interdependent international public goods has become the most challenging policy task in the twenty-first century ... the current under-supply of international public goods requires embedding IEL into stronger constitutional, cosmopolitan and democratically justifiable foundations.”¹⁸⁷

In *Why Justice and Human Rights Require Cosmopolitan International Economic Law*, Petersman argues that states’ obligations to protect human rights “also in international economic cooperation among citizens justify legal presumptions that ... international guarantees of economic freedoms and transnational rule of law must be interpreted as protecting the rights of not only of governments (as agents with limited, delegated rights) but also of citizens as ‘primary legal subjects’ of IEL.”¹⁸⁸

In *Justice as Fairness: A Restatement*, Rawls defines the parameters for legitimate exercise of the powers of government. According to Rawls:¹⁸⁹

Political power is legitimate only when it is exercised in accordance with a constitution (written or unwritten) the essentials of which all citizens, as reasonable and rational, can endorse in light of their common human reason. This is the liberal principle of legitimacy. It is a further desideratum that all legislative questions that concern or border on these essentials, or are highly divisive, should also be settled, so far as possible, by guidelines and values that can be similarly endorsed.

Rawls describes a society as “well-ordered” if it is “effectively regulated by a public conception of justice”¹⁹⁰ and states, hyperbolically in order to emphasise the importance of complying with constitutional norms, that “if a political conception of justice covers the constitutional essentials, it is already of enormous importance even if it has little to say about

¹⁸³ Petersman, *International Economic Law*, above n 178 at 19.

¹⁸⁴ *Ibid* at 23.

¹⁸⁵ *Ibid* at 25.

¹⁸⁶ *Ibid*.

¹⁸⁷ *Ibid*.

¹⁸⁸ Ernst-Ulrich Petersman, “*Justice and Human Rights Require Cosmopolitan International Economic Law*” in Federico Lenzerini and Ana Filipa Vrdoljak (eds), *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature* (Hart Publishing Ltd, 2014) 117 at 118. See also *Ibid* at 120-121.

¹⁸⁹ John Rawls, *Justice as Fairness: A Restatement* (Erin Kelly (ed), Harvard University Press, 2001) at 41.

¹⁹⁰ *Ibid* at 30.

many economic and social issues the legislative bodies must consider.”¹⁹¹ Accordingly Rawls proposes that “a free market system must be set within a framework of political and legal institutions that adjust the long-run trend of economic forces so as to prevent excessive concentration of property and wealth”.¹⁹² In his view, the justice of basic institutions and social policies should be judged in terms of how they promote and protect basic rights and liberties.¹⁹³

Meinhard Hilf, illustrates in the case of German constitutional law that the dignity of the human person “is considered to be the highest value to be protected. The ultimate aim of the state is to protect this value – and not to maintain any dignity of the state itself of its constitution ... Today it can be maintained that the exercise of *any public authority*, including authority in the field of foreign relations, may be challenged on the basis of basic constitutional principles.”¹⁹⁴ Mitsuo Matsushita argues that under Article 22(1) of the Constitution of Japan, “business activities can be restricted by law if the restriction is necessary for the purpose of promoting the public welfare.”¹⁹⁵

Building on the foregoing themes, this chapter argues that as the legitimacy of the Government of Ghana is founded on the Constitution, the very norms that impose obligations on the State with respect to the protection of the public interest, the actions of the Government such as the execution of investment treaties and the interpretation of those treaties should be judged within the terms of those norms. Given that the powers of the Government under the Constitution of Ghana are limited for the public good, unlimited power to the State to enter into an investment treaty that can limit public interest regulation cannot co-exist with this constitutional limitation. In *Limited Government and Unlimited Trade Policy: Why Effective Judicial Review of Foreign Trade Restrictions Depends on Individual Rights*, Petersman argues that governments “usually cannot directly produce welfare and economic wealth, but only a framework of rules that may encourage or impede the welfare of their citizens ... There is no constitutionally valid reason why the principle of limited delegation of powers should not also require to limit trade regulatory powers.”¹⁹⁶ Such limitation is justified because:¹⁹⁷

International guarantees of freedoms, non-discrimination, legal certainty, and transparency and use of proportionality policy instruments cannot fulfil their ‘constitutional functions unless they are supplemented by effective ‘enforcement mechanisms’ and placed into a ‘constitutional system’ subjecting the interpretation, application and enforcement of the rules to institutional ‘checks and

¹⁹¹ Ibid at 28.

¹⁹² Ibid at 44.

¹⁹³ Ibid at 45.

¹⁹⁴ Meinhard Hilf, “Treaty-Making and Application of Treaties in International Trade Law: The Case of Germany” in Meinhard Hilf and Ernst-Ulrich Petersman (eds), *National Constitutions and International Economic Law* (Kluwer Law and Taxation Publishers, 1993) 211 at 213.

¹⁹⁵ Mitsuo Matsushita, “Constitutional Framework of the Major Trade Laws in Japan: In the Context of the Uruguay Round” in Hilf and Petersman, *National Constitutions and International Economic Law*, above n 194, 275 at 277.

¹⁹⁶ Ernst-Ulrich Petersman, “Limited Government and Unlimited Trade Policy: Why Effective Judicial Review of Foreign Trade Restrictions Depends on Individual Rights” in Hilf and Petersman, *National Constitutions and International Economic Law*, above n 194, 537 at 542.

¹⁹⁷ Ernst-Ulrich Petersman, “National Constitutions and International Economic Law” in Hilf and Petersman, *National Constitutions and International Economic Law*, above n 194, 3 at 48-49.

balances. Such constitutional framework can hardly be made effective within worldwide international organizations which recognize the national sovereignty and diversity of member states ... and provide no effective sanctions against mutually agreed 'rule departures' among governments ... For instance, the establishment of parliamentary and judicial 'checks and balances' at the level of worldwide international economic organisations appears hardly feasible. And, as illustrated by the example of the EEC, even the existence of international parliamentary and judicial bodies is no adequate safeguard against international 'protectionist collusion' among trade and agricultural ministers at the expense of domestic citizens. The experience with the often little success of customs unions, and free trade areas in Africa and Latin America further indicates that even comprehensive, international customs union and free area agreements are no guarantee for effective liberalisation of national trade barriers.

The justification for constitutional limitations on investment treaty making in Ghana is that Ghana is a constitutional democracy. According to Article 35(1) of the Constitution, "Ghana shall be a democratic state dedicated to the realisation of freedom and justice; and accordingly, sovereignty resides in the people of Ghana from whom Government derives all its powers and authority through" the Constitution. Rawls states in *The Law of Peoples* that a constitutional democracy requires, "a reasonably just constitutional democratic government that serves fundamental interests."¹⁹⁸ By a "reasonably just ... constitutional democratic government," Rawls means that the government "is effectively under" the people's "political and electoral control, and that it answers to and protects their fundamental interests as specified in a written or unwritten constitution and its interpretation. The regime is not an autonomous agency pursuing its own bureaucratic ambitions. Moreover, it is not directed by the interests of large concentrations of private economic and corporate power veiled from public knowledge and almost entirely free from accountability."¹⁹⁹ Given the constitutional regime which places the welfare and basic rights of the people at the centre of governance in Ghana, the Government will be acting unconstitutionally if it enters into investment treaties that directly prohibit the undertaking of measures required or necessary under the Constitution in the public interest (or indirectly achieve that effect). In the words of Petersman, constitutional obligations of the states relating to human rights, including the right to development demand "limiting – in all human interactions at national, transnational, and international levels – the perennial abuses of public and private powers through long-term rules of a higher legal rank that protect equal basic freedoms and social rights against such abuses of power and enable the collective supply of public goods."²⁰⁰

¹⁹⁸ John Rawls, *The Law of Peoples: with The Idea of Public Reason Revisited* (Harvard University Press, 1999) at 23.

¹⁹⁹ *Ibid* at 24

²⁰⁰ Ernst-Ulrich Petersman, *Why Rational Choice Theory Requires a Multilevel Constitutional Approach to International Economic Law: A Response to The Case Against Reforming the WTO Enforcement Mechanism* (2008) *University of Illinois Law Review* 359 at 366

2.4.1.2 The Substantive and Procedural Constitutionality of Investment Treaties

There are two basic ways the constitutionality of treaties may arise in Ghana. First, as treaties have to be made in accordance with the constitutional procedures and by institutions empowered to do so, treaties may be constitutional or unconstitutional depending on whether they have been made in accordance with those procedures and by institutions empowered to make them. Treaties in this sense may be either *procedurally constitutional* or *procedurally unconstitutional* depending on whether or not they are made *in the manner* laid down in the Constitution.

The Supreme Court has held in *Attorney-General v Faroe Atlantic Co Ltd*,²⁰¹ *Attorney-General v Balkan Energy Ghana Ltd*²⁰² and *Martin Alamisi Amidu v Attorney-General Cases*²⁰³ that international business or economic transactions such as power purchase agreements, international loan agreements, and international project implementation agreements that have not been laid before and approved by Parliament as required by Article 181 of the Constitution are unconstitutional and the State cannot be required to pay damages for breach of such agreements. These cases about international contracts have the same legal consequences for investment treaties because Article 75 of the Constitution requires that treaties executed by the President shall be ratified by Parliament just as Article 181 requires parliamentary approval of an international economic or business transaction. Two of Ghana's investment treaties (Ghana-Denmark and Ghana-Malaysia) came into force in 1995 and 1997 respectively after the Constitution came into force in 1992. It is not clear from parliamentary debates or formal resolution of Parliament around the time whether these treaties were ratified by Parliament. If these investment treaties did not receive parliamentary approval they are *procedurally unconstitutional*.

Secondly, treaties may be *substantively constitutional* or *substantively unconstitutional*. *Substantive constitutionality* arises where a treaty does not conflict with any of the substantive standards laid down in the Constitution. Where a treaty or statute expressly conflicts with any of the substantive standards in the Constitution so that the State cannot protect substantive rights at all or with the most convenient measures required under the Constitution, there is *substantive unconstitutionality*. Again, governmental action that unreasonably restricts the ability of state institutions to carry out a constitutionally mandated policy or requirement would be substantively unconstitutional. For example, the Supreme Court has held in *Adofo v Attorney General* ²⁰⁴ that a statute made by the Government that ousts the court of their jurisdiction is unconstitutional.

Substantive unconstitutionality may be *express*, in which case a law or treaty explicitly conflicts with the Constitution by, for example, taking away or abrogating a substantive

²⁰¹ *Attorney-General v Faroe Atlantic Co Ltd* [2005-2006] SCGLR 271

²⁰² *Attorney-General v Balkan Energy Ghana Ltd*, Judgment, 16 May, 2012

²⁰³ *Amidu v Attorney-General*, Writ No. JI/15/2012, Judgment, 14 June 2013; and *Amidu v Attorney-General*, Writ No. JI/23/2012, Judgment, 21 June 2013.

²⁰⁴ *Adofo v. Attorney-General* [2003-2005] 1 GLR 239.

constitutional right.²⁰⁵ Substantive unconstitutionality may also be *implicit* or *indirect*. This may arise where a treaty, although not expressly taking away a substantive constitutional right or power, nevertheless achieves that effect if implemented. An example of this is where an investment treaty imposes damages against the State for adopting measures that are required under the Constitution or under domestic law without the need to pay compensation. Although in this case the investment treaties do not expressly prohibit the adoption of the measures, they may achieve that effect since the State might roll back from adopting measures for fear of investor-state arbitration suits. In this sense, the obligation to pay compensation can have the same legal effect as an express prohibition.

By this analysis, a treaty may be procedurally constitutional if it has been made in accordance with the constitutional procedures, yet be substantively unconstitutional if, on its face, it abolishes, or seriously undermines the realisation of a substantive constitutional right. Within the domestic context, laws made under municipal law by Parliament are void if they conflict with the Constitution. Therefore, a treaty will be substantively unconstitutional and should be treated as void if it substantially contravenes a substantive constitutional right because treaties should help realise constitutional rights and not abrogate them or compromise their realisation.

However, a treaty's unconstitutionality at the municipal plane does not necessarily render it unenforceable in international law. The implication is that an action that is unconstitutional under domestic law may not justify an act that is illegal under international law on the basis of *pacta sunt servanda* and the principle that international law prevails over municipal law. Nevertheless, if in substance and procedure such a treaty could not have been made under municipal law then the treaty could be invalid and should not be legally binding if the conditions of Article 46 of the VCLT as interpreted in Subsection 2.4.1.4 below are met.

2.4.1.3 The Legal Source and Purpose of the Powers of the State

One basis for arguing that the Constitution substantively limits the treaty making powers of the State is to study the source and purpose of the powers of government and the limits within which the powers must be exercised under the Constitution. As noted, Article 1(1) says that the sovereignty of Ghana resides in the people of Ghana. The powers of government are to be exercised in the people's name, for their welfare, and in the manner and within the limits laid down in the Constitution. It provides two such constitutional limitations.

The first limitation may be called *The Broad Limitation Test*. To establish this test it must be shown that the particular exercise of the powers of government was neither done in the name of the people of Ghana nor to advance their welfare. Whether or not the exercise of the powers breaches the constitutional standard that the powers shall be carried out in *the name and for the welfare* of the people will depend on the circumstances of each case. For example, a decision to permit a mine to operate without any consideration of the obvious

²⁰⁵ Ibid.

effects on the environment or the welfare of the local community may well be unconstitutional given that the State has an obligation to protect the environment and the health of people.

Under this test governmental policies and actions can also be challenged as *not in the public interest*, even if the powers were exercised within the Constitution, for the reason that they do not advance any public purpose. An example would be if an individual patently exercises public power to enter into an investment agreement with a state to advance specific interests of business cronies or specific government supporters for whom the agreement was a pre-requisite to securing foreign finance. This limitation test thus focuses on the purpose for or motive behind the exercise of the powers of government in the face of a constitutionally mandated value.

The second limitation, labelled *The Narrow Limitation Test*, requires that the powers of government be exercised *strictly within the parameters set out in the Constitution*, both substantively and procedurally. Under this test, the exercise of the powers could, objectively, be in the public interest, but nevertheless be unconstitutional because substantively or procedurally it does not comply with the constitutional provisions. For example, a treaty executed by the President that does not receive parliamentary approval is procedurally unconstitutional. A treaty that expressly denies citizens access to local courts to seek remedies for violations of human rights as required by the Constitution will be substantively unconstitutional, even if it brings some public good. The Constitution may only be amended by an Act.²⁰⁶ The entrenched provisions of the Constitution, including those on the supremacy and enforcement of the Constitution, fundamental human rights, the laws of Ghana, powers and structure of the executive, legislature and judiciary can only be amended by special procedures outlined in the Constitution.²⁰⁷ If these provisions are amended by any means other than by the specified approaches, the amendments will be unconstitutional, although the amendments may have been done in the public interest. This second limitation test focuses on the *legal limits* to the exercise of the powers of government.

Interpreted together, *The Broad Limitation Test* and *The Narrow Limitation Test* require that the exercise of the powers of government must be done both in the name of and for the welfare of the people of Ghana, and must in substance and procedure comply with the dictates of the Constitution. This constitutes the core of the concept of constitutionalism in Ghana. Thus, given that the Constitution is the supreme law of Ghana,²⁰⁸ the President and Parliament do not have the power to make treaties that substantively contravene it. Every treaty action the government takes will involve some limitation on its future freedom to act. However, certain limitations on rights (to individuals) or powers of the organs of the State under the investment treaties without qualification such as national treatment and the requirement under investment treaties to pay compensation to foreign investors even in situations of war and national emergency, are not in the public interest as that term is understood in the Constitution. This is because they limit the powers of the State to act in the

²⁰⁶ *Constitution of Ghana* art 289.

²⁰⁷ *Ibid* art 290.

²⁰⁸ *Ibid* arts 1(2) and 11(1).

interest of citizens for whom Government of Ghana is constituted if the same or similar treatment is not extended to foreign investors or in situations of emergency when the State may need to prioritise in favour of citizens. These standards require Ghana to expend its resources (time, money and human capital) where the Constitution requires the contrary. For example, under Article 31(10) of the Constitution, the right to compensation for actions that affect property rights may be denied in a state of emergency, such as natural disaster and war. If the State exercises its discretion against payment of compensation, investment treaty claims can be made against it.

The power to make treaties or enter into international agreements under the Constitution does not authorise the direct and indirect abridgment of the competences of the State of Ghana and its institutions to such an extent that it would constrain or prevent the State from continuing to function in pursuit of constitutional norms as a sovereign state. On the contrary, the power to make treaties is granted in order that the State can enter into treaties that will promote the core values of the Constitution, such as the promotion and protection of fundamental human rights, development and environmental protection.²⁰⁹ Where a treaty or enactment derives its legal validity from another legal source, the source from which it derives its legal validity takes precedence over the treaty or enactment. Kelsen espoused this point when he stated that:²¹⁰

The relation between the norm that regulates the creation of another norm and the norm created in conformity with the former can be metaphorically presented as a relationship of super- and subordination. The norm which regulates the creation of another norm is higher, the norm created in conformity with the former is the lower one.

Under Article 130(1) of the Constitution, the Supreme Court is assigned exclusive original jurisdiction in all matters relating to the enforcement or interpretation of the Constitution. The Court also has exclusive original jurisdiction to determine whether an enactment has been made in excess of the powers conferred on Parliament or any other authority or person by law or under the Constitution. Based on this constitutional mandate, the Supreme Court can pronounce on the constitutionality of both domestic legislation and investment treaties and other international agreements as it did in *Attorney-General v Faroe Atlantic Co Ltd*,²¹¹ *Attorney-General v Balkan Energy Ghana Ltd*²¹² and *Amidu v Attorney-General Cases*.²¹³

In *New Patriotic Party v Attorney-General*,²¹⁴ the Supreme Court stated that the Constitution is the supreme law of Ghana and therefore “laws, *municipal or otherwise*, which are found to be inconsistent with the Constitution, cannot be binding on the State whatever their nature. International laws ... are not binding on Ghana until such laws have been

²⁰⁹ *Polish Membership of the European Union (Accession Treaty)*, Polish Constitutional Court, Judgment K18/04 of 11 May 2005 para 8.

²¹⁰ Kelsen, above, *Pure Theory of Law*, n 153, at 221.

²¹¹ *AG v FAFL*, above n 201.

²¹² *AG v BEGL*, above n 202.

²¹³ *Amidu v AG*, above n 203.

²¹⁴ *New Patriotic Party v Attorney-General* [1997-1998] 1 GLR 378 (SC).

adopted or ratified by the municipal laws.”²¹⁵ It follows that as a matter of municipal law all laws made in Ghana, including treaties, must comply with the Constitution both procedurally and substantively. Ratified treaties will be binding on the State to the extent that they are substantively consistent with the Constitution. This is necessary to ensure accountability and that constitutional norms are not arbitrarily, capriciously and flimsily disregarded. On the supremacy of the Constitution, Justice Date-Bah delivering a unanimous decision of the Supreme Court stated in *Adofo v Attorney-General*:²¹⁶

The power to strike down legislation in conflict with any provision of the Constitution ... is one of the most important powers of this court. It is a power to safeguard liberty from encroachment by the legislature ... It is a power accorded this court by clear provisions in the Constitution ... whose exercise is ... mandated by binding precedent from this court. That binding precedent includes ... article 1(2) of the Constitution ... which provides as follows: ‘This Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void.’ This constitutional provision unequivocally and authoritatively establishes a doctrine of supremacy of the Constitution ... in the Ghanaian jurisdiction. This doctrine implies that ... Parliament’s enactments and those of previous legislatures are subject to the supremacy of the Constitution.

The doctrine of the supremacy of the Constitution ... should logically imply the power of judicial review of the constitutionality of legislation in order to enforce that supremacy ... The power of judicial review of the constitutionality of legislation, which is explicitly conferred on this court by articles 2(1) and 130(1) of the Constitution ... is one that should be vigilantly deployed by this court in discharge of the obligation of this court to uphold the Constitution.²¹⁷

The executive authority of Ghana is vested in the President, which is to be exercised in accordance with the provisions of the Constitution.²¹⁸ The executive authority includes the execution and maintenance of the Constitution and other laws of Ghana.²¹⁹ The Constitution vests the legislative power of Ghana in Parliament and final judicial power in an independent judiciary which shall administer justice subject only to the Constitution.²²⁰ The treaty making power is vested in the President subject to parliamentary ratification.²²¹ The exercise of these constitutional powers by the various institutions is *sine qua non* to promoting and protecting the welfare of the people, which this chapter argues is the yardstick for the exercise of governmental powers in Ghana. Also, in making and implementing policies and laws, the Government is to be guided by the Directive Principles of State Policy.²²² The Directive Principles require the Government to take steps to bring about the realisation of basic human

²¹⁵ Ibid 412 and 413 (emphasis added).

²¹⁶ *Adofo v Attorney-General*, above n 204 at 245-246.

²¹⁷ Ibid 245-246.

²¹⁸ *Constitution of Ghana* art 58(1).

²¹⁹ Ibid art 58(2).

²²⁰ Ibid arts 93(2), 125(1) and 125(3).

²²¹ Ibid art 75.

²²² Ibid art 34(1).

rights, a healthy economy, the right to good health care and the right to education.²²³ These are constitutional principles that prevent the State from agreeing to agreements that are incompatible with the Constitution.

2.4.1.4 Internal Law of Fundamental Importance and Binding Effect of Treaties

Whether a treaty cannot be binding on a state because the expression of a state's consent to be bound by the treaty was expressed in violation of internal law depends in part on the interpretation of the VCLT.²²⁴ Article 26 of the Convention gives effect to the *pacta sunt servanda* principle in international law, namely that every treaty "in force is binding upon the parties to it and must be performed by them in good faith." The principle of the law of treaties as reflected in Article 27 of the VCLT is also that a "party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." This principle is premised on the treaty in question having been validly made in the first place. Thus, the VCLT recognises that an expression of consent to be bound may be expressed in violation of internal law and that in such a case a state may not be bound by the treaty concerned. According to Article 46:

A State may not invoke the fact that its consent to be bound by a treaty has been expressed *in violation of a provision of its internal law* regarding competence to conclude treaties as invalidating its consent unless *that violation was manifest* and concerned a rule of its internal law *of fundamental importance*.

A *violation is manifest* if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith (emphasis added).

For countries that have a constitution, such as Ghana, it is an "internal law of fundamental importance" because it is the supreme law of the land. It creates rights and governance institutions, defines the powers of governments and the limits to those powers, and protects fundamental rights of human beings. In this regard, constitutions give expression to fundamental values of society and polity and reflect the collective identity and values of the people.²²⁵

Accordingly, where an expression of consent to be bound by a treaty is made contrary to substantive provisions of a constitution or its procedural requirements, a state may subsequently argue that its consent to the treaty was expressed in violation of its supreme law and is, therefore, not binding on it. In *Land and Maritime Boundary between Cameroon and Nigeria*,²²⁶ Nigeria argued that its constitutional rules regarding the ratification of treaties were not complied with in respect of a declaration entered into between it and Cameroon and

²²³ Ibid art 34(2).

²²⁴ Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2007) at 312-314.

²²⁵ JHH Weiler, "In Defence of the Status Quo: Europe's Constitutional *Sonderweg*" in JHH Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (Cambridge University Press, 2003) 7 at 15.

²²⁶ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* Judgment, (2002) ICJ Reports 303.

that the declaration was invalid.²²⁷ Nigeria further argued that Cameroon knew, or ought to have known, that the Head of State of Nigeria had no power legally to bind Nigeria without consulting the Nigerian Government.²²⁸ The ICJ rejected these arguments on the basis that the signatures of the heads of Cameroon and Nigeria were sufficient to make the declaration binding without the need for ratification.²²⁹ Accordingly, the ICJ held that the declaration was “binding and as establishing a legal obligation on Nigeria.”²³⁰ The Court reasoned further that:²³¹

The rules concerning the authority to sign treaties for a State are constitutional rules of fundamental importance ... However, a *limitation of a Head of State's capacity* in this respect is not manifest in the sense of Article 46, paragraph 2 [of the VCLT], unless at least properly publicized. This is particularly so because Heads of State belong to the group of persons who, in accordance with Article 7, paragraph 2, of the Convention ‘[i]n virtue of their functions and without having to produce full powers’ are considered as representing their State.

[T]here is no general legal obligation for States to keep themselves informed of legislative and constitutional developments in other States which are or may become important for the international relations of these States (emphasis added).

Under Article 7(1), a person is considered as “representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if” the person “produces appropriate full powers.” The production of full powers makes manifest the authority to adopt the text of the treaty or expression of consent to be bound. By Article 7(2), heads of state, heads of government, ministers for foreign affairs and heads of diplomatic missions are, by virtue of their functions, considered as representing the state in treaty making. They may, therefore, perform all acts relating to the conclusion of a treaty or can adopt the text of a treaty without having to produce full powers.

Article 7 is about *establishing the authority or capacity* to represent the State in the making of a treaty²³² and the legal limitations on how the person so empowered to represent the state *should express a state's consent to be bound*. The fact that a person has full powers to represent a state in the making of a treaty is not conclusive that the person has authority to agree to every term of the treaty or that the person will express a state's consent to be bound by the treaty in accordance with internal law of fundamental importance. Although persons such the heads of state, heads of government and ministers for foreign affairs are not

²²⁷ Ibid paras 258-59 and 265.

²²⁸ Ibid.

²²⁹ Ibid para 264.

²³⁰ Ibid para 268.

²³¹ Ibid paras 265 and 266

²³² On competence to conclude treaties see: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Provisional Measures, Separate Opinion of Judge Lauterpach) 13 September 1993 ICJ Reports 1993, 325, para 102; and *France v Commission of the European Communities*, above n 165, paras 42-43.

required to produce appropriate full powers when performing acts relating to the conclusion of a treaty, it is still open and possible that they may perform the acts in question either in accordance with or against the dictates of internal law. Everybody within a constitutional form of government is supposed to exercise their powers within the confines of the law. Therefore, the authority of a head of state and other specified persons to conclude treaties without the need to produce full powers should be treated as a rebuttable presumption so that the functions of the person cannot override express and unambiguous internal law governing the exercise of that authority. The functions of a person should not be treated as more conclusive than the need to actually establish the competence to conclude a treaty. There is the risk of a narrow interpretation of Article 7(2) of the VCLT focusing solely on the functions of the person expressing the consent leading to that conclusion.

It is questionable whether the ICJ is legally right when it held that “a limitation of a Head of State’s capacity ... is not manifest” unless the limitation is published because heads of state belong to the group of persons who can perform treaty conclusion acts without having to produce full powers. There is nothing in Articles 7 and 46 of the VCLT that suggests that the basis for determining whether an expression of consent to be bound by a treaty was expressed in violation of internal law is to be limited to the instrument authoring the expressing of consent or publication.

The instrument authorising the expression of consent to be bound by a treaty may not exhaust all factors that a person must take into consideration before expressing the consent to be bound. The instrument may only authorise the person to go and negotiate and agree to the terms of the treaty and may not contain the specifics of what terms to agree or not to agree to. In other words, while the instrument giving authorisation to express consent may deal with both the capacity to express consent and the extent of the person’s powers in relation to the performance of this function, the instrument may be of limited scope in terms of the extent of that person’s powers in the exercise of that representative function. If the instrument simply gives the person the capacity to conclude a treaty without specifying what the person may or may not agree to, which in practice seems to be the case, it will be out of context to argue that the person is thereby seized of the power to agree to any and every term, irrespective of its objective illegality under existing law, whether or not obvious at the time of concluding the treaty.

It follows from the preceding analysis in this Subsection that if limitations on the expression of consent to be bound are to be judged solely on the basis of the instrument showing the full powers of the person to represent the state in the making of the treaty or on publication, then those who are not required to produce full powers could always make any and every type of treaty, in spite of any fundamental limitations in internal law which may not have been obvious at the time of concluding the treaty. In a situation where the instrument authorising a person to adopt the text of a treaty does nothing beyond simply authorising the person to express consent to be bound, the person’s position will not be different from those who are not required to produce full powers.

The objectives of Article 46 are twofold: (1) to ensure that a state simply does not invoke non-compliance with internal law to avoid treaty obligations and thereby preserve the rights of the other contracting party which says the treaty is binding; and (2) to cure violations of fundamental internal law in the making of a treaty in favour of the state which says its internal law has been violated in the making of the treaty. The right to say a violation of internal law was not manifest is to protect the rights of the state which says the treaty is binding. The right to say the treaty is not binding is for the other state to secure compliance with its internal law of fundamental importance. So, there has to be a balance between these competing objectives in interpreting Article 46.

Violation of internal law has to be manifest for Article 46 to apply. For example, violation of the Constitution would be manifestly evident to other states signing investment treaties with Ghana if the treaties were to expressly prohibit the courts from entertaining suits brought against foreign investors for violation of human rights. A breach of the Constitution is more likely to be manifest to another state where the breach would also amount to a breach of general international law obligations – in particular where both parties to the investment treaty are also parties to another treaty that imposes specific human rights or environmental obligation on the parties. In this regard, it is significant to note that Ghana and some of its investment treaties partners are members of the UN and signatories or parties to the UN covenants on civil, political, economic, social and cultural rights.

The objective to cure violations of internal law will be defeated if it were to be held that in each and every case compliance with internal law is conclusive if the other state party had no reason to doubt it or if a treaty that does not comply with internal law anyway could nevertheless be valid and have legal effect because of the functions of the person who concluded the treaty. The objective of Article 46 will also be defeated if it is interpreted in such a manner that it becomes an instrument for violation or non-compliance with internal law by relevant persons in concluding international agreements. So it may be treated as conclusive if a state party has no reason to doubt compliance with internal law and capacity to make treaty can be presumed in order to protect the state which has no manifest reason to believe that internal law of its contracting party had not been complied with. This must not, however, lead to a situation where the objective purpose of Article 46 for a state to excuse itself from the binding effect of a treaty for non-compliance with its internal law to be defeated. Accordingly, it is proposed that violations of internal law should be treated as manifest if it would be objectively manifest to the parties conducting themselves at the time of concluding a treaty that one contracting party could not ordinarily have entered into the treaty or agreed to a particular treaty term, for example because the treaty will undermine the protection of fundamental human rights in the territory of that party.

It is proposed that the nature of the obligations under the treaty and the basis of a claim of invalidity or non-binding nature of a treaty or its provision should also inform the determination whether expression of consent was expressed in violation of internal law. If in substance, the obligation is one that a state could not have assumed in the first place then the State should

not be bound by such obligation, irrespective of the status of the person who purportedly expressed the consent of the state to be bound. A determination of whether an expression of consent to be bound by a treaty was expressed in violation of internal law should not be based solely on the instrument authorising the expression of consent or publication. The language in Articles 7 and 46 does not seem to establish a rigid standard.

Violation of internal law may be manifest depending on the nature of the terms of the treaty. So the means for determining whether an expression of consent to be bound by a treaty should include the instrument authorising the expression of consent, internal law and the terms of the treaty in question (whether those terms could objectively have been agreed to). It is on the basis of these that a state may claim the binding effect of a treaty on the parties. It is the ICJ's position that a state does not have a general legal obligation to keep itself informed of legislative and constitutional developments in other states. However, since each state entering into a treaty is aware or ought to be aware that under Article 46 a contracting state may not be bound by a treaty if the expression of consent is made in manifest violation of internal law, a contracting party should not only comply with its internal law but also should at least in good faith and out of abundance of caution verify or seek confirmation (in its own interest) if the other party has complied with internal law. Doing this is one way a state can act to meet the requirement in Article 46 that states conduct themselves in good faith in concluding a treaty. The good faith obligation does not require a state to monitor another contracting party to ensure the latter contracting party complies with its internal law. However, it should be treated as requiring each contracting party to take prudent steps that protects its interests. That way, either state may be estopped from arguing that a violation of internal law is or is not manifest as the case may be. The precautionary principle in international environmental law and international law generally reflects the value of risk avoidance.²³³ Verification by a contracting state can help its contracting partner to discover violations of its internal law that are not obvious but are fundamental, and will be in the mutual benefit of both parties.

This position is espoused on the basis that each state must act to protect its interests in treaty making. If a state's representatives enter into a treaty in disregard of the legal consequences attached to non-compliance with its internal law or non-compliance with the internal law of its treaty partner, then the state failing to do so should hardly be heard to say it was or was not manifest that internal law had not been complied with. Given the two objectives of Article 46 as set out this Subsection, the burden should be on both states to act prudently in concluding a treaty. This is necessary to ensure that each of the contracting parties acts fairly, honestly and in good faith towards each other in treaty making treaties. More important, what Article 46 requires to be "manifest" for an expression of consent to not bind a state is not the "limitation of ... capacity" to express the consent, as the ICJ suggests, but rather "violation of ... internal law" resulting from the expression of consent. Thus, if in

²³³ Andrew Jordan and Timothy O'Riordan, "The Precautionary Principle: A Legal and Policy History" in Marco Martuzzi and Joel Tickner (eds), *The Precautionary Principle: Protecting Public Health, the Environment and the Future of our Children* (World Health Organization, 2004).

practice and in good faith a treaty's terms will have a telling and obvious limiting effect on the right to regulate in the public interest under an internal law such as a constitution, the expression of consent to be bound would have been expressed in violation of internal law of fundamental importance and the state should not be bound by the treaty.

2.4.1.5 The Constitutionality of Treaties in US and EU: The Imperatives Theory as a Contrast

In the United States, scholars have argued in favour of constitutional supremacy over treaties. Under Article VI(2) of the Constitution of the United States, treaties and federal legislation made thereunder are the supreme laws of the land and are binding on states. While treaties are "supreme," they remain subject to the Constitution. Even at the states level, there is evidence to the effect that state judges are "harmonizing international law with state executive and legislative objectives, limiting the disruptive effect of treaties, using customary international law to advance state interests and applying international law where state citizens choose it to govern their contractual relationships. In short, state judges contribute an important structural safeguard of federalism vis-à-vis international law."²³⁴ Vázquez Manuel argues that a treaty "might be unenforceable in court because it is too vague, or otherwise calls for judgments of a political nature, or is unconstitutional, just as statutes ... might be."²³⁵ According to Tom Ginsburg, while treaties are the supreme law of the land, "later in time statutes can supersede them. Thus Congress and the President can together supersede a Treaty adopted by the President and Senate alone."²³⁶ John Jackson says there are few subject matter constitutional limitations on the power to conclude or agree to an international agreement in the United States, for example in relation to an international agreement that seeks to cede a US territory, abolish state militia or modify the states republican form of government. Such agreements might be held to be invalid.²³⁷ Thomas Buergenthal has argued that the United States has moved from being a pioneer in treaty observance "to being a country that, unlike some other Western democracies, puts increasing obstacles in the way of giving domestic effect to its international legal obligations."²³⁸

Indeed, as far back as 1889 the United States Supreme Court held in *Chinese Exclusion Case*²³⁹ that "the Constitution does not bar Congress from enacting laws inconsistent with the international obligations of the United States and that the courts will give effect to an act of

²³⁴ Sam Foster Halabi "The Supremacy Clause as Structural Safeguard of Federalism: State Judges and International Law in The Post-Erie Era" (2012) 23 *Duke Journal of Comparative and International Law* 63 at 118

²³⁵ Vázquez, Carlos Manuel, "Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties" (2008) 122(2) *Harvard Law Review* 599 at 605.

²³⁶ Tom Ginsburg, "Locking in Democracy: Constitutions, Commitment, and International Law" (2006) *New York University Journal of International Law and Politics* 707 at 716

²³⁷ John H Jackson, "US Constitutional Principles and Foreign Trade Law and Policy" in Hiif and Petersman, *National Constitutions and International Economic Law*, above n 194, 66 at 72.

²³⁸ Thomas Buergenthal, "Modern Constitutions and Human Rights Treaties" (1998) 36 *Columbia Journal of Transnational Law* 211 at 212

²³⁹ *Chinese Exclusion Case* 130 US 581 (1889)

Congress inconsistent with provisions in an earlier treaty."²⁴⁰ Thus while the debate over the constitutionality of treaties continues unabated, the conclusion to draw is that in practice a treaty will be held unconstitutional and unenforceable domestically if it conflicts with a federal constitutional stipulation. In fact, according to a renowned constitutional scholar in the United States, Louis Henkin, "treaties are subject to constitutional limitations."²⁴¹ In the event of conflict between a treaty and an Act of Congress the decisions of the Supreme Court dedicate that "courts must give effect to an act of Congress that is inconsistent with a prior treaty obligation of the United States."²⁴² It "is unlikely" then that the Supreme Court "would subordinate the Constitution to the law of nations and give effect to a principle of international law without regard to constitutional constraints"²⁴³ so that a treaty that is inconsistent with the Constitution may be binding internationally "but will not be enforced as law in the United States."²⁴⁴

With regards to the protection of public rights under the Constitution and general international law and its implications for the binding effect and efficacy of treaties which is of particular interest to this thesis, it is instructive to note that practice from the United States dictate that constitutional rights prevail over conflicting treaty provisions. Peter Spiro posed and addressed the question of the constitutionality of treaties and whether constitutionally protected human rights prevail against international agreements in the United States:²⁴⁵

Can a treaty override an individual right protected under the Constitution? In its 1957 decision in *Reid v. Covert*, the Supreme Court held that the "obvious and decisive answer to this ... is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." There is perhaps no element of the foreign relations law canon more universally held than the proposition that constitutional rights prevail as against inconsistent international agreements; a consensus of commentators, courts, and other constitutional actors has long held that, in this respect, the Constitution stands supreme. Even as other elements of modern foreign relations law have come under vigorous assault, this constraint on the treaty power has gone unchallenged. Indeed, across the political spectrum, the rule is counted among those whose deep entrenchment eliminates the need for justification – so much so that it has attracted almost no scholarly attention in recent decades.

²⁴⁰ As summarised by Louis Henkin, "The Constitution and United States Sovereignty: A Century of "Chinese Exclusion" and Its Progeny" (1986-1987) 100(4) *Harvard Law Review* 853 at 854

²⁴¹ *Ibid* at 869.

²⁴² *Ibi* at 870

²⁴³ *Ibid* 869-870

²⁴⁴ Louis Henkin, "International Law as Law in the United States" (1983-1984) 82 *Michigan Law Review* 1555 at 1562-1563. For similar analysis see Lori Fisler Damrosch, The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties (1991) 67 *Chicago-Kent Law Review* 515; Michael J. Glennon, "The Constitutional Power of the United States Senate to Condition Its Consent to Treaties" (1991) 67 *Chicago-Kent Law Review* 533; Stefan A. Riesenfeld and Frederick M. Abbot, "The Scope of US Senate Control over the Conclusion and Operation of Treaties" (1991) 67 *Chicago-Kent Law Review* 571; John C. Yoo, "Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding" (1999) 99(8) *Columbia Law Review* 1955; George A. Finch, The Need to Restrain the Treaty-Making Power of the United States within Constitutional Limits (1954) 48(1) *The American Journal of International Law* 57; Pitman B. Potter, "Relative Authority of International Law and National Law in the United States" (1925)(2) *The American Journal of International Law* 315; Louis Henkin, "Treaties In A Constitutional Democracy" (1989) 10 *Michigan Journal of International Law* 406; and Detlev F. Vagts, "The United States and Its Treaties: Observance and Breach" (2001) 95(2) *The American Journal of International Law* 313.

²⁴⁵ Peter J Spiro, "Treaties, International Law, and Constitutional Rights" (2003) 55(5) *Stanford Law Review* 1999 at 2000.

Practice with regards to the ranking of treaties in the scheme of municipal law varies from country to country. For example in countries such as France, Costa Rica, Belgium and Sweden, treaties at one time (if not now) had given higher normative rank.²⁴⁶ However, Buergenthal observes that with the proliferation of international human rights treaties giving jurisdiction to international tribunals over human rights issues and requiring domestic compliance with their decisions, a number of states have accorded “a special or preferred status with a normative higher than that of other treaties and ordinary domestic law.”²⁴⁷ Spain and a number of Latin American countries, including Argentina fall into this category. In Costa Rica, the Supreme Court has set aside a number of laws it found to be inconsistent with the American Convention on Human Rights and other international human rights treaties.²⁴⁸

In the context of Ghana, Article 40(a), (c) and (d) of the Constitution requires the Government in “its dealing with other nations,” “to promote and protect the national interests of Ghana,” “promote respect for international law [and] treaty obligations” and “adhere to the principles enshrined in or as the case may be, the aims and ideals of” the Charter of the United Nations, the Charter of the Organisation of the African Unity (now African Union) and the Treaty Establishing the Economic Community of West African States. Most of these treaties are human rights centred which suggests that the Constitution accords significant and higher legal standing to these treaties than those on private interests. This is particularly the case when the Constitution places the “national interests of Ghana” as a central pillar in the Government’s dealing with other nations and further requires it to seek the “establishment of a just and equitable international economic and social order” in Article 40(b). An “international economic order,” which includes the regulation of foreign investment by treaty, will not be “just and equitable” constitutionally if it subordinates the promotion and protection of human rights to private foreign investment interests that do not bring any public good.

Spiro powerfully argues that “international human rights norms played an important part in the expanded conception of domestic civil right ... No account of twentieth-century constitutional rights is complete without international geopolitical referents” for where international law “was once blind to individuals as such, today we find an increasingly consequential umbrella of individual rights protections in the form of international human rights norms.”²⁴⁹ It follows that where states “were once free to bargain away individual rights – for none were protected under international law itself – they now must account for them under other treaty and nontreaty norms.”²⁵⁰ The position of this thesis then is that as the legal regime for the protection of human rights and other public interests in Ghana now comprises international human rights norms and the Constitution, it should no longer be the doctrine of constitutional supremacy that should establish a basis for determining the validity and binding effect of conflicting investment treaties but the combined legal force of both constitutional

²⁴⁶ Buergenthal, above n 238 at 216.

²⁴⁷ Ibid at 216-217.

²⁴⁸ Ibid 218

²⁴⁹ Spiro, above n 245 at 2001 and 2002

²⁵⁰ Ibid.

and international human rights treaty norms on the promotion and protection of human rights and the public interest.

In the context of the European Union (EU), the issue has also arisen whether EU law is supreme over national constitutions of member states or national constitutions retain sovereignty over EU law. Three approaches on how to accept EU law have emerged. The first position, termed “European constitutional sovereignty”, “is where a constitutional court of a Member State unconditionally accepts the standpoint of the Court of Justice”²⁵¹ on EU law. The second approach, called “national constitutional sovereignty”, insists on the “continuing and unconditional sovereignty of the national constitutional order”²⁵² and emphasises “national self-determination and the need to put in place an active system of constitutional checks and balances on the development of EU law.”²⁵³ The third approach, “constitutional tolerance”, posits that national constitutional courts can decide on the authority and reach of EU law, but that these courts have a commitment to recognise the special status of EU law. In deciding on the application of EU law they need to do so in a manner does not violate certain constraints of national constitutional law.²⁵⁴

Michel Rosenfeld has rightly pointed out that multi-layered legal pluralism creates both divergences and convergences.²⁵⁵ Therefore, to “sustain the rule of law in the face of plural legal orderings that cannot be subsumed, readily within a smoothly working legal hierarchical or unity”²⁵⁶, it is important to focus on the convergence of legal norms. It is for this reason that Rosenfeld proposes the “harmonization through the spread of a normative congruence that weaves together a plurality of legal regimes and of world views.”²⁵⁷ Chris Thornhill also rightly argues that the international constitutionalist approach “lacks a reliable framework for assessing the exact, integral nature of the relations between national sovereignty and global law”.²⁵⁸ In the view of Thornhill, state sovereignty “cannot be pressed into a uniform legal category.”²⁵⁹ On these bases, this thesis emphasises instead the normative approaches and values shared between national constitutions and general international law in the areas of human rights, the environment and development (the convergence on the role of the state in relation to the public). The thesis argues that the juridical consequences to be attached to investment treaties and the interpretation of those treaties should be guided by the dictates of the State’s primary obligations under the Constitution and general international law towards

²⁵¹ Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Cases and Materials* (2edn, Cambridge University Press, 2010) at 190

²⁵² *Ibid.* See also *Polish Membership of the European Union (Accession Treaty)*, Polish Constitutional Court, Judgment K18/04 of 11 May 2005

²⁵³ Chalmers, Davies and Monti, *European Union Law* at 193. For further reading see Daniel Halberstam, “Local, Global, and Plural Constitutionalism: Europe Meets the World,” Public Law and Legal Theory Working Paper Series Working Paper No. 176 December 2009; Gráinne de Búrca and JHH Weiler *The Worlds of European Constitutionalism* (Cambridge University Press, 2011); and JHH Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (Cambridge University Press, 2003).

²⁵⁴ Chalmers, Davies and Monti, above n 251 at 194.

²⁵⁵ Rosenfeld, above 1 at 419.

²⁵⁶ *Ibid* at 421.

²⁵⁷ *Ibid* at 417.

Chris Thornhill, “National Sovereignty and the Constitution of Transnational Law: A Sociological Approach to Classical Antimony” (2012) 3(4) *Transnational Legal Theory* 394 at 408.

²⁵⁹ *Ibid.*

the public. Chapter three of the thesis deals with the domestic position on the constitutionality of international agreements and their domestic effect and enforceability in Ghana.

2.4.2 General International Law and the Making of Investment Treaties in Ghana

2.4.2.1 Peremptory Norms of General International Law

Beyond an analysis founded on constitutionalism, it can similarly be argued that peremptory norms of general international law limit the treaty making powers of states. The VCLT states in Article 53 that:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law ... [A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Human rights, such as the rights to life and health, access to justice, the right to water, the right to clean and safe environment and the right to development are universally recognised and accepted as fundamental for human existence and a life of dignity. They are rights *erga omnes*. This chapter suggests that these rights should be recognised as constituting *jus cogens* in general international law and should inform investment treaty making and interpretation. The ICJ held in the *Case Concerning East Timor (Portugal v. Australia)*²⁶⁰ that “the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character [and] is irreproachable.” The recognition of genocide and slavery as constituting *jus cogens* underscores the importance of the basis on which the prohibition against these crimes derive (not merely the crimes themselves as such), namely the right to life, health and human dignity. In the same way, the basic rights (including the right to development and environmental cleanliness) that are necessary for human health and a life of dignity should be regarded as *jus cogens* and should prohibit Ghana and other states from taking actions that prevent or undermine the realisation of these rights.

Anthony Aust observes that there is no agreement on the criteria to be used to identify norms of general international law that have a peremptory character.²⁶¹ However, as stated by Malcolm Shaw:²⁶²

The concept of *jus cogens* is based upon an acceptance of fundamental and superior values within the system and in some respects is akin to the notion of public order or public policy in domestic legal orders ... Rules of *jus cogens* are not new rules of international law as such. It is a question rather of a particular and superior quality that is recognised as adhering in existing

²⁶⁰ *Case Concerning East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, 90, para 29.

²⁶¹ Aust, *Modern Treaty Law*, above n178, at 319.

²⁶² Malcom N Shaw, *International Law* (6edn, Cambridge University Press, 2008) at 125-127

rules of international law ...Of particular importance ... is the identification of the mechanism by which rules of *jus cogens* may be created, since once created no derogation is permitted.

A two-stage approach is here involved in light of article 53: first, the establishment of the proposition as a rule of general international law and, secondly, the acceptance of that rule as a peremptory norm by the international law community of states as a whole ... The appropriate test would thus require universal acceptance of the proposition as a legal rule by states and recognition of it as a rule of *jus cogens* by an overwhelming majority of states, crossing ideological and political divides. It is also clear that only rules based on custom or treaties may form the foundation of *jus cogens* norms.

The Government of Ghana is obligated by the Constitution to protect the fundamental human rights which are also protected in various international human rights treaties, international environmental treaties and development-oriented agreements and declarations to which Ghana is a party. These norms include the Universal Declaration of Human Rights,²⁶³ International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights, United Nations Convention on Climate Change,²⁶⁴ Rio Declaration on Environment and Development,²⁶⁵ African Convention on the Conservation of Nature and Natural Resources,²⁶⁶ UN resolution on the human right to water and sanitation,²⁶⁷ Declaration on the Right to Development²⁶⁸ and Charter on Economic Rights and Duties of States.²⁶⁹ These conventions and declarations are, in one way or another, aimed at preserving human life and promoting human development generally. The rights, values and interests they seek to protect or preserve are also reflected in national legal norms such as the Constitution of Ghana. The rights and interests they protect need to be recognised as constituting *jus cogens*, from which derogation should not be permitted since they are universally recognised.

The Constitution in Article 73 requires the Government to "conduct its international affairs in consonance with the accepted principles of public international law and diplomacy in a manner consistent with the national interest of Ghana." *Accepted principles of public international law* include customary international law, international human rights treaties and international environmental agreements which have been ratified and incorporated into Ghanaian law by legislation.²⁷⁰ It is consistent with the national interest of Ghana that human rights and the environment are protected and that the people enjoy their right to development. The general international law duties to protect human rights and the environment and to make and implement development policies are also required of the State under the Constitution. So

²⁶³ *Universal Declaration of Human Rights*, 10 December 1948 UNGA Res 217A (III).

²⁶⁴ *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107 (Entered into force 21 March 1994).

²⁶⁵ *Rio Declaration on Environment and Development*, 13 June 1992, A/CONF.151/26 (Vol. I), 31 ILM 874.

²⁶⁶ *African Convention on the Conservation of Nature and Natural Resources*, 15 September 1968, CAB/LEG/24.1, 1001 UNTS 3 (Entered into force 16 June 1969).

²⁶⁷ The human right to water and sanitation, UNGA Res 64/292 (28 July 2010).

²⁶⁸ *Declaration on the Right to Development*, UNGA Res 41/128 (4 December 1986).

²⁶⁹ *Charter of Economic Rights and Duties of States*, UNGA Res 29/3281 (1974) UNGA 29th Session Agenda Item 48 UN Doc A/RES/29/, art 1.

²⁷⁰ *Ex Parte Attorney-General*, above n 94, at 2-7.

these rights and duties must guide the State in entering into treaties. An investment treaty provision will conflict with *jus cogens* and should be treated as void if it prevents a state from adopting measures to protect, for example, the right to clean water which is essential to human health and life.

In the following passages, the chapter analyses selected theoretical frameworks that support the use of constitutionalism and general international law to address the issue of conflict of legal norms and interests in international investment law.

2.4.2.2 The Theory of Forbidden Treaties in International Law

It is settled in general international law that states have the capacity to enter into treaties. The VCLT states in Article 6 that every state “possesses capacity to conclude treaties.” In 1923, the Permanent Court of International Justice (PCIJ) stated in the *Case of S. S. Wimbledon* that “the right of entering into international engagements is an attribute of State sovereignty”.²⁷¹ However, do states have the capacity to make all kinds of treaties on any subject or assume any type of obligations whatsoever?

Alfred Verdross’ work, *Forbidden Treaties in International Law*²⁷² offers an illuminating theoretical model and foundations for this chapter’s position on the role of general international law in treaty making. Verdross acknowledged that “as a matter of principle, states are free to conclude treaties on any subject whatsoever”.²⁷³ However, he questioned whether this is an absolute rule or it admits of certain exceptions. If there is an exception to the rule, some treaties must be forbidden. His theory operates on the hypotheses that treaties are premised on norms necessary for them to come into force and that general international law contains rules which have the character of *jus cogens* which limit the capacity of states in treaty making. According to Verdross, among the group of norms which constitute *jus cogens* is:²⁷⁴

the general principle prohibiting states from concluding treaties *contra bonos mores*. This prohibition ... is the consequence of the fact that every juridical order regulates the rational and moral coexistence of the members of a community. No juridical order can, therefore, admit treaties between juridical subjects, which are obviously in contradiction to the ethics of a certain community.

Verdross argues that a “treaty norm is void if it is either in violation of a compulsory norm of general international law or *contra bonos mores*.”²⁷⁵ Treaties are *contra bonos mores* if they “restrict the liberty of one contracting party in an excessive or unworthy manner or ...

²⁷¹ *Case of the SS Wimbledon (UK v Japan)*, 1923 PCIJ (ser A) No 1 (Aug 17), (*Permanent Court of International Justice*), para 35.

²⁷² Verdross, above n 18.

²⁷³ *Ibid* at 571

²⁷⁴ *Ibid* at 573

²⁷⁵ *Ibid* at 577.

endanger its most important rights²⁷⁶ or if they prevent states “from fulfilling the universally recognized tasks of a ... state”.²⁷⁷ According to Verdross, “every positive juridical order has its roots in the ethics of a certain community, that it cannot be understood apart from its moral basis.”²⁷⁸ Therefore, treaties are “immoral” if they force a contracting state into a situation or position which contradicts the ethics of the community,²⁷⁹ or undermine the performance of “moral tasks states have to accomplish in the international community”.²⁸⁰ There is an “ethical minimum recognized by all the states of the international community”,²⁸¹ which this chapter argues include the protection of the right to health and life, the right to development and the right to environmental quality.

Verdross’s list of universally recognised tasks of a state includes the maintenance of law and order, defence against external attacks, care for the welfare of citizens, and protection of citizens abroad.²⁸² He says a treaty norm which expressly prevents a state from fulfilling one of these essential tasks is *contra bonos mores* and void.²⁸³ When something is *contra bonos mores (et decorum)* it means that it is “[i]nconsistent with or contrary to preferred or sound practices, customs, public policy, or notions of equity.”²⁸⁴

Verdross cites several examples of treaties as *contra bonos mores*. The first binds a state to reduce its police or its organisation of courts so that the state “is no longer able to protect at all or in an adequate manner, the life, the liberty, the honor or the property ... on its territory.”²⁸⁵ The second binds a state “to reduce its army in such a way as to render it defenseless against external attacks.”²⁸⁶ The third binds a state “to close its hospitals or schools, to extradite or sterilize its women, to kill its children, to close its factories, to leave its fields unploughed, or in other ways to expose its population to distress.”²⁸⁷ Verdross argues that the content of these treaties is also void for being in violation of compulsory norms of general international law. According to him, where a treaty is void, “no obligation with such contents has ever come into existence.”²⁸⁸ He proposed that a dispute over the “immorality” of a treaty norm should be submitted to the decision of the PCIJ, which today is the ICJ.

Verdross’ theory provides a powerful tool for examining the limits that must be placed on states’ treaty making powers, because it is founded on accepted principles of general international law and the public values and interests each individual state should protect internally. This is reflected in Verdross’ emphasis on “ethical minimum” of the community and “universal tasks of a state”, such as the duty to protect liberty, life and property and to defend the state against external attacks. His examples show that human beings are entitled to certain basic rights and suggest that states must necessarily be performing certain basic and

²⁷⁶ Ibid at 574.

²⁷⁷ Ibid at 577.

²⁷⁸ Ibid at 576.

²⁷⁹ Ibid at 574

²⁸⁰ Ibid.

²⁸¹ Ibid.

²⁸² Ibid at 577.

²⁸³ Ibid at 573 and 574.

²⁸⁴ Aaron X. Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (Oxford University Press, 2009).

²⁸⁵ Verdross, ‘Forbidden Treaties’, above n 18, at 574.

²⁸⁶ Ibid

²⁸⁷ Ibid at 575.

²⁸⁸ Ibid at 577.

inherent corresponding functions in relation to those rights. This being so, the State should not have the capacity to make treaties that prohibit or have the effect of prohibiting it from performing basic functions in the interests of the public. Verdross's theory of forbidden treaties can be extended to investment treaties, which should be treated as *contra bonos mores* and should be void and not binding if they prevent the State from performing duties essential for the realisation of basic rights in society or in Verdross's words, "expose the population to distress".

Various renowned natural law theorists support the position advanced in this thesis that since the power of the State derives from the Constitution for the public good, it must be exercised to promote the common good of the people. A law that fails to promote or takes away the power of the State to act in the common good should not be obeyed. This proposition by John Finnis and Thomas Aquinas. According to Finnis' *Natural Law and Natural Rights*, the principal concern of natural law theory "is to explore the requirements of practical reasonableness in relation to the good of human beings who, because they live in community with one another, are confronted with problems of justice and rights, of authority, law and obligation."²⁸⁹ Natural law theories seek to identify the principles and limits of the law and to trace the ways in which sound laws are to be derived.²⁹⁰ Finnis' view on just and unjust laws and whether they are to be obeyed or not obeyed is influenced by his position on the source and public purpose of the authority to rule much similar to the position adopted in this thesis. For Finnis:²⁹¹

The ultimate basis of rulers' authority is the fact that they have the opportunity, and thus the responsibility, of furthering the common good by stipulating solutions to a community's coordination problems. Normally, though not necessarily, the immediate source of this opportunity and responsibility is the fact that they are designated by or under some authoritative rule as bearers of authority in respect of certain aspects of those problems. In any event, authority is useless for the common good unless the stipulations of those in authority (or which emerge through the formation of authoritative customary rules) are treated as exclusionary reasons, i.e. as sufficient reason for acting notwithstanding that subjects would not themselves have made the same stipulation and indeed considers the actual stipulation to be in some respect(s) unreasonable, not fully appropriate for the common good.

There are, in Finnis' view, "human goods that can be secured only through the institutions of human law, and the requirements of practical reasonableness that only those institutions can satisfy."²⁹² He identifies these human goods as life, knowledge, play, aesthetic, experience, friendship, practical reasonableness and religion.²⁹³ Finnis argues that "since authority is derived solely from the needs of the common good, the use of authority by rulers is radically defective if they exploit their opportunities by making stipulations intended by them not for the

²⁸⁹ John Finnis, *Natural Law and Natural Rights* (2edn, Oxford University Press, 2011) at 351.

²⁹⁰ *Ibid.*

²⁹¹ *Ibid* at 351-352

²⁹² *Ibid* at 4.

²⁹³ *Ibid* 90

common good.”²⁹⁴ Since the allocation of authority “is normally determined by authoritative rules dividing up authority and jurisdiction, amongst separate office-holders, office-holders may wittingly or unwittingly exploit their opportunity to affect people’s conduct, by making stipulations which stray beyond their authority. Except in ‘emergency’ situations in which the law (even the Constitution) should be bypassed and in which the source of authority reverts to its ultimate basis, an *ultra vires* act is an abuse of power and an injustice to those treated as subject to it.”²⁹⁵ It “may be commutatively unjust, by denying to one, some, or everyone an absolute human right, or a human right the exercise of which is in the circumstances possible, consistent with the reasonable requirements of public order, public health, etc., and compatible with the due exercise both of other human rights and of the same human rights by other persons.”²⁹⁶ Any such law or action amounts to injustice. In addressing the question whether injustice of any of these sort affects the obligation to obey the law, Finnis takes the position that “the stipulations of those in authority have presumptive obligatory force ... only because of what is needed if the common good is to be secured and realized.”²⁹⁷ Since rulers have authority “for the sake of the common good,” “if they use their authority to make stipulations against the common good, or against any of the basic principles of practical reasonableness, any such stipulation all together lacks the authority it would otherwise have.”²⁹⁸ For this reason, “stipulations made for partisan advantage, or ... in excess of legally defined authority, or imposing inequitable burdens on their subjects, or directing the doing of things that should never be done, simply fail, of themselves, to create any moral obligation whatever.”²⁹⁹ The principle is that *lex injusta non est lex*, which helps address what Finnis describes as “problems created for the conscience of reasonable citizens by unreasonableness in lawmaking”³⁰⁰

Thomas Aquinas in his celebrated masterpiece, *The Summa Theologica*, is of the view that “law must properly look to the relationship of universal happiness” since “law properly speaking, regards first and foremost the order to the common good.”³⁰¹ The common good “belongs either to the whole people, or to someone who is in the vicegerent of the whole people.”³⁰² According to Aquinas, “laws are ... just both from the end, when ... they are ordered to the common good; and from their author ... when the law that is made does not exceed the power of the law-giver; and from their form, when ... burdens are laid on the subjects according to an equality of proportion and with a view to the common good.”³⁰³ Since law must be directed to the common welfare of human beings, if a case arises “in which the observance of that law would be hurtful to the general welfare, it should not be observed”³⁰⁴

²⁹⁴ Ibid at 352.

²⁹⁵ Ibid.

²⁹⁶ Ibid at 354.

²⁹⁷ Ibid at 359

²⁹⁸ Ibid at 359-360.

²⁹⁹ Ibid at 360.

³⁰⁰ Ibid at 62

³⁰¹ Thomas Aquinas, *The Summa Theologica* (Vol, 2, Trans., Fathers of the English Dominican Province, Encyclopaedia Britannica Inc, 1952) at 207.

³⁰² Ibid.

³⁰³ Ibid at 233.

³⁰⁴ Ibid at 235.

The force and reason of the law lie in its ability to promote the common good of people, *vim et rationem legis*. Therefore, if the law fails to advance that common good then it does not have the authority or capacity to bind, *virtutem obligandi non habet*.³⁰⁵

Applied in the context of investment treaty law, the promotion of private foreign investment must serve the common interests of citizens the State of represents in entering into investment treaties and not just serving private interests alone. This can be achieved if foreign investment actually makes a contribution to the development of the host state and the terms of investment treaties do not override public interest regulation. Where investment treaties fail to attain this objective, they should not be enforced at the expense of the common good for which the State has entered into them. For in that sense they are unjust as imposing a disproportionate burden on the public, judged in terms of their restrictive effects on public interest regulation, in terms of the want of an investment's contribution to the development of the host state and in terms of unqualified and unrestricted rights and privileges they confer on private foreign investors as against the lack of similar rights for the State and its citizens. The protection of human rights, environment and the taking of measures for the realisation of the right to development can only be secured through the actions of national institutions. The State should not by any law including investment treaties unduly abridge powers required for it to perform this function.

2.4.2.3 Theories of Limitations and Qualifications Inherent in Statehood

Kojo Yelapaala examines the constitutional and *jus cogens* limitations on the competence of states in treaty making.³⁰⁶ The issues addressed by Yelapaala are very pertinent to the conflict between states' investment protection obligations and their obligations to protect the public interest. Yelapaala examines the extent to which the recognition of fundamental human rights in constitutions and general international law should limit the types of obligations states undertake in investment treaties.

Yelapaala explains that, a state is a juridical entity that acts only through agents or instrumentalities who have to be duly authorised by the State in the treaty making process. However, the agents' treaty making authority and competency are subject to structural limitations which relate to the political and legal framework within which the State functions in concluding treaties. He argues that:³⁰⁷

Within this framework the State is generally limited by its constitution and structure of government. The competency of the State itself in treaty making is therefore subject to various limitations both under ... municipal law and international law.

³⁰⁵ Giorgio Agamben, *State of Exception* (University of Chicago Press, 2008) at 25

³⁰⁶ Yelapaala, 'Fundamentalism Part II,' above n 14.

³⁰⁷ *Ibid* at 467-468.

Indeed, the treaty making process is subject to certain structural infirmities inherent in two forms of delegated authority: the one given to the State under its constitution and other legal instruments, and the other given by the State to its agents and instrumentalities. The first is necessarily subject to the principles of *delegatus non potest delegare* and *nemo dat quod non habet*. That is, the State itself is an instrument of its citizenry that is given certain functions and responsibilities which would tend to limit the powers of the State to delegate ... It follows then that the efficacy of treaty obligations undertaken in ... the name of investment protection is subject to these structural limitations and correspondingly to the competence of the State and its agents in concluding BITs.

In considering whether a state can “in the name of investment protection, undertake *any and every* obligation including those that pose significant risks to the health and safety of its citizens”,³⁰⁸ Yelapaala argues that the state’s “existence and powers are derived from its citizens who expect the State to exercise its powers for the general good of its citizens.”³⁰⁹ The state “has the *ultimate and indelible* responsibility of protecting its citizens from harm”,³¹⁰ so it is “doubtful whether the State can lawfully surrender these responsibilities and obligations and the corresponding rights and expectations of citizens in a treaty for private profit.”³¹¹ When it comes to health and safety the state is constrained “by both its international commitments and by its constitutional law obligations with respect to what treaty obligations it may undertake in its BITs practice.”³¹²

The Imperatives Theory draws on Yelapaala’s analysis and reasoning, but uses Ghana’s Constitution and general international law obligations of Ghana as the subjects of its analysis. It emphasises that limitations on the exercise of the powers of government in Ghana are more compelling and exacting when those limitations are recognised under both the Constitution and general international law. For this reason a treaty that advances a constitutional purpose should trump one that does not.

Evan Criddle and Evan Fox-Decent’s *Fiduciary Theory of Jus Cogens* is similar to Verdross and Yelapaala’s theories on fundamental human rights and corresponding obligations of states. They explain the peremptory status of *jus cogens* and their relationship with state sovereignty.³¹³ The theory argues that *jus cogens* norms are constitutive of a state’s authority to exercise powers as sovereign and to claim sovereign status as an international legal actor. In essence, the theory holds that:³¹⁴

the state and its institutions are fiduciaries of the people subject to state power, and therefore a state’s claim to sovereignty, properly understood, relies on its fulfillment of a multifaceted and overarching fiduciary obligation to respect the agency and dignity of the people subject to state power.

³⁰⁸ Ibid at 468.

³⁰⁹ Ibid.

³¹⁰ Ibid.

³¹¹ Ibid.

³¹² Ibid at 475.

³¹³ Criddle and Fox-Decent, above n 105, at 331 at 332.

³¹⁴ Ibid at 347.

The fiduciary's power is "purposive in that it is held or conferred for limited purposes, such as furthering exclusively the equitable interests of a trust's beneficiary."³¹⁵ The fundamental fiduciary duty "is to exercise the entrusted power exclusively for the ... purposes for which it is held or conferred."³¹⁶ Therefore, "[e]xercises of state power that violate jus cogens are prohibited under international law precisely because they are inimical to the fiduciary principle that governs state-subject relations."³¹⁷ Another implication of the fiduciary position of the state as agent of the people is that "it cannot delegate or contract out essential fiduciary obligations of statehood (e.g., the state's duties to guarantee equal security and the rule of law) without providing adequate safeguards to those affected by the delegated powers."³¹⁸

The theory of the State as a fiduciary whose powers must be exercised for the benefit of the people for whom the state and its institutions are agents is particularly appealing in the context of Ghana's Constitution. The framework of government is established to secure for the people and posterity: liberty, equality of opportunity and prosperity, sovereignty resides in the people of Ghana, and the powers of government are to be exercised to promote the welfare of the people. The Government of Ghana, therefore, must not pursue an agenda that is contrary to the people's welfare, by derogating from basic human rights (such as the right to a clean and safe environment and development) recognised under the Constitution or entering into legal commitments that prevent the protection of basic rights or undermine the implementation of measures for the realisation or enjoyment of the rights.

The Constitution governs the making and coming into effect of investment treaties because it determines who are endowed with the capacity to make treaties, defines the conditions that must be followed for the treaties to come into force and the juridical consequences attendant to the conclusion of treaties.³¹⁹ Investment treaties are made and become valid and binding then because they are created in the manner determined by the Constitution.

2.5 THE INTERPRETATION OF INVESTMENT TREATIES OF GHANA

The interpretation of a treaty arises only if it has been validly made. The question then is: where an investment treaty is validly made in procedural and substantive terms, what should be the approach to its interpretation by an investment tribunal if its provision is ambiguous or where it does not expressly prohibit a regulatory measure giving rise to an investor-state dispute? This Section argues that even if national constitutions and general international law did not limit the powers of states in investment treaty making, there is a legal case and value in interpreting investment treaties with reference to general international law, and where

³¹⁵ *Ibid* at 349

³¹⁶ *Ibid* at 350

³¹⁷ *Ibid* at 349

³¹⁸ *Ibid* at 384.

³¹⁹ *Constitution of Ghana* art 75 and VCLT art 6.

appropriate municipal law, so that investment disputes can be effectively and even-handedly resolved.

The International Law Commission (ILC) has suggested that customary international law and general principles of international law “are of particular relevance” to the interpretation of a treaty, where the treaty term is unclear or open-textured or has a recognised meaning in customary international law and general principles of international law.³²⁰ The parties to a treaty are taken to refer to customary international law and general principles of law “for all questions which the treaty does not itself resolve in express terms”.³²¹ They are also taken as not intending “to act inconsistently with generally recognized principles of international law.”³²²

Some investment tribunals have recognised the need to apply both municipal law and general international law in settling investment disputes. In *Wena Hotels Limited v Egypt*,³²³ the Tribunal stated that “[t]he law of the host State can ... be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit.” Article 42(1) of the ICSID Convention³²⁴ recognises the role of both general international law and municipal law in the resolution of international investment disputes. This provision requires a tribunal to decide a dispute in accordance with the rules of law agreed by the parties. In the absence of an agreement on applicable law, a tribunal “shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.” In *Azurix Corporation v Argentina*³²⁵ the Tribunal held that in light of Article 42(1) “both” municipal law and general international law “have a role to play, which role will depend on the nature of the dispute and may vary depending on which element of the dispute is considered.” If the investment treaty specifies the applicable law, then the scope of the applicable law will be so limited as specified by the treaty provided that the specified law will result in the effective administration of justice.

This chapter argues that international investment tribunals must take the obligations of states under general international law into consideration in resolving investment disputes. Investment tribunals often do refer to general international law, especially when that is necessary to protect the interest of the foreign investor.³²⁶ The relevant obligations of states under the same general international law must be applied to protect the states’ right to regulate as well.

The theoretical frameworks analysed below most of which build on the ILC work referred to above all focus on this theme: the need for investment tribunals to interpret investment

³²⁰ ILC, *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (2006) para 20

³²¹ *Ibid* para 19(a).

³²² *Ibid* para 19(b).

³²³ *Azurix Corporation v Argentina*, ICSID Case No. ARB/98/4) *Ad hoc* Committee Decision on Application for Annulment, 5 February 5, 2002 para 40.

³²⁴ *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 4 ILM 524 (entered into force 14 October, 1966).

³²⁵ *Azurix v Argentina*, above n 37, para 66.

³²⁶ See e.g. *Tecmed SA v Mexico*, above n 38, paras 70, 116, 120, 128, 151 and 154; and *ADC Affiliate Limited v Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 para 361.

treaties by referring to or applying *general international law* so that the international investment regime can better respond to broader societal interests. However, they differ in terms of the legal or philosophical arguments they advance to justify the call for the application of general international law in resolving investment disputes.

2.5.1 The Principle of Systemic Integration

Campbell McLachlan argues that international law is a system and investment treaties are part of it and must be interpreted with reference to general international law. He describes the relationship between investment treaties and general international law as “symbiotic” in the sense that “the content of the treaty obligation may be informed by general international law” and “the promulgation of the treaty obligation, and its application by arbitral tribunals, may inform the progressive development of general international law.”³²⁷ Since investment treaties “are not self-contained regimes”,³²⁸ “international law must be introduced into the analysis of a claim under an investment treaty in the first place through the medium of treaty interpretation”³²⁹ in light of Articles 31 and 32 of the VCLT. Article 31 requires interpretation “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Article 32 requires recourse to “supplementary means of interpretation, including the preparatory work of the treaty.” McLachlan argues that:³³⁰

Article 31(3)(c) expresses a more general principle of treaty interpretation, namely that of *systematic integration* within the international legal system. The foundation of this principle is that treaties are themselves creatures of international law. However wide their subject matter, they are all nevertheless limited in scope and are predicated for their existence and operation on being part of the international law system.

He explains further that:³³¹

even when it is not made express, the principle of systemic integration ... may be articulated as a presumption with both positive and negative aspects: (a) *negatively* that, in entering into treaty obligations, the parties intend not to act inconsistently with generally recognised principles of international law or with previous treaty obligations towards third states; and, (b) *positively* that the parties are taken 'to refer to general principles of international law for all questions which [the treaty] does not itself resolve in express terms or in a different way.'

³²⁷ Campbell McLachlan, “Investment Treaties and General International Law” (2008) 57 *International and Comparative Law Quarterly* 361 at 364

³²⁸ *Ibid* at 369.

³²⁹ *Ibid* at 371

³³⁰ Campbell McLachlan, “The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention” (2005) 54 *International and Comparative Law Quarterly* 279 at 280.

³³¹ *Ibid* at 311.

Ernst-Ulrich Petersman argues that investment tribunals should refer to general international law in resolving investment disputes, because the universal recognition of basic human rights, social, political and economic rights in international law requires an examination of the interrelationship between human rights law and international economic law. According to Petersman, “[a]s inalienable constitutional citizen rights and corresponding legal obligations of governments that are explicitly recognized in many national constitutions and international treaties, human rights constitutionally limit public and private power and commit governments to the promotion of human rights as constitutive elements of ‘justice’.”³³²

Sornarajah observes that:³³³

Investment treaties are located within international law and have to be interpreted in the context of such law. It would not be fitting that they continue to be interpreted without reference to wider international law and only with regard to commercial interests. Wider societal values must be taken into account. Development, which lies at the root of modern international investment law, is such a value, representing not only economic considerations but also other issues such as human rights and the environment.

He points specifically to the movement of international law:³³⁴

into areas such as environmental protection, economic development and human rights which impact on the protection of investments by multinational corporations and question whether the emphasis on protection accords with other interests of the international community. If international law does indeed apply to state contracts, it is obvious that any state contract which conflicts with any fundamental norm of international law will be invalid ... The rapid growth of international environmental law imposes duties on multinational corporations not to violate the standards contained in them. International environmental law supports the regulatory controls exercised by states to ensure environmental protection ... Arbitrators should not be one-sided by selecting only those norms of international law which promote investment protection. Likewise, norms of the international law on development will have to be addressed.

Systemic integration has been criticised by a number of scholars as overly-expansive and lacking positivist theoretical underpinning and clear guidance as to what is to be achieved if investment tribunals refer to or apply general international law.³³⁵ Daniel Kalderimis argues that systemic integration is not “outcome-determinative”; it “does not, and probably cannot, have a demonstrable effect on practical outcomes” because “it still leaves open” the “substantive question of what use to make of such customary law, or general principles, when one does look at them.”³³⁶

³³² Ibid at 6, 18 and 19

³³³ Sornarajah, *Law on Foreign Investment*, above n 5, at 79

³³⁴ Ibid at 296-297.

³³⁵ J Kammerhofer, “Systemic Integration, Legal Theory and ILC” (2010) 19 *Finnish Yearbook of International Law* 2008.

³³⁶ Kalderimis, above n 111, at 7.

This thesis argues that there is value in calling upon investment tribunals to refer to or apply general international law in resolving investment disputes, rather than limiting the scope of legal norms on which tribunals can rely, where the terms of investment treaties do not provide an adequate framework for effectively protecting both foreign investors and states or either of them. How investment tribunals ultimately make use of such norms is for them to determine. It is unrealistic to suggest that systemic integration must show precisely what the outcomes will be. Nobody ever knows exactly how the domestic courts will in practice apply rules of interpretation, statutory and common law, and what the juridical outcome will ultimately be, or exactly how substantive laws will be applied by the courts.

2.5.2 The Presumption against Conflict

Bruno Simma and Theodore Kill address the challenge posed to regulatory autonomy by international investment law. They suggest that an interpreter should apply the presumption that treaties are intended to have the effect that is consistent with existing rules of international law when faced with conflict between an investment treaty obligation and an obligation under general international law or municipal law.³³⁷ This presumption is employed to resolve issues of interpretation relating to the broader normative content of a treaty, such as the value of the interests being protected by the respective legal norms, rather than to the meaning of a specific term which systemic integration deals with.³³⁸

Joost Pauwelyn, in *Conflict of Norms in Public International Law: How WTO Rules Relate to Other Rules of International Law*,³³⁹ argues that international trade law and other sub-systems of international law “must be considered in light of the wider corpus of public international law”,³⁴⁰ because all norms:³⁴¹

are created in the background of already existing norms, in particular norms of general international law. To the extent that the new norm (say, a new treaty) does not contradict or ‘contract out’ of this general international law, general international law applies also to this new norm. To put it differently, for all issues not explicitly regulated by the new treaty ... pre-existing norms of international law continue to apply and a ‘fall-back’ to, especially, general international law is required ... In addition, new law is not only created in the context of *general* international law, but in the context of *all* rules of international law, including other treaties. If a new law does not contradict pre-existing treaties, the latter continue to apply.

The application of general international law arises where a treaty does not directly and explicitly disallow a matter or there is a gap in the treaty. Pauwelyn proposes that “for those areas on which the treaty remains silent, other norms of international law (in particular,

³³⁷ Bruno Simma and Theodore Kill, ‘Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology’ in Binder et al, *International Investment Law for the 21st Century*, above n 102, 678 at 683.

³³⁸ *Ibid* at 686.

³³⁹ Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Rules Relate to Other Rules of International Law* (Cambridge University Press, 2003).

³⁴⁰ *Ibid* at 201.

³⁴¹ *Ibid*.

general international law) continue to apply. As a result, the treaty cannot be applied in isolation. It must be applied together with those other norms of international law.”³⁴²

In similar language to Pauwelyn, Yelapaala argues that investment treaties must be interpreted in a manner that respects existing obligations of states. According to Yelapaala:³⁴³

one of the inherent and characteristic attributes of sovereignty is the police powers of the State. These powers exist and are inherent in the nature of sovereign States. Every treaty should start with the notion that these inherent attributes of the State exist and are not surrendered or abrogated by the State absent some specific language to the contrary in the treaty. Thus, when a treaty is silent on these matters the inherent characteristic attributes of the State must by necessity continue to exist. A tribunal called upon to interpret generalized protective provisions or schemes in a BIT must start with the presumption of the continuing vitality of the inherent characteristics of the State. Any interpretation of such generalized provisions that imposes restraints on the police powers and social policy choices of a State may do violence to the text of the treaty and the intention of contracting parties. For, it may impose obligations on the parties that were neither contemplated nor bargained for.

Yelapaala is especially concerned with the earlier generation of BITS that merely provided general protection to foreign investments without specifically restraining the State in the areas of public health and safety. Silence in this context should not be interpreted as restraining the State nor should the general protective language of these treaties be read as a waiver of the rights of the State to protect its citizens through measures that regulate or interfere with the activities of investors. He considers it prudent to start with the notion that the police powers and regulatory authority of the State exist.³⁴⁴

The argument for the continued application of general international law has received judicial recognition in *Legal Consequences for States of the Continued Presence of South Africa in Namibia*.³⁴⁵ In this case, the ICJ held that “[t]he silence of a treaty as to the existence of ... a right cannot be interpreted as implying the exclusion of a right which has its source outside of the treaty, in general international law, and is dependent on the occurrence of circumstances which are not normally envisaged when a treaty is concluded.”³⁴⁶

The issues that may invite regulation by a state at a particular point in time and the particular nature of regulation that may adversely affect investment reside outside investment treaties and are usually unknown at the time of making investment treaties or even at the point of admission of investment (although general inconsistencies with regulatory autonomy with respect to, for example, indigenous rights and environmental concerns may be known). As per the earlier arguments, if the nature of regulation that will adversely affect investment is known and the state goes ahead nevertheless to surrender its right to regulate, the question

³⁴² Ibid at 202.

³⁴³ Yelapaala, “Fundamentalism Part II,” above n 14, at 469-470.

³⁴⁴ Ibid at 470.

³⁴⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, Advisory Opinion, ICJ Reports 1971, p. 16

³⁴⁶ Ibid at para 96.

of the binding effect of the treaty or its provision in question will arise. Here, a right that cannot be expressly excluded or abrogated continues to exist and investment tribunals must reconcile that right with investment interests involved.

The presumption against conflict can be applied to the Ghanaian situation. It can be seen that Ghana's investment treaties were created within the context of existing constitutional law and general international law. Ghana's investment treaties recognise the need to apply general international law to protect foreign investment. For example, the Ghana-China investment treaty expressly requires that investor-state and state-to-state disputes shall be resolved in accordance with the treaty itself, municipal laws of the host contracting party and general international law.³⁴⁷ The Ghana-Netherlands and Ghana-United Kingdom investment treaties provide that where either municipal law or general international law provides investors with more favourable treatment than treatment available to them under the treaties, the more favourable treatment under municipal law or general international law shall prevail over the lesser treatment in investment treaties.³⁴⁸ The investment treaties also make reference to municipal law by requiring that the admission of foreign investment shall be subject to municipal laws and regulations.³⁴⁹ These provisions incorporate rules of constitutional law and general international law in the admission and substantive protection of investment, which justify the need to consider them in the resolution of investment dispute on the particular issue.

2.5.3 The Legal Status of Domestic Measures Authorised by General International Law

Under what he calls a "more progressive approach" in international investment dispute resolution, Jorge Viñuales introduces a new argument by calling for a distinction:³⁵⁰

between internationally induced and purely domestic environmental measures ... in order to recalibrate the relationship between investment and environmental protection. An internationally induced measure would indeed be less 'suspicious' than a unilateral one and the relations between such a measure (required or authorised by international environmental law) and investment disciplines could not be approached as a conflict between a purely domestic measure and international law.

Under his "more progressive approach" to resolving disputes between domestic measures and international investment protection obligations, Viñuales proposes two ways of addressing the issue. The first approach requires that "as a rule, an internationally induced

³⁴⁷ Ghana-China Investment Treaty, arts 10(5) and 13(5).

³⁴⁸ Ghana Netherlands Investment Treaty, art 2(5); and Ghana-United Kingdom Investment Treaty art 13.

³⁴⁹ Ghana-China Investment Treaty, art 2; Ghana-Malaysia Investment Treaty, art 2; Ghana-Denmark Investment Treaty, art 2; Ghana-Netherlands Investment Treaty, art 2; and Ghana-United Kingdom Investment Treaty, art 2.

³⁵⁰ Jorge Viñuales, "The Environmental Regulation of Foreign Investment Schemes under International Law" in P.-M. Dupuy and J. E. Viñuales (eds), *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* (Cambridge University Press, 2012) 273 at 278.

measure commands higher legitimacy.”³⁵¹ The second approach requires a re-characterisation of the conflict and rules applicable to solve it. Thus “[w]hen the challenged domestic measure is required or clearly authorised by an environmental treaty, a potential conflict with an investment discipline should be framed as a ‘normative conflict’ between two norms of international law.”³⁵² By re-characterising the conflict, that category of domestic measures will no longer be subordinated to investment treaties: “the bounds set by investment disciplines would no longer apply because the rule according to which international (investment) law prevails over domestic (environmental) law would not be applicable.”³⁵³

The importance of Viñuales’ analysis lies in its emphasis on the combined role of municipal law and general international law in investment dispute resolution. However, its limitation, in terms of scope, lies in the proposal that a domestic measure be *required* or clearly authorised by general international law for it to be given weight. Such an approach will exclude a domestic measure that has been pursued independently of general international law, but which nevertheless is consistent with it in the sense of not conflicting with it, or otherwise furthers an objective of general international law. It is proposed that the rule that international law prevails over municipal law should equally be inapplicable where a measure is itself consistent with or furthers general international law objective such as the protection of the public interest which is a central function of the state under municipal law and general international law. That should apply beyond just environmental law to any domestic measures that *are authorised by or consistent* with general international law, to the extent that the measures promote a general international law objective within the host state.

Relying on these theoretical frameworks, this chapter argues that investment tribunals must interpret investment treaties in light of general international law when an investment treaty does not expressly prohibit the particular governmental regulation or where a treaty contains exception provisions that can be informed by general international law. Equally investment tribunals should interpret investment treaties in light of the Constitution and consequent domestic legislation when a treaty acknowledges the role of domestic law or the treaty contains exception provisions that can be informed by the constitution or municipal law generally. This is not to say that investment tribunals must usurp the powers reserved for municipal courts. The point is that where principles of municipal law and general international law are relevant for the impartial and effective administration of justice in the resolution of investment disputes, investment tribunals should apply them. This is one way for them to respond to the credibility and legitimacy backlash against them.

Most of the theoretical frameworks analysed here suggest or imply that states can contract out of their power to regulate in the public interest. This is a serious limitation in these theoretical frameworks. If states can do so, there is no point in complaining that regulatory autonomy is being constrained by investment treaties, because states themselves have

³⁵¹ Ibid at 286.

³⁵² Ibid at 289.

³⁵³ Ibid at 288.

contracted out of that autonomy. The Imperatives Theory argues that Ghana may enter into international treaties that may impair the free exercise of its powers, but its obligations to regulate in the public interest limit the nature and scope of treaty obligations it can assume. For this reason, the Government of Ghana cannot contract out of the powers of the State required by the Constitution, and where applicable general international law to be exercised in the public interest. Again, whereas most of these theorists emphasise that investment treaties must be interpreted with reference to general international law because investment treaties are made within the backdrop of general international law, The Imperatives Theory argues that the duty of Ghana to protect fundamental rights of its citizens qualifies its treaty making powers. This qualification should inform the interpretation of investment treaties of Ghana.

2.6 THE CONSTITUTIONAL-GENERAL INTERNATIONAL LAW IMPERATIVES THEORY

2.6.1 The Constitutional-General International Law Imperatives Defined

The foregoing analysis on constitutionalism, general international law, public interest and the role of the State of Ghana is the foundation of The Imperatives Theory. The Theory argues that the Constitution and general international law must inform the making and interpretation of investment treaties of Ghana, given the primary duty of the State under these legal norms to protect the public interest. If Ghana is to live up to these legal obligations it must make investment treaties that are consistent with the norms that underlie and justify its right to regulate in the first place.

Both general international law and municipal law have important roles to play in the making of investment treaties and settlement of investment disputes in Ghana. The obligations of Ghana may also arise under both municipal law and general international law such as in the area of human rights protection. In such circumstances, it is time to shift from the principle that international law ranks higher than municipal law to examining the interrelationship between the two legal orders in terms of the common interests they protect and the role that such an interrelationship or bond should play in investment dispute resolution. Based on The Imperatives Theory, this chapter argues that Ghana does not have authority or competence to enter into treaties that expressly prevent it from acting to protect fundamental human rights. Such a limitation arises, for example, where an investment treaty prohibits performance requirements in Ghana. Performance requirements relating to local content for products, local jobs and training programmes for the local workforce or to build the capacities of local suppliers of goods and services directly serve the public interest but they may be the subject of an investor-state suit.³⁵⁴

The “constitutional-general international law imperatives” refer to the various fundamental human rights, including the right to life, health, development, healthy environment, food, water

³⁵⁴ Suzy H. Nikièma, *Performance Requirements in Investment Treaties* (IISD Best Practices Series - December 2014) at 2

and cultural rights protected under both the Constitution *and* general international law in Ghana. The concept also includes the remedial mechanisms adopted by the Ghana where those rights are violated, as well as the duties and obligations of the State to ensure the realisation and enjoyment of these rights. These rights and duties are “imperatives” because they emanate from the Constitution and general international law and their existence and effective enjoyment are fundamental and essential for the dignity and well-being of human beings. The protection of these fundamental public rights of citizens is the main reason the powers to govern are entrusted to the State.

The constitutional-general international law imperatives are thus legal rights of human beings and the corresponding core duties of the State. Yelapaala argues that a foundational principle of constitutionalism is “the protection and entrenchment of certain fundamental rights which cannot be derogated from, interfered with or otherwise compromised by the State and its organs without legal justification under established procedure.”³⁵⁵ This, as Kofi Quashigah argues, is because “the idea of government carries with it, the inherent conception of some modicum of respect for human dignity and welfare. Any system of government that rejects this is an aberration and does not have the legitimacy to continue to govern.”³⁵⁶ These rights and obligations must therefore guide the making and interpretation of investment treaties. The fundamental rights recognised by the Constitution and general international law should be the starting point for assessing the validity of treaties.

In Ghana, fundamental human rights are dealt with in Chapter Five of the Constitution. As a member of the United Nations, Ghana also has an obligation under Article 55(a) and (c) of the UN Charter to promote “higher standards of living ... and conditions of economic and social progress and development” as well as “universal respect for, and observance of, human rights and fundamental freedoms.”³⁵⁷ The Charter provides in Article 103 that “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”. The ICJ also held that the Charter prevails over conflicting treaty provisions.³⁵⁸ The Court held in *Nicaragua v United States of America*³⁵⁹ that “all regional, bilateral, and even multilateral, arrangements ... must be made always subject to the provisions of Article 103 of the Charter”. Pauwelyn argues that the UN Charter in light of Article 103 “could be said to be of higher legal standing based on its source”³⁶⁰ and that obligations “under the UN Charter are cloaked with this higher legal standing”.³⁶¹ A similar proposition is advanced by Alexander Orakhelashvili when he argues

³⁵⁵ Yelapaala, “Fundamentalism Part II,” above n 14, at 475.

³⁵⁶ Kofi Quashigah, ‘Trends in the Promotion and Protection of Human Rights in Ghana’ in Kwame Boafo-Arthur (ed), *Ghana: One Decade of the Liberal State* (CORDESIA Books, 2007) 21

³⁵⁷ *Charter of the United Nations*, signed in San Francisco, 26 June 1945 and entered into force 24 October 1945.

³⁵⁸ *Bosnia v. Serbia*, above n 190, para 99 and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*, Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, 114 at 126 para 42.

³⁵⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility*, Judgment, ICJ Reports 1984, 392 at 440 para 107.

³⁶⁰ Pauwelyn, *Conflict of Norms*, above n 339, at 99.

³⁶¹ *Ibid* at 338.

that Article 103 “establishes the case of normative hierarchy by giving precedence to certain norms over others.”³⁶²

Most of the international human rights treaties and international environmental treaties and declarations Ghana is a party or signatory to make explicit reference to the UN Charter and its purposes. The preambles to the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights show that these legal instruments were made and adopted by members states of the UN (including Ghana) to provide further and more detailed legal bases for states to live up to their obligations under the UN Charter to promote universal respect for, and observance of, human rights and freedoms. Articles 55 and 103 of the UN Charter, interpreted together, emphasise the fundamental importance of human rights and the primary responsibility of states to secure the protection of these rights as against other treaty obligations. The language in Article 103 of the Charter is authority for the proposition that governments’ human rights and other public interest obligations under the Charter should trump investment treaties that compromise the full protection, realisation and enjoyment of fundamental human rights and societal values in Ghana. This means that in the event of conflict, the Charter obligations must be complied with.

It is thus a constitutional-general international law imperative that Ghana fulfils its usual functions pertaining to the protection of the public interest in the areas of development, human rights and the environment. As argued by Rousseau, the state as sovereign “is formed entirely of the individuals who compose it, it has not, nor could it have, any interest contrary to theirs.”³⁶³ Therefore, the State must be free to regulate in the public interest. To be able to do this, the State must not make treaties that expressly and substantively require it to pay compensation for public interest regulation required by the Constitution and general international law without the need to pay such compensation. For, as Verdross has advised, if a state is burdened with obligations (such as damages) making it impossible “to fulfill the universally recognized tasks of a state ... no community would exist which would be able to care for ... human beings in an adequate way.”³⁶⁴ This is particularly the case for Ghana given its scarce resources, which makes it imperative that the State should prioritise where and when those resources are expended.

Equally, as Ghana entered into the investment treaties so as to advance its development rather than protect foreign investment as an end in itself, any obligations it assumed towards foreign investment must be interpreted consistently with the development objective and regulatory autonomy needed generally to further that objective. Under the *constitutional-general international law imperatives test*, the State will assume investment treaty obligations that assure foreign investors that their covered investments will be accorded the necessary legal protection. However, those obligations must not be such that they can compromise the ability of current and future governments to exercise their inherent right to regulate in the

³⁶² Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press, 2006) at 7.

³⁶³ Jean-Jacques Rousseau, Maurice Cranston (trans) *The Social Contract* (Penguin Books Ltd, 2004) at 18.

³⁶⁴ Verdross, ‘Forbidden Treaties,’ above n 18, at 576.

interests of citizens through whom and for whom governments derive public power under the Constitution.

2.6.2 The Postulates of Constitutional-General International Law Imperatives Theory Stated

The following are the implications that arise from an analysis of the Constitution of Ghana:

1. The State of Ghana (the State) is formed of individuals who compose it and derives its powers and sovereignty from the people for the public good. The State does not have interests independent of those individuals of whom it is composed.
2. Under the Constitution, the government is formed for the purpose of benefiting the governed and furthering the sovereign will of the people. The powers of government derive from the Constitution for the common good and must be exercised within the limits in the Constitution.
3. The Constitution and general international law make provision for the protection of the public interest in the areas of fundamental human rights, essential security of the State, the environment and the right to development and assign corresponding obligations in relation to these rights to the State. The duty to promote and protect these rights is the first and primary duty of the State as an agent and fiduciary of the people. The Constitution and general international law also recognise the protection of private property rights but they place emphasis on the protection of the public interest as the primary role of the State, which makes it more compelling that the State does not encumber its public interest regulatory powers by investment treaties which focus solely on private investment interests the public benefits of which are uncertain and unassured.
4. The State has the capacity under the Constitution and general international law to make treaties. As the capacity to make investment treaties derives from the Constitution and general international law, the treaties should be treated as invalid if they are made contrary to the process requirements of the Constitution and general international law or if they conflict with substantive constitutional standards and *jus cogens*.
5. Since the primary duties of the State are owed towards citizens under the Constitution, its capacity to make treaties must be qualified by a treaty's effect upon the ability of the State to fulfil those duties. Treaties that cannot be applied together with constitutional obligations of the State towards its citizens should be treated as invalid.
6. Where governmental regulation has adversely affected the value of an investment and investment treaties do not expressly require the payment of compensation for the particular regulation, the presumption is that investment treaties are intended to

comply with municipal law and general international law principles. In such a case, compensation should not be available to foreign investors if municipal law and general international law prohibit it.

7. The State has a legal obligation in general international law and municipal law to observe treaties that have been validly made. Treaties are validly made if they comply with the process and substantive requirements of the Constitution and general international law. Therefore, the State must respect and observe the terms of such investment treaties. A breach of enforceable investment treaties must give rise to the responsibility of the State to pay foreign investors damages arising directly out of the breach provided the investment treaty expressly requires it.
8. As the State is an agent and fiduciary of the people, it cannot derogate from its obligations to protect fundamental human rights of citizens. Accordingly, investment tribunals must aim at interpreting investment treaties in a manner that accommodates the State's right to regulate in the public interest. Much as investment interests must be protected, they cannot be protected at the expense of the public purpose for which the State has entered into the particular investment treaty and in disregard of the interests of the people whom governments represent. This requires tribunals to take into consideration the legal justification of the measure when making a decision on liability and damages.
9. As the Constitution assigns original, appellate and *final* jurisdiction over legal disputes to local courts and institutions, irrespective of the subject matter and persons involved, the State must not agree to international arbitration allowing foreign investors to bypass local courts for foreign forums in disputes involving the State itself. An agreement to arbitrate in the face of such a constitutional assignment is only effective where domestic remedies are unavailable or are proved to be ineffective. In this regard, the appropriate forums for the resolution of investment disputes including those on the validity of investment treaties are national courts, state-to-state tribunals and others recognised under customary international law and general international law agreed by the parties.
10. Foreign investors operate within Ghana and rely on the regulatory support and institutional and individual goodwill to operate successfully. They take the benefit of domestic support. They must likewise be subject to domestic regulatory measures that do not work in their favour provided those measures are not primarily aimed at harming them.

The position this thesis has adopted is that the legal validity, binding effect and interpretation of investment treaties should be linked to the competence of the State to make the treaties. The question might arise whether a state's competence to enter into a treaty should not be distanced from the policy outcomes or material effects of that treaty. Delinking competence in investment treaty making from the treaty's outcomes, it might be argued, is necessary to

separate sovereignty from the material effects of the treaty. Such a position may be plausible but it does not correspond with the practice and reality in law making and its implementation both at the municipal plane and international plane. It is axiomatic that laws are meant to have binding effect and be enforceable based on their material effects. Based on their material effects, laws may be valid and enforceable or invalid and unenforceable in light of the hierarchy of legal norms. Thus, the binding effect of legal norms or their material effects are always related to their legal and policy outcomes, which includes the extent to which the legal or policy outcomes conflict with existing legal norms. That is why while the *pacta sunt servanda* rule applies, Articles 7, 27 and 46 of the VCLT recognise, for example, that a state may be able to invoke a person's lack of capacity or the provisions of internal law as an excuse for non-compliance with a treaty. Articles 53 of the VCLT requiring the provisions of treaties to be void if they conflict with *jus cogens* relates intimately to the material effects or policy outcomes of the provisions against the demands of *jus cogens*.

The New York Convention in Article V(2)(b) empowers courts of an enforcing state to refuse the enforcement of an arbitral award on grounds of inconsistency with the public policy of the enforcing state. Essentially these matters relate to the competence of a state to conclude treaties in light of existing legal forms or even prospective ones (for example, in the case of new *jus cogens*). If a treaty could always be binding and enforceable irrespective of the policy outcomes, the objects of provisions such as 7, 27, 46 and 53 of the VCLT and others on the termination of treaties on grounds other than the expiry of the treaty would be defeated; in fact their inclusion in the VCLT would have been unnecessary. So the policy outcomes of a treaty can hardly be divorced from the competence to conclude it. If the policy outcomes of a treaty entered into by the State could always be distanced from the outcomes of the treaty, then the State could always enter into any treaty even if the treaty's coming into force meant an abandonment of the role of the State under the Constitution and general international law.

2.7 CONCLUSION

In *Richardson v. Mellish*,³⁶⁵ Justice Burrough stated that once you get astride an unruly horse "you never know where it will carry you." So just as an unruly horse has to be tamed or restrained to take its rider to where the rider is going, the Constitution and general international law (being the foundations for statehood, governance, public accountability and the bases of states' claim for policy space and regulatory autonomy) must substantively limit the type of treaty obligations the State assume and define approaches to investment treaty interpretation. States are the principal authors in the construction and maintenance of the investment treaty regime which constrains their regulatory autonomy. To retain their autonomy, states must act within the legal limits set by their constitutions and general international law in order to preserve the public rights these norms protect. In other words, the

³⁶⁵ *Richardson v. Mellish*, [1824] 2 Bing 229, 130 ER 294 at 303.

norms and rights that matter for states and for which they need autonomy must dictate the nature of the obligations they can or cannot agree to in investment treaties. This is the only way they can act in the interest of their cherished norms at the domestic level without or with minimal risk of incurring damages in investment arbitration.

THE IMPLICATIONS OF INVESTOR-STATE DISPUTE SETTLEMENT FOR THE JURISDICTION OF MUNICIPAL COURTS IN GHANA

3.1 INTRODUCTION

Investor-state dispute settlement (ISDS) has serious implications for the authority of municipal courts and the finality, efficacy and enforcement of their decisions within domestic legal systems. As opined by Dame Sian Elias, Chief Justice of New Zealand, “[s]ome of the most intrusive impacts of international law on domestic legal systems are now arising in the context of Investor-State Dispute Settlement processes.”¹ Underscoring that point, Chief Justice French of the Commonwealth of Australia questioned if this mechanism is “a cut above the courts”.² Their concerns are appropriate because interim and final judgments of municipal courts under national constitutions have been ignored or vacated by investment tribunals. In this connection, Sornarajah observes that an investor-state suit challenging the decision of a municipal court before an investment tribunal “raises justifiable fears as to whether constitutional doctrines, such as separation of powers, and the exclusivity of control over matters within national jurisdiction, are not being left behind in the effort to create regimes for foreign investment.”³ The focus of this chapter is on whether constitutional norms within national contexts prevent states from agreeing to investment dispute resolution under ISDS.

The question of the competence of a state to agree to ISDS is foundational in the search for regulatory autonomy in international investment law. Most existing legal scholarship relates to the flaws of ISDS. There is legal writing on arbitration and the exhaustion local remedies,⁴ the role of domestic courts in investment arbitration,⁵ the impact of ISDS on domestic courts,⁶ the necessity and virtues of ISDS,⁷ and whether investor-state arbitration or municipal courts should settle investment disputes.⁸ None seems to have directly focused

¹Sian Elias, *Barbarians at the Gate: Challenges of Globalization to the Rule of Law*, Address Given at the World Bar Association Conference, (Held at the Icon Room, Heritage Hotel, Queenstown, Thursday 4 September 2014) at 3.

²R S French, *Investor-State Dispute Settlement — A Cut above the Courts?* (Supreme and Federal Courts Judges' Conference, Darwin, 9 July 2014).

³M. Sornarajah, “The Clash of Globalizations and the International Law on Foreign Investment” (2003) 10(2) *Canadian Foreign Policy Journal* 1 at 10.

⁴Stephen Schwebel and Gillis Wetter, “Arbitration and the Exhaustion of Local Remedies” (1966) 60 *American Journal International Law* 484.

⁵Charles Brower II, “Investor-State Disputes Under NAFTA: The Empire Strikes Back” (2001-2002) *Columbia Journal of Transnational Law* 43; and George A. Bermann, “The “Gateway” Problem in International Commercial Arbitration” (2012) 37 *Yale Journal of International Law* 1.

⁶Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007); and Tom Ginsburg, “International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance” (2005) 25 *International Review of Law and Economics* 107.

⁷Stephan Schill, “The Virtues of Investor-State Arbitration”, <<http://www.ejiltalk.org/the-virtues-of-investor-state-arbitration/>>

⁸Leon Trakman, “Choosing Domestic Courts over Investor-State Arbitration: Australia’s Repudiation of the Status Quo” (2012) 35(3) *UNSW Law Journal* 979.

on the legitimacy of ISDS in terms of the legal limitations on the competence of states to agree to such constraints in the first place.

This chapter addresses this lacuna by assessing the competence of the State of Ghana to agree to a mechanism that permits foreign investors to bypass the domestic legal system when challenging state actions, and enables international tribunals to override the municipal courts whose jurisdiction under the Constitution of Ghana is supreme, original, appellate and final. The questions addressed include: Can the role of municipal courts and national institutions be constrained by ISDS? Since the Constitution assigns original, appellate and final jurisdiction to municipal courts, does the State have the competence to agree to investor-state arbitration that permits foreign investors direct access to investment tribunals to challenge state actions? Does customary international law limit the competence of the State to adopt an agreement that pre-commits the state to arbitrate?

The chapter argues that the Constitution and general international law limit the competence of the State in the conclusion of such an agreement. The ISDS can potentially shield foreign investors from being punished in municipal courts for breaches of applicable laws and standards in Ghana to the extent that any decision made by municipal courts can be challenged before investor-state tribunals. This can lead not only to damages that neutralise decisions arrived at by municipal courts, but also to additional damages and costs that have a severe fiscal impact and a chilling effect on decisions of governments and judicial bodies. By the ISDS, investment tribunals can therefore potentially impugn judicial independence and the powers guaranteed to the courts of Ghana under the Constitution.

From constitutional and public policy perspectives, giving investors the option of not having matters finally determined by the local courts is not a solution. Defending investor-state arbitral suits costs public money and resources. The process is secretive and lacks transparency. Public participation may not be permitted and may be practically impossible given the foreign location of arbitral hearings. Arbitral awards may not be published and the public may not know how much public resources the State has expended in particular arbitral proceedings. Such secrecy and lack of transparency are inconsistent with constitutional principles on probity, accountability and transparency in a democratic state such as Ghana.

International arbitration also removes the accountability of the Government of Ghana from the courts, since disputes involving the State and investors do not have to be resolved in national courts, through which the Government is accountable to the people. International arbitration undermines judicial authority and sovereignty because it does not respect the independence of the courts and the finality of their decisions which are fundamental principles under the Constitution.⁹ This can affect the ability of the courts to effectively adjudicate upon and protect constitutional issues and rights that touch and concern investment.

The chapter argues that these constitutional principles and norms should prevent the State from entering into ISDS or require Ghana to agree to ISDS mechanisms that respect constitutional norms and preserve its autonomy to regulate in the public interest.

⁹ Harten, above n 6 at 3.

The rest of the chapter is organised as follows. Section 3.2 presents a review of the current criticisms of ISDS. Section 3.3 shows that Ghana's courts have constitutional jurisdiction over all legal persons and legal disputes within the State's territorial boundaries and this includes jurisdiction over investment disputes and foreign investors. It examines the rationale for foreign investors' access to investor-state tribunals as an alternative to municipal courts.

Section 3.4 reviews the impacts of ISDS on the jurisdiction of municipal courts, showing how arbitral tribunals have used their powers to settle investment disputes to exert control over governmental decisions and final decisions reached by competent courts of jurisdiction. The exertion of such control leads to conflict between the jurisdiction of investment tribunals under investment treaties and the jurisdiction of municipal courts under the Constitution.

Section 3.5 challenges the constitutionality of ISDS and its compatibility with Ghana's obligations under customary international law. It proposes that the State must do away with ISDS on the ground that the courts of Ghana have constitutional jurisdiction over all legal disputes. The constitutional principles of accountability, probity, rule of law, separation of powers and transparency and finality of judicial decisions dictate against the State being party to such a mechanism. The State may only agree to ISDS mechanisms that preserve constitutional principles relating to the jurisdiction of municipal courts and the functions of government.

3.2 THE DEBATE OVER THE LEGITIMACY AND EFFICACY OF INTERNATIONAL ARBITRATION

According to UNCTAD, the ISDS mechanism was designed to "create a forum that would offer investors a fair hearing before an independent, neutral and qualified tribunal. It was seen as a mechanism for rendering final and enforceable decisions through a swift, cheap, and flexible process".¹⁰ The provision for ISDS in investment treaties demonstrates the importance states attach to this mechanism as a guarantee that disputes that arise between them and investors will be settled in a neutral and impartial forum. Such a guarantee, it is claimed, is necessary to attract foreign investment.¹¹

However, the actual functioning of ISDS reveals systemic and endemic deficiencies in the regime.¹² UNCTAD has summarised the issues as "a perceived deficit of legitimacy and transparency; contradictions between arbitral awards; difficulties in correcting erroneous arbitral decisions; questions about the independence and impartiality of arbitrators, and concerns relating to the costs and time of arbitral procedures."¹³

¹⁰ UNCTAD, *IIA Issues Note: Reform of Investor-State Dispute Settlement: in Search of a Roadmap* (No 2, United Nations, June 2013) at 2.

¹¹ M. Sornarajah, *The International Law on Foreign Investment* (3edn, Cambridge University Press, 2010) at 48-49.

¹² UNCTAD, above n 10, at 2.

¹³ *Ibid* at 1; and Leon Trakman, "Investor State Arbitration or Local Courts: Will Australia Set a New Trend?" (2012) 46(1) *Journal of World Trade* 83 at 100-108.

The legitimacy concerns with ISDS have to do with the regime's suitability to resolve disputes involving sensitive public policy issues,¹⁴ given its *ad hoc* and private nature,¹⁵ and the secrecy and lack of transparency in arbitration proceedings.¹⁶ The literature reveals "divergent legal interpretations of identical or similar treaty provisions as well as differences in the assessment of the merits of cases involving the same facts."¹⁷ Inconsistent interpretations have led "to uncertainty about the meaning of key treaty obligations and lack of predictability of how they will be applied in future cases."¹⁸ Arbitrators "decide important questions of law without a possibility of effective review" and existing review mechanisms, namely the ICSID annulment process and national-court review at the seat of arbitration, "operate within narrow jurisdictional limits."¹⁹ On the issue of cost and time-intensity of arbitration proceedings, "practice has put into doubt the oft-quoted notion that arbitration represents a speedy and low-cost method of dispute resolution."²⁰ The arbitral system has also been criticised as biased and its integrity questioned in part because arbitrators tend to be sympathetic to the party appointing them and the security of their appointment is dependent on them asserting jurisdiction over claims.²¹

The ISDS mechanism has also become a very powerful tool that investors use to challenge measures adopted by states in the public interest. More than seventy per cent of the 2013 investor-state claims concerned investments in the services sector, where public interest regulation is important, such as the supply of electricity or gas, telecommunications, construction, tourism, banking, real estate services, water, media and advertising.²²

Jeswald Salacuse attributes the growth in the number and severity of treaty based disputes between host states and foreign investors to the increase in foreign investment and in international investment agreements (IIAs). The global IIA regime reached 3,268 at the end of 2014. Around the same time, the number of investor-state dispute settlement claims reached 608 with 101 states as respondents.²³ Investor-state arbitration, therefore, has serious implications for the regulatory autonomy of states. Salacuse argues:²⁴

¹⁴ David Schneiderman, "Legitimacy and Reflexivity in International Investment Arbitration" (2011) 2(2) *Journal of International Dispute Settlement* 471; and Susan Frank, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions (2005) 73(4) *Fordham Law Review* 1521.

¹⁵ Gus Van Harten, "The Public-Private Distinction in the International Arbitration of Individual Claims against the State" (2007) (56) *International and Comparative Law Quarterly* 371.

¹⁶ Gary Born, and Ethan Shenkman, "Confidentiality and Transparency in Commercial and Investor-State International Arbitration" in Catherine Roger and Roger Alford (eds), *The Future of Investment Arbitration* (Oxford University Press, 2009) 4.

¹⁷ Campbell McLachlan, "Investment Treaties and General International Law" (2008) 57 *International and Comparative Law Quarterly* 361; and Campbell McLachlan, "The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention" (2005) 54 *International and Comparative Law Quarterly* 279.

¹⁸ Louis Wells, "Backlash to Investment Arbitration: Three Causes" in Michael Waibel et al (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law, 2010) 341 at 342.

¹⁹ UNCTAD, above n 10, at 3.

²⁰ *Ibid* at 4.

²¹ Gus Van Harten, "Perceived Bias in Investment Treaty Arbitration" in Waibel et al, above n 18, 433; and Sam Luttrell, "Bias Challenges in Investor-State Arbitration: Lessons from International Commercial Arbitration" in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) 445.

²² UNCTAD, above n 10.

²³ UNCTAD, *Recent Developments in IIAs and ISDS* (IIA Issues Note No 1, United Nations, February 2015) at 1 and 5.

²⁴ Jeswald Salacuse, "Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution" (2007) 31(1) *Fordham International Law Journal* 138 at 145.

The costs of investor-State disputes are placing growing financial and other hardships on individual countries, particularly on poor, developing countries. The potential costs of investor-State arbitration are basically threefold. First ... a host country faces the risk of having to pay awards that, in relation to its budget and financial resources, may prove extremely burdensome. Second, the host country must bear the substantial costs, both direct and indirect, of conducting the arbitration itself. Third, the "policy cost" of investor-State arbitration is that a substantial award to the investor may require the host country to repeal or modify measures that were implemented for the public good.

Salacuse observes that these three factors raise 'questions as to whether means other than arbitration and litigation can be found to resolve treaty-based, investor-State disputes'.²⁵ Sornarajah has proposed that only investment tribunals that are capable of balancing competing interests should be made to resolve investor-state disputes.²⁶

UNCTAD also suggests the challenges posed by the ISDS regime in terms of its efficiency and ability to limit regulatory autonomy "create momentum for its reform."²⁷ Its proposals to reform the ISDS regime include: the promotion of alternative dispute resolution; tailoring the existing system through individual IIAs; limiting investor access to ISDS; introduction of an appeals facility; and the creation of a standing international investment court.²⁸ The pressure for reforms to ISDS also saw new UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration coming into effect on 1 April 2014.²⁹

States themselves have begun to question the wisdom of ISDS given the challenge it poses to regulatory autonomy and their opposition to the inclusion of ISDS in investment treaties has been growing. Bolivia, Ecuador and Venezuela withdrew from ICSID in 2007, 2009 and 2012 respectively. Nicaragua and Venezuela no longer view ICSID as a preferred mechanism for resolving investor-state disputes.³⁰ Following a review of the actual value of investment treaties for investment inflows to South Africa and an assessment of the risk ISDS poses to the adoption of policies and domestic interventionist measures, South Africa has terminated about thirteen investment treaties with other countries and came out with the Promotion and Protection of Investment Bill 2013 to regulate the protection and promotion of investments domestically.³¹ The Bill makes provision for the resolution of investment disputes by mediation, domestic courts or a competent and independent tribunal or statutory body. Disputes may also be resolved by arbitration under the Arbitration Act 1965. Indonesia has

²⁵ Ibid at 139-140.

²⁶ Sornarajah, 'Clash of Globalization,' above n 3, at 9-10.

²⁷ UNCTAD, above n 10, at 1.

²⁸ Ibid.

²⁹ UNCITRAL, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (United Nations, 2014), <<http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>>
Convention on Transparency in Treaty-based Investor-State Arbitration, adopted by the UN General Assembly on 10 December 2014, <<http://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf>>

³⁰ UNCTAD, *IIA Issue Note: Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims* (No. 2, United Nations December 2010).

³¹ Jackwell Feris, "Challenging the Status Quo – South Africa's Termination of its Bilateral Trade Agreements" *International Arbitration Newsletter* (10 December 2015), <<http://pdf9.onenorth.com/pdfrenderer.svc/v1/ABCpdf9/GetRenderedPdfByUrl/Challenging%20the%20status%20quo.pdf?url=https://www.dlapiper.com:443%2fen%2fasiapacific%2finsights%2fpublications%2f2014%2f12%2finternational-arbitration-newsletter-q4-2014%2fchallenging-the-status-quo%2f%3f%26pdf%3d1&attachment=false>>

announced plans to terminate more than sixty investment treaties.³² The 1993 India Model Investment Treaty (BIT) has been considered for review.³³

The European Union (EU) made efforts to reform substantially the investment protection and ISDS system. In 2014, the European Commission conducted a public consultation within the EU seeking feedback from individuals and organisations on whether the proposed EU approach to investment protection and arbitration would achieve the right balance between protecting investors and safeguarding the EU members' right to regulate in the public interest. That consultation revealed opposition with regard to investment protection and ISDS in the Transatlantic Trade and Investment Partnership Agreement between the US and Europe.³⁴ Similar opposition had been expressed against the inclusion of ISDS in the Trans-Pacific Partnership.³⁵ In the US, the National Centre for State Courts urged the US Trade Representative and Congress:³⁶

to only approve trade agreements provisions that recognize and support the sovereignty of state judicial systems and the enforcement and finality of state court judgments and to clarify that under existing trade agreements, foreign investors shall enjoy no greater substantive and procedural rights than US citizens and businesses.

This analysis shows there is a substantial measure of dissatisfaction and disquiet with how ISDS operates. However, while the academic literature questions the wisdom, legitimacy and efficacy of ISDS, a compelling issue that has not yet been addressed directly is its legality in light of national constitutions and relevant principles of general international law. In this chapter that is examined with particular reference to its impact on the jurisdiction of municipal courts in Ghana.

3.3 INTERNATIONAL ARBITRATION AND THE JURISDICTION OF MUNICIPAL COURTS IN GHANA

3.3.1 The Jurisdiction of the Courts of Ghana

By Article 126(1) of the Constitution and the Courts Act 1993 (Act 459), the judiciary of Ghana consists of the Supreme Court, the Court of Appeal, Regional Tribunals, Circuit Court and District Court. According to Article 125(1), justice “emanates from the people and shall be

³² Ibid.

³³ Nicholas Peacock, Jennifer Hartzler and James MacKinnon, Indian Government Seeks Comments on a Proposed Draft Model Text for the Indian Bilateral Investment Treaty (Arbitration Notes, April 2015), <<http://www.lexology.com/library/detail.aspx?g=cd597b47-28b5-4329-8254-5e2a08050a31>>; and *Model Text for Indian Bilateral Investment Treaty*, https://mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf>

³⁴ European Commission, *Report on Online Public Consultation on Investment Protection and Investor-to-state Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement* (13 January 2015), <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf>

³⁵ Jane Kelsey and Lori Wallach, “Investor-State” Disputes in Trade Pacts Threaten Fundamental Principles of National Judicial Systems, <<http://www.citizen.org/documents/isds-domestic-legal-process-background-brief.pdf>>

³⁶ National Centre for State Courts, Free Trade Agreements, <<http://www.ncsc.org/Services-and-Experts/Government-Relations/International/Free-Trade-Agreements.asp>>

administered in the name of the Republic by the Judiciary which shall independent and subject only to this Constitution.” Consequently, Article 125(2) vests the judicial power of Ghana in the judiciary, which by Article 125(5) “shall have jurisdiction in all matters civil and criminal.” The independence of the judiciary is clearly protected in Article 127(1) of the Constitution which states that the judiciary “is subject to only this Constitution and shall not be subject to the control or direction of any person or authority.”

Under Article 130(1), the Supreme Court has “exclusive original jurisdiction in ... all matters relating to the enforcement or interpretation” of the Constitution. The Court, by Article 129(1), is also the “final court of appeal. Persons who are aggrieved by the Court’s decision may only seek a review in accordance with Article 133. Thus, the decision of the Court can be reviewed only within the terms of the Constitution and in the Court itself.

3.3.2 The Rationale of International Arbitration Questioned

Before the emergence of ISDS mechanisms, investor-state disputes were resolved through direct state-investor dialogue, in the municipal courts or through diplomatic espousal (by which a foreign investor would convince its home country to exercise diplomatic protection) and sometimes by the threat or use of military force.³⁷ Investment arbitration became popular in particular with the establishment of ICSID in 1965 and UNCITRAL Arbitration Rules in 1976. States started to include ISDS in investment treaties between the late 1950s and early 1970s. By the 1990s it became standard in investment treaties.³⁸

The ICSID Convention observes that, while investment disputes between states and foreign investors “would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases.”³⁹ According to the Executive Directors of the World Bank who drafted the Convention, the “creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.”⁴⁰

In support of investor-state arbitration it has also been argued that customary international law, diplomatic espousal and domestic legal systems in the developing world (where most foreign investments were made) proved ineffective for the settlement of investment disputes. Salacuse points out that the “shortcomings of both national and international remedies for government interference with foreign property rights led to the development of depoliticized

³⁷ Edwin Borchard, *The Diplomatic Protection of Citizens Abroad* (Banks Publication, 1919); M Sornarajah, *The Pursuit of Nationalized Property* (Martinus Nijhoff Publishers, 1986); J W Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2010); and Christopher Dugan et al, *Investor-State Arbitration* (Oxford University Press, Oxford, 2008).

³⁸ UNCTAD, *Investor-State Dispute Settlement: A Sequel* (United Nations, 2014) at 23.

³⁹ Entered into force on 14 October 1966, preamble para 3, <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf>

⁴⁰ International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (18 March 1965) para 9, <http://www.sloarbitration.eu/Portals/0/Arbitrazno-pravo/CRR_English-final.pdf>

alternatives.”⁴¹ This has led, in the case of Ghana as shown Section 3.3.3, to the complete removal of domestic courts from the settlement of substantive investment disputes even though the drafters of the ICSID Convention recognised that international methods for the settlement of disputes between a state and an investor may not be appropriate in certain cases.⁴²

Historically, investment treaties were designed in response to foreign investors and their home countries’ concerns over political and regulatory risks, such as expropriations and nationalisations. These home countries of foreign investors were developed, and mostly colonising, countries whose investors invested in the developing and mostly colonised world. Foreign investment protection by treaty and arbitration may thus be seen as a colonial construction because the internationalisation of such protection was primarily aimed at protecting private business interests of foreign investors of the developed world who invested abroad.⁴³

The argument in support of ISDS is based on presumed inefficiency and bias of domestic courts.⁴⁴ Yet the courts have always exercised jurisdiction over a wide variety of issues, including matters involving the state and foreign investors. Municipal courts are considered competent to resolve disputes between non-investing foreigners and their host states even on issues pertaining to the right to life and other basic necessities of human existence. Foreign investors also resolve their non-investment disputes, pertaining for example to human rights and labour, before municipal courts; in fact, it is national courts that have jurisdiction over such disputes. Yet, when it comes to foreign investment disputes, the courts are said to be incompetent and foreign investors cannot trust the courts so they must take their investment disputes to arbitral tribunals.

If courts were inefficient in the past when it came to using and applying international law to impartially resolve disputes involving sovereign states and alien investors, it cannot be assumed to be the same today. Anthea Roberts argues that the “prevailing wind appears to be changing”⁴⁵ because “national courts are increasingly using international and comparative law as a ‘sword’ to challenge legislative and executive actions rather than as a ‘shield’ to protect them”.⁴⁶ Further, inbuilt mechanisms within municipal judicial systems which allow for appeals are more measured and objective ways of resolving substantive disputes than an *ad hoc* system characteristic of arbitration.⁴⁷

⁴¹ Salacuse, *Law of Investment Treaties*, above n 37, at 45.

⁴² *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 4 ILM 524 (entered into force 14 October, 1966), preamble at para 3.

⁴³ Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press, 2013); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005) and M. Sornorajah, *The Settlement of Foreign Investment Disputes* (Kluwer Law International, 2000).

⁴⁴ CF Dugan et al, above n 37; and Salacuse, *Law of Investment Treaties*, above n 37

⁴⁵ Anthea Roberts, “Comparative International Law? The Role of National Courts in Creating and Enforcing International Law” (2011) *International and Comparative Law Quarterly* 57 at 59.

⁴⁶ E Benvenisti, “Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts” (2008) 102 *American Journal of International Law* 241.

⁴⁷ Andrea K Bjorklund, “Waiver and the Exhaustion of Local Remedies Rule in NAFTA Jurisprudence” in Todd Weiler (ed), *NAFTA Investment Law And Arbitration: Past Issues, Current Practice, Future Prospects* (Transnational Publisher, 2004) 253, at 285.

Indeed, national courts are international actors in the enforcement of international law and capable of creating and shaping international norms.⁴⁸ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁴⁹ (the New York Convention) and the ICSID Convention to which Ghana is a party locate their control mechanisms not just in arbitration tribunals but also in the laws and courts of contracting parties.⁵⁰ Multinational business entities and the international arbitral systems seek recourse to the supposedly 'inefficient and unreliable' municipal courts for the purposes of enforcing arbitral awards. The enforceability of arbitral awards depends on both international investment law and the law of domestic legal systems.⁵¹

Even investment tribunals themselves are beginning to admit that they may not necessarily be better placed than municipal courts to resolve investment disputes. For example, in *Balkan Energy (Ghana) Ltd v Ghana*, the Tribunal acknowledged that there might not be any difference between investment tribunals and national courts in their competence to resolve investor-state disputes. The Tribunal stated in relation to the judiciary in Ghana:⁵²

While international arbitration is not subordinated to the views of national courts it nonetheless can consider to the fullest extent possible how to conduct its own jurisdiction in a framework of compatibility and not of confrontation, particularly when national courts are both independent and professionally competent. There are cases in which these fundamental factors are either non-existent or subject to serious doubt and then the role of international arbitration might be different, but this is certainly not the case here.

It is, therefore, time to question the rationale underpinning ISDS.

3.3.3 The Right to International Arbitration in Ghana

Both domestic legislation on foreign investment and the investment treaties of Ghana provide for ISDS. The Ghana Investment Promotion Centre Act 2013 (Act 865) (GIPCA 2013) protects foreign investment in terms of investment incentives and dispute settlement. Like the GIPCA 1994 it replaced, the 2013 Act states in section 33(1) that "efforts shall be made through mutual discussion to reach an amicable settlement" where a dispute arises between a foreign investor and the government. Section 33(2) provides that a dispute which "is not amicably settled through mutual discussion within six months may be submitted at the option of the aggrieved party to arbitration." Under section 33(3) where there is no agreement to arbitrate for the settlement of investment disputes in a contract or investment agreement and the parties disagree on the mode of dispute resolution, the dispute is to be resolved through

⁴⁸ Richard R. Lillich, "The Role of Domestic Courts in Enforcing International Human Rights Law" (17-19 April, 1980) 74 *Proceedings of the Annual Meeting (American Society of International Law)* 20.

⁴⁹ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, entered into force 7 June 1959.

⁵⁰ New York Convention, arts III and V; and ICSID Convention, art 54.

⁵¹ *Ibid.*

⁵² *Balkan Energy (Ghana) Ltd v Ghana*, UNCITRAL, PCA Case No. 2010-7, Interim Award, 22 December 2010, para 375 (*BELG v Ghana*).

mediation under the Alternative Dispute Resolution Act 2010 (Act 798). This Act establishes the legal and institutional framework for domestic resolution of disputes by methods other than court trial process.

Similarly, under Ghana's investment treaties, investment disputes not resolved through mutual discussion within the specified times of written notification of a claim are to be settled by ISDS. The institutions specified include the Arbitration Institute of the Stockholm Chamber of Commerce, ICSID, UNCITRAL rules or an international arbitrator or *ad hoc* arbitration tribunal appointed by a special agreement between the parties.⁵³ To the extent that the Ghana Investment Promotion Centre Act and the investment treaties provide for ISDS, they have internationalised jurisdiction over investment disputes to international arbitral bodies.

There are variations between BITs. The Ghana-China investment treaty limits an investor-state dispute to "[a]ny dispute ... concerning the *amount of compensation for expropriation*",⁵⁴ while the Ghana-Malaysia, Ghana-Denmark, Ghana-Netherlands and Ghana-United Kingdom investment treaties provide for arbitration in respect of disputes "concerning *an obligation ... in relation to an investment*".⁵⁵ The broad scope of the latter means, for example, that BIT disputes concerning the implementation of human rights norms that affect the value of foreign investment still have to be settled through arbitration.

The GIPCA 2013 and investment treaties thus provide for two ways to resolve investment disputes: mutual discussion for an amicable settlement and arbitration. The specification of these two modes indicates that the courts are to have nothing to do with substantive investment disputes. In the fact, the requirement in section 33(3) of GIPCA 2013 that where there is no agreement to arbitrate a dispute is to be resolved through *mediation* under the Alternative Dispute Resolution Act lends further support to the proposition that the provision for ISDS removes investment disputes from the jurisdiction of the courts.

3.3.4 The Impact of International Arbitration on the Jurisdiction of the Courts in Ghana

Salacuse rightly warned that "[a]lthough investor-state arbitration has become increasing common, the uniqueness and power of this form of legal process should not be overlooked."⁵⁶ As Jane Kelsey and Lori Wallach argue, ISDS not only "empowers foreign investors to bypass domestic courts and sue governments for cash damages in international tribunals", it also enables investment tribunals to exert influence over domestic courts and threaten fundamental principles of domestic legal systems.⁵⁷ Michael Goldhaber suggests that "investment tribunals are far more willing than courts to assert control over a foreign court,

⁵³ Ghana-United Kingdom Investment Treaty, art 10; Ghana-Netherlands Investment Treaty, art 9; Ghana-Denmark Investment Treaty, art 10(1)(3); Ghana-Malaysia Investment Treaty, art 7; and Ghana-China Investment Treaty, art 10

⁵⁴ Ghana-China Investment treaty, art 10(1).

⁵⁵ Ghana-Malaysia Investment Treaty art, 7(1); Ghana-Denmark Investment Treaty art 10(1); Ghana-Netherlands Investment Treaty art 9(1); and Ghana-United Kingdom Investment Treaty art 10(1).

⁵⁶ Salacuse, 'Is there a Better Way,' above n 24, at 144.

⁵⁷ Kelsey v Wallach, above n 35.

and do so with increasing frequency.”⁵⁸ According to Goldhaber, investment tribunals are likely to exert power over domestic courts to protect their own jurisdiction, to remedy the intrusion of state courts into ISDS, to preserve the parties’ rights through interim measures, or to do justice.⁵⁹

Sergio Puig argues that “[c]onstitutional courts are ... fundamental to the ... stability of their respective nations because they are ... responsible for the social acceptance of the constitution and fundamental autochthonous norms and address the tensions between complex political structures and interests.”⁶⁰ If the decisions of such constitutional courts can be overturned and discarded by arbitral tribunals composed of disaggregated individuals who, overall, are faithful and accountable to an investment treaty regime which favours absolute protection of foreign investment, the value and effect of those courts within the domestic context will be seriously eroded. International arbitration can have such an effect because it can affect and disrupt the operation of due process and the jurisdiction, independence, credibility and effectiveness of the judiciary.⁶¹ While investor rights need to be properly protected, and obvious injustices in national courts against foreign investors corrected, rights created by investment treaties must not displace citizens’ rights under domestic law, the realisation of which depends on municipal courts.⁶²

The limitations investment tribunals place over domestic courts⁶³ are well illustrated by the following arbitral cases challenging decisions reached by the courts of Ghana. These cases demonstrate how investment tribunals can disregard the decisions of domestic courts and thereby render them ineffectual. While these disputes involved international agreements other than investment treaties, those agreements specified the same arbitral mechanism for the resolution of disputes between foreign investors and the State as Ghana’s investment treaties. The difference between these agreements and investment treaties is that the latter provide more sweeping rights for investors than the former. However, both kinds of agreements remove investors from the jurisdiction of municipal courts and assign the jurisdiction to foreign tribunals.⁶⁴

⁵⁸ Michael D Goldhaber, “The Rise of Arbitral Power Over Domestic Courts” (2013) (2) *Stanford Journal of Complex Litigation* 373 at 374.

⁵⁹ *Ibid* at 374.

⁶⁰ Sergio Puig, “Investor-State Tribunals and Constitutional Courts: The Mexican Sweetner Saga” (2013) 5(2) *Mexican Law Review* 199 at 201.

⁶¹ *Ibid* at 238.

⁶² Goldhaber, above n 58, at 395 and 399.

⁶³ See for example, *The Loewen Group, Inc v United States of America*, ICSID Case No. ARB(AF)/98/4, Award, 26 June 2003; *The Loewen Group, Inc v United States of America*, ICSID Case No. ARB AF/98/3 Decision on hearing of Respondent's Objection to Competence and Jurisdiction, 5 January 2001; *Chevron Corporation v Republic of Ecuador*, PCA Case No 2009-23, Fourth Interim Award on Interim Measures, 7 February 2013; *Ambiente Ufficio SpA v Argentine* ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013.

⁶⁴ For the different between treaty claims and contract claims in arbitration see M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015) at 130ff; and Eric De Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (Cambridge University Press, 2013) at 31-48.

3.3.4.1 *Balkan Energy Limited v The Republic of Ghana (BELG v Ghana)*⁶⁵

Balkan Energy Ltd (Ghana) (BELG) was a limited liability company incorporated under the laws of Ghana. Its sole shareholder was Balkan Energy Limited (incorporated in the United Kingdom), which was in turn wholly owned by Balkan Energy LLC of the United States. Balkan Energy Ltd entered into a Power Purchase Agreement (PPA) with Ghana in 2007 for the refurbishment and commissioning of dual fired (diesel and gas) barge and associated facilities.

The PPA provided for the settlement of disputes by ISDS. Balkan Energy Ltd alleged that the State failed to: provide adequate site electricity and connection to the national grid through a proper transmission line; to comply with its obligation to facilitate the importation of equipment and the acquisition of all necessary permits, approvals, and visas; and owed it tolling fees totalling over USD50 million.⁶⁶ In December 2009, BELG instituted arbitration proceedings against the State seeking a declaration that Ghana had breached the PPA, and for an order that Ghana pay the tolling fees and damages for the breaches.⁶⁷ The Tribunal was constituted in April 2010. The terms of appointment specified the UNCITRAL Rules as the governing rules and the laws of Ghana as the governing law of the PPA.⁶⁸

In June 2010 after the appointment of the Interim Tribunal, Ghana applied to the High Court of Ghana for an interlocutory injunction against the continuance of arbitral proceedings. On 25 June 2010, the High Court issued an injunction restraining BELG from proceeding with arbitration pending the determination of the enforceability of the arbitration clause and the PPA under Article 181(5) of the Constitution.⁶⁹ Ghana objected to the jurisdiction of the Interim Tribunal arguing that both the PPA and the arbitration clause were void because the PPA did not receive Parliamentary approval as required by Article 181(5) of the Constitution.⁷⁰

The Tribunal had to decide whether the arbitration agreement was valid and whether the High Court injunction affected the jurisdiction of the Tribunal.⁷¹ Ghana maintained that both the PPA and the arbitration clause were an “international business or economic transaction,” and were therefore void and unenforceable for lack of prior parliamentary approval.⁷² Ghana argued that the determination of the validity of either the PPA or the arbitration clause involved questions of interpretation of the Constitution, and was, therefore, non-arbitrable. The State argued that even if the Tribunal found that it was competent to rule on the validity of the PPA and the arbitration clause, “the proper and practical course would be for the

⁶⁵ *BELG v Ghana*, above n 52.

⁶⁶ *Ibid* para 4.

⁶⁷ *Ibid* paras 6-7.

⁶⁸ *Ibid* para 17

⁶⁹ *Ibid* paras 8 and 45.

⁷⁰ *Ibid* para 9.

⁷¹ *Ibid* para 61.

⁷² *Ibid* paras 117-119.

Tribunal to exercise restraint and to await a definitive determination of the issues of Ghanaian Constitutional law by the Ghana Supreme Court, which is seized of those issues.”⁷³

The State submitted that the PPA was governed by the laws of Ghana because there was a threshold constitutional law question as to whether the PPA was valid in the absence of parliamentary approval. According to Ghana, the Court had not yet clearly spoken as to whether Article 181(5) of the Constitution applied to transactions between the Government and a local entity, but which has international elements.⁷⁴ The State argued that the Court has exclusive original jurisdiction “in all matters relating to the enforcement or interpretation” of Constitution under Article 130(1)(a), so questions relating to the interpretation of the Constitution are non-arbitrable. Ghana also cited the Alternative Dispute Resolution Act which states that issues of enforcement and interpretation of the Constitution cannot be subject to arbitration.⁷⁵ In the State’s view, the Tribunal could have jurisdiction to hear the dispute only if the arbitration clause was valid and binding. However, there were serious questions:⁷⁶

as to whether the arbitration agreement itself is an international business or economic transaction, within the meaning of Article 181(5) of the ... Constitution, and thus invalid for lack of Parliamentary approval. Thus, for the Tribunal to consider the validity of the arbitration agreement with a view to determining its jurisdiction would require it to engage in interpretation of a provision of the Ghanaian constitution, a function which Ghanaian law does not permit an arbitral tribunal to perform.

In the view of the State:⁷⁷

the conclusion that the Tribunal is not competent is particularly appropriate given the fundamentally public nature of the task of constitutional interpretation. Moreover ... a pronouncement by this Tribunal that it is competent to decide the dispute between the Parties would have the ‘untenable’ consequence that the review of the Tribunal’s interpretation of the Ghanaian Constitution could ultimately fall to foreign courts (for example, in enforcement proceedings outside Ghana).

Despite the High Court interim injunction and the constitutional arguments advanced by the State, the Interim Tribunal proceeded with the hearing. The Tribunal held that it was competent to decide on the validity of the arbitration agreement and had jurisdiction to entertain the substantive suit under the competence-competence and separability principles in international arbitration which allow tribunals to determine questions concerning their jurisdiction and the substantive validity of the arbitration clause respectively.⁷⁸ According to the Tribunal, the arbitration clause was valid because all the formalities for its validity had

⁷³ Ibid para 64.

⁷⁴ Ibid para 65.

⁷⁵ Ibid para 66.

⁷⁶ Ibid para 71

⁷⁷ Ibid.

⁷⁸ Ibid paras 152-153, 167 and 99.

been met.⁷⁹ The Tribunal held that the law applicable to the arbitration agreement was the law of the seat of arbitration, namely The Netherlands.⁸⁰ It reasoned that the constitutional interpretation issue did “not necessarily fall within the public policy restriction in The Netherlands, because, if it did, any arbitration agreement or contract which encounters an argument of constitutional nature in a foreign country would be excluded from the jurisdiction of an arbitration tribunal to decide upon.”⁸¹

The Tribunal itself referred to the decision of Ghana’s Supreme Court in *The Attorney-General v Faroe Atlantic Co Ltd*⁸² that principles of estoppel do not apply to and cannot render enforceable a contract that is unconstitutional. Despite that, it held that:⁸³

While there may be valid reasons for the Ghanaian Constitution to impose restrictions on the State’s powers to enter into certain kinds of international transactions, there are circumstances where such a restriction cannot derogate from the effectiveness of the arbitration agreement to which the Parties are committed and which has been held out as valid by the competent Ghanaian officials. That is very much the case here. The very fact that the Respondent proposed the alternative of arbitration to settle the dispute indicates that the arbitration agreement was considered by it to be valid and in force, even if the Respondent ultimately decided not to pursue this line of action.

Under the Constitution, it is the Supreme Court that has the final say on the issue of the constitutionality of governmental actions, including the constitutionality of legal advice given by government officials. Yet, the effect of the quoted passages is that once government officials have given legal advice to the government and private parties as to the constitutionality or legality of a matter, not even the courts can question the constitutionality of that advice even if it is unconstitutional. Such a position is contrary to practice in municipal law and general international law on the power of courts in relation to governmental actions.

On the effects of the High Court injunction on the arbitral proceedings, the State had argued that the Tribunal “should accord respect” to the injunction because it rested on sound legal grounds and accordingly suspend proceedings.⁸⁴ If the Tribunal continued with the arbitral proceedings, it risked subjecting the parties “to conflicting decisions or to inconsistent judgments” and thereby placed them “in the difficult position of having to choose between violating the Ghana High Court’s injunction, or participating in the arbitral proceedings under protest.”⁸⁵ The State asserted that BELG’s insistence that the Tribunal should proceed to determine the validity and enforceability of the PPA and the arbitration clause “could constitute contempt of the Ghana High Court Order”, since the intent and spirit of the injunction required that the State “refrain from arguing the merits of the constitutional issue

⁷⁹ Ibid para 147.

⁸⁰ Ibid para paras 152-153.

⁸¹ Ibid para 144.

⁸² *The Attorney-General v Faroe Atlantic Co Ltd* [2005-2006] SCGLR 271 (AG v FACL)

⁸³ *BELG b Ghana*, above n 52, para 163.

⁸⁴ Ibid paras 169 and 170.

⁸⁵ Ibid para 172.

before this Tribunal” and “to urge the Tribunal to defer further proceedings pending the outcome in the Ghana litigation.”⁸⁶

Balkan Energy Ltd in turn argued that the injunction of the High Court contravened fundamental principles of international law and undermined ISDS. The principles of international law relied on were the doctrines of competence-competence, party autonomy, judicial abstention until an award is rendered, and prohibitions in the New York Convention against domestic courts blocking arbitration.⁸⁷ These arguments ignored the fact that the order of the High Court was an interim injunction which did not have the effect of perpetually barring the arbitral tribunal from ever proceeding with arbitration and determining the case on the merits upon the expiry of the order. The BELG never argued that a stay of arbitral proceedings would cause it irreparable harm. In these circumstances, the investor’s arguments were quite misplaced. The Tribunal claimed it had “the highest respect for the courts of Ghana and its legal system as a whole.”⁸⁸ So at the minimum, it could have out of that respect and comity stayed proceedings pending the expiry of the injunction and the substantive decision of the court. Proceeding to determine both the validity of the agreement to arbitrate and the jurisdiction of the tribunal in disregard of the High Court’s injunction is inconsistent the Tribunal’s claim of respecting the courts.

The Tribunal held that the order of the High Court of Ghana for stay of arbitral proceedings could not stop it from proceeding to substantively determine the dispute because Ghana had an obligation under the New York Convention to give effect to the arbitration agreement and recognise any award made pursuant to it. According to the Tribunal, a party to a treaty is bound to perform it in good faith and may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Even though an injunction is only an interim relief, the Tribunal held that the issuance of an “anti-arbitration” injunction that purported to “block” an international arbitral remedy to which the state is committed was inconsistent with the New York Convention’s purpose to ensure that agreements to arbitrate and the resultant awards are recognised and enforced.⁸⁹

Ghana did not argue that by virtue of municipal law it did not have an obligation to give effect to the PPA and the arbitration agreement and it did not challenge the competence of the Tribunal to resolve the investment dispute itself either. Ghana simply argued that there was a constitutional issue to be resolved in relation to the investment dispute, that is, whether the PPA and the arbitration agreement were constitutional for which it argued for a stay of arbitral proceedings. Since the Constitution was the sole and primary basis for determining the validity of the PPA, the State was not invoking internal to evade the performance of an international agreement. This case is different from a situation where an obligation under international law conflicts with an obligation under municipal law and a state seeks to evade the international obligation by citing municipal law in defence. In fact, the Tribunal did not

⁸⁶ Ibid para 174.

⁸⁷ Ibid para 178.

⁸⁸ Ibid para 62.

⁸⁹ Ibid para 191.

deny that the constitutionality of the PPA had to be decided under the Constitution and that the issue was within the jurisdiction of the Supreme Court. Indeed, the Tribunal ultimately resolved this issue based on an interpretation of the Constitution and not the investment treaties, the PPA and arbitration agreement which the State had an obligation to observe in international law. It follows that, the question of Ghana not wanting to observe these international agreements and seeking to invoke internal law in justification *simpliciter* did not strictly arise for the consideration of the Tribunal. Therefore, the Tribunal's reference to the obligation of the State to observe international agreements under the New York Convention and Article 27 of the VCLT which prohibit the State from invoking internal law to excuse the observance of the PPA were unjustified and unnecessary.

In any case, under the New York Convention recognition and enforcement of an arbitral award may be refused if the subject matter of the legal dispute is not capable of settlement by arbitration under the law of that country, or recognition or enforcement of the award would be contrary to the public policy of the country. So the argument by the State that the agreement to arbitrate and the PPA were invalid and the institution of proceedings in the competent municipal court to determine the validity of the agreements were not inconsistent with the international law. On the contrary, allowing municipal courts to determine the validity of the agreements would have helped the Tribunal and the investor. After all, if the tribunal proceeded to make a final award in favour of the investor, recognition and enforcement could be refused if the competent court in Ghana found the subject matter (in this case the PPA) to be incapable of arbitration or as contrary to public policy in Ghana. Furthermore, an interim injunction cannot properly be described as "anti-arbitration" in the sense that it was not against arbitration and did not purport to "block" an arbitral remedy but merely to suspend or stop proceedings in the interim. The issue before the court was the arbitrability of the constitutional issue and so the procedural right to arbitrate had not been taken away by the injunction and competence of the Tribunal to adjudicate upon the investor-state dispute itself had not been questioned either.

On the issue of the Tribunal's competence to engage in constitutional interpretation, the Tribunal stated:⁹⁰

Arbitration tribunals are not infrequently confronted with the need to interpret and apply constitutional provisions relevant to the resolution of disputes submitted to them, just as they are normally required to interpret and apply treaties that are relevant to the disputes. There is nothing abnormal in exercising a judicial function necessary for the proper administration of justice. Hence the Tribunal does not consider that, in asserting its competence to determine its jurisdiction in this case, it is disregarding or in any way contradicting the force of Article 130 of the Constitution of Ghana. In the view of the Tribunal, the purpose of that provision ... is to establish the judicial supremacy of the Supreme Court in the organization and allocation of powers in the domestic context of Ghana. When there is a case that transcends national borders because of an arbitration agreement or some other legal commitment, such a provision becomes

⁹⁰ *BELG v Ghana*, above n 52, para 143.

qualified and not necessarily predominant. Otherwise ... any dispute involving some element of constitutional interpretation, or any dispute in which an objection is raised that there is such an element, which is not difficult to do, would automatically be excluded from international arbitration, in spite of the existence of a clear commitment by the Parties to subject the dispute to arbitration.

The Tribunal is right in its view that arbitral tribunals may interpret and apply constitutional provisions relevant to the resolution of disputes submitted to them for the “proper administration of justice.” However, this chapter disagrees with the Tribunal imposing on the State its views on what the position of domestic law is or should be when in fact the competent municipal courts have pronounced their position on what the law is in the particular circumstances. In the instant case, the issue was not whether the Tribunal could interpret certain constitutional provisions in its administration of justice but whether the Tribunal had the jurisdiction to determine the constitutionality of the PPA. The investment treaty regime that gives the Tribunal the power to settle the dispute does not empower it to make such a determination or to perform judicial functions reserved for municipal courts. Even if it had the jurisdiction under investment treaties to make findings on the validity of these agreements that could not have given it the power to engage in interpretation aimed at determining the *constitutionality* of the agreements as the Tribunal on merit did. In the circumstances, the Tribunal ought to have deferred the issue of the constitutionality of the PPA to the Court. It showed disrespect to the Court when without finding that the Court erred in its judgment or denied the BELG certain rights, it arrived at an alternative interpretation of the constitutionality of the PPA in disregard of criteria specified by the Court (see Section 3.3.4.2 below). It is also not the case, as claimed by the Tribunal, that if an objection is raised in an investment dispute involving issues of constitutional interpretation that will lead to *automatic exclusion* of ISDS. Any such objection will simply mean that the tribunal will have to stay proceedings to allow for the competent court to adjudicate upon the constitutional issue.

3.3.4.2 *Balkan Energy Limited v The Republic of Ghana II (BELG v Ghana II)*

In the Interim Award on jurisdiction analysed in Subsection 3.3.4.1, the Tribunal left the question of the substantive validity of the PPA to be decided on the merits.⁹¹ So in the Award on the Merits, the Tribunal, composed of the same panel as in the Interim Award, considered whether the PPA was valid and enforceable.⁹² Before this issue came before the Tribunal, the Supreme Court had already heard arguments in *The Attorney-General v Balkan Energy Ltd (Ghana)*⁹³ (*AG v BELG*) on whether the same PPA and the agreement to arbitrate each constituted an international business or economic transaction within the meaning of Article 181(5) of the Constitution.

⁹¹ Ibid para 138.

⁹² *Balkan Energy Limited (Ghana) v The Republic of Ghana*, UNCITRAL, PCA Case No. 2010-7, Award on the Merits, 1 April 2014 (*BELG v Ghana II*).

⁹³ *The Attorney-General v Balkan Energy Ltd (Ghana)*, Writ No. J6/1/2012, Judgment, 16 May 2012 (*AG v BELG*).

The Supreme Court held that a business or economic transaction is international if it is “major” with a “significant” foreign element or the parties to the transaction have a foreign nationality or reside in different countries or, in the case of companies, the place of their central management and control is outside Ghana.⁹⁴ The Court held that the analysis of Article 181(5) should focus on the substance of the transaction over its form.⁹⁵ In relation to the PPA, the Court observed that the transaction for the refurbishment of the barge involved a foreign investment by a US company in a power generation project for the supply of energy to Ghana that involved negotiations with the Government of Ghana. Although BELG was incorporated under the laws of Ghana, it was wholly owned by a US company. The directors were foreign, and the control and central management of the company were in foreign hands. The PPA not only provided for ISDS, but some of its clauses, such as the waiver of sovereign immunity, are usually contained in foreign investment transactions.⁹⁶

Based on these findings, the Supreme Court held that the PPA constituted “an international business transaction within the meaning of Article 181(5) of the Constitution.”⁹⁷ With respect to the ISDS clause in the PPA, the Court reasoned that such a clause in and of itself could not constitute an international business or economic transaction because ISDS is not an autonomous transaction, commercial in nature, which pertains to or impacts on the wealth and resources of a nation.

The Supreme Court had previously stated in *The Attorney-General v Faroe Atlantic Co Ltd*⁹⁸ (*AG v FACL*) that international business or economic transactions to which the Government is a party require parliamentary approval, so that any such transaction that has not been approved “cannot take effect.”⁹⁹ Because the Agreement was an international business or economic transaction and it did not receive parliamentary approval, it was unconstitutional and the company could not make any claims for compensation founded on a constitutionally void agreement.¹⁰⁰

Based on these Supreme Court precedents, the State argued that the investment tribunal in *BELG v Ghana II* must follow the Court’s determination that the PPA was an international business transaction and declare it invalid, because the decision of the Supreme Court is the final pronouncement on the issue of the invalidity of the PPA.¹⁰¹ The State argued that ‘the Tribunal is bound to follow the law of Ghana as applied by Ghana’s highest court’ and hold that the PPA was void *ab initio*.¹⁰² In the Opinion of the State, the Supreme Court “has original and exclusive jurisdiction over all matters relating to the enforcement or interpretation of the Constitution, pursuant to Article 130(1)(a) of the Constitution” and arbitral tribunals “do not have power to enforce or interpret national constitutions, except for considerations of

⁹⁴ Ibid at 34. 37.

⁹⁵ Ibid at 31.

⁹⁶ Ibid at 38-39.

⁹⁷ Ibid at 40-41.

⁹⁸ *AG v FACL*, above n 82.

⁹⁹ Ibid at 305.

¹⁰⁰ Ibid at 297.

¹⁰¹ *BELG v Ghana II*, above n 92, paras 360, 364-370

¹⁰² Ibid para 361

transnational public policy inapplicable in this case.”¹⁰³ The State also asserted that it is a ‘fundamental principle of international law and arbitration that arbitral tribunals should recognize and defer to judgments ... with force of *res judicata*.’¹⁰⁴ The State maintained that the decision of the Court “is not open to future determination”¹⁰⁵ and that in the instant case ‘[a] determination as to the validity of the PPA under the laws of Ghana has ... been made by the Supreme Court of Ghana.’¹⁰⁶ The decision of the Court on the validity of the PPA, the State maintained, is final given that BELG did not apply for review, a right it had under the Constitution and the Court’s rules of procedure.¹⁰⁷

The Tribunal disagreed with the state’s arguments and with the decision and reasoning of the Supreme Court in *AG v BELG*. It held that BELG had reasonable expectation that Ghana had accepted the validity of the PPA and was, therefore, entitled to rely on it and to expect the State would fulfil its obligations thereunder.¹⁰⁸

According to the Tribunal, the Court’s interpretation of Article 181(5) “was plausible but it is only one possible alternative.”¹⁰⁹ The Tribunal admitted that the Court had made an affirmative finding that the PPA constituted an international business transaction under Article 181(5).¹¹⁰ It agreed with the reasoning of the Court that the PPA embodied the existence of significant foreign components and contained several international components, such as the nature of the business and the related investments made, and the waiver of sovereign immunity.¹¹¹ The Tribunal also admitted that the Court “rightly considered the provisions” of paragraph 5 in the context of Article 181 as a whole, the main concern of which ... is that an agreement entered into by the Government for the granting of a loan out of public funds or public accounts must be authorized by Parliament.”¹¹²

Yet, when confronted with whether the PPA constituted an international business transaction within the meaning of Article 181(5) of the Constitution, the Tribunal determined that it was not. In *AG v BELG*, the Supreme Court had emphasised substance over form in determining whether a transaction was international and needed parliamentary approval. The Tribunal insisted on form over substance holding that, although the PPA involved foreign components as found by the Court, it was entered into by a company registered in Ghana and which had its principal place of business in Ghana. It held further that the production envisaged under the PPA was to supply the domestic electrical market and payments were to be made in Ghana, which suggested that “performance under the PPA was entirely a domestic business.”¹¹³ Disregarding the criteria specified by the Supreme Court, Tribunal upheld BELG’s arguments that it ‘was organized as a Ghanaian company in compliance with the applicable legislation’ and thus ‘the foreign ownership of the company or the foreign

¹⁰³ Ibid para 363.

¹⁰⁴ Ibid para 364.

¹⁰⁵ Ibid para 366

¹⁰⁶ Ibid para 366.

¹⁰⁷ Ibid para 367.

¹⁰⁸ Ibid para 397.

¹⁰⁹ Ibid para 387.

¹¹⁰ Ibid para 376.

¹¹¹ Ibid para 380.

¹¹² Ibid para 380.

¹¹³ Ibid para 388.

nationality of its executives should not necessarily be an obstacle to concluding' that it is not an international business transaction.¹¹⁴

According to the Tribunal, the identification of a number of internationally related components of the PPA made by the Attorney-General and accepted by the Supreme Court "do not alter the fact that the company was incorporated in Ghana as required by the Ghanaian legislation and regulations."¹¹⁵ It distinguished the case from "a situation in which a foreign company or an agency ... operates in a certain country without a proper legal registration therein."¹¹⁶

The Tribunal further reasoned that, since the Attorney-General had advised on the constitutionality of the PPA before it was executed, Ghana could not be heard to argue the contrary.¹¹⁷ Yet, the Supreme Court had held in *AG v BELG* that the certification of the Attorney-General as to whether a transaction constituted an international business or economic transaction "cannot be conclusive", since such certification has to be made "before a dispute has arisen between the Government and any party."¹¹⁸

In rejecting the Court's view, the Tribunal reasoned that the constitutionality of a contractual agreement between a party and the government "should not be subject to an after-the-event scrutiny when that agreement has been acknowledged and prosecuted by that very Government for years", especially so "if any uncertainties are due to the Government's failure to seek any necessary Parliamentary approval and to clarify the application of the constitutional provisions in question."¹¹⁹ Ultimately, the Tribunal decided:¹²⁰

with due deference and respect, after having considered the Supreme Court's judgment in detail, the Tribunal must depart from the conclusion reached by that Court. The Tribunal is convinced by the Claimant's views on the need to apply a test taking into account the "totality of the circumstances" as the guideline for determining whether a given agreement is subject to the Constitutional provisions discussed. It is not enough to identify the foreign components of the PPA, which as noted do exist, but also the fact that the PPA was entered into by a Ghanaian company registered in Ghana cannot be ignored.

The State was ordered to pay BELG USD12 million and interest thereon in consideration of works BELG commissioned at the power station and USD50,000 in respect of the arrest of one of BELG's officers. The investor was ordered to pay the amount of USD300,000 for its own breach of contract. Each party was to pay half of the costs of arbitration which totalled USD1 million.¹²¹

¹¹⁴ Ibid para 380.

¹¹⁵ Ibid para 383.

¹¹⁶ Ibid para 383.

¹¹⁷ Ibid para 393.

¹¹⁸ *AG V BELG*, above n 93, at 37.

¹¹⁹ *BELG v Ghana II*, above n 92, para 391.

¹²⁰ Ibid para 388.

¹²¹ Ibid para 642.

3.3.4.3 *Bankswitch Ghana Ltd v The Republic of Ghana (Bankswitch v Ghana)*

The constitutionality of an international agreement between the State and a foreign investor also came up for consideration by the Permanent Court of Arbitration in 2014 in *Bankswitch Ghana Ltd (Ghana) v The Republic of Ghana*.¹²² The State and Bankswitch, whose shareholders were domiciled in Switzerland, entered into the Ghana Customs, Excise and Preventive Service Secure Document Management System Agreement on 12 December 2007 (the Agreement).¹²³ Under the Agreement Bankswitch was to provide the State with intelligent price evaluation software to assist customs officers in the price evaluation process and electronic data interchange system to enable secure data interchange between customs, importers and carriers.¹²⁴

The Agreement provided in Clause 19 that the parties would endeavour to settle any and all disputes, differences or disagreements through conciliation. In the event that they could not settle such disputes or differences in that manner, the aggrieved party could refer that matter for arbitration under UNCITRAL Arbitration Rules.¹²⁵ Clause 22 of the Agreement specified the laws of Ghana as the governing laws.¹²⁶ Bankswitch instituted arbitration proceedings against the State alleging breach of the Agreement, specifically for stopping to make monthly down payments without any official notification to Bankswitch.¹²⁷

Among the legal issues considered by the Tribunal was whether the Agreement was valid and enforceable under the laws of Ghana, specifically whether the Agreement was an international business or economic agreement within the meaning of Article 181(5) of the Constitution. The State argued that pursuant to Article 181(1) and (2) of the Constitution, the Agreement could not come into operation unless and until it was approved by a resolution supported by the affirmative votes of a majority of all the Members of Parliament. As no such resolution was ever passed, the Agreement could not have come into operation, and is thus void and of no effect.¹²⁸ Bankswitch argued that the state officials had represented that the Agreement was valid and enforceable and that the State could not be heard to argue the contrary.¹²⁹ This is a fair and valid argument to the extent that Bankswitch did not have any other means of determining the validity of the Agreement. The argument is necessary to ensure that State officials do not enter into agreements in disregard of domestic legal norms and turn round to use their own non-compliance with the same norms to claim the unenforceability of agreements. However, the final decision on the constitutionality of acts of government officials resides in the courts so it cannot be said that the constitutionality of such representation or non-compliance can never be raised.

¹²² *Bankswitch Ghana Ltd (Ghana) v The Republic of Ghana*, PCA 118294, UNCITRAL, Award Save as to Costs, 11 April 2014 (*Bankswitch v Ghana*).

¹²³ *Ibid* para 2.1.

¹²⁴ *Ibid* para 6.1.

¹²⁵ *UNCITRAL Arbitration Rules*, GA Res 31/98, 1976 (as revised 2010), <<https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>> .

¹²⁶ *Bankswitch v Ghana*, above n 122, para 2.5.

¹²⁷ *Ibid* paras 6.83-6.84 and 7.2.

¹²⁸ *Ibid* para 9.11.6.

¹²⁹ *Ibid* paras 9.5.6 and 9.5.11-9.5.12 and 11.56.

The Tribunal applied the Supreme Court's decision in *AG v FACL* and determined whether the Agreement fell under the ambit of an international business or economic transaction that required the approval of Parliament.¹³⁰ The Tribunal found that Bankswitch was significantly owned by foreign shareholders and the Agreement provided for the development of a national customs system dealing with imports to Ghana which had numerous international elements. On the basis of these factors which the Tribunal found were additional to those present in *BELG v Ghana II*, the Tribunal concluded that the Agreement was an international business or economic transaction under Article 181(5) of the Constitution as interpreted by the Supreme Court of Ghana in *AG v BELG*.¹³¹ The Tribunal then considered whether Ghana was estopped from relying on this provision in defending its position.

The Tribunal observed that Ghanaian law adopts the doctrine of incorporation (dualism) and concluded that principles of customary international law are part of the laws of Ghana.¹³² Therefore, the Government's conduct must be measured against international standards and principles of customary international law.¹³³ Accordingly:¹³⁴

To avoid its international legal obligations based on its domestic law ... would be inconsistent with public international law. The Government cannot rely on its own Constitution to avoid the customary international law rule that a host State must act in good faith and in a manner that is consistent with international law principles when dealing with a foreign investor.

In stating this position, the Tribunal relied on the *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*¹³⁵ wherein the PCIJ stated that "a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force".¹³⁶ The Tribunal also relied on the *Case of Certain Norwegian Loans (France V. Norway)*.¹³⁷ In this case, Judge Lauterpacht stated that the "question of conformity of national legislation with international law, is a matter of international law. The notion that if a matter is governed by national law it is for that reason at the same time outside the sphere of international law is both novel and, if accepted, subversive of international law."¹³⁸

The Tribunal in *Bankswitch v Ghana* also found that the Government of Ghana made various representations as to the validity of the Agreement, including payment of invoices, down payments and express statements by the Attorney-General and Minister of Justice. These representations reasonably led Bankswitch to believe that the Agreement was valid

¹³⁰ Ibid para 11.27.

¹³¹ Ibid para 11.29 to 1134.

¹³² Ibid para 11.36 to 11.50 and 11.62-11.63.

¹³³ Ibid para 11.57.

¹³⁴ Ibid para 11.59.

¹³⁵ *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, 1932, PCIJ, Series A/B, No. 44.

¹³⁶ Ibid at 24.

¹³⁷ *Case of Certain Norwegian Loans (France V. Norway)*, Judgment of 6 July 1957, ICJ Reports (1957) 9, Separate Opinion of Judge Lauterpacht 34, <<http://www.icj-cij.org/docket/files/29/4781.pdf>>

¹³⁸ Ibid at 37.

and enforceable under Ghana law.¹³⁹ Moreover, it was for the government to submit the Agreement for parliamentary approval. Bankswitch reasonably relied on the representations to its detriment because it put significant investments into the project.¹⁴⁰ Under the *pacta sunt servanda* principle the State has an obligation to perform its obligations under the Agreement in good faith.¹⁴¹ The State was also found to have been estopped by “international public policy” from entering into an international agreement only to claim subsequently that the agreement is void for non-compliance with its internal law because a foreign entity had carried out substantial performance of its obligations.¹⁴² Ghana could not be heard then to claim that the Agreement is void and unenforceable under Article 181(5) of the Constitution.¹⁴³ Ghana was consequently found to have breached the Agreement¹⁴⁴ and an amount of GH¢197.4 million, (about USD87.2 million) was awarded in favour of Bankswitch.¹⁴⁵

The Tribunal's decision on whether internal law can be invoked to excuse the performance of a treaty was made *per incuriam* because it did not consider the current position of treaty law on the subject. The two cases the Tribunal relied on were decided in 1932 and 1957 respectively when the VCLT had not come into force. Article 46 of the VCLT permits a state to invoke the fact that its consent to be bound by a treaty was expressed “in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent” if the “violation was manifest and concerned a rule of its internal law of fundamental importance.” The ICJ in 2002 in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* recognised a constitution as an “internal law of fundamental importance” which a state may be able to invoke to excuse the performance of treaty obligations.¹⁴⁶

Although the Tribunal agreed with the decision of the Supreme Court as to the elements of an international business or economic transaction, the Tribunal's position seeks to render otiose the decision of the Court in *AG v FACL* that estoppel cannot override an unconstitutional contract or agreement and that damages cannot flow from breach of such a contract or agreement.¹⁴⁷ For the Tribunal, while the law of Ghana “may not allow for a party to plead estoppel to a constitutional question, there is no such prohibition in international law”.¹⁴⁸

The issue in *Bankswitch v Ghana* was whether the Agreement constituted an international economic or business transaction within the meaning of Article 181 of the Constitution and was invalid for lack of parliamentary approval. That determination had to be made under municipal law (the Constitution) and not investment treaties or the Agreement itself or under

¹³⁹ *Bankswitch v Ghana*, above n 122, paras 11.82-11.85.

¹⁴⁰ *Ibid* para 11.92-11.93.

¹⁴¹ *Ibid* paras 11.62-11.63.

¹⁴² *Ibid* paras 11.72-11.81.

¹⁴³ *Ibid* para 11.82.

¹⁴⁴ *Ibid* para 12.1.2.

¹⁴⁵ *Ibid* para 12.1.3.

¹⁴⁶ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)*, Judgment, (2002) ICJ Reports 303 paras 258-166.

¹⁴⁷ *AG V FACL*, above n 82, at 299-298, 302 and 310.

¹⁴⁸ *Bankswitch v Ghana*, above n 92, para 11.75 9.

any other principles of international law. Therefore, it is inaccurate for the Tribunal to hold that the arguments Ghana advanced about the invalidity of the Agreement under the Constitution were intended to enable Ghana to evade its international obligations under the Agreement. Indeed, like in *BELG v Ghana II*, this Tribunal ultimately resolved the issue of whether the Agreement was an international economic or business transaction by relying on the decisions of the Supreme Court (which were made under the Constitution) and directly on the Constitution itself. The issue was not one of conflict between an international obligation and municipal legal obligation for which the international obligation had to prevail over municipal legal obligation. As the Constitution was the only basis to determine the validity of the Agreement it is not wholly accurate to say that Ghana was invoking internal law to evade a treaty obligation. In the circumstances, Article 27 of the VCLT was inapplicable.

3.3.4.4 The Enforceability of the Arbitral Awards in Ghana

In every respect, the positions arrived at by the various tribunals are contrary to or different from the decisions arrived at by the Supreme Court. This was not the case of a national court being legally wrong, biased, incompetent or unjust. In making these interpretive decisions the tribunals in the two BELG cases and *Bankswitch v Ghana* were usurping the powers of the Supreme Court which under Article 130 of Constitution has exclusive original jurisdiction in matters relating to the enforcement or interpretation of the Constitution. For example, although the Tribunal held in *BELG v Ghana II* that the Court's interpretation of Article 181(5) of the Constitution was a "plausible ... alternative,"¹⁴⁹ the Tribunal failed to establish why (whether under municipal law or general international law) its approach to the interpretation of the constitutional provision (which is also an alternative) should prevail over that of the Supreme Court.

The Tribunal stated that it "could not presume to decide an issue of constitutional interpretation in Ghana when the highest courts of the country have considered the matter under their respective jurisdictions." Yet, this is exactly what the Tribunal did when it made a determination on the validity of the PPA under the Constitution. The issue there was not whether the Tribunal was entitled to exercise jurisdiction on the merits of the claim under arbitration agreement, but whether it had the competence to interpret the constitutionality of the PPA against the background of the Supreme Court's decision on the matter. This manifests the case of investment tribunals using their powers to protect foreign investment at the expense of the jurisdiction of municipal courts and the interest pursued by the State. As the tribunals did not find that the Supreme Court was legally wrong (a determination they could not make under the Constitution any way), there is no reason for their contrary positions to command more obedience and observance. Therefore, the decisions of the tribunals which are parallel to those of the Supreme Court should be treated as not having the legal effect of overruling or quashing the decision of the Court and they should not be recognised in Ghana.

¹⁴⁹ *BELG v Ghana II*, above n 92, para 387.

Under Articles 129 and 133 of the Constitution, the Supreme Court is the final court of appeal but the Court may review its decisions in the interest of the administration of justice. As BELG did not exercise this constitutional right of review, it would be legally impossible for the award in its favour to be enforced in Ghana. In *Amidu v The Attorney General*,¹⁵⁰ the Supreme Court held that:¹⁵¹

Clearly there should be less room to award a restitutionary remedy where ... breach is of a constitutional provision. A contract which breaches article 181(5) of the Constitution is null and void and therefore creates no rights. It should not be legitimate to evade this nullity by the grant of a restitutionary remedy. Although one accepts the cogency of the argument that there is need to avoid unjust enrichment to the State through its receipt of benefits it has not paid for, there is the higher order countervailing argument that the enforcement of the Constitution should not be undermined by allowing the State and its partners an avenue or opportunity for doing indirectly what it is constitutionally prohibited from doing directly. The supremacy of the Constitution in the hierarchy of legal norms in the legal system has to be preserved and jealously guarded.

So unless it is shown that the PPA and the Agreement did not need parliamentary approval even though they are international business or economic transactions within the meaning of Article 181(5) of the Constitution, the awards would be legally unenforceable in Ghana. Constitutionally, enforcement cannot be made without the Supreme Court having reviewed and departed from its previous decisions on the constitutional effect of a transaction that has not received parliamentary approval or its position on damages not being available in respect of unconstitutional agreements or contract. The State must not benefit from wrongs carried out by its officials and innocent private parties must not be made to suffer for the failures of state officials to duly perform their functions. So mechanisms have to be put in place within the domestic context to protect innocent parties who reasonably rely on the decisions of competent state officials to their detriment, especially if the matter on which advice is given is not manifestly contrary to the public policy of the State.

Under Articles 26 and 27 of the VCLT, a state is under obligation to perform a treaty it has entered into and it may not invoke the provisions of its internal law as justification for its failure to perform the treaty. However, under Article V(2)(b) of the New York Convention, the recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that the subject matter of the legal dispute is not capable of settlement by arbitration under the law of that country, or recognition or enforcement of the award would be contrary to the public policy of that country. The New York Convention also recognises in Article II(3) that the courts of a state which has agreed to ISDS have the competence to make a finding that an agreement to arbitrate "is null and void, inoperative or incapable of being performed." International public policy estoppel (whatever its content) cannot operate to prevent a state from invoking internal law as an

¹⁵⁰ *Amidu v The Attorney-General*, Writ No. JI/15/2012, Judgment 14 June 2013.

¹⁵¹ *Ibid* at 24.

excuse to not perform an international obligation because the VCLT expressly gives states this right. Policy cannot prevail over explicit statement of the law. Moreover, in *The Republic v High Court: Ex Parte; Attorney-General*,¹⁵² the Supreme Court held that “there is no obligation to enforce a foreign judgment which offends the local public policy of the forum state.”¹⁵³ These are legal grounds in international investment law on which the enforceability of the tribunals’ awards in favour of the companies can be impeached in Ghana. These policy grounds can be used to challenge any effort to enforce the decisions any forum outside Ghana.

The investors would have a case arguing under Article 46 of the VCLT that violation of the Constitution was not manifest. However, the discretion under the New York Convention for a state to not recognise or enforce an award if the subject matter is not capable of arbitration or is contrary to public policy is not predicated on whether the basis of the violation of internal law of fundamental importance or public policy was manifest. The Supreme Court has held in *The Republic v High Court: Ex Parte; Attorney-General* that “the independence of Ghanaian courts is subject to the received common law rules on conflict of laws relating to foreign judgments.”¹⁵⁴ Those rules in addition to statute require the recognition foreign judgments and thus “allow for the application of principle of *res judicata* for the purpose of proceedings properly brought in a Ghanaian court in which issues determined in a foreign court arise.”¹⁵⁵ So the investors could also argue that the State is estopped from re-litigating the constitutionality of the various agreements in Ghanaian courts. However, one of the requirements of issue estoppel is that “the foreign court must be a court of competent jurisdiction; and its decision must have been final and conclusive.”¹⁵⁶ As the issue of the constitutionality of the agreements is not within the jurisdiction of the arbitral tribunals they were not competent to make decisions on it and their decisions made thereof are not final and conclusive. So the State is still entitled to raise the issue of constitutionality of the agreements and their enforceability within the domestic context in light of public policy, the Constitution and New York Convention.

3.4 THE CONSTITUTION, GENERAL INTERNATIONAL LAW AND INTERNATIONAL ARBITRATION IN GHANA

3.4.1 The Local Remedies Rule in Ghana

In light of the analyses on the jurisdiction of municipal courts and the implications of ISDS for that jurisdiction treated in Section 3.3, the chapter argues that foreign investors must have recourse to and exhaust domestic remedies in municipal courts. Recourse to municipal courts is necessary to restore judicial sovereignty in Ghana and ensure that both the Government

¹⁵² *The Republic v High Court: Ex Parte; Attorney-General*, Case No J5/10/2013, 20 June 2013.

¹⁵³ *Ibid* at 23.

¹⁵⁴ *Ibid* at 15.

¹⁵⁵ *Ibid*.

¹⁵⁶ *Ibid* at 18.

and foreign investors do not run from their responsibility to abide by the laws of Ghana. Recourse to municipal courts and exhaustion of local remedies may be excused under customary international law on the basis that it would be futile to go to the courts in the first place. In such circumstances, international adjudicating bodies, including investment tribunals must perform their functions in a manner that balances competing interests.

Jan Paulson has stated that the exhaustion of local remedies requirement “has long been established as a general principle of international law.”¹⁵⁷ In *Certain Norwegian Loans Case*, the ICJ held that exhaustion of local remedies may only be excused where no effective remedy is available domestically.¹⁵⁸ The Constitution makes provision for the realisation of this principle in Article 125(1) where it states that the judiciary shall administer justice in Ghana.

Kojo Yelapaala argues that “violations of constitutionally guaranteed rights are less suitable for resolution by privately appointed arbitrators with no commitments to the relevant constitutional doctrine or culture.”¹⁵⁹ Indeed, arbitral tribunals in other cases involving Ghana have declined jurisdiction over issues involving human rights on the basis that it is not within their jurisdiction to settle disputes concerning human rights.¹⁶⁰ Moreover, the investment treaties of Ghana require compliance with constitutional and other municipal legal requirements before they could come into force as a matter of municipal law.¹⁶¹

The courts of Ghana have final jurisdiction over all persons and legal disputes in Ghana. The constitutional position on the jurisdiction of municipal courts does not make exception for the courts to be bypassed, except perhaps in cases involving the State and another state in which the issue of which state’s court will have jurisdiction will arise, thus calling for a neutral forum such as the ICJ. In cases involving a private party and the State and the use of public funds and resources over an issue that is justiciable and subject to the jurisdiction of the courts under the Constitution, relevant constitutional principles on accountability and separation of powers prohibit the removal of the courts from entertaining investment disputes including when they relate to constitutional issues and the public policy. Under Article 125(5) of the Constitution, Parliament may determine the jurisdiction of the courts. This provision requires Parliament to confer further jurisdiction on the courts in addition to the criminal and civil jurisdiction the Constitution confers on the courts. It does not empower Parliament to take away from the courts their existing jurisdiction, which includes jurisdiction over investment disputes involving the State as a party. So the Executive and Parliament cannot take away the State itself from the jurisdiction of the courts in matters involving foreign investment because recourse to municipal courts and exhaustion of local remedies are mandatory under the Constitution. They are also mandatory customary international law except where a case

¹⁵⁷ Jan Paulson, *Denial of Justice in International Law* (Cambridge University Press, 2005) at 102.

¹⁵⁸ *France v Norway*, above n 137, para 34.

¹⁵⁹ Kojo Yelapaala, “Fundamentalism in Public Health and Safety in Bilateral Investment Treaties Part II” (2008) 3(2) *Asian Journal of WTO & International Health Law and Policy* 465 at 479.

¹⁶⁰ *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, Award on Jurisdiction and Liability, 29 October 1989.

¹⁶¹ Ghana-China Investment Treaty, art 14; Ghana-Malaysia Investment Treaty, art 12; Ghana-Denmark Investment Treaty, art 14; and Ghana-Netherlands Investment Treaty, art 14

of futility is established.

International arbitration undermines the credibility, dignity, effectiveness and independence of the judiciary as guaranteed by Articles 125(1) and 127(2) of the Constitution by allowing foreign investors to challenge the decision of the courts of Ghana. By this mode of settling investment disputes, foreign tribunals are able to question the decisions of the courts of Ghana before tribunals the decisions of which may render judicial decisions of no effect, against the dictates of Articles 125, 129-133 and 140 of the Constitution which vest original, appellate, review and final judicial powers in the courts. Therefore, it is substantively unconstitutional to permit foreign investors to bypass the courts established under the Constitution. The Constitution does not recognise arbitral tribunals as having powers to hear appeals or entertain suits arising from the decisions of municipal courts. To the extent that an agreement to arbitrate ousts the courts of jurisdiction over investment disputes which are justiciable under the Constitution and denies the State the right to go to municipal courts over foreign investment disputes, it is substantively unconstitutional. The State cannot choose to protect foreign investment at no price to foreign investors when doing so is to be achieved at the expense of constitutional principles governing the exercise of the powers of government in the public interest.

The foregoing analysis is not to say that foreign investors should be left at the mercy and pleasure of the State. It is necessary to guarantee foreign investors reliable access to effective administration of justice in cases involving them. Todd Weiler argues that one of the foundational elements of the doctrine of denial of justice “is prohibition against nationality-based discrimination in the administration of justice.”¹⁶² It is said governments often denied foreigners adequate access to municipal courts.¹⁶³ Due process, which includes the right to be heard, is an important aspect of determining access to justice or denial of justice to foreigners, including foreign investors.¹⁶⁴ As Weiler puts it, “[e]njoying access to unbiased and procedurally fair dispute settlement mechanisms remains a fundamental requirement of international investment law.”¹⁶⁵ Jan Paulson also underscored the importance of access to justice when he stated that the “right of access to courts is fundamental and uncontroversial; its refusal the most obvious form of denial of justice. Legal rights would be illusory if there were no entitlement to a procedural mechanism to give them effect.”¹⁶⁶

Foreign investors have the right of access to justice in Ghana. Where this is not municipally available they can resort to international mechanisms to resolve their disputes with host states.¹⁶⁷ As held by the Inter-American Court of Human Rights in *Velasquez Rodriguez Case*, a “remedy must ... be effective - that is, capable of producing the result for

¹⁶² Todd Weiler, *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standard of Treatment in Historical Context* (Martinus Nijhoff Publishers, 2013) at 296.

¹⁶³ *Ibid* at 296.

¹⁶⁴ *Ibid* at 296-297.

¹⁶⁵ *Ibid* at 297.

¹⁶⁶ Paulson, *Denial of Justice*, above n 157, at 134.

¹⁶⁷ Alfred von Verdross, “Forbidden Treaties in International Law: Comments on Professor Garner’s Report on “The Law of Treaties” (1937) 31 *American Journal of International Law* 571 at 574.

which it was designed.”¹⁶⁸ If a remedy “is not adequate in a specific case, it obviously need not be exhausted.”¹⁶⁹ Foreign investors should be made to show that practically they do not have the right of access to justice within each municipal legal system, before recourse to ISDS can be legal or justified. Such a case could be made before a tribunal duly constituted by the state parties which is duly placed to decide on competing interests of private and public nature, and not under the current ISDS mechanism which is biased in favour of the private business entity.

Not requiring the exhaustion of local remedies, let alone complete removal of foreign investors from the jurisdiction of municipal courts without showing a lack of domestic remedies, cannot be justified in constitutional law and general international law. As Chittharanjan Amerasinghe succinctly stated, that “the celebrated ‘rule of local remedies’ is accepted as a customary rule of international law needs no proof today, as its basic existence and validity has not been questioned.”¹⁷⁰ In the *Interhandel Case*, the ICJ held that “[t]he rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law ... *A fortiori* the rule must be observed when domestic proceedings are pending.”¹⁷¹ In the *ELSI Case*,¹⁷² the ICJ ruled on the need to exhaust local remedies unless remedies do not exist. Some arbitral cases have recognised the need for foreign investors to resort to local remedies but did not require the investors to exhaust the remedies.¹⁷³ If local remedies are not resorted to at all or are resorted to but not exhausted, then claims of denial of justice or ineffectiveness of the judiciary cannot be validly and legitimately made. The Tribunal in *Chevron Corporation v Ecuador* underscored this point when it stated that:¹⁷⁴

in the consideration of whether the means provided by the State to assert claims and enforce rights are sufficiently ‘effective’ the Tribunal must consider whether a given claimant has done its part by properly using the means placed at its disposal. A failure to use these means may preclude recovery if it prevents a proper assessment of the ‘effectiveness’ of the system for asserting claims and enforcing rights.

A case is also made for recourse to and exhaustion of local remedies because the investment treaties of Ghana provide for initial amicable settlement of investment disputes between the State and investors upon failure of which they may go to arbitration. The ICJ held in the *ELSI Case* that where there has in fact been resort to a local remedy of some sort, and there remain other avenues which have the power to resolve the dispute in question, a different

¹⁶⁸ *Velasquez Rodriguez Case*, Judgment, 29 July 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988) para 66.

¹⁶⁹ *Ibid* para 64.

¹⁷⁰ Chittharanjan Felix Amerasinghe, *Local Remedies in International Law* (2edn, Cambridge University Press, 2004) at 3.

¹⁷¹ *Interhandel Case (Switzerland v United States of America)*, Judgment of 21 March 1959, ICJ Reports (1959) 6 at 27.

¹⁷² *Eletronica Siculo SPA (ELSI)*, Judgment, ICJ Reports 1989, p. 15 paras 55, 56 and 59 (ELSI Case).

¹⁷³ *Generation Ukraine, Inc. v Ukraine*, ICSID Case No ARB/00/9, Award, 16 September 2003, paras 20.30, 20.33; and *Jan de Nul NV Dredging International NV v. Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006 para 121.

¹⁷⁴ *Chevron Corporation v Ecuador*, UNCITRAL, Partial Award on the Merits, 30 March 2010, para 324.

forum cannot be used.¹⁷⁵ It has to be established by the litigant concerned that the remaining domestic remedies cannot guarantee the alien a fair and equitable solution to the dispute¹⁷⁶ or that there are “circumstances which do not permit any hope of redress to be placed in the use of those remedies”¹⁷⁷ before direct resort to an international dispute foreign can be justified. According to Sornarajah, the local remedies rule in customary international law “is a recognition of the judicial sovereignty of the state over issues that fall within its jurisdiction. It should not be lightly disregarded.”¹⁷⁸ So in customary international law, at the minimum, local remedies must be resorted to. Thus, while Ghana and foreign investors have the autonomy to agree to ISDS by arbitration, they can do so only within the bounds of the Constitution and customary international law.

Ursula Kriebaum has argued that since ISDS “was intended as an exclusive remedy for investment disputes between the investor and the host state,”¹⁷⁹ or to replace the vagaries of adjudication of investment claims against States by their own courts, requiring the exhaustion of local remedies will make ISDS “subsidiary” or an “alternative” to national court jurisdiction.¹⁸⁰ According to her, “[t]o require a preliminary determination of the legality of the domestic act by domestic courts as a requirement for the existence of a breach of a protection standard runs counter to the concept of international arbitration as an alternative to domestic litigation and an exclusive remedy.”¹⁸¹ Logically, this is an accurate argument. However, the historical origins of investment arbitration in post colonialism,¹⁸² and the very fact it has not been convincingly proven why municipal courts are capable of effectively adjudicating upon all disputes within national territories except foreign investment disputes, renders claims that national courts are not well placed to resolve investment disputes suspect and direct access to ISDS unjustified in the first place. Moreover, as the impartiality, efficiency, neutrality and transparency of investment tribunals are subject to question,¹⁸³ they cannot claim better legitimacy over investment disputes than national courts. Further, investment tribunals are not better placed to interpret municipal laws which are equally relevant in the resolution of investment disputes.¹⁸⁴

According to Michael Akehurst, there is a presumption of interpretation that “treaties are not intended to derogate from customary law.”¹⁸⁵ Such a presumption is plausible because treaties bind only the states parties to that treaty. Customary international law, however, binds

¹⁷⁵ *ELSI Case*, above n 172, para 63.

¹⁷⁶ Amerasinghe, *Local Remedies*, above n 170, at 179.

¹⁷⁷ *The Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland)* Reports of International Arbitral Awards (Vol XII, 6 March 1956) 83 at 119.

¹⁷⁸ Sornarajah, *Law on Foreign Investment*, above n 11, at 220.

¹⁷⁹ Ursula Kriebaum, “Local Remedies and the Standards for the Protection of Foreign Investment”, Christina Binder et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009) 417 at 457.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.* at 460.

¹⁸² Anghie, above n 43; and Miles, above n 43.

¹⁸³ Schneiderman, above n 14; Harten, above n 6; Born and Shenkman, above n 16, at 4.

¹⁸⁴ Hernando Diaz-Candia, “The Role of Municipal Laws in Investment Arbitration” in Andrea Bjorklund (ed), *Yearbook on International Investment Law and Policy 2012-2013* (Oxford University Press, 2014) 517.

¹⁸⁵ Michael Akehurst, “The Hierarchy of the Sources of International Law” (1975) 47(1) *British Yearbook of International Law* 273 at 275.

all states irrespective of their explicit consent and subject matter.¹⁸⁶ In this regard, it is settled in both customary international law and municipal law that municipal courts have jurisdiction within the domestic context to adjudicate upon legal disputes including those touching upon fundamental rights of citizens.¹⁸⁷ If the courts do not perform this function or are inhibited from doing so effectively, people will have no remedy against abuses. The law and practice is that it is the function of the courts to protect fundamental rights of citizens. This constitutes the basis of territorial jurisdiction. The jurisdiction of municipal courts over issues such as human rights and environment should be treated as a peremptory norm which states cannot contract out of or impair by the agreements they reach with other states or parties. A treaty that abolishes or impairs the jurisdiction of the courts with respect to the protection of fundamental rights of citizens conflicts with a peremptory norm of general international law on jurisdiction and is inconsistent with Article 53 of the VCLT. In this respect, general international law should prohibit states from reaching agreements that seek to abolish the jurisdiction of the courts or subject that jurisdiction to requirements that in effect render the jurisdiction of no use.

3.4.2 The Right of Access to Justice in Ghana

The arbitral cases involving Ghana highlight the fact that ISDS can render the decisions of national courts ineffectual, no matter the subject matter of legal dispute between the State and a foreign investor. That raises a different aspect of the conflict between international investment arbitration and the constitutional function of the national courts, namely the right of citizens to effective justice before municipal courts. By Article 35(3) of the Constitution, the “State shall promote just and reasonable access by all citizens to public facilities and services”. To assure open and transparent administration of justice, Article 126(1) provides that “the proceedings of every court shall be held in public” except “in the interest of public morality, public safety or public order.”

The Constitution, therefore, empowers the courts to exercise jurisdiction over all legal disputes in Ghana, including those relating to human rights and investment. The Supreme Court has interpreted 125 of the Constitution in *Sam v Attorney-General (No 2)* as intended “to assure Ghanaians *access to justice regardless of the subject matter or the identity of the defendant*, and to *vest final adjudicating power in the judiciary*, in the form of both its original and supervisory jurisdiction.”¹⁸⁸

The right of access to justice is thus clearly protected under the Constitution. This right, Francesco Francioni states, “is a synonym of judicial protection ... the right to seek a remedy

¹⁸⁶ Ralf Michaels and Joost Pauwelyn, “Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law” (2011-2012) 22 *Duke Journal of Comparative and International Law* 349 at 63.

¹⁸⁷ Malcolm Shaw, *International Law* (6edn, Cambridge University Press, 2008) at 652-664.

¹⁸⁸ *Sam v Attorney-General (No 2)* [1999-2000] 2 GLR 336 at 376.

before a court or tribunal which is constituted by law”.¹⁸⁹ Access to justice may also be defined to include “those remedies offered by competent public authorities, which are not courts of law but can nevertheless perform a dispute settlement function.”¹⁹⁰ It “is a *sine qua non* for any type of constitutional democracy, where the rule of law and the independence of the courts, rather than the benevolence of the ruler, provide the fundamental guarantees of individual rights and freedoms.”¹⁹¹ In United Kingdom case of *R v Lord Chancellor, ex Parte Lightfoot*,¹⁹² access to justice was held to be a constitutional right that forms part of “that special class of rights which ... everyone living in a democracy under the rule of law ought to enjoy.”¹⁹³

An assessment of the relationship between ISDS and access to justice is particularly important in light of the lack of integration of the right to regulate in the public interest into Ghana’s investment treaties and the fact that investment tribunals have not been designed with the promotion and protection of the public interest in mind.

Foreign investors depend on local administrative and regulatory support and goodwill to make profits when carrying out their business activities within the host country, or as Kojo Yelapaala puts it, to “scoop and ship” the resources of the host country for the benefit of themselves and their home countries.¹⁹⁴ The positive and negative effects of foreign investors’ activities are felt within the host country. Allowing foreign investors to use international arbitration to challenge regulation and accountability through the administration of justice in the host state can undermine the access of citizens to the municipal courts to protect their rights as guaranteed under the Constitution. If decisions of municipal courts can be challenged before investment tribunals, the ISDS mechanism can also deprive the courts of the power to effectively hold foreign investors accountable for their actions within the domestic context. How does Ghana’s Constitution respond to this situation?

In *Adofo v Attorney-General*,¹⁹⁵ the Supreme Court declared as unconstitutional a law that sought to deny former employees of Ghana Cocoa Board the right to institute court proceedings in relation to the termination of their employment for redundancy. The Court reasoned that since the law purported to oust the jurisdiction of the High Court, it conflicted with the right of access to justice under Article 140(1). According to the Court, per Justice Date-Bah:¹⁹⁶

The unimpeded access of individuals to the courts is a fundamental prerequisite to the full enjoyment of fundamental human rights. This court has a responsibility to preserve this access in

¹⁸⁹ Francesco Francioni, “The Right of Access to Justice under Customary International Law” in Francesco Francioni (ed), *Access to Justice as a Human Right* (Oxford University Press, 2007) 1 at 3.

¹⁹⁰ *Ibid* at 4.

¹⁹¹ Francesco Francioni, “Access to Justice, Denial of Justice and International Investment Law” (2009) 20(3) *European Journal of International Law* 729 at 730.

¹⁹² *R v Lord Chancellor, ex Parte Lightfoot* [1998] 4 All ER 764.

¹⁹³ *Ibid* at 773-774.

¹⁹⁴ Kojo Yelapaala “In Search of a Model Investment Law for Africa” (2006) 1 *African Development Bank Law and Development Review* 1. In “scoop and ship” investment operations, “the resources of the host country are extracted, loaded onto ships and exported for processing in other countries.” *Ibid* at 12.

¹⁹⁵ *Adofo v. Attorney-General* [2003-2005] 1 GLR 239.

¹⁹⁶ *Ibid* at 250.

the interest of good governance and constitutionalism. Unhampered access to the courts is an important element of the rule of law to which the Constitution ... is clearly committed. Protection of the rule of law is an important obligation of this court. Accordingly ... it is incompatible with the necessary intendment of chapter 5 of the Constitution ... for a statute to provide for a total ouster of the jurisdiction of the courts in relation to rights which would otherwise be justiciable. This is an interpretation of the Constitution ... which is intended to reflect a core value of the Constitution ... namely public accountability of the government and its agencies in the interest of democracy. Public accountability of the executive implies an obligation on the part of the executive (including its agencies), where any legal person shows just cause, to explain its performance and conduct and to remedy any legal wrong that the executive may have committed. This obligation would be eroded if the executive were able to insulate its conduct in particular areas involving justiciable rights from the scrutiny of the courts.

The Court observed a further reason for prohibiting the barring of access to the courts was that it brings the very function of the judiciary into question:¹⁹⁷

[T]he judiciary is given the role of a watch-dog against abuse or excess of power by the executive or the legislature. This function of the judiciary as a third pillar of responsible and accountable government would be undermined by the ouster of the jurisdiction of the courts in any matters relating to justiciable rights. In short, the constitutional vision immanent in the Constitution ... is inconsistent with the barring of access to the courts established under the Constitution.

All citizens must have meaningful access to the courts because:¹⁹⁸

constitutional arrangements such as those prevailing in Ghana cannot work to their purpose unless there is a court system in place to resolve matters impinging on the liberty of the individual and the powers of government. Implied in this proposition is the principle that there should be untrammelled access to the courts. It is this core value which informs the general provision in article 125(5) of the Constitution ... which proclaims that: 'The Judiciary shall have jurisdiction in all matters civil and criminal, including matters relating to this Constitution, and such other jurisdiction as Parliament may, by law, confer on it.' Provisions derogating from this central constitutional role of the judiciary and the courts are inherently incompatible with a core value of the Constitution.

The international human rights treaties to which Ghana is a party also recognise the right of access to justice. The African Charter on Human and Peoples' Rights¹⁹⁹ in Article 7 provides that every individual has the right to have their cause heard. The Universal Declaration of Human Rights²⁰⁰ in Article 8 guarantees everyone the right to an "effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the

¹⁹⁷ Ibid at 250-251.

¹⁹⁸ Ibid at 254.

¹⁹⁹ *African Charter on Human and Peoples' Rights* (adopted 27 June 1981, entered into force 21 October 1986).

²⁰⁰ *Universal Declaration of Human Rights* UN GA Res. 217 A(III), UN Doc. A/810 at 71 (adopted 10 December 1948).

constitution or by law.” The UN Committee on Economic, Social and Cultural Rights also identifies “the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable” as necessary for the enforcement of economic, social and cultural rights.²⁰¹

In 1937, Alfred Verdross articulated the central importance of municipal courts in national affairs when he argued as forbidden in international law a treaty “binding a state to reduce ... its organization of courts in such a way that it is no longer able to protect at all or in an inadequate manner the life, the liberty, the honor and the property of men on its territory” and such a treaty is *contra bonos mores* and void.²⁰² The point of emphasis here is not just about absolute prohibition of the court from performing their functions, but also the inhibition of the courts from effectively discharging their duties. It means for example that a treaty that gives rights to private parties that render the jurisdiction of the courts over those persons otiose when such jurisdiction is necessary to protect fundamental rights of citizens should be forbidden and must not binding in international law.

In order to ensure the protection of the national interests the courts must not only be available and accessible, they must be able to provide effective remedy without fear or favour. As the African Commission on Human and Peoples’ Rights stated in *Jawara v The Gambia*:²⁰³

A remedy is considered available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint.

The existence of a remedy must be sufficiently certain, not only in theory but also in practice, failing which it will lack the requisite accessibility and effectiveness.

According to Godfrey Musila, for a remedy to be considered “effective, substantive as well as procedural benchmarks must be met ... [D]omestic avenues of recourse adopted must ‘vindicate a right’ ... and ... the path to securing such remedial measures should not be riddled with procedural hindrances, whether calculated or incidental to an otherwise proper process.”²⁰⁴ The problem of ISDS for the courts as forums for access to justice is not that it makes courts substantively unavailable. In theory, the courts are always available even when a country is a party to an investment treaty that provides for ISDS.

The problem with ISDS, in practice, is that it is a procedural and substantive hindrance and impediment to access to justice. For example, a municipal court decision to protect human rights from the activities of foreign investors can be challenged by foreign investors if

²⁰¹ Committee on Economic, Cultural and Social Rights, *General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)*, adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, 14 December 1990, para 5.

²⁰² Verdross, ‘Forbidden Treaties,’ above n 167, at 574.

²⁰³ *Jawara v The Gambia*, (2000) AHRLR 107, paras 32 and 35.

²⁰⁴ Godfrey Musila, “The Right to an Effective remedy under the African Charter on Human and Peoples’ Rights” (2006) 6 *African Human Rights Law Journal* 442 at 446.

they feel that the value of their investments are or will be affected by a court's decision in breach of applicable standards of investment protection. This can compromise the effectiveness of the constitutional right of access to the courts. The experience of Ghana with ISDS supports the propositions advanced by Francioni that this mechanism "undercuts the authority of national courts to deal with investment disputes and makes the judicial protection that they may provide against harm caused by the investor subject to extensive review by compulsory international arbitration."²⁰⁵

3.5 CONCLUSION

Certain constitutional principles counsel against the inclusion of investor-state arbitration in international agreements and contracts. In *Apaloo v Electoral Commission*, Justice Bamford-Addo stated that "[t]he people of this country in 1992 promulgated for themselves a constitution, which vested sovereign power in the people and provided a democratic system of government based on certain fundamental principles."²⁰⁶ Those fundamental principles include the supremacy of the constitution,²⁰⁷ the fiduciary nature of the State and its agents and organs in relation to the people,²⁰⁸ probity and accountability,²⁰⁹ equality before law and freedom non-discrimination,²¹⁰ rule of law,²¹¹ separation of powers,²¹² independency of the judiciary,²¹³ finality of judicial decisions,²¹⁴ and open and transparent administration of justice.²¹⁵

The government is accountable to the people through municipal courts in which acts of government can be challenged. This is not the case for ISDS which can facilitate the government avoiding accountability since arbitral tribunals do not have jurisdiction over political and public policy issues and their processes promote secrecy and "fail to meet basic principles of transparency, consistency and due process common to [domestic] legal systems,"²¹⁶ which can conceal government misfeasance. These factors prevent the State from agreeing to investor-state arbitration in relation to matters that pertain to the interpretation and enforcement of the Constitution, the jurisdiction of the courts on matters of public importance and public interest regulation. Further, constitutional principles on the rule of law and accountability and effective administration of justice by municipal courts can be impaired if foreign investment disputes and foreign investors are allowed to bypass the jurisdiction of the courts, especially because foreign investment disputes always involve the State and public resources.

²⁰⁵ Francioni, 'Denial of Justice, above n 191, at 738.

²⁰⁶ *Apaloo v Electoral Commission*, [2001-2002] SCGLR 1 at 9-10.

²⁰⁷ *Constitution of the Republic of Ghana 1992*, art 1(1).

²⁰⁸ *Ibid* art 1(1).

²⁰⁹ *Ibid* preamble.

²¹⁰ *Ibid* art 17.

²¹¹ *Ibid* preamble and art 23 and 296.

²¹² *Ibid* art 57-92, 93-124 and 125-161.

²¹³ *Ibid* art 127.

²¹⁴ *Ibid* art 129.

²¹⁵ *Ibid* art 126(3).

²¹⁶ Elizabeth Evatt et al, *An Open Letter from Lawyers to the Negotiators of the Trans-Pacific Partnership Urging the Rejection of Investor-State Dispute Settlement* (8 May 2012).

A number of constitutional arguments therefore weigh heavily against arbitral tribunals entertaining investor-state suits that challenge judicial decisions in Ghana. First, arbitral tribunals do not have the jurisdiction to interpret the constitutionality of acts of government officials. The interpretation and enforcement of the Constitution are the exclusive preserve of the Supreme Court of Ghana.

Secondly, arbitral tribunals do not have appellate or review powers under both the Constitution and the investment treaties to entertain cases that the Supreme Court as the final appellate court has definitely and finally pronounced on. The jurisdiction of arbitral tribunals under investment treaties and other IIAs to resolve investment disputes does not empower them to adjudicate upon constitutional and public issues reserved for municipal courts under the Constitution. There is nothing in the investment treaties in substance and procedure that permits arbitral tribunals to hear and review final judicial decisions. It cannot be reasonably and necessarily implied from the power of investment tribunals to resolve investment disputes that they have the power to hear cases in which domestic courts have made final decisions. If foreign investors submit to the jurisdiction of the domestic courts, then they are bound by the decisions of the courts and may only appeal against those decisions where there is an explicit right of appeal. There does not exist a right of appeal in favour of foreign investors under the Constitution and the investment treaties of Ghana to foreign arbitral tribunals. The right to challenge a decision of a municipal court before an arbitral tribunal has to be shown to exist in substance and procedure. It cannot simply derive from the power of an arbitral tribunal to settle investment disputes set out in the substantive standards of investment treaties in a treaty consented to by the State.

Moreover, the decision of a domestic court involving a foreign investor is not the same thing as the measure giving rise to the dispute. Therefore, such a court decision cannot amount to a measure under the investment treaties and may be a subject of arbitration under customary international law on the basis that justice has not been done. Consequently, under existing investment treaties investment tribunals cannot entertain suits challenging the decisions of municipal courts without the exception under customary international law for recourse to an international adjudicating body having been established.

Thirdly, while private parties may choose to have their legal disputes resolved by other methods of dispute resolution, whether municipal or international, other than by the courts of Ghana, the State which derives its powers from the Constitution cannot do so. By Article 1(1) of the Constitution, the sovereignty of Ghana derives from the people and the powers of government are to be exercised in the name of the people and within constitutional limits. The mandate of the judiciary to administer justice in the name of the people and constitutional values on probity and accountability cannot work to their purposes if the State itself as fiduciary of the people can choose to say its own courts cannot entertain disputes involving it and private profit seeking organisations. If the State can choose to exclude the courts from entertaining such disputes, citizens can hardly hold the government to account. Under Article 2 of the Constitution, citizens can go to court to challenge the constitutionality of acts or

omissions of the government. This right can be weakened by ISDS. This is because if a citizen challenges a decision of the Government in relation to foreign investment and the court finds in favour of the citizen, such a finding can be subjected to investor-state arbitration if a foreign investor perceives that the value of its investment will be affected by a decision of the court.

As Chief Justice French of Australia advised, ISDS' "long-term implications for national judicial systems as an aspect of wider concerns about democratic governance should be considered when decisions are being made on whether to include any and if so what kinds of ISDS arbitral provisions in BITs."²¹⁷ For Ghana, the State must never include investor-state arbitration in future investment treaties and other international contracts and agreements if it is to reassert the authority of municipal courts and the integrity and finality of their decisions in matters involving foreign investors. The sovereignty of the State and exclusive jurisdiction of the courts over legal disputes arising in Ghana justifies reliance on municipal courts. Foreign investors like everybody else must be subject to the jurisdiction of the courts of host country in which they operate. There is no justifiable reason for a prior exemption of foreign investors from the jurisdiction of municipal courts without irrefutable evidence that the courts whose jurisdiction the investors are running away from are just incapable of resolving investment disputes. The historical reasons behind ISDS and general theories that say foreign investment leads to development without more can no longer be the justification for the investment treaty regime. A case could be made for ISDS if it were in a position to take into consideration the protection of social and community interests, as well to provide protection for foreign investors. However, the system as it exists now focuses on absolute protection of foreign investment sometimes, if not always, at the expense of communal interests. For this reason, Sornorajah argues that:²¹⁸

When coupled with wide concepts of taking, the compulsory unilateral right of recourse to arbitration that has been created by treaty regimes work to the detriment of social interests. There is, however, a need for machinery to settle purely contractual disputes. For an acceptable balance to be struck, it has to be conceded that certain types of disputes are inherently incapable of being settled through consensual processes such as arbitration. Tribunals such as ICSID and NAFTA tribunals are undemocratic tribunals, incapable of assessing the competing social and ethical interests. As commercial arbitral tribunals are wont to do, they pay attention only to the commercial considerations that are involved in the dispute. Their concern for the values of the international community is weaker than their concern for contractual sanctity and the securing of their next appointment to a tribunal on the basis of their display of commercial probity and their loyalty to the values of multinational business. There is a need to evolve a doctrine that requires consideration of environmental and human rights issues and ensures that this consideration is not enmeshed with doctrines that assert contractual concerns ... The issues raised here involve the interests not of the parties alone but of the society of the host states in which the foreign

²¹⁷ French, 'A Cut Above the Courts,' above n 2, at 3.

²¹⁸ Sornarajah, 'Clash of Globalizations', above n 3, at 9-10.

investment takes place and those of the wider international community. International tribunals, which can balance these issues adequately, should settle such issues.

The need to resort to the courts or other credible alternatives to ISDS cannot, therefore, be over-emphasised. Such an alternative exists in Ghana and could be adapted. The Alternative Dispute Resolution Act by section 1 exempts disputes touching on the national or public interest, the environment, and the enforcement and interpretation of the Constitution from being settled by alternative dispute resolution methods, including arbitration. This Act applies to domestic alternative dispute resolution and will be applicable to investment disputes only when the parties have not agreed to ISDS and are subsequently unable to agree on a mode of dispute resolution.²¹⁹ If the State wants to continue with ISDS, then to ensure that investment disputes that touch on public interest regulation are not arbitrable, explicit provision should be made in future investment treaties to that effect. It must also be specified that disputes arising from general regulation (that is regulation not specifically aimed at regulating the activities of foreign investors) and constitutional issues are not arbitrable. In any case only pure commercial disputes may be subject to arbitration. Future investment treaties must also be clear that decisions of the courts on public interest regulation and the interpretation and enforcement of the Constitution are not arbitrable.

Pure investment disputes, disputes arising from non-public interest direct governmental regulation of investors' activities, may be resolved either in the courts or by domestic investment arbitration under the Alternative Dispute Resolution Act. An appeal from the decision of the Alternative Dispute Resolution Centre established under the Act could be made to ISDS suitably adapted to handle issues involving public policy. In light of the above arguments on the customary international law position on recourse to municipal courts and exhaustion of local remedies and the constitutionality of ISDS, the right to arbitrate under existing investment treaties accrues only when a case has been made that domestic remedies are not available or ineffective prior to resort to ISDS. Then a case can be justified to have recourse international arbitration which in resolving disputes must take competing interests into consideration.

²¹⁹ Ghana Investment Promotion Centre Act 2013, s 33(3).

THE IMPLICATIONS OF INVESTMENT TREATIES FOR ENVIRONMENTAL PROTECTION IN GHANA*

4.1 INTRODUCTION

Human beings 'have evolved within, depend on and are part of the world of nature.'¹ In the *Legality of the Threat of Use of Nuclear Weapons Case*, the ICJ stated that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn."² Melisa Thorne expressed a similar view when she stated:³

Human life and the human environment are inseparable. To survive, humans must have air to breathe, water to drink, food to eat, and a place in which to live and sleep. If these elements become polluted, contaminated, or are eliminated or destroyed, life will cease to exist. To protect human life ... environmental life support system must be maintained and protected.

The importance of the environment for human health, livelihood and sustainable development has also been well articulated in international environmental treaties and instruments, including the Rio Declaration on Environment and Development (Rio Declaration).⁴ It states that human beings should be at the centre of sustainable development, which means they should be entitled to a healthy and productive life in harmony with nature.⁵ The right to development must be fulfilled in a manner that equitably meets developmental and environmental needs of present and future generations⁶ and states must enact environmental legislation on liability and compensation for those who suffer from pollution and other environmental damage.⁷

At the national level, Article 36(9) of the Constitution of Ghana says the State "shall take appropriate measures needed to protect and safeguard the national environment for posterity; and shall seek co-operation with other states and bodies for purposes of protecting the wider

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¹ M. Holdgate, *From Care to Action: Making a Sustainable Future* (Earthscan, 1996) at 1 quoted in Duncan French, *International Law and Policy of Sustainable Development* (Manchester University Press, 2005) at 10.

² *Legality of the Threat of Use of Nuclear Weapons Case*, ICJ Reports 1996, 226 para 29.

³ Melissa Thorne, "Establishing Environment as a Human Right" (1990-1991) 19 *Denver Journal of International Law and Policy* 301.

⁴ United Nations Conference on Environment and Development, *Report of the United Nations Conference on Environment and Development* (12 August 1992), <<http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>>

⁵ *Ibid* Principle 1.

⁶ *Ibid* Principle 3.

⁷ *Ibid* Principles 11 and 13.

international environment for mankind.” This duty to protect environment for posterity is a constitutional recognition of a customary land law principle stated in Justice N. A. Ollenu’s *Principles of Customary Land Law in Ghana* that ‘land belongs to a vast family of whom many are dead, a few are living and countless host are still unborn.’⁸ Legally, this duty is fulfilled through the enactment and enforcement of environmental laws and regulations. As seen already, Ghana is also a party to a number of investment treaties which are intended to provide the legal protection for foreign investment. Ghana must live up to the duty to protect the environment and at the same time fulfil investment treaty obligations. However, as the Commission for Environmental Cooperation of North America (CECNA) has argued, environmental regulations may run afoul of investment treaties.⁹

Both municipal and international environmental law depend for their effectiveness on domestic implementation. However, Philippe Sands and other scholars point out that one of the challenges facing environmental law is the difficulty of enforcement, particularly where environmental protection objectives come into conflict with economic interests.¹⁰ Business activities can have harmful effects on the environment which may call for state intervention. Obsolete and hazardous technology exported for investment purposes can have harmful effects on the environment and life.¹¹ The World Commission on Environment and Development (WCED) suggested as far back as 1987 that “economics and ecology can interact destructively and trip into disaster.”¹² The unending disputes in Ogoni region in Nigeria provide an excellent example of how the people of a host state have to bear environmental degradation caused largely by foreign oil exploration and exploitation companies while the profits go to the foreign business community.¹³ Thus, while economic ideas and tools can contribute to the achievement of environmental protection and safety goals, there can equally be tension between environmental goals and business operations.¹⁴

The CECNA also points out that conflict with investment treaties is one of the reasons both municipal and international environmental law rules suffer from inadequate domestic implementation.¹⁵ Writing on the potential for international investment law to limit environmental regulation, the US Trade Representative stated:¹⁶

⁸ NA Ollenu, *Principles of Customary Land Law in Ghana* (Sweet and Maxwell, 1962 at 4.

⁹ Commission for Environmental Cooperation of North America, *Free Trade and the Environment: The Picture Becomes Clearer* (2002) at v, <<http://www3.cec.org/islandora/en/item/1871-free-trade-and-environment-picture-becomes-clearer-en.pdf>>

¹⁰ Philippe Sands et al, *Principles of International Environmental Law* (3ed edn, Cambridge University Press, 2012) at 15.

¹¹ M Sornarajah, *The International Law on Foreign Investment* (3edn, Cambridge University Press, 2010) at 57, 109 and 110.

¹² World Commission on Environment and Development, *Our Common Future: Report of the World Commission on Environment and Development* (4 August 1987) Chapter 1, paras 18-19.

¹³ Sornarajah, above n 11, at 79.

¹⁴ James R May and J Patrick Kelly, “The Environment and International Society : Issues, Concepts, and Context” in Shawkat Alam et al (eds), *Routledge Handbook of International Environmental Law* (Routledge, London, 2013) 13 at 18.

¹⁵ Sands et al, above n 10, at 15-16.

¹⁶ United States Trade Representative, *Final Environmental Review of the Dominican Republic – Central America – United States Free Trade Agreement* (February 2005) at 29, <<http://www.state.gov/documents/organization/131461.pdf>>

In the Trade Act, Congress recognized that securing a stable investment climate and a level playing field for U.S. investment abroad is an important objective of U.S. trade policy. By fostering economic growth and job creation, investment can bring important benefits, including potential benefits to the environment: as wealth grows and poverty decreases, more resources become available for environmental protection, with potential benefits for developing countries, particularly as they develop constituencies in favor of increased environmental protection. Congress, however, also gave weight to concerns that arbitral claims brought by investors against governments (through “investor-State” arbitration) could be used inappropriately to challenge U.S. domestic laws and regulations, including those concerning the environment.

This chapter explores the issue of foreign investment and environmental protection in Ghana and the potential effects of Ghana’s investment treaties on environmental regulation.¹⁷ Is it the case, as CECNA suggests, that those treaties could impair the ability or narrow the regulatory autonomy of the Government of Ghana to take measures to protect the environment? Does the constitutional and general international law duty of the State to protect the environment limit the investment treaty obligations the State can undertake? How should conflict between the legal duty to protect the environment and compliance with investment treaty obligations be addressed?

The potential limitations of investment treaties on environmental regulation are particularly important for Ghana. Environmental degradation occasioned by the activities of businesses, especially the Ghanaian experience in the mining industry, calls for environmental regulation by the State which may result in conflict with investment treaty obligations if an investment is adversely affected by the regulation. Ghana’s investment treaties do not make exceptions for public interest regulation, such as environmental protection. They require the payment of compensation to foreign investors where the adverse effects of governmental regulation on an investment are considered an expropriation, whether directly or indirectly and even if regulation is for public purpose.

This chapter focuses specifically on the potential for investment treaties to limit the adoption of environmental protection measures, such as the enactment and enforcement of environmental legislation. It shows that key aspects of the legal regime for environmental protection in Ghana, such as the cancellation and termination of environmental permits and regulation of environmental hazardous substances, could be challenged by foreign investors as breaching Ghana’s investment treaties.

Because investment treaties could compromise the constitutional and international environmental law duty of Ghana to protect the environment for present and future generations, that duty places legal limitations on the investment treaties obligations the State can assume. The State does not have the competence to conclude investment treaties that explicitly and directly prevent it from adopting environmental protection measures, for example by requiring the payment of compensation in situations where the Constitution and

¹⁷ See Abba Kolo and Thomas Waelde, “Environmental Regulation, Investment Protection and “Regulatory Taking” in *International Law*” (2001) 50(4) *International and Comparative Law Quarterly* 811.

municipal environmental law require the adoption of the environmental measures in question and prohibit the payment of compensation to affected individuals.

The chapter is organised as follows. Section 4.2 deals with the state of the environment and the relationship between foreign investment and environmental degradation in Ghana. It shows that the human health and economic importance of the environment and the level of environmental damage in Ghana (occasioned in part by the activities of both local and foreign mining companies) justify the State's active role in the protection of the environment.

Section 4.3 addresses the right to a safe and healthy environment and shows that Ghana's Constitution, domestic legislation and international environmental treaties impose the legal duty on the State to protect the environment.

Section 4.4 reviews and interprets arbitral case law on environmental regulation so as to assess the legal implications of investment treaties for environmental protection in Ghana. It focuses on how the standards of investment protection by treaty, such as national treatment, expropriation, fair and equitable treatment, and full protection and security, could limit the adoption and enforcement of environmental legislation. It argues that standards of investment can restrain the State from adopting measures to protect the environment.

Section 4.5 assesses the constitutional and general international law duty to protect the environment and its implications for the making and interpretation of investment treaties. It argues that the duty of the State under the Constitution and general international law with respect to environmental protection must guide the State in the making of investment treaties. It equally argues that this duty should inform the interpretation of investment treaties.

4.2 THE IMPACTS OF FOREIGN INVESTMENT ON ENVIRONMENT AND HUMAN RIGHTS IN GHANA

Environmental protection is important for Ghana because its ecosystems support human livelihoods and the economy generally. Natural resources such as the soils, water, minerals, forests and wildlife are essential for the productive sectors of the economy of Ghana. The majority of Ghana's working population depends on farming activities for their livelihoods.¹⁸ Agriculture contributes to food security, provides raw materials for local industries, generates foreign exchange, and provides employment and incomes for most of the population, especially those living in the rural areas. Around eleven million of Ghana's twenty-five million people live in forest areas, and about two thirds of Ghanaians are supported by forest-related activities.¹⁹

Yet Ghana, like most other African countries, has suffered from excessive exploitation of its natural resources (especially in the extractive industry) to the detriment of ordinary people who should benefit from the natural resources in the very environments in which they are

¹⁸ Ghana Statistical Service, *2010 Population & Housing Census National Analytical Report* (May 2013) at 287 and 400.

¹⁹ Republic of Ghana, *Growth and Poverty Reduction Strategy (GPRS II) (2006 – 2009)* (National Development Planning Commission, November 2005) at 31.

born, bred and lead their lives.²⁰ Investment in Ghana's mining industry is largely held by foreign investors.²¹ Environmental degradation, defined as deleterious and undesirable change or disturbance to the environment,²² is a major impediment to increased productivity and sustainability in Ghana's agriculture sector.²³ The United Nations Development Programme (UNDP) reports that environmental degradation affects people's health through impacts on physical and social environments. The economic costs of those impacts, including malnutrition, are also large.²⁴ The UNDP reports that over 1000 deaths in about one million people occur in Ghana due to environmental causes.²⁵ Many other studies depict a similar picture of the state of the environment in Ghana.²⁶

Environmental impacts are of particular significance in the mining industry, which, as stated, is largely owned by foreign investors.²⁷ A study conducted by Ghana's Commission on Human Rights and Administrative Justice (Commission on Human Rights) in mining communities in 2008 evidences environmental degradation from mining operations.²⁸ The mining community of Anyinam alleged that air was polluted with dust, chemicals and smoke and that a pungent smelly effluent was discharged into the community from an ore treatment plant. Residents further claimed that toxic chemicals from a sulphur treatment plant affected the health of community members.²⁹ Skin diseases were attributed to the release of poisonous gas into the atmosphere from a ventilation shaft located in the middle of the community. The community accused AngloGold Ashanti Ltd (AngloGold) of entrenching poverty, since the chemicals the company used for mining resulted in infertile and contaminated land and the destruction of crops due to surface mining.³⁰ The Commission found that the affected communities received "highly inadequate compensation from the company for destroyed farms and crops."³¹

The Commission's study shows the effect of mining on the environment has negative consequences for human rights in Ghana. It obtained sufficient evidence to conclude that "there has been widespread pollution of communities' water sources".³² Rivers and streams which previously served as sources of water for the communities dried up having "been

²⁰ International Union for the Conservation of Nature, *An Introduction to African Convention on Conservation of Nature and Natural Resources* (IUCN Environmental Policy and Law Paper No. 56, 2004), <<https://portals.iucn.org/library/efiles/edocs/EPLP-056.pdf>>

²¹ Joseph Ayee, Tina Søreide, G P Shukla and Tuan Minh Le, "Political Economy of the Mining Sector in Ghana" (World Bank Policy Research Working Paper 5730, July 2011), <<http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-5730>>

²² D L Ambrose Johnson et al "Meanings of Environmental Terms" (1997) 26(3) *Journal of Environmental Quality* 581 at 584.

²³ *Growth and Poverty Reduction Strategy*, above n 19, at 33.

²⁴ UNDP, *Human Development Report 2011* (Palgrave Macmillan, 2011) at 51.

²⁵ *Ibid.*

²⁶ Environmental Protection Agency, *Ghana Environment Sector Study* (February, 2007) at 4; Republic of Ghana, *The Coordinated Programme of Economic and Social Development Policies, 2010 – 2016: An Agenda for Shared Growth and Accelerated Development for a Better Ghana* (December 2010) at 21; World Bank, *Ghana: Country Environmental Analysis* (Report No. 36985-GH, 2 November 2007) at para 13; World Bank, *The Republic of Ghana: Selected Policy Issues* (Report No. 69622-GH, June 30, 2012) at para 72..

²⁷ UNCTAD, *Investment Policy Review: Ghana* (United Nations, June 2003) at 7.

²⁸ Commission on Human Rights and Administrative Justice, *The State of Human Rights in Mining Communities in Ghana* (DPI Print Ltd, 2008).

²⁹ *Ibid* at 35.

³⁰ *Ibid* at 38.

³¹ *Ibid* at 37.

³² *Ibid* at 172.

polluted, destroyed due to mining activities or diverted for company use.”³³ According to the Commission, tests of water samples from twenty-two out of twenty-eight mining communities showed that at least two water quality parameters with health implications were present, in concentrations significantly higher than the World Health Organisation maximum allowable limits for drinking water.³⁴ Mining companies provided alternative sources of water, such as pipes, boreholes and hand-dug wells for the affected communities. However, those alternatives were left to be maintained or replaced by communities who lack the technology, know-how and financial resources to do so. The alternatives sources of water were malfunctioning with some of the facilities unsafe for drinking.³⁵

The Commission concluded that serious health, social and economic consequences of mining activities needed to be addressed “with legislative reforms.”³⁶ It called upon the Government to review the Minerals and Mining Act 2006 (Act 703) to give better protection to people living in mining areas. It also recommended that given the “widespread poverty in the mining communities and the changing economy of food crop production ... the Government should not grant or renew any mineral rights until a cost benefit analysis of the mining industry has been done.”³⁷ Those findings on mining and human rights support an earlier study conducted by the World Bank in 2007 which recommended strengthening the capacity of the regulatory institutions to efficiently manage contracts with the private operators and to better monitor the quality of water provision by secondary providers across the distribution chain.³⁸

According to the Environmental Protection Agency of Ghana (EPA), a significant number of major environmental problems, including environmental degradation, pollution of water bodies, deforestation, poor waste management, and risks from chemical use, result from the activities of mining companies.³⁹ The EPA environmental rating of mining companies for 2012 shows that the emissions and effluents of AngloGold exceeded the environmental quality standards for discharging toxics into the environment and that on-site hazardous waste management practices caused serious risk to physical and human environments.⁴⁰ Other companies such as Ghana Bauxite Company Ltd and Prestea Sankofa Gold Ltd failed to comply with legal requirements on environmental permitting by not having a valid permit or a certificate as required by the Environmental Assessment Regulations 1999 (LI 1652).⁴¹

The EPA also found that a large number of companies had poor environmental performance in terms of waste management, toxic releases, and monitoring and reporting. Of the sixteen mining companies rated on environmental performance, only two were in full compliance with environmental standards, applied best practices and were responsive to

³³ Ibid at 174

³⁴ Ibid at 174-175.

³⁵ Ibid at 174.

³⁶ Ibid at 193-194.

³⁷ Ibid at 194.

³⁸ World Bank, *Environmental Analysis*, above n 26, at 68-69.

³⁹ Environmental Protection Agency, *Ghana: State of Environment Report 2004* (April 2005) at 3

⁴⁰ EPA, *AKOBEN Environmental Rating and Disclosure Programme*, <<http://www.epaghanaakoben.org/>>. For the rating of mining companies see <<http://www.epaghanaakoben.org/rating/listmines2>>

⁴¹ Ibid.

public complaints. Five of the sixteen were rated as unsatisfactory – that is, not in compliance with environmental standards. Six were rated as posing serious risks to environmental quality.⁴² The EPA further found a majority of companies (foreign and domestic) in the manufacturing industry, including timber and chemicals, did not comply with best practices on environmental protection. Most of them operated without the requisite environmental permits.⁴³ The EPA's rating leads to the conclusion that most mining companies operated largely without complying with environmental quality laws, regulations and guidelines.

These environmental issues and their serious implications for communities' health and livelihoods require governmental intervention in making and implementing environmental laws, policies and guidelines. In 2012, the World Bank suggested that Ghana "urgently" needed "to use the presence of the mining industry to induce growth and sustainable benefits, while minimizing environmental impacts".⁴⁴ The Bank called on the Government to carry out a comprehensive cost-benefit analysis of the sector, including fiscal benefits and non-fiscal benefits, and potential social and environmental costs.⁴⁵ The Commission on Human Rights has suggested that a meaningful right to a healthy environment in mining communities requires substantive environmental standards to regulate the activities of companies undertaking large scale surface mining that causes pollution and environmental degradation.⁴⁶ The Commission recommended that mining companies pay fully for the environmental costs of their operations. It also recommended that penalties for failure to pay compensation to communities and individuals adversely affected by bad environmental practices by mining companies should be introduced and strictly enforced.⁴⁷

A failure of regulation to protect the environment would require capital resources to be expended in the future to redress losses arising from environmental damage. Environmental protection is thus necessary to avoid or obviate the social and economic costs of environmental damage. Environmental regulation and liability rules should specify the grounds and procedures for the grant or revocation of environmental permits or certificates, requirements for environmental impact assessment and the imposition of fines to remedy environmental damage.⁴⁸ Environmental protection by legislation makes the state, not the market, the arbiter and protector of the public interest.⁴⁹ This is consistent with Ghana's Constitution and international environmental treaties.

⁴² Ibid.

⁴³ Environmental Protection Agency, Ghana AKOBEN Programme, <<http://www.epaghanaakoben.org/rating/listmanufacturers2>>

⁴⁴ World Bank, *Ghana Selected Policy Issues*, above n 26, para 104.

⁴⁵ Ibid para 110.

⁴⁶ *The State of Human Rights in Mining Communities in Ghana*, above n 28, at 178-179.

⁴⁷ Ibid at 178-179.

⁴⁸ Sands et al, above n 10, at 700.

⁴⁹ John Kenneth Galbraith, *Economics and the Public Purpose* (Deutsch, 1974) at 289.

4.3 THE ENVIRONMENTAL RIGHTS AND DUTIES IN GHANA

4.3.1 Environmental Rights and Duty of the State under the Constitution

Environmental rights are broadly divided into two categories: ⁵⁰ substantive environmental rights, which relate to the right to a healthy environment itself; and procedural environmental rights, which include the right to information, public participation and access to environmental justice.⁵¹ Domestic constitutions express environmental goals in a number of ways, including as a policy directive, a procedural right, an explicit substantive right or as an implicit substantive right derived from another enumerated right.⁵² The Constitution of Kenya, for example, provides for the substantive and procedural right to a clean and healthy environment and access to environmental justice by giving the right to all persons to enforce this right.⁵³

Under Article 1(2) of the Constitution of Ghana, citizens have the procedural right to enforce the Constitution by going to court to ensure state institutions and individuals act in accordance with the Constitution. There is a substantive duty on the State in Article 36(9) to protect and safeguard the environment. Citizens also have a duty under Article 40(k) to protect and safeguard the environment. Article 257(6) vests minerals in the President and Article 269(1) requires the Fishery Commission, Forestry Commission and Minerals Commission to regulate and manage the utilisation of natural resources such as fisheries, forestry and minerals. The EPA is the primary institution responsible for environmental protection in Ghana.

The duty to protect the environment by “appropriate measures” in Article 36(9) implies a recognition of the right to a clean and safe environment in Ghana or, at least, the importance of the environment for some other reasons, such as for farming and health. This chapter argues that a measure is “appropriate” if it effectively meets environmental protection objectives. The right to life, property, to work under “satisfactory and healthy conditions” and health recognised in Articles 13, 18, 24 and 30 of the Constitution reinforce that substantive human right to a safe and healthy environment in Ghana.

Article 295(1) defines the public interest as “any right or advantage which enures or is intended to enure to the benefit generally of the whole of the people of Ghana”. In *Dey v The Republic*, Justice Forster decided the public interest “connotes those rights or advantages in things that are public *juris* and therefore considered as vested in the public, the entire State or community and not restricted to the dominion of a particular private person.”⁵⁴ Justice Forster conceived of such public interest as consisting of “a clean environment, the unfettered right to

⁵⁰ Stephen Turner, *A Global Environmental Right* (Routledge, 2014) at 24-28.

⁵¹ Riccardo Pavoni, “Environmental Rights, Sustainable Development, and Investor-State Case Law: A Critical Appraisal” in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 255 at 256-257.

⁵² May and Kelly, above n 14, at 604.

⁵³ Y. K. Brian Sang, “Tending Towards Greater Eco-Protection in Kenya: Public Interest Environmental Litigation and Its Prospects Within the New Constitutional Order” (2013) 57(1) *Journal of African Law* 29.

⁵⁴ *Dey v The Republic* [1997-1998] 2 GLR 919 at 927.

enjoy the beaches and the greenery”. Accordingly, he concluded that various offences including “dumping of toxic matter” were “clearly offences committed against the public interest.”⁵⁵

4.3.2 Environmental Rights and Duty of the State under General International Law

Human rights have emerged as an important area of discourse in international environmental law. Fundamental human rights, such as the right to life, health, food, water, and indeed property, cannot be achieved without adequate environmental conditions of clean water, air and land.⁵⁶ The UN Conference on the Human Environment proclaimed that the environment is essential to human “well-being and to the enjoyment of basic human rights – even the right to life itself.”⁵⁷ There is a fundamental right of human beings “to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.”⁵⁸ For this reason, humankind bears “a solemn responsibility to protect and improve the environment for present and future generations.”⁵⁹

Ghana is party to a large number of international environmental conventions and international human rights treaties which strengthen environmental rights under the Constitution.⁶⁰ One is the African Charter on Human and Peoples’ Rights,⁶¹ which states in Article 24 that “[a]ll peoples shall have the right to a general satisfactory environment favourable to their development.”

In *Social and Economic Rights Action Centre v Nigeria*,⁶² the African Commission on Human and Peoples’ Rights (African Commission) interpreted Article 24 of the African Charter. In this case, the complainants alleged that the Government of Nigeria had been directly involved in oil production through a state oil company, which was the majority shareholder in a consortium with Shell Petroleum Development Corporation. The complainants argued that the oil operations caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People. The oil consortium, the complainants argued, exploited oil reserves in Ogoniland with no regard for the health and environment of the local communities. Toxic wastes were discharged into the environment and local waterways in violation of applicable international environmental standards. The consortium did not maintain its facilities which led to spills in the proximity of villages. The resulting contamination of water, soil and air had health impacts, including skin infections, gastrointestinal and respiratory ailments, increased risk of cancers and

⁵⁵ Ibid.

⁵⁶ May and Kelly, above n 14, at 21; and Turner, above n 50, at 18-22.

⁵⁷ United Nations Environmental Programme, *Declaration of the United Nations Conference on the Human Environment* (16 June 1972), preamble at para 1.

⁵⁸ Ibid Principle 1.

⁵⁹ Ibid.

⁶⁰ Environmental Protection Agency, *List of International Conventions on the Environment in which Ghana Participated*, <<http://www.epa.gov.gh/ghanalex/multilateral/index.html>>

⁶¹ adopted 27 June 1981, entry into force 21 1986.

⁶² *Social and Economic Rights Action Centre v Nigeria*, African Commission on Human and Peoples’ Rights, Comm. No. 155/96 (2001).

neurological and reproductive problems. The complainants alleged that the Nigerian Government violated the right to health and the right to healthy environment by failing to fulfil the minimum duties under Articles 16 and 24 of the African Charter.⁶³

The African Commission held that the Government of Nigeria did not comply with Articles 16 and 24 of the Charter because it failed to undertake appropriate monitoring and to provide both information to communities exposed to hazardous activities and opportunities for them to be heard and participate in decisions affecting them.⁶⁴ Performing these duties would have protected the rights of the victims of the violations.⁶⁵ The African Commission, per Commissioner Dankwa of Ghana, held that:⁶⁶

The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter ... imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources. Article 12 of the International Covenant on Economic, Social and Cultural Rights ... requires governments to take necessary steps for the improvement of all aspects of environmental and industrial hygiene. The right to enjoy the best attainable state of physical and mental health enunciated in Article 16(1) of the African Charter and the right to a general satisfactory environment favourable to development ... obligate governments to desist from directly threatening the health and environment of their citizens.

Government compliance with the spirit of Articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.

International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa.

The complainants also alleged violations of Article 21 of the African Charter, which guarantees all Africans the right to freely dispose of their wealth and natural resources, and imposes a corresponding duty on African states to “eliminate all forms of foreign exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.” The complainants alleged that the Government of Nigeria failed to monitor or regulate the operations of the oil companies, which paved the way for the oil consortiums to exploit oil reserves in Ogoniland,

⁶³ Ibid paras 1-2 and 50.

⁶⁴ Ibid para 53.

⁶⁵ Ibid para 54.

⁶⁶ Ibid paras 51-53 and 68.

and it did not involve the Ogoni communities in the decisions that affected the development of Ogoniland.⁶⁷ The Commission held that, despite its obligation to protect persons against interferences in the enjoyment of their rights, the Nigerian Government facilitated the destruction of the Ogoniland by giving “the green light to private actors, and the oil companies in particular, to devastatingly affect the well-being of the Ogonis.”⁶⁸ Such conduct violated Article 21 of the African Charter. Commissioner Dankwa reasoned that:⁶⁹

Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties. This duty calls for positive action on part of governments in fulfilling their obligation under human rights instruments. The practice before other tribunals also enhances this requirement as is evidenced in the case *Velásquez Rodríguez v. Honduras*. In this landmark judgment, the Inter-American Court of Human Rights held that when a State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised, it would be in clear violation of its obligations to protect the human rights of its citizens. Similarly, this obligation of the State is further emphasised in the practice of the European Court of Human Rights, in *X and Y v. Netherlands*. In that case, the Court pronounced that there was an obligation on authorities to take steps to make sure that the enjoyment of the rights is not interfered with by any other private person.

Other international instruments create similar rights and obligations to the African Charter. The states parties to the International Covenant on Economic, Social and Cultural Rights⁷⁰ (ICESCR), including Ghana, “recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”⁷¹ To achieve the full realisation of this right, the parties shall take steps necessary for the “improvement of all aspects of environmental and industrial hygiene.”⁷² The objectives of the African Convention on Conservation of Nature and Natural Resources are: “to enhance environmental protection; to foster the conservation and sustainable use of natural resources; and to harmonize and coordinate policies in these fields with a view to achieving ecologically rational, economically sound and socially acceptable development policies and programmes.”⁷³ Article III recognises the right of Africans to an environment favourable to their development and a corresponding duty of states to protect the environment. Parties have a “fundamental obligation” which requires that they:

shall adopt and implement all measures necessary to achieve the objectives of this Convention, in particular through preventive measures and the application of the precautionary principle, and

⁶⁷ Ibid para 55.

⁶⁸ Ibid para 58.

⁶⁹ Ibid para 57.

⁷⁰ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, entered into force 3 January 1976

⁷¹ *Constitution of the Republic of Ghana 1992*, Art 12(1).

⁷² Ibid art 12(2)(b).

⁷³ *African Convention on the Conservation of Nature and Natural Resources*, 15 September 1968, CAB/LEG/24.1, 1001 UNTS 3 (Entered into force 16 June 1969), art II.

with due regard to ethical and traditional values as well as scientific knowledge in the interest of present and future generations.

The UN resolution on Permanent Sovereignty over Natural Resources states that foreign investment agreements freely entered into by states “shall be observed in good faith,” but equally makes it clear that states and international organisations “shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources.”⁷⁴

As Ghana is party to these instruments, it is bound by decisions made thereunder. Articles 40(c) and 73 of the Constitution require the Government to promote respect for international law and treaty obligations. Moreover, the principles of free consent, good faith and the *pacta sunt servanda* rule in general international law bind every treaty in force upon the parties to it.⁷⁵ A breach of a treaty obligation is an internationally wrongful act and gives rise to the international responsibility of the state concerned.⁷⁶ States that are responsible for the fulfillment of international obligations concerning the conservation and utilisation of natural resources and protection of the environment generally are therefore subject to liability in accordance with general international law.⁷⁷ Sands emphasises the fundamental importance of international environmental treaty obligations that require states to prevent particular environmental harm and refrain from carrying out or permitting activities that could lead to environmental damage.⁷⁸

In the *Pulp Mills on the River Uruguay (Argentina v Uruguay)*,⁷⁹ the ICJ elaborated on states’ duty to protect the environment. Argentina brought an action against Uruguay under the Statute of the River Uruguay,⁸⁰ claiming that by allowing the discharge of nutrients into a river that suffered from reverse flow and stagnation, Uruguay violated the obligation to prevent pollution and failed to comply with applicable international environmental agreements.

The ICJ held that a duty to preserve the aquatic environment and prevent pollution by prescribing appropriate rules and measures under an international environmental treaty entails the adoption of appropriate rules and measures, vigilance in their enforcement, and the exercise of administrative control, including monitoring activities undertaken by public and private operators. A failure to do so diligently would engage the state party’s responsibilities under an environmental treaty if the failure leads to adverse effects on citizens within or outside the state.⁸¹ In other words, international environmental treaty obligations require the adoption of rules and measures that give effect to the treaty objective to protect the

⁷⁴ Permanent Sovereignty over Natural Resources, GA Res 1803 (XVII), 17 UN GAOR Supp (No17) 15 UN Doc A/5217 (1962), para 8.

⁷⁵ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, entered into force 27 January 1980 (VCLT), preamble at para 4 and art 26.

⁷⁶ International Law Commission (ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the ILC at its fifty-third session, November 2001, Supplement No. 10 (A/56/10), arts 1 and 2 <<http://www.refworld.org/docid/3ddb8f804.html>>

⁷⁷ ILC, *Draft Principles of Conduct for the Guidance of States in the Conservation and Harmonious Exploitation of Natural Resources Shared by Two Or More States*, Nairobi, 9 May 1978.

⁷⁸ Sands et al, above n 10, at 704.

⁷⁹ *Pulp Mills on the River Uruguay (Argentina v Uruguay)* ICJ Reports 2010, 14.

⁸⁰ Statute of the River Uruguay, entered into between Argentina and Uruguay on 26 February 1975.

⁸¹ *Ibid* para 197.

environment. As the right to environmental safety is central to the realisation of the right to health and livelihood and is justified in terms in terms of the Constitution and general international law, it should be treated as taking precedence over an investment treaty obligation which seeks to prevent or limit the adoption of measures required for the realisation of this right.

4.4 THE INVESTMENT TREATY REGIME AND ENVIRONMENTAL PROTECTION IN GHANA

This Section analyses how investment treaties pose a challenge to environmental regulatory autonomy.⁸² A state discharges its legal duty to protect the environment by the enactment and enforcement of environmental laws and regulations. The ability and willingness of investor-state tribunals to accommodate or take account of environmental duties of host states to protect the environment is determined by examining a number of arbitral decisions that have been made when foreign investors challenged the performance of these duties.

The cases analysed in this chapter were selected because they involve disputes over environmental measures of the kinds specifically required under the environmental laws and regulations of Ghana. They involved alleged breaches of similar investment protections to those recognised under Ghana's investment treaties: full and adequate protection,⁸³ full protection and security,⁸⁴ fair and equitable treatment,⁸⁵ and expropriation,⁸⁶ and provision for international arbitration of investment disputes.⁸⁷

Some of the investment treaties under which these cases were brought, such as North American Free Trade Agreement (NAFTA),⁸⁸ recognise the right of each treaty partner to establish its own levels of environmental protection and ensure that its laws and policies provide for and encourage high levels of protection. Yet, environmental measures adopted by the contracting states have been challenged by foreign investors and in most cases host states have been found to have breached the applicable standards of investment protection.

Ghana's investment treaties do not define the substantive standards of investment protection and provide no exception for environmental regulation. This situation worsens Ghana's position in relying on the investment treaties to defend environmental measures. In light of the similarities of disputed measures and standards of investment protection,

⁸² On this subject see Somarajah, above n 11, chapter 10; Martin Wagner, "International Investment, Expropriation and Environmental Protection" (1999) 29 *Golden Gate University Law Review* 465; and Jorge Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press, 2012).

⁸³ Ghana-Malaysia Investment Treaty, art 2(2).

⁸⁴ Ghana-Denmark Investment Treaty, art 3(1); Ghana-Malaysia Investment Treaty, art 3(1); Ghana-Netherlands Investment Treaty, art 3(2); and Ghana-United Kingdom Investment Treaty, art 3(1).

⁸⁵ Ghana-Denmark Investment Treaty, art 3(1); Ghana-Malaysia Investment Treaty, art 3(1); Ghana-Netherlands Investment Treaty, art 3(2); and Ghana-United Kingdom Investment Treaty, art 3(1).

⁸⁶ Ghana-China Investment Treaty, art 10; Ghana-Malaysia Investment Treaty, art 7; Ghana-Denmark Investment Treaty, art 10; Ghana-Netherlands Investment Treaty, art 9; and Ghana-United Kingdom Investment Treaty, art 10.

⁸⁷ ⁸⁷ Ghana-China Investment Treaty, art 4; Ghana-Malaysia Investment Treaty, art 5; Ghana-Denmark Investment Treaty, art 6; Ghana-Netherlands Investment Treaty, art 6; and Ghana-United Kingdom Investment Treaty, art 7.

⁸⁸ *American Free Trade Agreement*, entered into force 1 January 1994.

conclusions can be drawn from these cases about the potential of investment treaties to narrow environmental policy space and regulatory autonomy in Ghana.

4.4.1 The Fundamental Legal Requirements for Environmental Protection in Ghana

To assess how investment treaties might limit environmental regulation in Ghana it is important to review the legal duty on the Government to protect the environment. The Environmental Protection Agency (EPA) was established under the Environmental Protection Agency Act 1994 (Act 490) (EPA Act) for the protection and improvement of the environment in Ghana. Its function is to enforce environmental policy and legislation, prescribe standards and guidelines, and inspect and regulate business operations relating to the environment. A number of its specific functions have the potential to conflict with the standards of investment protection as interpreted by investment tribunals. Section 2 of the EPA Act requires the Agency to:

1. issue environmental permits and pollution abatement notices for controlling sources of pollutants and substances which are hazardous or potentially dangerous to the quality of the environment;
2. issue notices in the form of directives, procedures or warnings to persons for the purpose of controlling the volume, intensity and quality of noise in the environment;
3. prescribe standards and guidelines relating to the pollution of air, water, land and any other forms of environmental pollution;
4. ensure compliance with prescribed environmental impact assessment procedures in the planning and execution of development projects;
5. impose and collect environmental protection levies; and
6. regulate the import, export, manufacture, distribution, sale and use of pesticides.

The EPA Act and its accompanying regulations, Environmental Assessment Regulations 1999 (LI 1652) mandate the Agency to require a person responsible for an undertaking which has, or is likely to have, an adverse effect on the environment to submit an environmental impact assessment within the period specified in the notice.⁸⁹ Where the EPA considers that the activities of an undertaking pose a serious threat to the environment, it may serve an enforcement notice on the person requiring them to take steps to prevent or stop the activities.⁹⁰ A failure to comply with an enforcement notice is an offence for which the offender is liable on summary conviction to a fine and in default to a term of imprisonment not exceeding one year or both.⁹¹ The EPA Act even permits the use of force necessary to

⁸⁹ Environmental Protection Agency Act, s 12(1) (EPA Act).

⁹⁰ Ibid s 13(1).

⁹¹ Ibid s 13(3).

ensure compliance with an enforcement notice.⁹² Any amount of money reasonably incurred to prevent or stop an offending activity may be recovered as a civil debt from the person responsible.⁹³

The EPA has the power to suspend or cancel a licence if it has reasonable grounds to believe the licensee failed or refused to comply with environmental laws and regulations or any other conditions for the licence.⁹⁴ The Agency may also suspend or cancel a licence if that is necessary to prevent or remove a hazard to human beings, crops, animals or the environment.⁹⁵ A licensee aggrieved by a suspension or cancellation of the licence may appeal to the Minister of the Environment, and to the High Court if not satisfied with the Minister's decision.⁹⁶ Again, the Agency has the power to suspend, cancel or revoke an environmental permit where the holder of the permit fails to obtain any authorisation required by law, breaches enactments relating to environmental assessment, fails to make any payments required on the due date or acts in breach of the conditions of the permit.⁹⁷

Under the EPA Act, the importation, exportation, manufacture, distribution, advertisement, sale or use of unregistered pesticides is an offence.⁹⁸ A court has the power to direct the forfeiture of the equipment, pesticide or appliance used in the commission of an environmental offence to the State, or to order the suspension or cancellation of a licence that may have been granted to the person concerned.⁹⁹ Under section 6 of the Forests Protection Act 1974 (NRCD 243) a court which convicts a person of an offence, such as the felling or damaging of forest trees, shall order the forfeiture of the forest produce, instruments, vehicles and any other articles in respect, or by means, of which the offence was committed. Anything forfeited to the State may be sold or otherwise disposed of and the proceeds applied for forest rehabilitation.

The Minerals and Mining Act 2006 (Act 703) requires in section 18(1) that before undertaking an activity or operation under a mineral right, the right-holder shall obtain the necessary approvals and permits from the Forestry Commission and the EPA for the protection of natural resources, public health and the environment. Section 18(2) requires a holder of a mineral right to "comply with the applicable Regulations ... for the protection of the environment in so far as it relates to exploitation of minerals." By sections 65, 68-69 and 87 of the Act, the Minister responsible for mining has the power to suspend, cancel or revoke mineral rights, licenses and permits for non-compliance with the law or where it is in the public interest to do so.

These statutory provisions contain a number of key legal requirements for environmental protection in Ghana that might lead to investor-state arbitration under investment treaties. They include:

⁹² Ibid s 14(2).

⁹³ Ibid s 14(4)

⁹⁴ Ibid s 45(a)

⁹⁵ Ibid s 45(b).

⁹⁶ Ibid s 46.

⁹⁷ Environmental Assessment Regulations 1999 (LI1562) r 26.

⁹⁸ EPA Act, s 28(1) and 57(1).

⁹⁹ Ibid s 60.

1. the grant, suspension, cancellation or termination of environmental permits;
2. shifting the cost of environmental remediation onto persons whose activities caused environmental damage;
3. forfeiture of the assets of an offending person to the State to meet the cost of restoring the environment to its desirable state;
4. imposition of environmental fines and levies for non-compliance with environmental laws and regulations;
5. using local institutions, including the courts, to enforce environmental norms;
6. requiring those whose activities displace or affect owners or lawful occupiers of land to pay them compensation;
7. conviction and imprisonment of environmental offenders;
8. using force to ensure compliance with environmental notice;
9. no payment of compensation for general environmental regulation that effects property rights; and
10. banning the export and import or restricting the use of chemicals and pesticides on environmental protection grounds.

The following sections assess the nature of the challenge that investment treaty rules and arbitration might pose to the adoption or enforcement of some of these environmental protection measures in Ghana.

4.4.2 The Cancellation, Suspension and Termination of Environmental Permits

Permits and licences are very important for business activities, which cannot commence without them or continue if the permit is withdrawn. The revocation of a licence can affect the viability of a business concern even though the physical assets of the business are not directly expropriated. At the same time, a state can enforce its environmental laws and policies through denial, suspension, cancellation or termination of environmental permits. As stated earlier, Ghana's Commission on Human Rights has recommended that the State must not renew the permits of mining companies whose operations lead to environmental damage and human rights abuses so as to protect the environment and human health. Thus, limitations on how the State exercises its right to regulate through permitting can compromise its ability to regulate effectively the activities of enterprises that affect basic rights of citizens.¹⁰⁰

The Supreme Court of Ghana in *New Patriotic Party v Inspector General of Police*¹⁰¹ stated that "[w]hoever has power to grant a permit or licence has power to refuse it."¹⁰² Sornarajah made a similar point that "[t]here is general acceptance that a state has a right to

¹⁰⁰ Sornarajah, *Law on Foreign Investment*, above n 11, at 16.

¹⁰¹ *New Patriotic Party v Inspect General of Police* [1993-94] 2 GLR 457 at 473

¹⁰² *Ibid* at 473.

cancel agreements or investment projects which cause significant environmental harm”¹⁰³ because this “flows not only from the sovereignty of the state which permits the state to protect its territory from environmental harm but also from the fact that, in modern international law, a state is a repository of the right to safeguard the environment in the interests of humankind.”¹⁰⁴ Noting that regulations “are usually implemented through licensing systems, and the sanction is withdrawal of the licence”,¹⁰⁵ Sornarajah argues that a state which seeks to terminate the foreign investment of a multinational corporation that it considers is causing unnecessary environmental harm will be told that such termination violates the foreign investment agreement and results in liability to pay compensation.¹⁰⁶

The enforcement of environmental protection standards by revoking environmental permits or requiring foreign investors to comply with environmental regulations as required by the EPA Act could lead to investor-initiated arbitration alleging breaches of investment protections.

4.4.2.1 *Clayton v Government of Canada*¹⁰⁷

The investors and their company, Bilcon of Delaware, were engaged in supplying building materials, including concrete, in Canada. The business required a substantial supply of aggregate concrete for its projects, and proposed to establish and operate a quarry and marine terminal in Nova Scotia to extract and ship large quantities of basalt (used in the production of concrete and asphalt) by bulk tanker to the investor’s New Jersey manufacturing site.¹⁰⁸ The proposed terminal underwent a lengthy environmental assessment by Nova Scotia and the Canadian Federal Government as required by state and federal environmental and fishery legislation. At the end of 2007, both governments decided to not approve the permit on environmental grounds in line with the recommendations of a Joint Review Panel (JRP).

The environmental assessment was conducted by experts in oceanography, planning, and resource and environmental studies. It involved extensive public hearings and led the JRP to recommend rejecting the proposed quarry for environmental and social reasons.¹⁰⁹ It concluded that the ‘imposition of a major long-term industrial site would introduce a significant and irreversible change to Digby Neck and Islands, resulting in sufficiently important changes to that community’s core values to warrant the Panel assessing them as a Significant Adverse

¹⁰³ Sornarajah, *Law on Foreign Investment*, above n 11, at 110.

¹⁰⁴ *Ibid* at 110.

¹⁰⁵ *Ibid* at 77

¹⁰⁶ M. Sornarajah, *The Clash of Globalizations and the International Law on Foreign Investment* (2003) 10(2) *Canadian Foreign Policy Journal* 1 at 10.

¹⁰⁷ *Clayton v Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015. [provide the full name – case is known by the company ‘Bilcon’]

¹⁰⁸ International Arbitration Reports, “Canada Sets Out Arguments in NAFTA Claim Arising out of Environmental Assessment of Quarry and Shipping Project” (19 September 2009), <http://www.iareporter.com/articles/20091008_14>

¹⁰⁹ International Investment Arbitration and Public Policy, *Clayton/ Bilcon v Canada* (NAFTA Chapter 11) (Case Pending; Summary as of February 2011), <[http://iiapp.org/media/uploads/clayton_bilcon_v_canada_\(pending,_summary_as_of_feb_2011\).rev.pdf](http://iiapp.org/media/uploads/clayton_bilcon_v_canada_(pending,_summary_as_of_feb_2011).rev.pdf)>

Environmental Effect that cannot be mitigated.¹¹⁰ Canada emphasised the importance and uniqueness of the biophysical and human environment in the proposed site at Digby Neck and the adjacent Bay of Fundy, which was the habitat of many endangered species. The economy of the local area was based on the region's ecological assets, including the fishing and ecotourism industries.¹¹¹

Bilcon complained that Canada breached its NAFTA obligations: the minimum standard of treatment; national treatment and most-favoured-nation treatment. It argued that Canada acted in an unfair and unreasonable manner toward the investors by imposing biased, needless and unfair procedures and obligations.¹¹² The investor also argued that Canada failed to accord them full protection and security by "not taking steps to protect them from discriminatory and arbitrary treatment in the environmental regulatory process; not following its own laws with respect to governmental regulatory authority over the proposed quarry; and failing to accord the investors a fair hearing and reasonable decision".¹¹³ Bilcon claimed that its legitimate expectations, based on the extensive encouragement of Nova Scotia officials to invest in a quarry in the area, were frustrated by the rejection of the application.¹¹⁴ The investor sought USD300 million in damages.

In a split decision, the Tribunal held that Canada breached the minimum standard of treatment, reasoning that the investors:¹¹⁵

understood that they would only obtain environmental permission if the project satisfied the requirements of the laws of federal Canada and Nova Scotia. They expected, however, that absent any change in the federal or provincial law, the project site was not effectively zoned against development, and that their project would be assessed on the merits of its environmental soundness in accordance with the same legal standards applied to applicants generally.

The majority reasoned that the investor reasonably relied on specific encouragements, at the political and technical levels, to pursue the project not only in Nova Scotia but in the specific site the investors chose. They considered that encouragements by the government contributed to the investors' decision to proceed with their business plans and invest very substantive corporate resources and millions of dollars in good faith to obtain an Environmental Impact Statement. The JRP had acknowledged it adopted an unprecedented approach that was inimical to the proponents having any real chance of success based on an assessment of their individual project on its merits in accordance with the laws in force at the time.¹¹⁶

The majority concluded that the JRP had not carried out its mandate as required of it by the Canadian Environmental Assessment Act to apply its analysis of 'likely significant effects

¹¹⁰ *Clayton v Canada*, above n 107, at para 20.

¹¹¹ *Ibid* para 130.

¹¹² *Ibid* para 352.

¹¹³ *Ibid* para 366.

¹¹⁴ *Ibid* para 394.

¹¹⁵ *Ibid* para 447-453.

¹¹⁶ *Ibid* paras 449-459.

after mitigation' to the whole range of potential project effects when arriving at its conclusions.¹¹⁷ As a result, the ultimate decision makers in the governments of Canada and Nova Scotia were not provided with all the information that could have provided a proper foundation to arrive at their own final conclusions.¹¹⁸

In the opinion of the Tribunal, states are entitled to regulate for purposes of environmental protection and general public interest, but they still have to respect obligations they have entered into to protect foreign investment. Where states fail to do so, they can hardly escape liability. The Tribunal stated:¹¹⁹

Modern regulatory and social welfare states tackle complex problems. Not all situations can be addressed in advance by the laws that are enacted. Room must be left for judgment to be used to interpret legal standards and apply them to the facts ... State authorities are faced with competing demands on their administrative resources and there can be delays or limited time, attention and expertise brought to bear in dealing with issues. The imprudent exercise of discretion or even outright mistakes do not, as a rule, lead to a breach of the international minimum standard.

At the same time, the international minimum standard exists and has evolved in the direction of increased investor protection precisely because sovereign states – the same ones constrained by the standard – have chosen to accept it. States have concluded that the standard protects their own nationals in other countries and encourages the inflow of visitors and investment.

The Tribunal also held that Canada breached the national treatment standard, arguing the standard focuses on the way the investor or investment is treated, “rather than confining concerns over discrimination to comparisons between similar articles of trade.”¹²⁰ Noting that a number of Canadian companies’ operations of the quarry and marine terminal projects had the potential to affect the local community,¹²¹ it said the “assessments in these cases were carried out in accordance with the usual ‘likely significant adverse effects after mitigation’ analysis.”¹²² Therefore, these other investors received more favourable treatment than Bilcon, in like circumstances.¹²³

In a dissenting opinion Donald McRae explicitly warned the ruling would have a chilling effect on environmental protection. He held that the Clayton Group had no basis to claim a breach of national treatment or most-favoured-nation treatment because it was treated in accordance with Canadian law, which all investors were entitled to expect.¹²⁴ According to McRae, the majority decision is “a remarkable step backwards in environmental protection”,¹²⁵

¹¹⁷ Ibid para 452.

¹¹⁸ Ibid para 453.

¹¹⁹ Ibid paras 437-438.

¹²⁰ Ibid para 692.

¹²¹ Ibid para 696.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ *Clayton v Government of Canada*, PCA Case No. 2009-04, Dissenting Opinion of Professor Donald McRae, 10 March 2017 para 53.

¹²⁵ Ibid para 51.

because they added a further control over environmental review panels. A failure of a review panel to comply with Canadian law now “becomes the basis for a NAFTA claim allowing a claimant to bypass the domestic remedy provided for such a departure from Canadian law.”¹²⁶ McRae describes this as “a significant intrusion into domestic jurisdiction [that] will create a chill on the operation of environmental review Panel.”¹²⁷ In the past, if environmental review panels made an error, for example by exceeding their jurisdiction or failing to comply with the law, the government would have ignored their recommendations or they would have been overturned on review by a federal court.¹²⁸

The majority’s finding that failure to fully comply with Canadian environmental law breached the minimum standard of treatment could place the proper application of Canadian law by an environmental review panel in the hands of a NAFTA Chapter 11 tribunal, “importing a damages remedy that is not available under Canadian law.”¹²⁹ McRae found the majority’s decision especially “troubling for the ability of a state to apply its environmental law”¹³⁰ because the state could end up liable for damages to an investor where a review panel “put great weight on the effect of a project on the human environment and took account of the community’s own expression of its interests and values”¹³¹ McRae described the majority’s approach as a “subjugation of human environment concerns to the scientific and technical feasibility of a project” and an intrusion into both the way an environmental review process is to be conducted and the environmental public policy of the state.¹³² The effect of such intrusion is that “a chill will be imposed on environmental review panels which will be concerned not to give too much weight to socio-economic considerations or other considerations of the human environment in case the result is a claim for damages”.¹³³

For Ghana, this case means that decisions of the EPA to enforce commissioned environmental reports and regulations on environmental permits stand the risk of being challenged by foreign investors. Threats of an investor-state suit could have a chilling effect and result in the EPA not giving considerable attention to environmental and social considerations when the interests of foreign investors are involved.

4.4.2.2 *Chemtura Corporation v Canada*¹³⁴

This case involved Canada’s termination of a pesticide (lindane) registration and ban on its use on public health and environmental grounds. Under the Canadian Pest Control Products Act 1997 and the Pest Control Products Regulations 1997, the sale or import into Canada of controlled products such as lindane was prohibited, unless the product had been registered and conformed to prescribed standards. The Pest Management Regulatory Agency, which

¹²⁶ Ibid, para 48

¹²⁷ Ibid, para 48.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid para 49.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid para 51.

¹³⁴ *Chemtura Corporation v Canada*, NAFTA /UNCITRAL, Award, 2 August 2010

was responsible for the regulation of pest control products in Canada, had the primary objective of preventing unacceptable risks to people and the environment from the use of pest control products.¹³⁵

Following a risk assessment, the Agency decided there was a need for regulatory action by suspending or terminating registration of lindane in light of significant concerns regarding the exposure of workers to health risks.¹³⁶ Chemtura Corporation's registrations of lindane were terminated on grounds of environmental safety and health risks.¹³⁷ Chemtura argued that Canada breached the minimum standard of treatment, saying the review of its lindane registration was flawed because notice was unspecific and failure to complete the review in a timely way thwarted the investor's attempts to have the review re-evaluated in accordance with law. A further breach of the minimum standard of treatment was Canada's prohibition on planting lindane-treated seed, contrary to previous assurances it had given.¹³⁸ The investor also alleged the review of lindane use was conducted as a result of a trade irritant and not for health and environmental considerations.¹³⁹ It claimed damages of USD78.5 million.¹⁴⁰ Canada counter-argued that the Agency's conduct was a valid exercise of police powers,¹⁴¹ and that the minimum standard of treatment under NAFTA does not "limit the discretion of regulators to take steps in compliance with their duty to protect public health and the environment."¹⁴²

The investor's claim was dismissed. The Tribunal noted that lindane had raised serious concerns internationally and was listed among the chemicals designated for elimination under the Stockholm Convention on Persistent Organic Pollutants.¹⁴³ In the Tribunal's view, Canada succeeded in establishing that lindane raised increasingly serious concerns about its health and environmental implications and that the evidence on record did not show bad faith or disingenuous conduct on the part of Canada¹⁴⁴. On the contrary, it showed the review was undertaken in pursuance of the Agency's mandate and as a result of Canada's international obligations.¹⁴⁵ Moreover, the investor was made aware of the importance of the exposure risks and was asked to provide information on the matter, but it failed to take advantage of these opportunities.¹⁴⁶ The investor was also afforded the same treatment as all other registrants of controlled products.¹⁴⁷ The Agency took the measures within its mandate, in compliance with its standard regulatory practice, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the

¹³⁵ Ibid para10.

¹³⁶ Ibid paras 29-30.

¹³⁷ Ibid paras 32-34.

¹³⁸ Ibid para 93.

¹³⁹ Ibid para 133.

¹⁴⁰ Ibid para 95-96.

¹⁴¹ Ibid para 97.

¹⁴² Ibid para 183.

¹⁴³ Ibid paras 135-136.

¹⁴⁴ Ibid paras 135 and 138.

¹⁴⁵ Ibid paras 138 and 184.

¹⁴⁶ Ibid para 150.

¹⁴⁷ Ibid para 192 and 236.

environment. Therefore, the investor could not claim unfair treatment, bad faith or breach of due process.¹⁴⁸

Chemtura v Canada supports the proposition that some tribunals recognise actions for environmental protection purposes under municipal law and general international law as legitimate. This is clear from the Tribunal's reasoning that the review of lindane use and the cancellation of registration that followed arose "out of legitimate regulatory concerns and in accordance with Canada's international commitments."¹⁴⁹ The Tribunal further held that in assessing whether treatment afforded to an investment accords with the minimum standard of treatment, a tribunal "must take account of all circumstances, including the fact that certain agencies manage highly specialized domains involving scientific and public policy domains."¹⁵⁰

In assessing claims of bad faith, the Tribunal looked at both procedure (for example, adequacy of notice) and substance (Canada's legal commitments under municipal law and general international law).¹⁵¹ It is not clear whether from the decision, if the procedural claims as to "bad faith" had been established, Canada would have been found liable in spite of the legitimacy of the measure under law. The following case supports the view that if bad faith (procedurally) and lack of transparency had been established, Canada would have been found liable.

In making decision in favour of Canada, the Tribunal also noted wide international recognition of the harmful environmental and health effects of lindane and the ban of lindane use in a number of other countries.¹⁵² This leaves doubt as to what would have been the Tribunal's decision if the harmful effects of lindane had not yet been widely recognised and the Agency had taken precautionary measures pending more information.

The cumulative effect of the decision is to protect environmental regulatory autonomy under both domestic environmental law and international environmental law. Such a decision provides some regulatory comfort for Ghana whose duty to protect the environment is founded under the Constitution and international environmental treaties, mindful that arbitral tribunals do not follow strict precedent.

4.4.2.3 *Tecnicas Medioambientales Tecmed SA v Mexico*¹⁵³

Tecmed's was a Spanish investor in Mexico whose application to renew a license to operate a landfill facility for hazardous industrial waste was rejected and the company asked to institute a programme to close the landfill. The investor lodged a claim under the investment treaty between Spain and Mexico, which prohibited expropriation without the payment of compensation in similar terms to Ghana's investment treaties.

¹⁴⁸ Ibid para 152 and 162.

¹⁴⁹ Ibid para 147.

¹⁵⁰ Ibid para 123.

¹⁵¹ Ibid paras 148-653.

¹⁵² Ibid para 184.

¹⁵³ *Tecnicas Medioambientales Tecmed SA v Mexico*, Case No. ARB (AF)/00/2, Award, 23 May 2003.

Tecmed argued that the refusal to renew the environmental permit to operate the landfill constituted an expropriation of its investment.¹⁵⁴ Mexico argued that the Resolution pursuant to which the permit was denied “was a regulatory measure issued in compliance with the State’s police power within the highly regulated and extremely sensitive framework of environmental protection and public health.”¹⁵⁵ Further, the site of the landfill did not comply with applicable regulations in terms of its location and characteristics.¹⁵⁶

The Tribunal found that community opposition to the landfill “was widespread and aggressive, as evidenced by several events at different times”,¹⁵⁷ but that that was not the reason Mexico decided not to renew the licence and required the project to relocate. It found there were political motives (such as election and change of administration in the municipality) behind the Resolution and that the decision had not been made and applied transparently and predictably.¹⁵⁸ The Resolution had not suggested that the violations relating to hazardous waste compromised public health or impaired ecological balance or protection of the environment.¹⁵⁹

The Tribunal reasoned that the investors would not have acquired the assets without access to the authorisations and permits to use them for a hazardous waste landfill.¹⁶⁰ It found the municipal regulatory agency undertook to keep current the existing licenses and authorisations for the operation of the landfill, including federal ones granted to the state company in which Tecmed invested, until Tecmed could obtain its own permits.¹⁶¹ Access to those licenses, authorisations or permits was a central part of the tender and acquisition of assets relating to the landfill and of Tecmed’s expectations when it decided to invest.¹⁶² Moreover, the Mexican officials and institutions involved had indicated on various occasions that the landfill operations complied with domestic legal provisions on environmental protection and public health preservation.¹⁶³ Mexico was found to have expropriated the investments because the company had to bear the financial cost of the relocation.¹⁶⁴ The Tribunal ordered Mexico to pay Tecmed USD5.3 million, plus compound interest at an annual rate of six per cent.¹⁶⁵

The Tribunal admitted that a state’s exercise of its sovereignty within the framework of its police powers “may cause economic damage to those subject to its powers without entitling them to any compensation whatsoever is undisputable”.¹⁶⁶ It nevertheless emphasised the effect of governmental measures on investment,¹⁶⁷ and held that its own function was to examine whether the Resolution in question violated the investment treaty and international

¹⁵⁴ Ibid paras 95-96.

¹⁵⁵ Ibid para 97.

¹⁵⁶ Ibid para 105.

¹⁵⁷ Ibid para 108.

¹⁵⁸ Ibid paras 127 129-130, 132, 157 and 153-166.

¹⁵⁹ Ibid para 124.

¹⁶⁰ Ibid para 90.

¹⁶¹ Ibid para 89.

¹⁶² Ibid para 90.

¹⁶³ Ibid para 124.

¹⁶⁴ Ibid paras 151, 157, 159 and 166

¹⁶⁵ Ibid para 201.

¹⁶⁶ Ibid para 119.

¹⁶⁷ Ibid paras 111 and 115-116.

law. It was not its function to, and it would not “review the grounds or motives of the Resolution in order to determine whether it could be or was legally issued.”¹⁶⁸ There was no principle stating that regulatory actions *per se* did not give rise to liability under the applicable investment treaties “even if they are beneficial to society as a whole – such as environmental protection – particularly if the negative economic impact of such actions on the financial position of the investor is sufficient”.¹⁶⁹ In view of these propositions, it is not clear in what circumstances a state will or will not be required to pay compensation for causing economic damage to those subject to its powers.

Similarly, the Tribunal acknowledged that due deference is owed to a state when it defines issues that affect public policy or the interests of society as a whole, and in relation to actions that will be implemented to protect such values. However, this does not prevent an arbitral tribunal from examining the actions of the state to determine whether such measures are reasonable with respect to their goals (quite apart from their legitimacy), the deprivation of economic rights and the legitimate expectations of those who suffer such deprivation.¹⁷⁰ The Tribunal thus placed primacy on the effect of a measure on an investment.

When assessing whether a measure is equivalent to an expropriation, the Tribunal looked at whether the measure radically deprived the investor of the economic use and enjoyment of its investments, or the assets involved had lost their value or economic use for their holder.¹⁷¹ That determination is important because it is one of the main elements when distinguishing between a regulatory measure, which is an ordinary expression of the exercise of the state’s police power that entails a decrease in assets or rights, and a *de facto* expropriation.¹⁷² The effects of the actions or behaviour under analysis were therefore relevant.¹⁷³

The nub of the decision is that the Resolution terminating the environmental permit did not state environmental protection as its objective and the processes for granting and terminating the permit lacked transparency and consistency.¹⁷⁴ There is, however, nothing in the case to suggest that a decision would have been made in favour of the state if the purpose of the Resolution had been stated and the regulatory institutions acted transparently and consistently. As it is, the decision does not show in clear terms whether or not legitimate environmental regulation that adversely affects investment might give rise to state liability. On the contrary, the Tribunal’s emphasis on the effect on the investment suggests the state would most likely have been found liable even if it had linked its decision to an environmental protection objective and acted transparently and consistently.

These three cases illustrate the point that legislative enactments or amendments and imposition of conditions on environmental permits in Ghana that could adversely affect foreign investors and their investments are capable of being the subject of arbitration. This can lead to tension between investor rights and environmental regulation in Ghana. The threat of

¹⁶⁸ *Ibid* para 120.

¹⁶⁹ *Ibid* para 121.

¹⁷⁰ *Ibid* para 122.

¹⁷¹ *Ibid* para 115

¹⁷² *Ibid*.

¹⁷³ *Ibid*.

¹⁷⁴ paras 127 129-130, 132, 157 and 153-166.

investor-state arbitration could lead to Ghana rolling back on an intended environmental protection measure.¹⁷⁵ Conclusion can also be drawn from the cases that acting in compliance with due process, transparency and good faith requirements is necessary to minimise the risk of being found in breach of standards of environment protection in Ghana.

4.4.3 Export Ban of Environmentally Hazardous Substances

A state may exercise its powers to protect the environment by regulating the export, import or use of chemicals and pesticides that have implications for environmental quality. For example, in Ghana using unregistered pesticides is an offence.¹⁷⁶ Under section 2(r) of the EPA Act, the Agency has the mandate “to regulate the import, export, manufacture, distribution, sale and use of pesticides.” The Hazardous Chemicals Committee must monitor the use of hazardous chemicals by collecting information on those activities.¹⁷⁷ Those commercial dealings with pesticides are permitted only in accordance with a licence issued under the EPA Act,¹⁷⁸ which may only be issued if the applicant will comply with its conditions.¹⁷⁹ The Agency may refuse a licence if it has reasonable grounds to believe the applicant will not comply with the conditions of the licence or revoke the licence if the conditions are breached. Conducting those activities with pesticides which have not been registered or without a licence is an offence that attracts a fine or imprisonment to a term not exceeding two years or both.¹⁸⁰

Several cases under NAFTA show the EPA’s regulation could come under attack. For example, Canada banned the export of a synthetic chemical compound known as polychlorinated biphenyl (PCB) into the US. The goal of the ban was to ensure that Canadian PCB wastes were managed in an environmentally sound manner to prevent any possible significant danger to the environment and human health.¹⁸¹ The ban was also to enable Canada conform to its international convention obligations under the Basel Convention.¹⁸² In *SD Myers Incorporated v Canada*¹⁸³ the ban was found to be in breach of the national treatment standard under NAFTA.¹⁸⁴ Canada had argued that ban was consistent with Canadian Environmental Protection Act. The Tribunal held that Canada violated the national treatment standard¹⁸⁵ because its policy was intended “to protect and promote the market share of enterprises that would carry out the destruction of PCBs in Canada and that were owned by Canadian nationals”.¹⁸⁶

The decision of the Tribunal on the scope of application of the minimum standard of

¹⁷⁵ Wagner, above n 92, at 467.

¹⁷⁶ Section 28(1) and 57(1).

¹⁷⁷ Section 10(2)(a).

¹⁷⁸ Section 40(1).

¹⁷⁹ Section 43

¹⁸⁰ Section 7(1)(a) and (b).

¹⁸¹ Ibid para 106.

¹⁸² Ibid para 106-107 and para 153.

¹⁸³ *SD Myers Incorporated v Canada*, NAFTA, Partial Award, 13 November 2000.

¹⁸⁴ *Ibid* paras 130-137.

¹⁸⁵ *Ibid* para 256.

¹⁸⁶ *Ibid* Para 162.

treatment seems to suggest that the right to regulate and the purpose of governmental regulation is a viable defence in investment treaty arbitration and that investment tribunals will respect the decision of states to make governance and regulatory decisions as they deem fit.¹⁸⁷ The Tribunal held that breach of fair and equitable treatment and full protection and security:¹⁸⁸

occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders. The determination must also take into account any specific rules of international law that are applicable to the case.

However, the Tribunal also held that the fact that a host party has breached a rule of international law that is specifically designed to protect investors will tend to weigh heavily in favour of finding a breach of the fair and equitable treatment and full protection and security.¹⁸⁹ This chapter argues that if foreign investors always have to prevail against states over the adoption of environmental measures because investment treaties are specifically designed to protect foreign investment, the freedom and duty to regulate and the purpose of governmental regulation will be subordinate considerations, and states may not want to adopt measures to protect the environment for fear of investor-state arbitration.¹⁹⁰

Whereas *Myers v Canada* attached a great deal of importance to the effect of the challenged measure on investment, *Methanex Corporation v United States of America*¹⁹¹ gave its support for environmental regulation. Methanex, a Canadian investor, initiated arbitration against the US under Chapter 11 of NAFTA claiming that a Californian law and regulations banning the use of methyl tertiary-butyl ether (MTBE), a gasoline additive, on environmental and health grounds was intended to create a local ethanol industry where no significant industry had previously existed and to discriminate against and harm Methanex and all other foreign methanol producers contrary to the national treatment standard.¹⁹² It also argued that the ban amounted to an expropriation of its investments. It sought almost USD1 billion in compensation from the US.

The Tribunal dismissed the claim, reasoning that there was neither evidence nor ground to infer that the policy was legally connected with a desire to harm methanol producers or benefit domestic ethanol producers.¹⁹³ It was satisfied that no malign pretext underlay

¹⁸⁷ *Myers v Canada*, above n 183, para 250, 261 and 263-264.

¹⁸⁸ *Ibid* para 263.

¹⁸⁹ *Ibid* para 264.

¹⁹⁰ Todd Weiler, "A First Look at the Interim Merits Award in *S.D. Myers, Inc. V. Canada: It Possible to Balance Legitimate Environmental Concerns with Investment Protection*" (2001) 24 *Hastings International and Comparative Law Review* 173.

¹⁹¹ *Methanex Corporation v. United States of America*, NAFTA, UNCITRAL, Final Award, 7 August 2005.

¹⁹² *Ibid* Part IV - Chapter B, para 12; Part II - Chapter D, paras 25 and 26.

¹⁹³ *Methanex v United States: Final Award* Part IV - Chapter E, para 22.

California's conduct and measures.¹⁹⁴ The Tribunal's focus on the purpose of the regulations shows that some investment tribunals are willing to treat argument that environmental measures are grounded on domestic environmental law as a valid defence in investor-state arbitration.

Methanex v United States, like *Chemtura v Canada*, provides some relief to states desirous of protecting the environment because the Tribunal considered the intent and purpose of the challenged measures and whether they were expressly connected to the investor. The requirement of "a legally significant connection between the measure and the investor or the investment"¹⁹⁵ places practical limitations on investors' ability to challenge any and every measure that might adversely affect the value of an investment even if the measure was not expressly directed at the investment. Sanford Gaines suggests "a narrow reading of 'legally significant connection' between a measure and an investor is especially comforting to governments that are considering environmental regulation, which almost invariably imposes economic costs, and sometimes even direct business losses, on a variety of private parties."¹⁹⁶ These cases support the conclusion that environmental regulation of the use of environmentally hazardous substances under the EPA Act in Ghana might lead to state being sued by foreign investors for money damages, and that the legal outcome would be uncertain.

4.5 RECONCILING INVESTMENT TREATY REGIME WITH ENVIRONMENTAL LAWS AND REGULATIONS IN GHANA

4.5.1 The Environmental Protection Duty and Investment Treaty Making

How is the conflict between investment treaty norms and Ghana's constitutional and general international law duty with respect to environmental protection to be resolved? This question has to be addressed in terms of the limits to investment treaty making powers of the State and in terms of treaty interpretation.

The Constitution requires the government to exercise its powers in a manner that advances the welfare of the people of Ghana, including the protection of the environment. The Constitution attaches a lot of importance to the environment by requiring the State to protect and safeguard the national environment for posterity and by establishing the Lands Commission to make proposals for the protection of the natural and physical environment.¹⁹⁷ As shown in Section 4.3.2, various international, regional and national efforts by various

¹⁹⁴ Ibid Part IV - Chapter E, para 20

¹⁹⁵ Ibid Chapter E, para 22.

¹⁹⁶ Sanford E. Gaines, "Methanex Corp. v. United States" (2006) 100(3) *American Journal of International Law* 683 at 687. For further scholarship on this case and others analysed in this chapter see: Alessandra Asteriti, "Regulatory Expropriation Claims in International Investment Arbitrations: A Bridge Too Far?" in Andrea K Bjorklund (ed) *Yearbook on International Investment Law and Policy: 2012-2013* (Oxford University Press) 451; Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economics Analysis* (Cambridge University Press, 2014) chapter 5; and Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press, 2013).

¹⁹⁷ *Constitution of Ghana* art 87(2)(c).

states aimed at protecting the environment point to the existence of consensus with respect to environmental protection.¹⁹⁸ Such consensus seems to exist in the area of climate change.

The Constitution in Article 36(9) requires the State to cooperate with other states for purposes of protecting the environment, which is fulfilled by the State being party to a convention such as the African Convention on Nature. Therefore, there is a link between the State's constitutional duty and its international environmental duty to protect the environment. The Constitution does not place a similar obligation on the State when it comes to foreign investment. So the duty to protect foreign investment cannot be placed on the same footing as the duty to protect the environment, merely because foreign investment is governed by a treaty. The VCLT states in Article 27 that a "party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." That prohibition is without prejudice to the right of a state to say a treaty is not binding on it because its consent to the treaty was expressed in manifest violation of internal law of fundamental importance under Article 46 of the VCLT. However, the issue is not even about Ghana being able to excuse the performance of an investment treaty obligation on the basis of internal law. The issue is that since the duty to protect the environment derives from the Constitution *and* international environmental treaties, it should be superior to an investment treaty obligation or at least be placed on the same level.

The International Law Commission in 1981 observed that "safeguarding the ecological balance has come to be considered an 'essential interest' of all States."¹⁹⁹ In the *Case Concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*,²⁰⁰ the ICJ acknowledged and gave judicial backing to the duty of states to protect the environment when it stated that "in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage."²⁰¹ In his separate opinion, Judge Weeramantry stated that "the right to development and the right to environmental protection are important principles of current international law." The protection of the environment "is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself."²⁰² In *Legality of the Threat or Use of Nuclear Weapon Case*,²⁰³ the ICJ held that "[r]espect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality."²⁰⁴

¹⁹⁸ United Nations Education, Science, and Culture Organization (UNESCO), *Final Report: Intergovernmental Conference of Experts on Scientific Bases for Rational Use and Conservation of the Resources of the Biosphere* (4-13 September 1968), <<http://unesdoc.unesco.org/images/0001/000172/017269eb.pdf>>; GA Res 2542, UN Doc A/7833, A/L 583 (1969), <[http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/2398\(XXIII\)&Lang=E&Area=RESOLUTION](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/2398(XXIII)&Lang=E&Area=RESOLUTION)>; *Permanent Sovereignty over Natural Resources*, GA Res 1803 (XVII), (1962); and *Report of the U.N. Conference on the Human Environment Stockholm*, U.N. Doc. A/CONF.48/14/Rev. 1, at 4 (1974).

¹⁹⁹ ILC, *Yearbook of the International Law Commission 1980* (Volume II, Part Two, United Nations, 1981) at 39.

²⁰⁰ *Case Concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, 78.

²⁰¹ *Ibid* at para 140.

²⁰² *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (*Separate Opinion of Vice-President Weeramantry*) [1997] ICJ Rep 7, at 88-89

²⁰³ *Legality of the Threat or Use of Nuclear Weapon Case*, Advisory Opinion, ICJ Reports 1996, p. 226.

²⁰⁴ *Ibid* para 30.

These cases establish the importance of the environment and the compelling nature of the corresponding duty of states to protect the environment under international environmental law. It can therefore be argued in the context of international investment law that while international environmental conventions do not expressly prohibit states from entering investment treaties, they do limit the investment treaty obligations the State can assume in view of the duty they impose on the State to protect and safeguard the environment for the public good.

In view of the State of Ghana's constitutional and international law obligations on the environment, this chapter argues that there is a limit to the type of legal duties the State of Ghana can sign on to in investment treaties. Because environmental treaties promote the protection of the environment in the same manner as does the Constitution they should be treated superior to investment treaties which seek to promote foreign investment through restriction of governmental regulation, including regulation required by the Constitution and international environmental treaties to protect the environment. Accordingly, the constitutional and general international law duty with respect to environmental protection should dictate the standards of investment protection the State can undertake.

4.5.2 The Environmental Protection Duty and Investment Treaty Interpretation

The interpretation of investment treaties by investment tribunals or other investment dispute resolution bodies must take into consideration the legal justification for the adoption of an environmental protection measure giving rise to the dispute. Where measures are adopted in furtherance of municipal environmental law and international environmental treaty objectives, the link between municipal law and international environmental law must add legal significance to the legitimacy of the measure. In the words of Jorge Viñuales:²⁰⁵

one important question that has sometimes been inadequately handled by investment tribunals is that of the legal effects attached to the justification of the measure. In an environmental context, this justification should be allowed to play a role at two levels. First, the legal basis of the measure is important. A measure adopted to comply with an international environmental obligation cannot be treated on the same footing as a purely domestic measure. The legal framework applicable to the assessment of the legality of a 'multilateral' measure is indeed different from that applicable to a 'unilateral' measure, at least as far as the applicable 'conflict rules' (the rules used to determine the priority of one norm over another) are concerned. Second, even for purely domestic measures, the interpretation of investment disciplines must leave sufficient room to accommodate environmental considerations.

²⁰⁵ Jorge Viñuales "The Environmental Regulation of Foreign Investment Schemes under International Law" in P.-M. Dupuy and J. E. Viñuales (eds.), *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* (Cambridge University Press, 2013) 273 at 277.

Viñuales argues further that:²⁰⁶

the recognition of the link between a domestic measure and an environmental treaty would place the measure challenged at the same level as investment disciplines, thus excluding the application of the rule giving priority to international (investment) law over domestic (environmental) law.

Sornarajah raised the question of:²⁰⁷

whether matters of international concern relating to the environment or human rights are *ius cogens* principles which trump the rights of foreign investors under investment treaties unilaterally to institute arbitral proceedings. The argument can credibly be made that there are some values in international environmental law and human rights law that are so fundamental that the propositions of investment treaties which are designed to protect large multinational corporations should give way to them.

This chapter adopts Sornarajah's view that:²⁰⁸

The progressive evolution of the right to a clean environment as a human right and as a norm incorporating higher values may lead to an inflexible right for the state to interfere in order to protect the environment and to regard this interference as not amounting to a taking which is not compensable. But, the right must be exercised on objective grounds.

Where an environmental measure is sanctioned by both municipal environmental law and international environmental law, the interpretive approach should either give rise to no liability at all or the award of damages must take into consideration both the merits of the measure and the fact that it derives its justification from both legal norms. Where the measure derives its source from municipal environmental law alone, its merits must be taken into consideration in deciding on liability and damages, although in such a case the principle that international law trumps municipal law may be applicable.

The proposed interpretive approach is necessary to ensure that investment treaties, as international legal norms, do not become instruments for the flagrant disregard of established fundamental rights of citizens whether under domestic law, general international law or both. Therefore, there is the need for a "retreat from the perception that investment protection is the only purpose of the investment treaty" to the recognition of defences in the interpretation of investment treaties "on the basis of the relevance of the international law generally and of the international law on human rights and the environment in particular".²⁰⁹ The interpretation of investment treaties and the award of damages against the state cannot continue to ignore the

²⁰⁶ Ibid at 286.

²⁰⁷ Sornarajah, *Law on Foreign Investment*, above n 11, at 232.

²⁰⁸ Ibid at 110.

²⁰⁹ Ibid at at xvi.

fact that “a state has the right to intervene in an investment that poses a danger to the environment or involves an abuse of human rights”.²¹⁰

4.6 CONCLUSION

The argument that investment treaties must not undermine people’s right to live in a clean and safe environment is not intended to say that the environment must be protected at the expense of foreign investment made within the host state. Thomas Waelde and Abba Kolo argue that:²¹¹

The major concern of the foreign investor is not with environmental regulation per se but rather it is with the uncertainty and surprise aspect of environmental regulation in particular and regulatory changes generally which upset the fiscal and regulatory regime under which the investment was made ... Investment protection rather turns around the issue of unexpected change with an excessive detrimental impact on the foreign investor's prior calculation.

If a company decides to invest, then it expects that the legal and fiscal conditions will remain relatively stable for some time. This is especially so for the natural resources, energy and infrastructure projects where investment is long-term, high risk, capital intensive and highly dependent on the exercise of government’s regulatory powers. Stability of key investment conditions and protection against abuse or excess of regulatory powers is then of essence to the foreign investor ... This is the more so if the investment was made based on promises given by the host State in an agreement with the investor or contained in the country's investment laws.

Discriminatory and protectionist measures disguised and camouflaged in the name of environmental protection cannot be accepted in the face of legal commitments to protect foreign investment under investment treaties. States must also respect express promises they may make to foreign investors to refrain from certain forms of regulatory changes if those promises have been legally made under national constitutions and general international law.

However, the case for stability and predictability of the legal environment for investment cannot be taken in absolute terms. As Waede and Kolo point out, “national and even more so international environmental law are typically open-ended and very responsive to public opinion pressure.”²¹² This may occasion the need to change these laws. Moreover, laws generally are made subject to being repealed, changed or amended when the need arises. This is an inherent part of lawmaking and legal implementation. The reason for doing so is often unexpected.

Therefore, investors should not claim too much surprise (if they can claim surprise at all) when the law is changed or repealed. If investments are long-term and the economic and social conditions in which the investments were made change, this in turn may demand

²¹⁰ Ibid at 78.

²¹¹ Kolo and Waelde, above n 17, at 819-820.

²¹² Ibid at 820.

changes in the legal framework governing the investment or changes in law generally. In such circumstances, it can hardly be reasonably and legitimately expected that laws and regulations, whether they affect foreign investment or not, should remain stable and unchangeable.²¹³ If an enactment, amendment or repeal of laws is manifestly needed, an investment tribunal's analysis of its impact should focus as well on its merits and not just on its unexpectedness and impact on investment alone. Requiring compensation for every significant diminution in the value of an investment caused by legally justified environmental regulation will unduly restrain public governance because claims for compensation can cripple governments economically. Environmental regulation is required and should not be treated as expropriation if the primary motive for such regulation which interferes with investment rights was protection of the environment and not to expropriate as such.²¹⁴

While the entry of foreign investment could have beneficial effects,²¹⁵ it could also have negative effects. Jonathan Bonnitcha argues that "the effectiveness of measures to protect the environment is a function of their achievement of non-economic conservation objectives. The economic interests of foreign investment may occasionally coincide with these objectives, but they are not representative of them."²¹⁶ In view of this, an investment treaty that is premised on the notion that all foreign investment is uniformly and always beneficial so that all forms of regulation must be frozen in the interest of the investment is misleading and dangerous to the national interest.²¹⁷

Therefore, there is the need for exception to liability for interference with foreign investment on environmental grounds in existing investment treaties of Ghana. As the duty of the State to protect the environment derives from Ghana's municipal law (the Constitution and EPA Act) and international environmental treaties, that duty must not be made subordinate to investment treaty obligations. For future investment treaties, provisions on expropriation must provide for effective safeguards that will ensure the adoption and use of environmental protection measures.²¹⁸ Future investment treaties of Ghana will also need to consider the suitability of investment tribunals to resolve issues of law, policy and business. For as Sornarajah argues there is room:²¹⁹

for the further proposition that these issues should not be dealt with by arbitral tribunals that are created under investment treaties which have only a narrow mandate to decide issues that arise from the foreign investment. Instead, tribunals that reflect the interests of the international community as a whole should deal with such disputes. There must be a doctrine of arbitrability created which ensures that issues that concern the international community as a whole should

²¹³ For changed circumstances and investment protection see Christina Binder, "Changed Circumstances in Investment Law: Interfaces between the Law of Treaties and the Law of State Responsibility with Special Focus on the Argentine Crisis" in Christina Binder et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, Oxford, 2009) 608; and Asif Quresh, "The Economic Emergency Defence in Bilateral Investment Treaties: Development Perspective" in Binder et al, *Ibid* 631.

²¹⁴ Sornarajah, *Law on Foreign Investment*, above n 11, at 111.

²¹⁵ Amokura Kawharu "International Law Protection of Foreign Owned Property and Regulatory Freedom", at 5-6 <http://www.nzcel-conf.auckland.ac.nz/papers/Kawharu_Amokura.pdf>

²¹⁶ Bonnitcha, *Substantive Protection under Investment Treaties*, above n 196, at 132.

²¹⁷ Sornarajah, *Law on Foreign Investment*, above n 11, at 230.

²¹⁸ *Ibid* at 272.

²¹⁹ *Ibid* at 232.

not be disposed of by arbitral tribunals which draw their jurisdiction from the will of only the parties to the dispute before them.

Conversely, allowing the state to regulate in disregard of commitments it undertakes in relation to foreign investment and without any attention to compensation would result in over-regulation uninhibited by the economic costs attendant to the state's actions.²²⁰ The normative value of interests of the state and foreign investors at stake must be taken into consideration and not just the value of an investment and the effect of a governmental has on it. This is the only way both unbridled and extensive investment protection and excessive and unjustified regulation can be checked.

²²⁰ Kolo and Waelde, above n 17, at 839.

THE IMPLICATIONS OF INVESTMENT TREATIES FOR DEVELOPMENT POLICY IN GHANA*

5.1 INTRODUCTION

As discussed in the chapter one, the prevailing orthodoxy is that there is a link between foreign investment and development.¹ Sornarajah points out in his seminal book, *The International Law on Foreign Investment*, there “is an enduring belief that all foreign investments should be protected because they are beneficial to the development goals of the host states.”² Based on this premise, most countries have liberalised or strengthened their legal regimes for the promotion and protection of foreign investment and international law on foreign investment has been preoccupied with the treatment to be accorded to foreign investment and associated private property rights.³

Yet, as conceded by the OECD and the UNCTAD, the benefits of foreign investment are neither assured nor do they accrue automatically.⁴ Sornarajah states that “[w]ithin economics itself, the idea that there is a single explanation of the effects of foreign investment on development or that there is only a single and uniform means of achieving economic development is heavily contested.”⁵ The effects of foreign investment on development depend on the conditions prevailing in the host country, the value of the investment to the national economy, the activities and strategies of foreign investors and the host government’s policies.

As foreign investment is not the sole means through which states can develop, this chapter argues that governments should not surrender their general regulatory autonomy in order to attract investment. Taxation, capital account regulation, industrial and targeted social and economic policies also matter for the realisation of development, and it is the role of governments to make and implement such policies. Such measures may impact on foreign investments. For example, states may prohibit the marketing of a particular type of product,

* A longer version accepted for publication: Dominic N Dagbanja, “The Investment Treaty Regime and Development Policy Space in Ghana: Analysis in Constitutionalism and General International Law” in Andrea K Bjorklund (ed), *Yearbook on International Investment Law and Policy 2014-2015* (Oxford University Press, 2016).

¹ Stephan Schill, “International Investment Law as International Development Law” in Andrea K. Bjorklund (ed), *Yearbook on International Investment Law and Policy 2012-2013* (Oxford University Press, 2014) 327 at 329-330; OECD, *Foreign Direct Investment for Development: Maximising Benefits, Minimising Costs* (OECD Publishing, 2002) at 7; and UNCTAD, *Midrand Declaration and A Partnership for Growth and Development* (TD/377, 24 May 1996) at 14, para 36. For contested literature about the role of foreign investment treaties in the attraction of foreign investment and their benefits see generally Karl Sauvant and Lisa Sachs (eds), *The Effects of Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press, 2009).

² M Sornarajah, *The International Law on Foreign Investment* (3edn, Cambridge University Press, 2010) at 51.

³ Shyami Fernando Puvimanasinghe, *Foreign Investment, Human Rights and the Environment: A Perspective from South Asia on the Role of Public International Law for Development* (Martinus Nijhoff Publishers, 2007) at xi

⁴ OECD, above n 1, at 7; and UNCTAD, *Economic Development in Africa: Rethinking the Role of Foreign Direct Investment* (United Nations, New York and Geneva, 2005) at 64-65.

⁵ Sornarajah, *Law on Foreign Investment*, above n 2, at 52.

restrict the manner in which an investment may be used, or impose compliance costs on foreign investors. Measures may also be adopted in response to the conduct of foreign investors' activities, such as those in mining that impact on the host state's population. Governments must be concerned that foreign investors have challenged a range of development-related measures as breaching investment treaty obligations.⁶

This chapter goes further than defending the space and autonomy to regulate for development, and argues the duty of states to make and implement development policies limits the type of investment treaty obligations they can assume in the first place. It also examines how that limitation should inform the interpretation of investment treaties.

Three important points about the relationship between investment treaties and development need to be highlighted. The first is that capital investment, whether at home or abroad, is motivated primarily by profitmaking and does not necessarily lead to development. Kwame Nkrumah, first President of Ghana, argued that:⁷

The basic principle of capitalism and... private enterprise (which in Africa generally means foreign private enterprise) is that an industrial or commercial project shall depend for its initiation or continuance ... on how much profit it makes for the individual or group of individuals, such as shareholders ... It means in Ghana they are only going to support or introduce such projects as will show them the maximum possible profits ... National development is impossible under this system. How can we develop Ghana as a whole if the test of every project is its attractiveness to foreign investors and its rapid profitability? Which foreign investor is going to develop the Northern Region of Ghana, for example, when the quickest source of profit is in the Southern Region?

The second point made by UNCTAD is that, even if investment treaties enhance investment promotion and protection objectives, they also impose constraints that:⁸

could take many forms: they could limit options for developing countries in the formulation of development strategies that might call for differential treatment of investors, e.g. industrial policies; or they could hinder policymaking in general, including for sustainable development objectives, if investors perceive new measures as unfavourable to their interests and resort to IIA-defined dispute settlement procedures outside the normal domestic legal process.

Third, although states sign investment treaties to attract foreign investment for their development, most arbitral tribunals do not regard an investment's contribution to development as a central element in the definition of investment. Consequently, a state may not be entitled to a successful claim that an investment should not be protected under an investment treaty because of its lack of contribution to the state's development. Hence, measures adopted by states to promote their development may give rise to investment treaty

⁶ Caroline Henckels, "Balancing Investment Protection and Sustainable Development: The Role of Deference" in Bjorklund, *Yearbook on Investment Law and Policy*, above n 1, 305 at 306.

⁷ Kwame Nkrumah, *Revolutionary Path* (Panaf Books, London, 2001) at 415-146.

⁸ UNCTAD, *World Investment Report 2012: Towards a New generation of Investment Policies* (United Nations, 2012) at 133.

liability if the measures adversely affect an investment, even if the investment does not contribute to national development. Diane Desierto highlights this problematic, observing that:⁹

the concept of development figures in two highly polemical questions that have become a staple in contemporary investment arbitral disputes. The first question asks whether development should be treated as an essential element or criterion (rather than simply a descriptive feature) to establish the existence of an “investment” to which the international investment agreement ... would apply. ... The second question inquires if the state’s regulatory prerogative to pursue development objectives forms part of [the] subject matter that can be deemed excluded from the applicability of an IIA ... [T]hese questions speak to a much broader *problématique* about the extent of applicability of an IIA to an investor-state dispute when the host state has to contend with challenging adverse development situations arising during the life of an investment.

On one hand, investment treaties seek to create attractive and favourable conditions for investors through liberalisation. On the other hand, investment treaties by their very nature tend to limit states’ measures that might be necessary for the realisation of development. The question then is: how can states fulfil treaty obligations to protect foreign investment and at the same time retain policy space and regulatory autonomy for development policymaking and implementation according to their judgement, needs and conditions?¹⁰

This chapter explores the relationship between Ghana’s standards of investment protection by treaty and its development policymaking and implementation obligations under the Constitution and general international law. Under Articles 1(1) and 36(1) and (2) of the Constitution, the Government of Ghana is required to manage the economy in a manner that maximises development, to provide for adequate means of livelihood and sustainable employment, and to aim at a democracy that secures the basic necessities of life. Ghana is also a party to a number of international human rights treaties and international environmental treaties that recognise the right to development and the corresponding duty of the State. To ensure that the State lives up to its obligation to take steps that assure the realisation of development, the standards of investment protection the State assumes must in the first place respect and be consistent with that obligation to regulate in furtherance of development.

Section 5.2 examines development as a right and the duty of the State in Ghana. It argues that the duty to make and implement development policies is specifically assigned to the Government, which does not have the authority to make treaties that directly or indirectly prohibit its performance of that duty.

Section 5.3 shows that development is an objective of the investment treaties of Ghana. Yet that objective has not been influential in investment arbitration when it comes to defining the concept of investment and whether an investment is entitled to protection.

⁹ Diane Desierto, “Deciding International Investment Agreement Applicability: The Development Argument in Investment” in Freya Baetebs (ed), *Investment Law within International Law: Integrationist Perspectives* (Cambridge University Press, 2013) 240 at 240-241.

¹⁰ UNCTAD, *International Investment Agreements: Key Issues* (UNCTAD/ITE/IIT/2004/10 (Vol. I), United Nations, 2004) at 55.

Section 5.4 deals with the relationship between standards of investment protection and development policymaking in Ghana, using two examples. The first examines the tension between selected standards of investment protection and constitutional powers and duties relating to targeted development policies that are designed to assist domestic businesses and citizens. The second example relates to repatriation of investment and profits and foreign exchange regulation.

Section 5.5 addresses the implications of the state's development obligations for the status and interpretation of existing investment treaties and the adoption of future ones.

5.2 THE RIGHT TO DEVELOPMENT AND DUTY OF THE STATE IN GHANA

5.2.1 The Concept of Development and Its Complicity in Neoliberalism

5.2.1.1 The Concept of Development

“Development” does not have a universally accepted definition because, as Ann Seidman has stated, development theory is not value free.¹¹ It “is necessarily normative in that it must contain – explicitly or implicitly – value judgments as to what ‘ought’ to happen in the development process, what goals development ‘ought’ to achieve.”¹² For this reason, Rumu Sarkar has suggested the definition of development, like beauty, “usually lies in the eye of the beholder”.¹³

Development theorists have formulated a variety of goals which each considers as critical elements of development. One approach equates development with economic development where, for example, the rate of development may be measured by increase in per capita income.¹⁴ For example, William Barber argues that the development condition is “satisfied when two conditions have been met: the ... economy expands in real terms; and the per capita real income ... also improves through time.”¹⁵ However, defining development in terms of economic growth is fundamentally problematic because economic growth can be attained without addressing real problems like inequality, poverty and social deprivation.¹⁶

It is, in part, because of the limitation of the economic approach to development that the UNDP developed the Human Development Index (HDI) in 1990 as an alternative measure of development.¹⁷ The HDI combines the indicators of life expectancy, educational attainment

¹¹ Ann Willcox Seidman, *Ghana's Development Experience 1951-1965* (A Thesis Submitted to the Graduate School of the University of Wisconsin in Partial Fulfilment of the Requirements for the Degree of Doctor of Philosophy at the University of Wisconsin, 1968) at 9.

¹² *Ibid* at 10.

¹³ Rumu Sarkar, *International Development Law: Rule of Law, Human Rights, and Global Finance* (Oxford University Press, 2009) at 37.

¹⁴ *Ibid* at 38.

¹⁵ Willcox Seidman, above n 11, at 10.

¹⁶ William J Barber, *The Economy of British Central Africa: A Case Study of Economic Development in a Dualistic Society* (Stanford University Press, 1961) at 8.

¹⁷ Richard Peet and Elaine Hartwick, *Theories of Development: Contentions, Arguments and Alternatives* (Guildford Press, 2009) at 2.

¹⁷ United Nations Development Programme (UNDP), *Human Development Report 1990: Concept and Measurement of Human Development* (Oxford University Press, 1990).

and income. Human development is defined as “a process of enlarging people’s choices. The most critical ones are to lead a long and healthy life, to be educated and to enjoy a decent standard of living.”¹⁸ This approach to development is also reflected in the UN’s Millennium Development Goals (MDGs). The MDGs set the standards aimed at: eradicating extreme poverty and hunger; achieving universal primary education; promoting gender equality and empowerment of women; reducing child mortality; improving mental health; combating HIV/AIDS, malaria and other diseases; and ensuring environmental sustainability.¹⁹

Arthur Lewis posited an alternative “people’s test” centred on “what is happening to food, clothes, education, health services, housing and employment”.²⁰ According to Lewis, a development plan is unsatisfactory if it makes output its goal rather than consumption or if it gives excessive weight to future consumption at the expense of current needs.²¹ In similar vein, Amartya Sen describes development as “a process of *expanding* the real freedom that people enjoy.”²² Development “requires *the removal* of major sources of ... poverty as well as tyranny, poor economic opportunities as well as systemic social deprivation, neglect of public facilities ...”²³

A basic needs approach recognised under Ghana’s Constitution, emphasises the need to enlarge people’s choices in life. The basic needs approach to development provides a conceptual framework for analysing and explaining development normatively, based on national and international human rights standards. Development, then, is both an individual and state right with a corresponding duty to be performed by the state.²⁴ From a human development perspective, the state’s duty in relation to development requires the integration of legal norms protecting basic rights of citizens into the plans, policies and processes of development.²⁵

Following that approach, this chapter conceives of development as those basic and essential entitlements and values that are fundamental to human life and existence and the corresponding duty of the state in relation to them. These entitlements and values include the right to food, water, housing and health. Development must focus on human beings and must be inclusive, which means making life better for everyone: sufficient food, a safe and healthy place in which to live and affordable social and economic services to everyone.²⁶ This social and human approach to development is reflected in the various development frameworks of

¹⁸ Ibid at 10.

¹⁹ See e.g. Republic of Ghana and United Nations Development Programme, *West Gonja Human Development Report 2007: Vulnerability and the Attainment of the MDGs at the Local Level* (2007) at 4; United Nations, *The Millennium Development Goals Report 2013* (United Nations, 2013); World Commission on Environment and Development, *Report of the World Commission on Environment and Development: Our Common Future* (1987) para 27. See also United Nations, *Transforming our World: The 2030 Agenda for Sustainable Development*, A/RES/70/1 adopted by the General Assembly on 25 September 2015, <http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E>

²⁰ W Arthur Lewis, *Development Planning: The Essentials of Economic Policy* (Harper and Row, 1966) at 96.

²¹ Ibid

²² Amartya Sen, *Development as Freedom* (Anchor Books, 1999) at 4 (emphasis added).

²³ Ibid.

²⁴ Brigitte Hamm, “A Human Rights Approach to Development” (2001) 23(4) *Human Rights Quarterly* 1005.

²⁵ World Health Organisation, *Right to Water* (Health and Human Rights Publication Series No 3, February 2003) at 9-10.

²⁶ Peet and Hartwick, above n 16, at 1.

Ghana,²⁷ and in Articles 1(1) and 36(2)(e) of the Constitution, whereby the powers of government shall be exercised to promote the “welfare” and “basic necessities of life” of the people of Ghana. In this sense, the duty to make and implement development policies must determine what the State does with its powers, taking into consideration the implications of the particular exercise of the powers for the realisation of the right to development.

5.2.1.2 The Complicity of Development in Neoliberalism

James Gathii describes neoliberal economic policies as “mainly preoccupied with displacing statist regulatory interventions in the market place while integrating national economies into the international market economy with little or no constraints on the flow of international capital.”²⁸ The reliance on the concept of development and the role of the State in relation to it in this chapter as justification for a limitation on the capacity of the State in investment treaty making and as a normative framework for the interpretation of investment treaties does not ignore the fact that development is not an unproblematic concept or one that has been used to justify neoliberalism. The chapter does not present development as an inherently stable and positive standard against which the legal validity and effect of an investment treaty can be determined. Indeed, there are scholars who might question whether the right to development and corresponding duty of the State should be used as a framework for determining the extent of the capacity to execute investment treaties and their interpretation given that development is used as justification for liberal legal and regulatory framework for foreign investment protection as discussed in Section 1.1 of chapter 1, Sections 2.1 and 2.2 of chapter 2 and Section 5.1 of this chapter.

Antony Anghie in his seminal book, *Imperialism, Sovereignty and the Making of International Law* not only shows that colonialism was central in the development of international law, he also shows how the concept of development presented to satisfy neoliberal ideals has contributed to the construction of international legal regime for private foreign investment promotion and protection. He observes that with the attainment of independence, the new states were concerned with providing their populations with a decent standard of living that could be achieved through development. The West and the new states alike “understood that private actors, MNCs [multinational corporations], played a vital role in achieving development.”²⁹ The legal framework appropriate for the regulation of these new entities could be provided by ‘transnational law’, which comprised a combination of domestic

²⁷ See e.g. Office of the Planning Commission, *Seven-Year Plan for National Reconstruction and Development. Financial Years 1963/1964 – 1969/1970* (Government Printer, 1964); Republic of Ghana, *Ghana Poverty Reduction Strategy 2003-2005: Agenda for Growth and Prosperity* (National Development Planning Commission, 19 February, 2003); Republic of Ghana, *Growth and Poverty Reduction Strategy (GPRS II) (2006 – 2009)* (National Development Planning Commission, November 2005); Republic of Ghana, *The Coordinated Programme of Economic and Social Development Policies, 2010 – 2016* (December 2010), (“Economic and Social Development Policies”); and Republic of Ghana, *Medium-Term National Development Policy Framework: Ghana Shared Growth and Development Agenda (GSGDA), 2010-2013* (Vol I, National Development Planning Commission, December 2010), <<http://www.ndpc.gov.gh/GPRS/Final%20Draft%20Policy%20Framework%20092010.pdf>>

²⁸ James Thuo Gathii, “Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law” (1999) 5 *Buffalo Human Rights Law Review* 107 at 108.

²⁹ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005) at 203-204

law, private international law and public international law. Specifically, the increasing engagement of MNCs in the economic affairs of the 'Third World' led to the emergence of the international law of foreign investment.³⁰ The distinction between the 'developed' and the 'developing' became central to the operation of the Bretton Woods institutions which were to formulate new techniques to bridge the difference between the 'advanced' and the 'backward' countries.³¹ The neoliberal logic about the role of foreign investment in development that justify the limitations the investment treaty regime places on regulatory autonomy has also been questioned by Sornarajah in *The Retreat of Neo-Liberalism in Investment Treaty Arbitration* in which he argues that the innate nature of arbitration enables pro-business arbitrators to articulate and shape investment treaties in a manner that entrenches and expands neo-liberal principles in international investment law. The expansionist ideals are achieved through nebulous standards of investment protection.³²

Sundhya Pahuja in *Decolonising International Law: Development, Economic Growth and the Politics of Universality* analysis how the concept of development has been used to universalise the rule of law and international law.³³ She argues that:³⁴

Once the rule of law was cast as being relevant to the legitimacy of a state and a certain model of democracy was put forward as universal, the concept of development was engaged implicitly to underwrite that universalisation. In other words, in universalizing a particular model of democracy and its attendant rule of law ... styles of liberal evangelism were relevant on a development narrative. Once the concept of development was engaged implicitly in defining the rule of law, it was a short step for the rule of law to become the explicit concern of international economic institutions. The embrace by international economic institutions proved to be a powerful engine in the universalization of a particular model of the rule of law on both a conceptual and practical level. This is because of the mutually sustaining nature of the relationship between development and the concept of law as understood by those institutions.

Jennifer Beard similarly points out that the market in liberal capitalism is central to an "understanding of how rule of law development programmes operate at the metaphysical level."³⁵ According to Beard:³⁶

³⁰ Ibid at 223-226

³¹ This is reflected for example in the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 4 ILM 524 (entered into force 14 October, 1966) which established the International Centre for the Settlement of Investment Disputes, *Convention Establishing the Multilateral Investment Guarantee Agency*, adopted 11 October 1985 and entered into force 12 April 1988; The World Bank, *World Investment Report 1997: The State in a Changing World* (Oxford University Press, 1997); and World Bank, *World Development Report 2000/2001: Attacking Poverty* (Oxford University Press, 2001). For an analysis of the relationship between international law and development and the role of international institutions therein see Wolfgang Friedmann, Florentino P. Feliciano and A. A. Fatouros, "The Relevance of International Law to the Processes of Economic and Social Development" (1966) 60 *Proceedings of the American Society of International Law at Its Annual Meeting (1921- 1969)* 8.

³² M Sornarajah, "The Retreat of Neo-Liberalism in Investment Treaty Arbitration" in Catherine A. Rogers and Roger P. Alford (eds), *The Future of Investment Arbitration* (Oxford University Press 2009) 273 at 276-281.

³³ Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2011) at 172-185

³⁴ Ibid at 185.

³⁵ Jenny Beard, "The Confessional Framework of Rule of Law Development: How to Offer Salvation to Willing Legal Subjects" (2006) 75 *Nordic Journal of International Law* 409 at 410.

³⁶ Ibid at 412.

rule of law development reforms are a technique for the constitution of legal subjectivity at both the national and individual level. Legal subjectivity at the national level is being shaped by the restructuring of the nation's institutions and legal system structures ... Legal subjectivity at the individual level is regulated through the construction and universalisation of individual rights, freedoms and desires. The objective of all of these reforms is to create legal subjects willing obedience to a universal rule of law.

Just as the early Christian was trained to confess his sins to the clergy, contemporary underdeveloped peoples are trained within development practices to speak of their economic and cultural practices in terms of their "willingness to reform" to the rule of law instituted and structured by various development agencies. These agencies, in turn, claim to be able to mediate and transform these peoples into a truer, more developed form of subject.

In *Representations of the Liberal State in the Art of Development*, Beard is "particularly dubious about a discourse that is packed predominantly with the historical and cultural effects of a small minority of 'Western' peoples - market-driven growth, open, rule-based multilateral trade, capital investment, technology, capital financing, democracy, human rights and fundamental freedoms, liberal governance and a 'civil' society."³⁷ For this reason, Beard proposes in *The Political Economy of Desire: International Law, Development and the Nation State* that the definition of development (insofar as it leads to distinctness and delineation) "ought to be opened to the point that it can no longer be identified – to the extent that the West ought no longer to call itself 'developed'."³⁸

The above analysis points to arguments about the relationship between international law and development in international relations and that development has become a basis for the universalisation of western values relating to law, human welfare and human rights. Development has become a basis for calls for the strengthening of the rule of law in developing countries.³⁹ As Tom Ginsburg argues:⁴⁰

The new wave of law and development activity corresponds with a shift toward market-oriented economic policies in the developing world. Reform of legal institutions is now seen as one pillar of a tripartite package of reforms that also includes democracy and economic liberalization. The relationships between law and politics on one hand and law and economy on the other are not well understood, but they are usually seen to be mutually reinforcing. In both the political and economic spheres the task of law is to constrain the state and empower private economic actors. Thus, liberal notions of autonomous law are at the core of the new law and development activity.

³⁷ Jenny Beard, *Representations of the Liberal State in the Art of Development* (2001) 10 *Griffith Law Review* 6 at 9.

³⁸ Jennifer Beard, "The Political Economy of Desire: International Law, Development and the Nation State" (March 23, 2009) University of Melbourne Legal Studies Research Paper No. 380, <<http://ssrn.com/abstract=1367439> or <http://dx.doi.org/10.2139/ssrn.1367439>>. See also Jennifer Beard, *The Political Economy of Desire: International Law, Development and the Nation State* (Routledge-Cavendish, 2006).

³⁹ Tom Ginsburg, "Review: Does Law Matter for Economic Development? Evidence from East Asia" (2000) 34(3) *Law and Society Review* 829 at 830

⁴⁰ *Ibid* at 831.

James Gathii argues in similar terms that “good governance serves as the World Bank’s short hand for measuring which parts of the human rights agenda are compatible or consistent with its financial and economic mandate.”⁴¹ This requirement, he argues, “severely constrains the possibilities within the good governance agenda that prior development policies offered human rights advocates and activists.”⁴² In short, whatever may be the benefits that derive from the concept of development as a right, it has the risk of being used to justify neoliberal ideas that underlie the investment treaty regime and liberal economic theories such those on structural adjustments in Ghana.⁴³ Also, the concept of development, in the words of Beard “is used as a convenient name for a particular socio-economic status”⁴⁴ which, like the concepts of North and First World, is “closely associated with particular social and economic divisions in and of the world” whereby “it is the developed world that claims for itself that space, which exists only as transcendence.”⁴⁵ Development discourse in that sense “represents a very real and effective form of imperial power that is concerned with the maintenance of a particular (western) version of subjectivity through its appropriation of history” to the extent that development cannot be understood “without the binary of underdevelopment.”⁴⁶

There is also a tension between the centrality of law in theories of development and existing evidence from Asia.⁴⁷ More important for purposes of this chapter, the foregoing analysis shows that scholars have questioned the appropriateness of the definition and use of the concept of development. Those questions are legitimate and important for two reasons. First, they point to the fact that international economic relations have a history of actual or potential exploitation and abuse in the name of protecting ‘vulnerable’ states that are ‘poor’ and lack the capacity to govern themselves to prosperity without adopting the paths followed by the developed world.⁴⁸ The above scholarship also helps address the question whether investment treaties are really intended to attract foreign investment for development and if so why their terms do not largely explicitly make room for the protection of development measures against legal suits by foreign investors.⁴⁹ Such critical analysis help lift the veil of the investment treaty regime to see what is really behind them. By such analysis, the conclusion can be drawn that the historical origins of investment treaties and international

⁴¹ Gathii, above n 28 at 108.

⁴² Ibid.

⁴³ K. Konadu-Agyemang (ed.), *IMF and World Bank Sponsored Structural Adjustment Programs in Africa: Ghana’s Experience, 1983–199* (Ashgate, Aldershot, 2001); International Monetary Fund, *Ghana: Enhanced Structural Adjustment Facility Economic and Financial Policy Framework Paper, 1998–2000*, <<http://www.imf.org/external/np/pfp/ghana/ghana0.htm>>; and K. Donkor, *Structural Adjustment and Mass Poverty in Ghana* (Ashgate, 1997).

⁴⁴ Beard, “The Political Economy of Desire,” above n 38 at 6

⁴⁵ Ibid.

⁴⁶ Ibid 5.

⁴⁷ Ibid at 830. Useful practical and theoretical readings on the role of law in development include Katharina Pistor and Philip A. Wellons, *The Role of Law and Legal Institutions in Asian Economic Development, 1960-1995* (Oxford University Press, 1999); Kanishka Jayasuriya (ed), *Law, Capitalism, and Power in Asia: The Rule of Law and Legal Institutions* (Routledge, 1999); Robert S. Brown and Alan Guterman, *Asian Economic and Legal Development: Uncertainty, Risk, and Legal Efficiency* (Kluwer Law International, 1998).

⁴⁸ Dominic N Dagbanja, “The Limitation on Sovereign Regulatory Autonomy and Internationalization of Investment Protection by Treaty: An African Perspective” (2015) 60(1) *Journal of African Law* 1 at 22.

⁴⁹ Ibid at 20.

relations generally have influenced the terms of these treaties and the terms in turn define the way the treaties are interpreted and enforced.⁵⁰

Second, the critical approach to the concept of development reflected in the works of Pahuja, Anghie and Beard analysed above are also important given that there does not exist one path to development and development itself is not and should not be treated as a value-free concept. Thus, this chapter adopts Maxwell Chibundus' view that that "the relevance of law for development must be grounded in the experiences of the society under study and in ways giving form and meaning to those experiences by their institutionalization, not through internationalizing the societies, nor through a universalist or global conception of procedural mechanisms or substantive rights and duties."⁵¹

However, as Beard rightly argues, general international law and socio-economic development "both rest on the belief that individuals, and more belatedly, peoples, are meant to live in circumstances that grant them certain rights and freedoms fundamental to their humanity. To this end, international law seeks to provide peace and security, mechanisms of good governance."⁵² In this regard, general international law, development and the nation state "may be understood as instrumental to the *process* of improving human life."⁵³ This is reflected in international human rights treaties and international environmental treaties Ghana is a party to, especially as analysed in this chapter and chapters 1, 2 and 4 of this thesis. Thus while the development discourse "opens up the possibility of international organisations such as the World Bank" and may exclude different ways of understanding who human beings in their differing geographical and cultural settings are and what the state is, it may equally open the possibility of various forms of legitimate forms of government in different polities.⁵⁴ Especially, if the concept of development has to do with the basic needs of citizens and the State has a role in the realisation of those needs, as this chapter argues it is, then, development can be used as framework for determining the capacity of the state to conclude investment treaties and how those treaties should be interpreted depending on the nature of the terms of those treaties for the state in the performance of that role. This approach is particularly justified in the context of a state such as Ghana the Constitution of which places the welfare of the people at the centre for the exercise of the powers of government and requires the government in its dealings with other nations to act in accordance with accepted principles of public international law and in the national interest.⁵⁵ In any case, the fact that development is presented as justification of the legal regime for private foreign investment promotion and protection as reflected in the investment treaty regime of Ghana supports the need to place development at the centre stage in the making and interpretation of investment treaties. Any argument that advocates for a peripheral place for development in the interpretation and enforcement of investment treaties is inconsistent with the very neoliberal

⁵⁰ Ibid at 22.

⁵¹ Maxwell O Chibundu, "Law in Development: on Tapping, Gourding, and Serving Palm-Wine" (1997) 29 *Case Western Reserve Journal of International Law* 167 at 171.

⁵² Beard, "The Political Economy of Desire," above n 38 at 1

⁵³ Ibid.

⁵⁴ Beard, "Representations of the Liberal State," above n 37 at 10.

⁵⁵ *Constitution of Ghana* arts 1(1), 40(a) and 73.

ethos that underlie the investment treaty regime, namely that the regime is *sine qua non* for investment attraction *for development*.

The choice of development then as a framework for the analysis in this chapter is informed and justified by the public importance the Constitution and international human rights treaties Ghana is a party to attach to this concept as a right for citizens and in view of the fact development is defined as an objective of Ghana's investment treaty regime as analysed in Section 5.3.

5.2.2 The Constitution and Development

A "right" is defined as a "legally enforceable claim"⁵⁶ or "a recognized and protected interest the violation of which is wrong."⁵⁷ This chapter argues that the primary intent of the Constitution is to provide a framework for the state to advance the right to development in its broadest meaning.

As noted previously, the preamble states that the Constitution was enacted to "establish a framework of government which shall secure for [the people of Ghana and] posterity the blessings of liberty, equality of opportunity and prosperity",⁵⁸ and Article 1(1) that "[t]he Sovereignty of Ghana resides in the people of Ghana in whose name and for whose welfare the powers of government are to be exercised in the manner and within the limits laid down in this Constitution". The Constitution also recognises and protects various fundamental human rights, including the right to life, right to own property,⁵⁹ and economic rights, especially those relating to work, and educational and cultural rights.⁶⁰ All of these constitute rights in and of themselves, but they are also important attributes of the basic needs approach to development. By Article 12(1) of the Constitution, these fundamental human rights are to be respected and upheld by the Government and all legal persons in Ghana.

To give effect to the realisation of the right to development, the Constitution in Article 86 establishes the National Development Planning Commission (NDPC). The Commission's role under Article 87 is to conduct strategic analyses of macro-economic and structural reform options, and to make proposals for the development of multi-year rolling plans and for the protection of the natural and physical environment. The Commission is also required to make proposals for ensuring even development in Ghana, to monitor, evaluate and coordinate development policies, programmes and projects, and to perform other functions relating to development planning.⁶¹ If development were peripheral and not central as a right in Ghana, the Constitution would not have established the NDPC.

The Constitution further provides for the Directive Principles of State Policy, which according to Article 34(1):

⁵⁶ Bryan Garner (ed in Chief), *Black's Law Dictionary* (West: Thompson Reuters, 2009) at 1436

⁵⁷ *Ibid.*

⁵⁸ *Constitution of Ghana*, Preamble.

⁵⁹ *Ibid* arts 18 and 20.

⁶⁰ *Ibid* arts 13, 14, 16(1), 18, 20 and 24-26.

⁶¹ *Ibid* arts 86 and 87.

shall guide all citizens, Parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties and other bodies and persons in applying or interpreting this Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society.

The Principles as enumerated in Articles 34-39 of the Constitution cover a number of political, economic, social, educational and cultural objectives that are pertinent to development in Ghana. In sum, they require the Government to establish Ghana as a society that is just and free; a society of probity and accountability; and a society in which the basic and essential needs of people can be met. By Article 36(1) of the Constitution, the State must take all steps necessary to ensure that the economy is managed in a manner that leads to development, secures the maximum welfare, freedom and happiness of every person in Ghana, and that adequate means of livelihood and suitable employment are provided.

Steps are to be taken to ensure that individuals and the private sector bear their fair share of social and national responsibilities, including responsibilities to contribute to the overall development of Ghana.⁶² Appropriate measures are to be taken to: encourage foreign investment, subject to any existing law regulating investment in Ghana; afford equality of economic opportunity to all citizens; protect and safeguard the national environment; safeguard the health, safety and welfare of all persons in employment; and encourage the participation of workers in the decision-making process at the workplace.⁶³

The State must direct policies towards ensuring that every citizen has equality of rights, obligations and opportunities before the law.⁶⁴ To meet the social goals in society, Article 37(2)(a) and (b) of the Constitution says the “State shall enact appropriate laws to assure ... the enjoyment of rights of effective participation in development processes” and “the protection and promotion of all other basic human rights and freedoms, including the rights of ... vulnerable groups in development processes.” According to Article 37(3), in the discharge of these obligations the State is to be guided by international human rights instruments that recognise and apply particular categories of basic human rights to development processes, such as those specified below.

Finally, but not least, the Constitution attaches so much importance to development that it requires in Article 69 (b)(ii) that the President shall be removed from office if he is found to have conducted himself in “a manner prejudicial to the economy ... of the State.” This provision can be read as consistent with Article 1(1) (obligation to promote the welfare of the people) and the development objective for managing the economy in Article 36(1) The requirement in Article 36(1) that the State “shall take all necessary action” in the management

⁶² Ibid art 36(2)(a)-(e). On the enforceability of the directive principles of state policy see *New Patriotic Party v Attorney-General* [1993-94] 2GLR 35 AT 65-66; *New Patriotic Party v Attorney-General (the CIBA case)*. [1997-98] 1 GLR 378 at 393-394; *Ghana Lotto Operators Association v National Lottery Authority*, Ruling, Ref. NO. J6/1/2008, 23 July 2008; and Seth Yeboa Bimpong-Buta, *The Role of The Supreme Court in the Development of Constitutional Law in Ghana* (Submitted in accordance with the requirements for the degree of Doctor of Law – LLD at the University of South Africa, 1 February 2005) at 187ff.

⁶³ *Constitution of Ghana* art 36(4) and (6), (8)- (11).

⁶⁴ Ibid art 37(1).

of the economy suggests that governmental *actions* in the form of administration, legislation, policymaking and implementation, monitoring and evaluation are all prerequisites for the realisation of development in Ghana. The Government itself recognised this when, under the leadership of President John Atta Mills it stated in 2010 that policy on development must be guided by the “imperative that it is through the execution of policies and programmes which bring about growth with equity that socio-economic development becomes inclusive and responsive to the needs of all Ghanaians”.⁶⁵ In other words, development does not just happen on its own. In order for development to be attained, the state or someone must act. As Theo Scheepers argues, development “is not a mere evolutionary or natural process. If not managed, it remains a change process not capable of producing an improved quality of life”⁶⁶

5.2.3 General International Law and Development

Ghana is a party to the African Charter on Human and Peoples’ Rights.⁶⁷ Article 22 of the Charter specifically recognises the right to development and corresponding duty of the State in the following terms:

All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

The obligations of the State with respect to development policymaking and implementation also arise from a number of other regional treaties in Africa. For example, the objectives set out in Article 3 of the Constitutive Act of the African Union⁶⁸ adopted by African heads of state and government, including Ghana, include to “promote and protect human and peoples’ rights,” “promote sustainable development at the economic, social and cultural levels,” “promote co-operation in all fields of human activity to raise the living standards of African peoples” and “advance the development of the continent”. Among the objectives of the Treaty Establishing the African Economic Community⁶⁹ stated in Article 4(a) is the need to “promote economic, social and cultural development and the integration of African economies in order to increase economic self-reliance and promote an endogenous and self-sustained development.”

⁶⁵ Republic of Ghana, *Economic and Social Development Policies*, above n 27, at ii.

⁶⁶ Theo Scheepers, *A Practical Guide to Law and Development: An Introduction to the Law Applicable to Development and the Development Management Process in South Africa* (Juta & Co Ltd, 2000) at 14.

⁶⁷ *African Charter on Human and Peoples’ Rights*, 27 June 1981, 21 ILM 58, entered into force 21 October 1986

⁶⁸ *Constitutive Act of the African Union*, adopted by the Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Government at Lome, Togo, 11 July 2000.

⁶⁹ *Treaty Establishing the African Economic Community*, Signed, 3 June 1991.

It also can be inferred from a rights-based approach to development that the right to development is recognised under the Charter of the United Nations,⁷⁰ the International Covenant on Civil and Political Rights,⁷¹ and the International Covenant of Economic, Social and Cultural Rights,⁷² because they are human-centred treaties specifically meant to advance the rights, interests and welfare of human beings.⁷³ The Universal Declaration of Human Rights in Article 22 states that everyone “has the right to social security and is entitled to realization, through national effort ... of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”⁷⁴ According to the Declaration on the Right to Development⁷⁵:

Article 1(1): The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

Article 2(3): States have the right and the duty to formulate appropriate national development policies that aim 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 in the fair distribution of the benefits resulting therefrom.

Significantly, Ghana’s Constitution requires the Government to adhere to international conventions⁷⁶ such as the African Charter, and in international affairs to “conduct its affairs in consonance with accepted principles of public international law.”⁷⁷

From the perspective of The Imperatives Theory, development is a *constitutional-general international law imperative* because it is guaranteed by both the Constitution and general international law. The obligation with respect to development policy should, therefore, be treated as taking precedence over investment treaty obligations which are justified largely in investment treaties. Accordingly, the State should not have the competence to conclude investment treaties that explicitly and directly prevent the adoption of measures for the realisation of the right to development.

⁷⁰ Charter of the United Nations, 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force 24 October 1945.

⁷¹ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, entered into force 23 March 1976.

⁷² *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, entered into force 3 January 1976.

⁷³ Arts 55, 56 and preamble to the UN Charter; Arts 22, 26(2), 28 and 29(1) of *Universal Declaration of Human Rights*; Art 1 of *International Covenant on Civil and Political Rights*; and Arts 1 (1), 2(1) and 11 of *International Covenant on Economic, Social and Culture Rights*; and *United Nations Declaration on the Right to Development* UN GA Res. 41/128 (4 December 1986).

⁷⁴ *Universal Declaration of Human Rights* UN GA Res. 217 A(III), UN Doc. A/810, adopted 10 December 1948, art 71.

⁷⁵ *Ibid.*

⁷⁶ *Constitution of Ghana*, art 40(d).

⁷⁷ *Ibid* art 73.

5.3 THE DEVELOPMENT OBJECTIVE IN THE INVESTMENT TREATY REGIME OF GHANA

5.3.1 Foreign Investment, Development and Investment Treaties of Ghana

The preambles to Ghana's investment treaties show that they seek to create favourable conditions for foreign investment because of its role in development, explicitly linking the protection of foreign investment to development cooperation, economic development, increased prosperity and stimulation of the flow of capital and technology. Strengthening cooperation between private enterprises of the contracting parties is also an important objective of Ghana's investment treaty framework. They adopt broadly similar wording. For example, the objective of the Ghana-United Kingdom investment treaty was "to create favourable conditions for greater investments". The parties assumed that the "encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity".⁷⁸ The Ghana-Netherlands investment treaty was meant "to strengthen the traditional ties of friendship" between the two countries and "to extend and intensify the economic relations between them particularly with respect to investments".⁷⁹ An agreement upon the treatment to be accorded to foreign investments was considered necessary to stimulate the flow of capital and technology for development. The Ghana-China investment treaty between two developing countries expressed the parties' desire "to encourage, protect and create favourable conditions for investment", "based on the principles of mutual respect for sovereignty, equality and mutual benefit and for the purpose of the development of economic cooperation between both States."⁸⁰

The investment treaties never pretend to present the protection of foreign investment as an end in itself. Yet, the fact that Ghana's investment treaties articulate the objective of development in their preambles does not mean the country can confidently rely on an investment's lack of contribution to development as a defence in investment arbitration. The balance of arbitral decisions shows a state may not be relieved of liabilities arising from breach of an investment treaty obligation on the basis that the investment involved made no contribution to development. Most arbitral cases demonstrate that an investment's lack of contribution to development is not central to the definition of an investment.

In *Electrabel SA v Hungary*, the Tribunal identified profit and return as necessary and integral elements of an "investment". Although "the economic development of the host State is one of the objectives"⁸¹ of the ICSID Convention "and a desirable consequence of the investment", it held "it is not necessarily an element of an investment."⁸² The Tribunal in *Saba*

⁷⁸ Ghana-United Kingdom Investment Treaty, preamble.

⁷⁹ Ghana-Netherlands investment Treaty, preamble.

⁸⁰ Ghana-China Investment Treaty, preamble.

⁸¹ *Electrabel SA v Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) para 5.43.

⁸² *Ibid* para 5.43.

Fakes v Turkey reached the same conclusion, saying it was “not convinced ... that a contribution to the host State’s economic development constitutes a criterion of an investment within the framework of the ICSID Convention.”⁸³ Even when tribunals find that an investment treaty is aimed at promoting and protecting foreign investment to advance the wellbeing of people, they have still placed emphasis on the investment protection objective and glossed over the development objective. For example, in *Siemens A.G. V Argentina*, the Tribunal in interpreting the Argentina-Germany investment treaty stated that it:⁸⁴

shall be guided by the purpose of the Treaty as expressed in its title and preamble. It is a treaty “to protect” and “to promote” investments. The preamble provides that the parties have agreed to the provisions of the Treaty for the purpose of creating favorable conditions for the investments of nationals or companies of one of the two States in the territory of the other State. Both parties recognize that the promotion and protection of these investments by a treaty may stimulate private economic initiative and increase the well-being of the peoples of both countries. The intention of the parties is clear. It is to create favorable conditions for investments and to stimulate private initiative.

*Salini v Morocco*⁸⁵ and *Fedax v Venezuela*⁸⁶ are cases which hold the contrary view. They decided the contribution of an investment to the economic development of the host State is an element of the definition of an investment for purposes of deciding whether the investment is entitled to protection under an applicable investment treaty. *Patrick Mitchell v The Democratic Republic of Congo*,⁸⁷ *Malaysian Historical Salvors SDN BHD v The Government of Malaysia*,⁸⁸ *Alex Genin Eastern Credit Ltd Inc v The Republic of Estonia*,⁸⁹ *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*,⁹⁰ *Amoco Asia Corporation v Republic of Indonesia*⁹¹ and *Joseph Charles Lemire v Ukraine*⁹² also recognised contribution to the economic development of the host country as a characteristic of investment for the purpose of deciding if an investment is entitled to protection. These cases show that some tribunals recognise that the obligation to protect foreign investment is related to the host state’s search for development.⁹³

⁸³ *Saba Fakes v. Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, para 97.

⁸⁴ *Siemens A.G. V Argentina* ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2008, para 81 (emphasis added).

⁸⁵ *Salini Costruttori SpA & Italstrade SpA v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001).

⁸⁶ *Fedax NV v. Republic of Venezuela*, ICSID Case No ARB/96/3, Decision of the Tribunal on Objection to Jurisdiction (11 July 1997).

⁸⁷ *Patrick Mitchell v The Democratic Republic of Congo*, Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006 paras 27-41.

⁸⁸ *Malaysian Historical Salvors SDN BHD v The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009 paras 56ff.

⁸⁹ *Alex Genin Eastern Credit Ltd Inc v The Republic of Estonia*, Case No. ARB/99/2, Award, 25 June 2001 paras 348ff

⁹⁰ *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No ARB/07/21, Award, 30 July 2009 paras 81-82.

⁹¹ *Amoco Asia Corporation v Republic of Indonesia*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 25 September 1983, para 23.

⁹² *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/O6/18, Decision on Jurisdiction and Liability, 14 January 2010 paras 272-273.

⁹³ See Schill, above n 1, at 2012-2013, 327 and 340-344.

However, the predominant approach appears to be that contribution to a host country's development is not a mandatory element of the concept of investment.⁹⁴ The approach adopted by those tribunals raises a question as to what the consideration or *quid pro quo* is for states in return for the protections they accord to foreign investors. This question is most appropriately asked in light of *Société Générale*,⁹⁵ which held that the goals or purposes of investment treaties as reflected in their preambles are of less interpretive importance than their actual terms in treaty interpretation. Investment tribunals have effectively minimised the relevance of development in arbitration. The implication for Ghana is that it would have difficulty using an investment's lack of contribution to development as a justification for not according an investment the required treatment under investment treaties.

As a matter of strategy, if states have specific interests they need to be respected, they must make specific provisions to that effect in the substantive terms of investment treaties. States could also provide a more specific definition of the concept of investment to include contribution to development in investment treaties, and this could limit the scope of application of the concept of investment.

5.3.2 Globalisation, International Relations and the Politics of Investment Treaties of Ghana

The analysis in Subsection 5.3.1 would seem to suggest investment treaties are entered into solely in the public interest. This may not really be the case. Investment treaties have been inspired by "capital-exporting states' increased concern for investment protection, given the scale, frequency, and volume of their foreign direct investment spurred by worldwide liberalization and globalization trends."⁹⁶ The investment treaty regime thus originates and hinges primarily on the desire of governments in developed countries home to large multinational business entities to provide a secure legal regime for the protection of these businesses.⁹⁷ The internationalization of foreign investment protection by treaty was primarily aimed at protecting the private business interests of investors from the developed world who invested abroad.⁹⁸ In that sense, investment treaties are a product of corporate influence operating on both the home and host countries of foreign investors and their investments.⁹⁹ As argued by Thomas Pogge in *Politics as Usual: What Lies Behind the Pro-Poor Rhetoric*:¹⁰⁰

⁹⁴ On the question of balance between investment protection and development see, Caroline Henckels, "Balancing Investment Protection and Sustainable Development: The Role of Deference" in Bjorklund, *Yearbook on Investment Law and Policy*, above n 1, 305; and Caroline Henckels, "Balancing Investment Protection and the Public Interest: the Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration" (2014) *Journal of International Dispute Settlement* 197.

⁹⁵ *Société Générale v. Dominican Republic*, LCIA Case No UN 7927, UNCITRAL Arbitration Rules, Award on Preliminary Objections to Jurisdiction (19 September 2008).

⁹⁶ Diane A Desierto, *Public Policy in International Economic Law: The ICESCR in Trade, Finance, and Investment* (Oxford University Press, 2015) at 314. See also Dagbanja, "Limitation on Sovereign Regulatory Autonomy," above n 48.

⁹⁷ Zachary Elkins, Andrew T. Guzman and Beth A. Simmons, "Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000" (2006) 60(4) *International Organization* 811 at 817

⁹⁸ Dagbanja, "Limitation on Sovereign Regulatory Autonomy," above n 48 at 4

⁹⁹ It was on the basis that Multilateral Agreement on Investment was corporate inspired and was aimed at promoting corporate interests at the expense of sovereignty, environment, human rights and development that the agreement received opposition among some scholars and a coalition of such as Amnesty International, Australian Conservation

The governments of the more powerful developed countries, especially the so-called G-7, have played a dominant role in designing the post-Cold War global institutional order. In shaping this order, those governments have given much weight to the interests of their domestic business and financial elites and rather little weight to the interests of the poor and vulnerable populations of the less developed countries. The resulting global institutional order is arguably unjust insofar as the incidence of violence and severe poverty occurring under it is much greater than would have been the case under an alternative order whose design would have given greater weight to the interests of the poor and the vulnerable.

Thus an analysis of the reasons for the signing of investment treaties can no longer be limited to the development argument; namely that investment treaties are designed to attract foreign investment for the development of the country receiving the investment.¹⁰¹ Given in particular what Pogge describes as “double transformation of the traditional realm of international relations”¹⁰² which involves the “proliferation of international, supranational, and multinational actors, and the profound influence of transnational rules and of the systematic activities of these actors deep into the domestic life of national societies”¹⁰³ investment treaties cannot be looked at from the perspective that they are simply instruments mutually agreed to between two states for development purposes alone. In light of globalisation, an analysis of investment treaties focusing on the sole fact that Ghana is looking for development in signing the treaties would ignore the profound effects of transnational actors on the domestic life of national societies and their decision-making.¹⁰⁴ As Pogge argues, the traditional conception of the world of international relations as inhabited only by states “is rapidly losing its *explanatory* adequacy – through the emergence and increasing importance of transnational rules, and through the creation and increasing stature on the international stage of non-state actors, such as multinational corporations, international agencies, regional organizations, and NGOs.”¹⁰⁵ Central to globalisation and global justice rhetoric “is the causal impact of the design of the transnational institutional arrangements upon the conditions of life experienced by human beings worldwide.”¹⁰⁶ Thus investment treaties of Ghana may have been influenced by its diplomatic and international relations with treaty partners. In this regard, Diane Desierto ably articulates the reasons other than the public interest in development that may underlie the signing of particular investment treaties (which may be applicable to Ghana):¹⁰⁷

Foundation, Friends of the Earth, Oxfam, Public Citizen and Third World Network among others. See Stephen J Kobrin, “The MAI and the Clash of Globalizations” (1998) 112 *Foreign Policy* 112

¹⁰⁰ Thomas Pogge, *Politics as Usual: What Lies Behind the Pro-Poor Rhetoric* (Polity Press, 2010) at 21-22.

¹⁰¹ For a refusal of investment attraction for development as the sole reason for the signing of investment treaties see Dagbanja, “Limitation on Sovereign Regulatory Autonomy,” above n 48 at 20-22.

¹⁰² Thomas Pogge, *Politics as Usual: What Lies Behind the Pro-Poor Rhetoric* (Polity Press, 2010) at 14

¹⁰³ *Ibid* at 14

¹⁰⁴ *Ibid* at 17.

¹⁰⁵ *Ibid* at 17

¹⁰⁶ *Ibid* at 19

¹⁰⁷ Desierto, above n 96 at 314-315.

Whether viewed from the normative or functionalist perspective, the proliferation of IIAs bears testament to how States value the need to maintain and guarantee regulatory predictability, at least sufficiently enough for these States to accept the trade-off that future exercises of regulatory powers could be subjected to claims against the State for alleged international responsibility. The State's authoritative decision-makers may choose to incur this trade-off not just for supposed ability of an IIA to attract foreign investment from new capital-exporting sources, but also for the fact that these decision-makers might also stand to reap other immediate *indirect* political and economic gains from choosing to entrench regulatory predictability through an IIA ... [T]hese collateral or indirect benefits from successfully negotiating an IIA ... include: 1) obtaining favorable counterpart international lending or sovereign financing terms as part of a basket of international commitments with an IIA partner; 2) opening new market access through a broader free trade agreement that includes the IIA; 3) garnering favorable perceptions and increased support from domestic constituencies and local businesses; 4) institutionalizing an international investment regulatory policy that is consistent with the decision-maker's political views on resource allocation and development strategies; and 5) paving the way for other additional strategic cooperation in the future with the new State partner under the IIA. Moreover, it is also possible that a State's authoritative decision-makers see few costs in entering into an IIA – where the duration of an IIA's applicability stands to outlast politicians' electoral terms, these decision making elites could be less concerned with the possibility of any future political fallout if the State were to be held internationally responsible under the IIA for regulatory actions that injure foreign investors. Under these circumstances, the functional gains from concluding an IIA make it only more politically expedient to do so than otherwise.

Thus each Government of Ghana's decision to enter into investment treaties at the time may have been aimed at a number of objectives other development *per se*. These may include putting Ghana at par with other African countries in terms of competition without a real focus on the actual benefits that will derive from signing the investment treaties. The decision may also have been influenced by corporate lobbying even if the entering into the treaty coincided with a development objective of Ghana. The investment treaties may also be a deliberate global agenda push by global economic institutions and multinational business entities making or interested in making investments in Ghana.¹⁰⁸ Ghana often receives development aid and budgetary support from the United Kingdom and the European Union. It may be that Ghana entered into some of these treaties to meet the demands of its so-called development partners who may demand such treaties to secure legal protection for their investors in return for financial aid or loans granted to Ghana. The benefits that members of the signing government stand to gain could also be part of the explanatory variables. Again, the investment treaties may be seen as a way of promoting the political objectives of the political party in power on privatization and liberalisation. For example, the government of President John Kufuor placed emphasis on privatisation and liberalisation and set up a branch of a ministry responsible for private sector development. This was done even though the Ghana

¹⁰⁸ Ibid at 314. See also Andrew T. Guzman, "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties" (1997) 38 *Virginia Journal of Transnational Law* 639.

Investment Promotion Centre which is primarily responsible foreign investment promotion was already in existence. Most of Ghana's investment treaties in force came into force during John Kufuor's administration.

Uche Ewelukwa Ofodile argues in this regard that investment treaties are used to "liberalize the economies of developing countries."¹⁰⁹ According to Ofodile, "it is not clear the extent to which factors such as resource constraint, lack of legal and technical capacity, and official corruption really influence the outcome of negotiation of land lease agreements"¹¹⁰ and by extension, investment treaties in Africa. Pogge argues in *World Poverty and Human Rights* that many governments of the developing countries are "autocratic, corrupt, brutal and unresponsive to the interests of the poor majority. They are greatly at fault for not representing the interests of the poor in international negotiations and for consenting to treaties that benefit themselves and foreigners at the expense of their impoverished populations."¹¹¹

The point then is that there are other possible explanations other the public interest for the signing of investment treaties in Ghana. With the potential of governments, particularly in Africa signing these agreements and contracts to benefit themselves, out of political expediency or to meet borrowing conditions rather than solely in order that investment might be attracted to meet the needs of the people, Pogge says:¹¹²

We must then ask ourselves whether it is morally acceptable that the existing international order recognizes rulers – merely because they exercise effective power within a country and regardless of how they acquired or exercise such power – as entitled to confer legally valid property rights in this country's resources and to dispose of the proceeds of such sale, to borrow in the country's name and thereby to impose debt service obligations upon it, to sign treaties on the country's behalf and thus to bind its present and future population, and to use state revenues to buy the means of internal repression. Such recognition accords international resource, borrowing, treaty, and arms privileges to many governments that are plainly illegitimate. These privileges are *impoverishing*, because their exercise often dispossesses a country's people who are excluded from political participation as well as from the benefits of their government's borrowing or resource sales. These privileges are moreover *oppressive*, because they often give illegitimate rulers access to the funds they need to keep themselves in power even against the will of the majority. And these privileges are *disruptive*, because they provide strong incentives toward the democratic acquisition and exercise of political power.

However, there are those of who see nothing wrong with transnational rules governing private foreign investment promotion and protection. The argument in support of investment treaties

¹⁰⁹ Uche Ewelukwa Ofodile, "Africa-China Bilateral Investment Treaties: A Critique" (2013) 35 *Michigan Journal of International Law* 131 at 139.

¹¹⁰ Uche Ewelukwa Ofodile, "Managing Foreign Investment in Agricultural Land in Africa: The Role of Bilateral Investment Treaties and International Investment Contracts" (2014) 7(2) *The Law and Development Review* 329 at 332

¹¹¹ Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Polity Press, 2002) at 22.

¹¹² Pogge, *Politics as Usual*, above n 102, 18-19.

is that states are willing parties to them.¹¹³ In this regard, an investment treaty is seen as reflecting “the mutual decision of its States Parties to bind themselves ... a strategy which helps the problem of enforcing government promises during the inevitable intervening time between a government promise and its performance.”¹¹⁴ As summarised by David Schneiderman, the state “is implicated by participating in the construction of the rules and structures governing international economic relations and, in turn, committing itself to abide by the scope of state law-making jurisdiction imposed by those same rules. States, in other words, are the authors of the very legal regime that is realigning the bounds of permissible state action”¹¹⁵ Such an argument is legally justified in terms of the *pacta sunt servanda* principle codified in Article 26 of the VCLT¹¹⁶, namely, that a treaty in force “is binding upon the parties to it and must be performed by them in good faith.” In this sense, investment treaties are “precommitments, in the sense of giving up future choices to guard against preference shifts”¹¹⁷ and must be respected and observed at all times.

Pogge has refuted the argument that consent makes and justifies a treaty binding on states in all circumstances. He argues that “consent cannot defeat a charge of human rights violations given that, on the usual understanding of moral and legal human rights, they are inalienable and thus cannot be waived by consent.”¹¹⁸ He argues that “an appeal to consent cannot justify the severe impoverishment of children who are greatly overrepresented among those who suffer severe poverty and its effects. Insofar as the present global order is, foreseeably, greatly suboptimal in terms of avoiding severe poverty of children, the claim that this order violates their human rights cannot be blocked by any plausible appeal to consent.”¹¹⁹ Above all, Pogge forcibly and cogently argues that “insofar as very poor people do not consent, through a meaningful democratic process, to some global institutional arrangements, the justificatory force of such consent is typically weakened by their having no other tolerable option, and often weakened even further by the fact that their calamitous circumstances are partly due to those whose conduct this consent is meant to justify.”¹²⁰

Moreover, any argument that host developing states are “willing” parties to investment treaties is effectively undermined by the use of model investment agreements, especially when unequal bargaining power is inherent in the nature of the investment treaty negotiation process involved.¹²¹ In an investment negotiation process characterised by unequal bargaining power, bilateral treaties, Kojo Yelpaala argues, “are used to achieve the same

¹¹³ For this debate see for example M Sornarajah and Leo Trakman, “A Polemic: The Cases for and Against Investment Liberalization” in Leon A Trakman and Nicola W Ranieri (eds), *Regionalism in International Investment Law* (Oxford University Press, 2013) 499; and M Sornarajah, “The Case against a Regime on International Investment Law” in Leon Trackman and Nicola Ranieri (eds), *Regionalism in International Investment Law* (Oxford University, 2013) 475.

¹¹⁴ Desierto, above n 96 at 312-313.

¹¹⁵ David Schneiderman, “Investment Rules and the New Constitutionalism” (2000) 25 *Law and Society Inquiry* 757 at 758.

¹¹⁶ *Vienna Convention on the Law of Treaties*, done at Vienna on 3 May 1969, entered into force 27 January 1980

¹¹⁷ Tom Ginsburg, Svitlana Chernykh and Zachary Elkins, “Commitment and Diffusion: How and Why National Constitutions Incorporate International Law” (2008) *University of Illinois Law Review* 201 at 212.

¹¹⁸ Pogge, *Politics as Usual*, above n 102 at 40.

¹¹⁹ *Ibid* at 41.

¹²⁰ *Ibid*.

¹²¹ Dagbanja, “Limitation on Sovereign Regulatory Autonomy,” above n 48 at 22-23.

protection of investments that would have been imposed by the state in a power position without a treaty”.¹²²

Thus the binding effect of an investment treaty should be looked at not just in terms of consent, but also the totality of the surrounding circumstances governing the conclusion of the treaty including any conditions that may defeat free consent and the negotiation process as envisaged under Articles 31 and 32 of the VCLT. As Ernst-Ulrich Petersman argues the “overall coherence of national and international economic law necessary for an efficient functioning of international markets depends not only on coherent legal principles of international private and public law, but also on their democratic recognition and support as legitimate and just.”¹²³ Such democratic recognition and support is further justified because as pointed out by Jane Kelsey in *The Fire Economy: New Zealand’s Reckoning*, “[e]conomies, finance and markets” that underlie the investment treaty regime “are all social phenomena. They frame, and are framed by, relationships among people, families ... and the other diverse communities that make up society, and by relationships with other nations. They are also shaped by – and generate – unequal distributions of wealth and power.”¹²⁴ So where an investment treaty can be entered into only in accordance with a national constitution and general international law for public interest purposes, then the binding effect of the treaty and its interpretation and enforcement should have regard to those legal norms which underlie the conclusion of the treaty in the first place.

5.4 THE INVESTMENT TREATY REGIME AND DEVELOPMENT POLICY IN GHANA

5.4.1 Targeted Economic and Social Policies in Ghana

As established in Section 5.2, Ghana’s Constitution and various international human rights treaties require the State to take measures to protect citizens and vulnerable groups in particular. Such measures could contravene the national treatment and most-favoured-nation (MFN) treatment principles of Ghana’s investment treaties, whereby the same or similar treatment must be extended to foreign investors or the State must compensate them. The State has the discretion to decline admission of foreign investors into those sectors because it is within its sovereign right to do so. However, if the State chooses to admit them, the discretion to give preferential treatment to domestic investors would be impaired by the national treatment and most-favoured-nation treatment.

Investment treaty provisions that substantively and expressly limit the State from implementing such measures, or require the state to extend the measures to parties that the

¹²² Kojo Yelapaala “Fundamentalism in public health and safety in bilateral investment treaties [Part I]” (2008) 3(1) *Asian Journal of WTO and International Health Law and Policy* 242 at 249.

¹²³ Ernst-Ulrich Petersman, “Why Rational Choice Theory Requires a Multilevel Constitutional Approach to International Economic Law: A Response to *The Case Against Reforming the WTO Enforcement Mechanism*” (2008) *University of Illinois Law Review* 359 at 371.

¹²⁴ Jane Kelsey, *The Fire Economy: New Zealand’s Reckoning* (Bridget Williams Books with New Zealand Law Foundation, 2015) at 82.

Constitution does not require, may well be found to conflict with the State's constitutional duty to make and implement development policies in favour of special groups or individuals.

The Constitution in Article 12(2) provides that "[e]very person in Ghana ... shall be entitled to the fundamental human rights and freedoms of the individual". One such fundamental human right is freedom from discrimination. The Constitution prohibits discrimination on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status.¹²⁵ Discrimination is defined as giving different treatment to different persons attributable only or mainly to their respective descriptions, "whereby persons of one description are subjected to disabilities or restrictions to which persons of another description are not made subject or are granted privileges or advantages which are not granted to persons of another description."¹²⁶ A person must not be discriminated against by reason, among others, of the place of origin.¹²⁷ In *Commission on Human Rights and Administrative Justice v Norvor*, the High Court held that freedom from discrimination "knows no bounds but is to be enjoyed by every person in Ghana".¹²⁸

On this basis, it might be argued that the national treatment and MFN obligations are consistent with the constitutional protection of freedom from discrimination and that they do not conflict. However, the Constitution provides in Article 17 (4)(c) that the protection against discrimination and the guarantee of equality before the law shall not:

[P]revent Parliament from enacting laws that are reasonably necessary to provide ... for the imposition of restrictions on ... *economic activities of such persons* [who are not citizens of Ghana] and for other matters relating to such persons.

By this provision, Parliament can enact laws restricting foreign investors' economic activities. In short, by Article 17(4)(c), foreign investors may be treated or regulated differently from the way domestic investors are treated or regulated. On the basis of the Constitution, the State can take measures that it considers reasonable necessary to advance the interests of citizens that may not be available to non-citizens engaged in the same or similar business activities. Yet this is exactly what the national treatment standard prohibits.

There are other constitutional and statutory provisions in Ghana which, if implemented, would conflict with national treatment. For example, the Constitution in Article 36(2)(a) requires the State to afford ample opportunity for individual initiative and creativity in economic activities and to foster an enabling environment for a pronounced role of the private sector in the economy. Article 36(2)(b) further requires the State to ensure that individuals and the private sector bear their fair share of social and national responsibilities, including responsibilities to contribute to the overall development of Ghana. These constitutional requirements read in light of Article 17(4)(c) means the Government has the authority and

¹²⁵ *Constitution of Ghana* art 17(1).

¹²⁶ *Ibid* art 17(2).

¹²⁷ *Ibid* art 17(3).

¹²⁸ *Commission on Human Rights and Administrative Justice v Norvor* [2001-2002] 1 GLR 78. at 90.

discretion to choose to pursue industrial policies specifically targeted at local businesses so that they can grow and contribute to development in Ghana.

5.4.1.1 Industrial Policy

There are policies in Ghana that are largely aimed at the domestic industry. For example, the Government developed the Ghana Industrial Policy in 2010 in response to the challenges facing the manufacturing sector, such as increased competition in domestic and export markets and high production and distribution costs arising from high interest rates, aged and obsolete equipment, inefficient infrastructural services and low productivity. The aim was to “develop requisite skills, ensure adequate and cost-competitive production inputs and services, and provide needed finance for industrial development.”¹²⁹

The Industrial Policy provided guidelines for the implementation of the Government's industrial development agenda “with particular respect to the growth, diversification, upgrading and competitiveness of Ghana's manufacturing sector”,¹³⁰ some of which may be owned solely by Ghanaians or by Ghanaians and foreign citizens. The key development objectives of the Industrial Policy were to expand productive employment and technological capacity in the manufacturing sector, and to promote agro-based industrial development and spatial distribution of industries to achieve reduction in poverty and income inequalities.¹³¹ While foreign investors in the manufacturing sector may be entitled to the benefits under the policy, the State is under no obligation to extend them to business entities owned solely by foreign investors. Since the focus of the policy is the growth and capacity of local manufacturers, the State may choose to favour domestic businesses only. Such preferential treatment may be held to be inconsistent with national treatment. If the Industrial Policy were applied to favour third state investors but not those protected under Ghana's investment treaties, the latter could institute investor-state dispute claims against Ghana for breach of MFN since this treaty obligations requires protections accorded to third state investors to be extended to treaty partner investors.

The Public Procurement Act 2003 (Act 663) in section 3(t) requires the Public Procurement Authority of Ghana to assist the local business community to become competitive and efficient suppliers to the public sector.¹³² The Act also allows for the use of national competitive tendering, whereby only domestic prospective tenderers may be invited to participate in the procurement process.¹³³ The implementation of these policies and laws

¹²⁹ Republic of Ghana, *Ghana Industrial Policy* (2010) at 4.

¹³⁰ *Ibid* at 3.

¹³¹ *Ibid* at 4.

¹³² see Dominic Dagbanja, “Promoting a Competitive Local Business Community in Ghana: The Role of the Legal Framework for Public Procurement” (2014) 58(2) *Journal of African Law* 1.

¹³³ Dominic Dagbanja, *The Law of Public Procurement in Ghana: Law, Policy and Practice* (Lap Lambert Academic Publishing AG & Co Kg, 2011) at 151.

specifically targeted at the domestic investors could be found to conflict with national treatment and MFN.¹³⁴

Domestic law in Ghana also makes provision for other special assistance to domestic businesses that may create conflict with the national treatment standard. The National Board for Small-Scale Industries Act 1981 (Act 434) and the Ghana Export Promotion Authority Act 1969 (Act 396) require the executive directors of the National Board for Small-scale Industries and Ghana Export Promotion Authority to provide assistance to domestic businesses that may not be available to foreign investors in like circumstances. In particular, section 4 of the Ghana Export Promotion Authority Act requires the Authority to organise an insurance credit guarantee scheme for the protection of the interest of Ghanaian exports. If foreign investors are engaged in the same export industry as domestic investors, they may seek compensation under the investment treaties in the event that the Government introduces credit schemes that advantage domestic investors or which threaten the market share of foreign investors.¹³⁵

Investment treaties exhibit a dual nature when it comes to industrial policy: they can “be potentially supporting and potentially constraining of industrial policies.”¹³⁶ By creating a legal framework for investment protection, they may attract investment into sectors of the economy in which the host state does not have the needed domestic capacity. For example, although Ghana is endowed with natural resources in the form of minerals and oil, it does not have the technology and know-how to explore and exploit them. Foreign investment in these industries is necessary for the State to extract these resources and the development of these industrial sectors in general.

However, investment treaties can also constrain industrial policy if a state wants to protect domestic investors from invasion by foreign investors or simply want to protect infant or strategic domestic investors for development purposes.¹³⁷ For example, under section 27 of Ghana Investment Promotion Centre Act 2013 (Act 865) non-citizens and enterprises not wholly owned by a citizen are not permitted to invest or participate in the sale of goods or provision of services in a market¹³⁸; operation of taxi or car hire service in an enterprise that has a fleet of less than twenty-five vehicles, the printing of recharge scratch cards; the production of exercise books and other basic stationary; and the retail of finished pharmaceutical products. Only citizens and enterprises wholly owned by citizens may invest in these areas. Investment treaties are potential barriers to the attainment of these legislative goals. Upon admission, foreign investors can challenge such provision as discriminatory and

¹³⁴ Ghana-Denmark Investment Treaty, art 3(2); Ghana-Netherlands Investment Treaty art 3(1); and Ghana-United Kingdom Investment Treaty, art 3(2).

¹³⁵ Luke Eric Peterson, *Bilateral Investment Treaties and Development Policy-Making* (International Institute for Sustainable Development, 2004) at 30.

¹³⁶ Wolfgang Alschner and Elisabeth Tuerk, “The Role of International Investment Agreements in Fostering Sustainable Development” in Freya Baetebis (ed), *Investment Law within International Law: Integrationist Perspectives* (Cambridge University Press, 2013) 217 at 224.

¹³⁷ *Ibid.*

¹³⁸ The Ghana Investment Promotion Centre Act defines a market in section 43 as “a public place whether open or enclosed, established and managed by local custom, or specifically designated by the appropriate local government authority or its agents and which has selling sites in the nature of stores and stalls among others for the purpose of selling and buying..”

unreasonably restricting their investment opportunities and market share in the prohibited areas.

Ghana's investment treaties do not include exceptions to ensure that positive discrimination measures taken in favour of designated groups are protected from investment treaty claims for the payment of compensation. Therefore, existing targeted policies or future ones stand the risk of being challenged as in breach of the national treatment standard.

A case illustrating how industrial policy may be challenged by foreign investors is *Nusa Tenggara Partnership BV and PT Newmont Nusa Tenggara v. Republic of Indonesia*.¹³⁹ Newmont Nusa Tenggara was engaged in the mining of copper in Indonesia. The company was largely co-owned by Newmont Mining Corporation in the US and Japan's Nusa Tenggara Mining Corporation. The source of the dispute between Indonesia and Newmont was Indonesia's introduction of a ban on the exports of ore concentrates in which Newmont had invested. The export ban was part of the Law 4/2009 on Mineral and Coal Mining, which required mining companies to 'downstream' production (to refine and process minerals by establishing a smelter) in the country prior to export. The law allowed exports of semi-finished mineral products, such as copper concentrate, until 2017, but only with a progressive export tax which ranged between 20% and 60%.

This was part of a strategy of the Indonesia government to reduce its dependency on the export of raw materials and to assert control over the management of its resources, consistent with the Declaration on Permanent Sovereignty over Permanent Sovereignty Natural Resources.¹⁴⁰ The progressive tax rate was intended to force miners to develop mineral processing facilities in Indonesia, as part of a broader goal to get a larger share return from its mineral resources. The law also aimed to limit foreign ownership of mining companies by obliging foreign-owned mining industries to progressively divest to become a minority shareholder within ten years. The Indonesian government further hoped to spur development of domestic downstream processing industries in order to produce value-added products and generate more revenue. The government wanted to boost domestic employment and the local economy and help Indonesia to be less dependent on the export of raw materials.

However, mining companies active in extractive industry opposed the law. According to Newmont, it had led them to halt work at the Batu Hijau copper and gold mine, which created hardship and economic loss.¹⁴¹ The company instituted arbitration against Indonesia in June 2014 under the Indonesia-Netherlands investment treaty, arguing that the plan to implement a ban on unprocessed mineral exports would violate the treaty. Newmont later withdrew the case following a settlement reached with Indonesia to give the company special exemptions from the mining law.¹⁴² Hilde van der Pas and Riza Damani interpret this case as:¹⁴³

¹³⁹ *Nusa Tenggara Partnership BV v Indonesia*, ICSID Case No. ARB/14/15, Order of the Secretary-General Taking Note of the Discontinuance of the Proceedings, 29 August 2014.

¹⁴⁰ *Declaration on Permanent Sovereignty over Permanent Sovereignty Natural Resource*, GA Res 1803 (XVII), 17 UN GAOR Supp (No 17) at 15, UN Doc A/5217 (1962) art 1.

¹⁴¹ Hilde van der Pas and Riza Damani, *The case of Newmont Mining vs Indonesia* (EU-SEAN FTA Network Briefing, 12 November 2014), <<http://www.tni.org/sites/www.tni.org/files/download/newmont-indonesia-case-4.pdf>>

¹⁴² *Nusa Tenggara Partnership BV v. Republic of Indonesia*, above n 139.

¹⁴³ Pas and Damani, above n 141.

a powerful example of how investment agreements ... are used by companies to get exemptions from government regulations and legislation, undermining democracy and development. It also illustrates the long-term dangers of governments signing investment agreements, which continue to be enforced even when subsequent governments try to re-establish sovereign control over investment in their countries.

Indonesia's experience illustrates how taxation and export processing requirements can create problems with the investment treaty regime in Ghana. Article 174 of Ghana's Constitution authorises Parliament to regulate taxation by way of legislation. The Internal Revenue Act 2000 (Act 592) was enacted pursuant to this provision. The Act empowers the State to impose taxes on individuals and businesses. Taxation is thus one legal means through which the State can generate revenue to meet its development needs. The use of export taxes and local processing requirements is justified to give effect to the development provisions in the Constitution.

Similarly, the Ghana Export Promotion Authority Act empowers the Authority in section 4(2)(e) "to create interest in, and goodwill for, Ghanaian products". Under Section 12 of the Export and Import Act 1995 (Act 503) the Minister of Trade and Industry "may, by legislative instrument, prohibit or restrict the exportation or importation of the goods specified in the instrument." This gives wide discretion to the Minister to regulate export and import, which discretion may be exercised to meet local processing requirements as part of Ghana's development strategy.

5.4.1.2 Balancing Investment Protection and Industrial Policy Objectives

There are scholars who think targeted social and economic policies may not be justifiable. In making a case for national treatment, Jan Paulson suggests that "[h]ot-headed politicians may seek public favour by advancing narrow conceptions of the national interest by law or decree."¹⁴⁴ However, Paulson failed to tell the reader what the national interest is, what amounts to "narrow conceptions of national interest", and by what standard "narrow conceptions of national interest" will be measured. If Paulson had explained these concepts, his claims could have been better evaluated. Governments exist to advance the interests of the public they represent and this may require the taking of both immediate and long term positions that they consider are in the national interest, in accordance with their constitutional and general international law obligations.

As Hans Morgenthau argues, in a world where states "compete with and oppose each other for power, the foreign policies of all nations must necessarily refer to their survival as their minimum requirement"¹⁴⁵ [including on foreign investment protection by treaty]. Morgenthau points out that "no nation can have a sure guide as to what it must do and what it

¹⁴⁴ Jan Paulson, *Denial of Justice in International Law* (Cambridge University, 2005) at 147.

¹⁴⁵ Hans Morgenthau, "Another 'Great Debate': The National Interest of the United States" (1952) 46(4) *The American Political Science Review* 961, 972.

need not do in foreign policy without accepting the national interest as that guide.”¹⁴⁶ So respect and space must be given to each nation state to define its national interest. A “philosophy, very much alive ... which, while it recognizes the national interest and its importance, defines it in terms which take the heart out of the concept and out of the policies intended to support it”¹⁴⁷ must, therefore, be avoided in international investment law.

Morgenthau insists that the “legitimacy of the national interest must be determined in the face of possible usurpation by subnational, other-national, and supranational interest”,¹⁴⁸ and not just in terms of how it affects a supranational interest, such as foreign investment. There is no nation that has the resources to promote all desirable objectives with equal vigour. Therefore, all nations must be allowed to allocate their scarce resources as rationally as they deem fit,¹⁴⁹ and to define their national interests against usurpation by non-national interests.¹⁵⁰ In a bilateral and multinational world it is imperative that “the national interest of a nation which is conscious not only of its own interests but also of that of other nations must be defined in terms compatible with the latter.”¹⁵¹ The point remains, nevertheless, that each nation state must be the judge of its national interest, such as protecting local businesses. At least, the protection of the businesses of citizens is consistent with the protection of the national interest. National treatment tends to screw states in terms of determining what serves their national interests and allocating scarce resources accordingly.

In this regard, Ghana’s Constitution permits all constitutional measures necessary to protect the public interest. This will include assisting domestic investors without having to extend the same or similar treatment to foreign investors. Further, Article 17(4)(c) specifically permits restrictions on non-citizens’ economic activities. Any such restrictions stand to be challenged under investment treaties.

Thus, there is the need to safeguard industrial policy and development policy space in investment treaties. Arbitral tribunals derive their mandate from the terms of investment treaties which substantively focus on investor protection. Investment treaties are mostly silent on development and states’ development policymaking autonomy and do not impose any obligations on foreign investors in terms of the contribution they should make to the development of their host countries. Accordingly, arbitral tribunals have interpreted and will continue to interpret investment treaties in a manner that advances investment interests to the neglect of development and development objectives.¹⁵²

Given pro-investor interpretive approaches, states must assert their authority over the application and interpretation of investment treaties by providing for substantive obligations in investment treaties on corporate legal responsibilities of foreign investors. The contribution of

¹⁴⁶ Hans Morgenthau, “What Is the National Interest of the United States?” (1952) 282 *The Annals of the American Academy of Political and Social Science* 1, 6.

¹⁴⁷ *Ibid.*

¹⁴⁸ Morgenthau, “Great Debate” above n 145, at 973.

¹⁴⁹ *Ibid.* at 977.

¹⁵⁰ *Ibid.* at 976.

¹⁵¹ *Ibid.* at 971.

¹⁵² *MTD Equity Sdn. Bhd and MTD Chile S.A. v. Republic of Chile*, Decision on Jurisdiction, at para 104; and *SGS Société Générale de Surveillance SA v Philippines*, Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, para 116.

the proposed business undertaking to development must be specified as an essential characteristic of investment. This will ensure that an investment cannot be entitled to protection if it does not make such contribution.¹⁵³ This has already being envisaged by Article 12 of Ghana Model BIT of 2008,¹⁵⁴ which states that nationals and companies of contracting states in the territory of the other shall be bound by the laws and regulations in force in the host state, including the host states laws and regulations on labour, health and the environment. The provision also states that nationals and companies of one contracting party in the territory of the other contracting party “shall to the extent possible, encourage human capital formation, local capacity building through close cooperation with the local community, create employment opportunities and facilitate training opportunities for employees, and the transfer of technology.” The State should go further and exclude industrial policy tools such as taxation, subsidies and government procurement from the purview of future investment treaties. Reservations should be made for selected industries and the possibility of adopting non-conforming measures in future in the reserved areas.¹⁵⁵

5.4.2 Foreign Exchange Regulation in Ghana

5.4.2.1 Capital Controls as a Development Tool in Ghana

A common substantive provision in investment treaties is the requirement to permit the repatriation of investment and returns. The right to transfer funds is necessary to enable foreign investors to freely move their investment funds and returns for their business and other purposes. Depending on how that right is articulated in an investment treaty, the duty of the host state to regulate the movement of capital can either be extinguished or effectively curtailed when alleged violations of guarantees on repatriation of investment and returns are subject to investor-state arbitration. Abba Kolo articulated the dilemma this creates:¹⁵⁶

From the point of view of the foreign investor, the essence of making an investment is to make profits and distribute same to its shareholders who might reside in its home country or in several countries. Repatriation of funds might also be needed by the foreign investor for other purposes such as to service external loans, pay license fees and royalties, purchase raw materials and machinery for production and pay for other services. These are critical for the success of an investment. Hence, the importance of the repatriation provision in investment treaties. On the other hand, a host state might be concerned about the depletion of its foreign reserves through such transfers and the adverse effect it might have on the economy especially during times of economic difficulties. Therefore it will not want to curtail its discretion to adopt measures including exchange restrictions in order to deal with economic difficulties.

¹⁵³ Alschner and Tuerk, above n 136, at 230.

¹⁵⁴ Ghana Model BIT, <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2866>>

¹⁵⁵ Alschner and Tuerk, above n 136, at 225.

¹⁵⁶ Abba Kolo, “Investor Protection vs Host State Regulatory Autonomy during Economic Crisis: Treatment of Capital Transfers and Restrictions under Modern Investment Treaties” (2007) 8(4) *Journal of World Investment and Trade* 457 at 471.

Capital controls can help avoid or prevent capital flight when there are difficulties in a country. The imposition of capital controls is an important element of fiscal sovereignty.¹⁵⁷ During periodic economic, social and political crises, monetary and exchange rate regimes have often been renegotiated.¹⁵⁸ The International Monetary Fund suggests that countries often tighten monetary policy during crisis.¹⁵⁹ In this respect, monetary policy (defined in terms of money, interest and exchange rate¹⁶⁰) and regulation, both as crisis response measures and the rehabilitation of capital controls as a pre-emptive tool, are important aspects of development policy. Jane Kelsey rightly argues that:¹⁶¹

Money is not simply a commodity. Nor are national currencies merely the symbols of a (presumed) national identity. In an economic system based on commodity capitalism, money is the medium for exercising power. It serves as the means of payment, store of value and unit of account, and as a commodity in its own right. Monetary policy and exchange rates are the vehicles through which national governments control the creation of money and influence its value so as to distribute resources among competing interests. Their ability to adjust the value and price of money in response to internal and external economic shocks impacts on the affordability of goods and services, the viability and profitability of businesses, the level of wages and unemployment, the sustainability of regions and pressures to migrate. These, in turn, affect people's wellbeing, the cohesion and stability of the society and citizens' confidence in their government.

The United Nations Task Team on the Post-2015 UN Development Agenda highlighted the importance of the state's autonomy in light of the global financial crisis:¹⁶²

The recent financial crisis has highlighted the damaging impacts on living standards that can result from macroeconomic instability. Large swings in economic activity, high inflation, unsustainable debt levels and volatility in exchange rates and financial markets can all contribute to job losses and increasing poverty ... The broad objective of macroeconomic policy is to contribute to economic and social wellbeing in an equitable and sustainable manner.

Continued and sustained economic growth is not only a precondition for employment generation, but also provides countries the fiscal space to address other critical social concerns, such as access to health services, sanitation and safe drinking water, and others ... Accordingly, the primary goal of macroeconomic stabilization policies should be to achieve stable economic growth. This key policy objective is complemented by the need to stabilize intermediate variables

¹⁵⁷ Ibid at 460.

¹⁵⁸ Jane Kelsey, "The Denationalization of Money: Embedded Neo-Liberalism and the Risks of Implosion" (2003) 12(2) *Social & Legal Studies* 155-176 at 156.

¹⁵⁹ IMF, *Recent Experiences in Managing Capital Inflows – Cross-Cutting Themes and Possible Policy Framework* (14 February 2014) Paras 5, <<http://www.imf.org/external/np/pp/eng/2011/021411a.pdf>>

¹⁶⁰ Jane Kelsey, *The New Zealand Experiment: A World Model for Structural Adjustment?* (Auckland University Press 1995) at 150

¹⁶¹ Kelsey, above n 158 at 156.

¹⁶² United Nations Task Team on the Post-2015 UN Development Agenda, *Macroeconomic Stability, Inclusive Growth and Employment: Thematic Think Piece* (United Nations, May 2012) at 3 and 4, <http://www.un.org/millenniumgoals/pdf/Think%20Pieces/12_macroconomics.pdf>

that can have a strong impact on growth. Price stability and external balances in particular play an important role through their impact on investment decisions. To achieve these intermediate goals, countries need policy space to use macroeconomic tools flexibly, including counter-cyclical fiscal and/or monetary policies, appropriate investment and exchange rate regimes, and strong financial sector regulation and supervision.

These views support the proposition that there is a link between macroeconomic stability and meeting the essential and basic needs of people, which this chapter argues is central to development. These authorities also point to the central importance of regulation by the state for a stable financial system to be attained. The IMF also argues that “capital controls may be useful in addressing both macroeconomic and financial-stability concerns”.¹⁶³ Prudential regulations and capital controls can also help to “reduce the buildup of vulnerabilities on balance sheets and the emergence of credit booms”.¹⁶⁴

The capital controls toolkit encompasses a broad spectrum of instruments, including administrative taxes on certain inflows and outflows, minimum holding periods, and currency-specific reserve requirements.¹⁶⁵ For capital control measures to have their desired effects, they should be targeted at the specific risks at hand and tailored to country circumstances because “there is no ‘one-size-fits-all’ approach to capital control design”.¹⁶⁶ Capital controls, by their nature, “limit the rights of residents or non-residents to enter into capital transactions or to effect the transfers and payments associated with these transactions.”¹⁶⁷ Investment treaties commonly prohibit capital control measures, such as restriction on transfer of funds. Kelsey has argued that investment treaty provisions can prevent governments from taking “pre-emptive or remedial action in relation to future crises including the application of capital controls and restructuring of sovereign debt.”¹⁶⁸

5.4.2.2 Repatriation of Investment and Foreign Capital Regulation in Ghana

All the investment treaties of Ghana provide in various ways for repatriation of investment and returns. The Ghana-China and Ghana-Malaysia investment treaties make this subject to domestic laws and regulations.¹⁶⁹ The Ghana-Denmark investment treaty similarly requires transfer of investment and profits, subject to the right of each state party to exercise “equitably, in good faith and on a non-discriminatory basis the powers conferred by its laws.”¹⁷⁰ The Ghana-Netherlands investment treaty requires transfers in a freely convertible

¹⁶³ Jonathan D. Ostry et al, *Managing Capital Inflows: What Tools to Use?* (SDN/11/06, IMF, 5 April 2011) at 4, <<http://www.imf.org/external/pubs/ft/sdn/2011/sdn1106.pdf>>

¹⁶⁴ *Ibid* at 6.

¹⁶⁵ IMF, *Recent Experiences in Managing Capital Inflows – Cross-Cutting Themes and Possible Policy Framework* (14 February 2014) paras 5 and 7, <<http://www.imf.org/external/np/pp/eng/2011/021411a.pdf>>

¹⁶⁶ *Ibid* at 7

¹⁶⁷ *Ibid* at 11.

¹⁶⁸ Jane Kelsey, “How the Trans-Pacific Partnership Agreement Could Heighten Financial Instability and Foreclose Governments’ Regulatory Autonomy” (2010) 8 *New Zealand Yearbook of International Law* 3.

¹⁶⁹ Ghana-China Investment Treaty, art .5; and Ghana-Malaysia Investment Treaty, art 6.

¹⁷⁰ Ghana-Denmark Investment Treaty, art 8.

currency, “without undue restriction or delay.”¹⁷¹ The Ghana-United-Kingdom and Ghana-Netherland investment treaties do not subject the right to repatriation of investment and returns to regulation under municipal law. The Ghana-United Kingdom investment treaty is the most absolute. It guarantees foreign investors the right of “unrestricted transfer” of investments and returns.¹⁷²

A failure or refusal to permit the transfer of funds may breach not only the specific provisions on repatriation of investment and returns in an investment treaty, but the obligations to provide foreign investors with fair and equitable treatment and full protection and security as well. The treaties do not make provision for balance of payment exception. On the contrary, they require that foreign investors be accorded national treatment and MFN treatment in the event of a national emergency.¹⁷³

Yet, the Constitution requires the Bank of Ghana to promote and maintain the stability of the currency and to “direct and regulate the currency system in the interest of the economic progress of Ghana.”¹⁷⁴ The Bank is also required to “encourage and promote economic development and the efficient utilisation of the resources of Ghana through effective and efficient operation of a banking and credit system in Ghana.”¹⁷⁵ The Constitution expressly relates monetary policy and regulation to development in Ghana. So it can be argued that signing an investment treaty that prevents foreign exchange regulation would be inconsistent with the Constitution.

The Foreign Exchange Act 2006 (Act 723) empowers the Bank of Ghana to “make rules to prescribe the conditions required to carry out the business of foreign exchange transfers”.¹⁷⁶ The Act also permits the imposition of temporary restrictions where the Governor of the Bank of Ghana “determines that the country is experiencing or has experienced a severe deterioration in its balance of payments that requires the temporary imposition of exchange controls beyond”¹⁷⁷ ordinary measures relating to foreign exchange control.

Specifically, where the country is experiencing or has experienced a severe deterioration in its balance of payments, the Governor in consultation with the Minister responsible for Finance and Economic Planning may make rules to restrict payments between residents and non-residents or between non-residents; payments to or from the country; the acquisition, holding, and use in the country of foreign currency or traveller’s cheques; and the frequency at which the acts of purchase and sale of foreign exchange may be effected in the country.¹⁷⁸

These constitutional and statutory provisions do not make any distinction between nationals and non-nationals or between foreign investors and domestic investors. Everybody is to be subject to the Bank of Ghana’s regulations if the specified conditions are met. They

¹⁷¹ Ghana-Netherlands Investment Treaty, art 5.

¹⁷² Ghana-United Kingdom Investment Treaty, art 8.

¹⁷³ Ghana-China Investment Treaty, art 4; and Ghana-Malaysia Investment Treaty, art 4; Ghana-Denmark Investment Treaty, art 7; Ghana-Netherlands Investment Treaty, art 7. Ghana-United Kingdom Investment Treaty, art 5.

¹⁷⁴ *Constitution of Ghana* art 183(2)(a).

¹⁷⁵ *Ibid* art 183(2)(c).

¹⁷⁶ Foreign Exchange Act s 19.

¹⁷⁷ *Ibid* s 20(1).

¹⁷⁸ *Ibid* 20(1)(a)-(d).

are therefore consistent with the agreements with China, Malaysia and Denmark. However, the investment treaties' provisions of the United Kingdom and Netherlands seek to exempt foreign investors from such foreign exchange regulation. While the Ghana-China, Ghana-Malaysia and Ghana-Denmark investment treaties make guarantees as to repatriation of investment and returns subject to domestic law, they also specify the rate and currency of exchange, and even the times that transfers are to be done. These specifics can create conflict with contrary requirements in relevant statutes such as the Foreign Exchange Act. The Ghana-Denmark investment treaty provides for MFN as do those with the Netherlands and the United Kingdom in respect of repatriation of investment and returns.

As discussed in Section 5.3, the investment treaties of Ghana were entered into for development; by implication that includes policies to prevent or mitigate a crisis that would impact on the poor. Yet, their restrictions on capital controls can have a direct impact on development because they limit foreign exchange regulation and prevent the adoption of policies to address crisis in the interests of the poor in Ghana. This possibility is not just hypothetical. In early 2014 the currency of Ghana, the Cedi, seriously depreciated against major foreign currencies, with 7.8 percent depreciation against the United States dollar.¹⁷⁹ The Bank of Ghana in February 2014 issued a new set of foreign exchange regulations and a code of conduct to guide the operations in the foreign exchange market.¹⁸⁰ The new measures consisted of revisions to the 2007 rules for the operation of foreign exchange and foreign currency accounts, restrictions on foreign currency-denominated loans and repatriation of export proceeds to foreign countries, and revision of operating procedures for foreign exchange bureaux.¹⁸¹ These measures were intended to reduce the country's vulnerability to shocks, stabilise the local currency, re-anchor inflation expectations and sustain macroeconomic stability.¹⁸²

The measures were, therefore, consistent with the Bank of Ghana's constitutional mandate to promote and maintain the stability of the currency of Ghana and direct and regulate the currency system in the interest of the economic progress of Ghana. Yet, President John Mahama, in the same month, reassured foreign investors that "all agreements governing their investments remain in force and repatriation of profits and dividends are guaranteed."¹⁸³ This shows the continued emphasis on, and preferential treatment of, foreign investment in Ghana, even when there was the need to enforce just-announced measures to check the decline of the cedi. It also highlights the fact that a country with international legal commitments to protect foreign investment, such as under an investment treaty, can feel compelled to make exceptions to the implementation of domestic measures so as to keep to the international commitments.

¹⁷⁹ Bank of Ghana, *Monetary Policy Committee: Press Release* (February, 2014) para 10; and Bank of Ghana, *Notice to Banks and the General Public: Revised Rules on the Operation of Foreign Exchange Accounts and Foreign Currency Accounts* (Notice No. BG/GOV/SEC/2014/02, 4 February 2014), <http://www.bog.gov.gh/privatecontent/Public_Notices/Procedures/bsd%20-%20FCA%20and%20FEA.pdf>

¹⁸⁰ *Ibid* para 13.

¹⁸¹ *Ibid* para 14.

¹⁸² *Ibid* para 12.

¹⁸³ Republic of Ghana, *State of the Nation Address: Structural Transformation – Rising to the Challenge* (Delivered to the 6th Parliament of the 4th Republic of Ghana on Thursday, 25 February 2014) at 10.

It is particularly, then, important for Ghana to be concerned about absolute guarantees of monetary transfers and foreign exchange in the investment treaties. As investment case law shows, the fact that a country is experiencing or has experienced a severe deterioration in its balance of payments or other financial crisis will not necessarily relieve it from compliance with these investment treaty obligations.

Kevin Gallagher et al have observed that “investment is an important ingredient for economic growth, and that capital flows may under certain conditions be a valuable supplement to domestic savings for financing such investment”.¹⁸⁴ Yet, “certain capital flows (such as short-term debt) can have de-stabilizing effects in developing countries.”¹⁸⁵ During financial and currency crises countries need policy space to experiment with a variety of capital account regulations.¹⁸⁶ Capital regulations are used to manage exchange rate volatility, to avoid currency mismatches, limit speculative activity in the economy, and provide policy space for monetary policy. Measures may be either price-based or quantity-based. Measures are price-based when they alter the price of foreign capital such as with a tax on inflows or outflows. Quantity-based measures include prohibitions or caps on minimum stay periods for capital that comes into the country.¹⁸⁷ Capital account regulations of capital inflows may include tax on foreign exchange derivatives, limits or taxes on net liability position in foreign currency of financial intermediaries and mandatory approvals for capital transactions. Capital outflow regulatory measures may include prohibition or limits on sectors in which foreigners can invest, restrictions on amounts of principal or capital income that foreign investors can send abroad and taxes on capital outflows.¹⁸⁸

The Argentine experience shows that some of these measures can be the subject of investor-state arbitration. In *Continental Casualty Company v. Argentina*¹⁸⁹ the Tribunal found that the Argentina-United States investment treaty, like the Ghana-United Kingdom investment treaty, prohibited all restrictions on transfer of investment capital and returns. This, according to the Tribunal, limited the state’s prerogatives to impose currency exchange restrictions.¹⁹⁰ A law enacted by Argentina in response to the economic crisis limited cash withdrawals from bank accounts and transfers of funds out of Argentina, with the exception of certain current transactions. The law was presented as a short term emergency measure until the conversion of the public debt could be completed, so as to avoid any instability in the level of deposits in the financial system. The foreign investor argued that the legislative restriction imposed by the Argentina breached the applicable investment treaty provision on repatriation of investment and returns. Argentina argued that the regulations of monetary transfers conformed to customary international law consistent with the exercise of monetary

¹⁸⁴ Kevin Gallagher Stephany Griffith-Jones, José Antonio Ocampo, “Capital Account Regulations for Stability and Development: A New Approach” in Kevin Gallagher Stephany Griffith-Jones, José Antonio Ocampo (eds), *Regulating Global Capital Flows for Long-Run Development* (The Frederick S. Pardee Centre for the Study of Longer-Range Future Task Force Report, Boston University Creative Services, March 2012) 1.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid

¹⁸⁷ Ibid at 4

¹⁸⁸ Ibid.

¹⁸⁹ *Continental Casualty Company v. Argentina*, ICSID Case No ARB/03/9, Award, 5 September 2008.

¹⁹⁰ Ibid para 240.

sovereignty by states. Argentina also justified the restriction as necessary under the essential security provision of the investment treaty given the severe difficulties in the balance-of-payment,¹⁹¹ an argument not available to Ghana because there is no such provision in its investment agreements. Bradley Condon has observed that “[i]n treaties that do not contain general public interest exceptions, tribunals have excluded public interest regulation from the scope of application.”¹⁹²

The Tribunal held that the guarantee regarding repatriation of investment is fundamental to the freedom to make foreign investment and that it is an essential element of the promotional role of investment treaties.¹⁹³ However, the Tribunal rejected the investor’s claim because the type of transfer at issue did not specifically represent the proceeds from the sale or liquidation of all or any part of an investment and, therefore, was not a transfer related to protected investment as required by the applicable investment treaty.¹⁹⁴ The Tribunal concluded that it was unnecessary to examine whether in view of the acute foreign exchange crisis Argentina was encountering, the country was allowed, notwithstanding treaty obligations, to introduce the exchange restrictions law.¹⁹⁵ In *Enron Corporation v Argentine Republic*,¹⁹⁶ it was held that economic and financial crises or other major crises “do not in themselves amount to a legal excuse”¹⁹⁷ for breach of investment treaty obligations. However, *LG&E Energy Corporation v Argentina*¹⁹⁸ reached a contrary decision when it accepted Argentina’s defence of necessity.

Drawing from this arbitral case law, it can be concluded that Ghana’s investment treaties’ provisions allowing free, unrestricted transfer of funds can limit capital control regulation in Ghana to the extent that such regulation can be challenged before investment tribunals. This is particularly the case as Ghana’s investment treaties require that even in emergency situations investors must be accorded national treatment and MFN treatment. As Kelsey has argued, “binding and enforceable financial services and investment agreements tie governments” to the regime of high liberalisation and light regulation of financial markets. Kelsey shows in the case of Korea that governments that adopt alternative strategies to that orthodoxy “risk legal challenges for breaching their trade obligations”,¹⁹⁹ such as national treatment and guarantees on capital movements, if they adopt currency controls measures such as capping currency forward and derivatives trading of domestic banks, imposition of a limit on forward foreign exchange contracts between bankers and exporters, and restrictions on bank loans in foreign currency to local companies.

¹⁹¹ *Ibid* para 82.

¹⁹² Bradley Condon, “Treaty Structure and Public Interest Regulation in International Economic Law” (2014) 17(2) *Journal of International Economic Law* 333.

¹⁹³ *Continental v Argentina*, above n 189, para 239.

¹⁹⁴ *Ibid* para 241 and 244.

¹⁹⁵ *Ibid* para 245.

¹⁹⁶ *Enron Corporation v Argentina ICSID Case No. ARB/01/3*, Award, 22 May 2007.

¹⁹⁷ *Ibid* para 232.

¹⁹⁸ *LG & E Energy Corporation v Argentina*, Decision on Liability, ICSID Case No ARB 02/1, 3 October 2006.

¹⁹⁹ Jane Kelsey, “The Conundrum of Shifting Orthodoxies: FTAs and Korea’s Currency Controls” (2011) 14(4) *Journal of International Economic Law* 485.

5.5 CONCLUSION

There is a constitutional and treaty right of citizens to development in Ghana and a corresponding duty of the State of Ghana to make and implement development policies. The analysis also establishes that domestic measures, whether in economic or financial crises, intended to address public interest concerns risk being challenged through investment treaty arbitration. This chapter argues that the validity and legal effect of a treaty should be premised on the nature of its conflict with pre-existing norms which determine the making and coming into force of that treaty or on norms which later come into force and determine the continued validity of the treaty. The right and the duty of the State under the Constitution and general international law to formulate appropriate national development policies to improve the well-being and livelihoods of the people of Ghana are such norms.

A state such Ghana does not have interests of its own to pursue in entering into investment treaties, other than to enable it to meet its basic public interest obligations. One of the strategies the State has adopted to meet its development obligation is to enter into various investment treaties to guarantee foreign businesses willing to invest within its territory protections against non-commercial risks. In this sense, Omar García-Bolívar is right in arguing that “foreign investments are in the same category as public revenues, credit and aid – they are all means to finance the development of the recipient State.”²⁰⁰

The absolute limitations the investment treaties place on governmental regulation to secure the protection of foreign investment could be justified if there were only one path towards development and that path were proven to be foreign investment. In theory and practice this is not so.²⁰¹ The theory that foreign investment leads to development is highly contested because in spite of the liberalisation of foreign investment regulation, “there is nothing to show that the benefits of foreign investment have resulted in the economic progress of the least developed countries. The correlation between liberalization and development cannot be cogently demonstrated.”²⁰² Thus, without further assurance of how the promotion and protection of foreign investment *per se* brings or will lead to development in Ghana, the absolute restrictions that investment treaties impose even on general governmental regulation meant to contribute to the realisation of development cannot be constitutionally justified.

Investment promotion policy needs to be aligned with an overall development policy, the Constitution and general international law which are the foundation of that development policy in Ghana. To enhance coherence between investment protection obligations and national development objectives, the legal duty to make and implement development policies must

²⁰⁰ Omar García-Bolívar, ‘Economic Development at the Core of the International Investment Regime’ in Chester Brown and Kate Miles (eds) *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) 586 at 588.

²⁰¹ M Sornarajah and Leo Trakman, “A Polemic: The Cases for and Against Investment Liberalization” in Leon A Trakman and Nicola W Ranieri (eds), *Regionalism in International Investment Law* (Oxford University Press, 2013) 499 at 504.

²⁰² M Sornarajah, *The Clash of Globalizations and the International Law on Foreign Investment* (2003) 10(2) *Canadian Foreign Policy Journal* 1 at 18.

limit the power of the State in terms of investment treaty obligations it can undertake. There is the need to make provision in future investment treaties for an investment to be entitled to protection only if it makes contribution to development.

The substantive obligations in existing treaties to protect foreign investment must be interpreted and enforced in a manner that takes account of that development objective and the legal duty of the State to make and implement development policies. Where the states parties manifest their intent to benefit themselves by way of development (as reflected in the preambles to Ghana's investment treaties), it becomes important that that intent is taken into consideration in the interpretation of the investment treaties.²⁰³ Where the objectives and purposes of investment treaties are contained in their preambles, and these objects include an expectation that foreign investment will contribute to development and well as to protect foreign investment,²⁰⁴ the investment's contribution to development should equally be relevant in determining whether the investment is entitled to the protection. Indeed, the obligation to protect foreign investment should not be enforceable if it was undertaken on the basis that an investment will contribute to development and the investment fails to contribute to development.

Every law has a purpose. The substantive provisions of a law have their own purposes too, but those purposes are commonly intended to advance the primary purpose for which the law is made in the first place. The substantive provisions of a law do not have ends independent of the primary enactment in which they are contained. Therefore, it is wrong to interpret a provision of an enactment without reference to the overarching objective of the enactment containing the provision it is intended to advance. Unless the preamble or provision of an investment treaty shows in clear and unambiguous terms that its primary and sole purpose is the protection of foreign investment, it will be out of context of the treaty to interpret it in disregard of its development implications if the treaty's preamble or provision states that it is aimed at attracting foreign investment for development. The issue here is not whether a preamble prevails over substantive provisions in law, but whether preambles contain purposes of the law which the substantive terms of the law must be interpreted to advance. This distinction is often not made in the literature. The imperative to interpret investment treaties in accordance with their objectives contained in their preambles, and not just in terms of their substantive standards of investment of protection, is consistent with Article 31(1) and (2) of the VCLT wherein it is stated a treaty shall be interpreted "in the light of its object and purpose. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes." The position advanced here is supported by Sornarajah who argues that:²⁰⁵

The present instruments on investment are premised on the assumption that foreign investment promotes the economic development of the states into which the investment flows. All bilateral

²⁰³ García-Bolivar, above n 200 at 588 and 589-590.

²⁰⁴ Sornarajah, *Law on Foreign Investment Law*, above n 2 at 50.

²⁰⁵ *Ibid* at 153.

investment treaties and regional treaties on investment contain a prefatory statement to the effect that such development takes place as a result of investment flows. It may be implied from this that multinational corporations which make investments in host states should promote economic development or, at the least, should not conduct themselves in such a manner as to hinder such development. If there is clear evidence that a multinational corporation has hindered development, the argument may be made that the rules of investment protection are not applicable to that investment and therefore that the investment will not be protected. After all, all investment instruments insist that economic development is the objective of foreign investment.

In *The Clash of Globalizations and the International Law on Foreign Investment*, Sornarajah argues in similar terms that:²⁰⁶

The re-emergence of the right to development as a means of articulating the aims of the least developed nations in the alleviation of hunger and poverty ... will have to be taken into account in balancing the call for absolute freedom of pre-entry rights of establishment, national standard, and full protection for foreign investment. It cannot any longer be argued with conviction that foreign investment that does not address the developmental needs of the poor is entitled to the standards of protection demanded by neo-liberal theory.

It has been argued that the concept of “development” is amorphous and very broad since it can contain many elements. This situation can make it difficult for investment tribunals to define and measure development and contribution of an investment to the development of the host state.²⁰⁷ However, investment promotion and protection by treaty is premised on the conventional wisdom that “[w]ith its enormous potential to create jobs, raise productivity, enhance exports and transfer technology, foreign direct investment is a vital factor in the long-term economic development of the world’s developing countries.”²⁰⁸ According to those who support investment protection by treaty, outward investment offers additional avenue for developing countries to link up to global markets and production systems. These investments could help firms to access markets, natural resources, foreign capital, technology or various intangible assets that are essential to their competitiveness that may not be readily available in their home countries.²⁰⁹ These stated benefits of the legal commitment to protect foreign investment can form the starting point for a tribunal to determine whether the investment at stake has made or can make contribution to the host state’s development

Thus, in making an assessment of an investment’s contribution to the development of the host state, account should be taken of what foreign investment is said to be capable of bringing to the host state, namely the extent to which the investment benefits the public interest in terms of transfers technology or know-how to the host state, employment and the

²⁰⁶ M Sornarajah, *The Clash of Globalizations and the International Law on Foreign Investment* (2003) 10(2) *Canadian Foreign Policy Journal* 1 at 18-19.

²⁰⁷ Desierto, above n 9 at 250.

²⁰⁸ Kofi Annan, “Foreword” in UNCTAD *World Investment Report 2003. FDI Policies for Development: National and International Perspectives*, (United Nations, New York, 2003) at iii.

²⁰⁹ *Ibid.*

overall impact of the investment on the host state's development.²¹⁰ This is particularly so in the case of Ghana because the Constitution requires that the private sector bears its fair share of social and national responsibilities, including responsibilities to contribute to the overall development of Ghana.²¹¹ This suggests that the protection of private sector interests must be tied to national development priorities. The State can insist that a foreign investor is not entitled to any rights under investment treaties if the investment does not meet specified developmental goals at the time of the admission of the investment or expressly stated developmental objectives in the investment treaties. It must follow as argued by García-Bolívar that:²¹²

If an investment is contrary to the public interest, has not generated any knowledge transfer to the host State, has not enhanced the economy or its productivity, has not increased the standards of living of the host country or the labour conditions, it almost certainly has not made a contribution to the economic development of that country ... [T]hat investment should be denied protection.

The standards of investment protection, such as fair and equitable treatment and full protection and security among others, do not have fixed and determinable meanings and scope that investment tribunals can readily pick and apply in investment dispute settlement in a predictable manner. Also there are not fixed ways of determining the standards of compensation payment in investment arbitration. Investment tribunals have never been deterred by their inability to give fixed meanings to these standards. They are able to find their way through these ill-defined standards to determine states' liability *in the interest of protecting foreign investment* under investment treaties. As tribunals are able to do this in favour of foreign investors, they should be willing to consider the merits of a state's assertion about a purported investment's lack of contribution to development for which the investment may not be entitled to protection. An inability to precisely define development and the contribution of an investment to the host state's development should not deter investment tribunals from considering a state's defence that an investment is not entitled to protection because it has made no contribution to its development. If an investment treaty has development as an objective, that objective becomes important for consideration in interpreting the treaty.

²¹⁰ García-Bolívar, above n 200 at 603.

²¹¹ *Constitution of Ghana*, art 36(2)(a)-(e).

²¹² García-Bolívar, above n 200 at 695.

CONCLUSION

Investment treaties are playing an increasingly prominent role in shaping the domestic regulatory decisions of States in ways that were not anticipated when they were signed, especially in developing countries like Ghana.

The search for development has played an important role in the expansion and growth of this investment treaty regime. Explanations as to the best way forward for a country to improve its chances for development and the role of foreign investment therein have been expressed in various languages, including in the form of classical economic, dependency and middle path theories.¹ The neoliberal theory in particular has influenced the liberalisation of foreign investment regimes worldwide.

Sornarajah observes that investment treaties, underpinned by neoliberalism,² are intended to provide the legal basis for the treatment of foreign investment. Their terms and processes reflect the predominant ideas of: less government intervention and regulation in favour of free markets and increased private sector activities; belief in and emphasis on the liberalisation of foreign investment inflows on the assumption that such inflows are fundamental to economic development and justify absolute protection of foreign investment; safeguards of property rights of (particularly private) foreign investors; external arbitration as the supposedly effective means of resolving disputes between foreign investors and host states; and the consequential call for a realignment of legal systems to suit these neoliberal ideals.³

The protection of foreign investment by treaty is achieved by substantive standards of investment protection and investor-state arbitration. These are reflected in Ghana's investment treaties with China, Denmark, Malaysia, Netherlands and the United Kingdom. Although these treaties pre-date the neoliberal period, the detailed study of development, environment and judicial autonomy in this thesis shows they can be used to achieve its objectives, and limit the state's ability to fulfil its duties under the Constitution and general international law to act in the public interest. In this regard, the objectives of neoliberalism as reflected in the terms of investment treaties are unbalanced since the treaties seek to restrain public interest regulation in order to attain investment protection objectives.

Investment treaties entitle foreign investors to claim that legislative and administrative measures or even judicial decisions have breached states' obligations towards them and to bring regulatory actions under the scrutiny of arbitral tribunals. The various legislative and

¹ M. Sornarajah, *The International Law on Foreign Investment* (3edn, Cambridge University Press, 2010) 47-61.

² M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015) at 10-15.

³ M Sornarajah, "The Retreat of Neo-Liberalism in Investment Treaty Arbitration" in Catherine Rogers and Roger Alford (eds), *The Future of Investment Arbitration* (University Press, New York, 2009) 273 at 274-275.

administrative measures of other states that have been challenged in recent years include environmental policies, banking sector reforms, legislative and policy measures in response to economic crises, revocations of licenses and permits, application of tax laws, judicial decisions and water concessions.⁴ The standards of investment protection are primarily aimed at restricting governmental regulation that might affect the activities of foreign investors and the value of their investments and to compensate them if regulation adversely affects the investments, whether the regulation is in the public interest or not.

International investment law scholarship that is critical of this trend has focused on how investor-state suits might affect states regulatory autonomy or particular governmental measures. The restraining effect of investment treaties has led to some scholars likening these treaties to national constitutions, because they pre-commit future governments to certain norms and policies, they are difficult to amend, include binding enforcement mechanisms, and serve a different constituency by “conferring privileged rights of citizenship on corporate capital, while constraining the power of the nation state and the democratic rights of its citizens.”⁵

Scholarly works on the role of constitutional law and general international law norms (the very norms which define the functions of governments in the public interest and justify states’ claim for regulatory autonomy in investment arbitration) in the making and interpretation of investment treaties are not common in the literature. Indeed, the subject has not been explored systematically. In particular, country-specific studies on whether states can sign on to the type of obligations they undertake in investment treaties in light of their obligations towards their own citizens, and how agreements that do not conform to those standards should be treated, are wanting.

This thesis has addressed that lacuna, with specific reference to Ghana. The thesis argues that the State of Ghana’s obligation to protect the public interest is central under the Constitution and general international law as the powers of government must be exercised both to promote the welfare of the people and within constitutional limits. Moreover, investment treaties presuppose the existence of norms necessary for them to come into existence and have legal effect, and the state’s obligation to comply with them. These factors limit the investment treaty obligations Ghana can assume in the future and raises difficult legal questions about the validity of existing treaties that conflict with the State’s public interest obligations. If they are treated as valid, their interpretation must be informed by reference to those obligations. The thesis has developed this proposition through *The Constitutional-General International Law Imperatives Theory*. It argues that the autonomy to regulate in the public interest cannot be retained or effectively recaptured without ensuring that the norms pertaining to human rights, environment, development and the jurisdiction of

⁴ Gus Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (Oxford University Press, 2013) at 10-13; and Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Hart Publishing, 2009) at 2.

⁵ Jane Kelsey “Global Economic Policy-Making: A New Constitutionalism?” (1999-2000) 9 *Otago Law Review* 535 at 545; see also David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise* (Cambridge University Press, 2008) at 69.

the courts remain paramount basis for determining what the State can or cannot do with public power. The obligation to protect foreign investment must be made to co-exist, and not displace, the public interest reason for which the State entered into the investment treaty.

6.1 RECONCILING STANDARDS OF INVESTMENT PROTECTION WITH PUBLIC INTEREST REGULATION IN GHANA

Three scenarios are considered as to how to reconcile the standards of investment protection with the obligations of the State towards the public: the framework for making future treaties; renegotiation of existing treaties; and interpretation of current treaties that remain unchanged.

6.1.1 The Framework for Making Future Investment Treaties

The duty of the State of Ghana to regulate in the public interest, the difficulties of voiding treaties and the narrow room for escaping from a treaty's binding effect under the Vienna Convention on the Law of Treaties (VCLT) support the need to rethink the terms of future investment treaties. Existing investment treaties that prevent or limit governmental regulation because of their effect on foreign investors, and give rise to liability to pay compensation for regulation mandated in the public interest are incompatible with the state's obligations.

The admission and coming into force of Ghana's investment treaties were conditioned upon the states parties complying with the constitutional and internal legal procedures and requirements.⁶ The object of requiring compliance with municipal law in the admission of investment and for the entry into force of the investment treaties was to ensure that the procedures and fundamental interests under municipal law are not rendered otiose by the entry into force of the treaties. That objective will be defeated if investment treaties remain valid or have binding effect even when their admission or coming into force did not comply with the Constitution.

The Constitution sets the terms for the making and entry into force of Ghana's investment treaties. This thesis distinguishes between procedural and substantive compliance, and between procedural constitutionality and substantive constitutionality. Those treaties which purportedly entered into force without having complied with the procedural requirements under the Constitution should be treated as invalid (procedural unconstitutionality) and unenforceable. The Constitution equally requires the Government to conduct its international affairs, such as entering into investment treaties, in a manner consistent with the national interest. Those treaties that validly entered into force are substantively inconsistent with the Constitution (substantive unconstitutionality) and general international law to the extent that they prevent or limit public interest regulation.

⁶ Ghana-China Investment Treaty, arts 1 and 14; Ghana-Malaysia Treaty, art 2 and 12; Ghana-Denmark Investment Treaty, arts 2 and 14; Ghana-Netherlands Investment Treaty, arts 2 and 14; and Ghana-United Kingdom Investment Treaty, art 2 and 14.

The dilemma is how procedural and substantive invalidity should be treated. Ghana's courts could determine an investment treaty is invalid. However, a declaration of invalidity under municipal law by municipal courts does not have effect in international law. Since these are bilateral treaties, issues as to their invalidity are better resolved through diplomatic discussion. Ghana's investment treaties provide for the settlement of state-to-state disputes regarding the application or interpretation of investment treaties by consultation through diplomatic channels or by a state-to-state arbitral tribunal specifically set up for that purpose. Such a tribunal is to be constituted by each contracting party appointing an arbitrator and the two arbitrators appointing a third person. Where the contracting parties are unable to constitute a tribunal within the specific periods by each of the investment treaties, then either contracting party may apply to the President of the ICJ to appoint the arbitrators.⁷

Since such a tribunal is to be constituted by the states parties themselves, it is more likely to be vested with the powers of those states that will enable it to resolve a dispute on the validity, unlike investor-state tribunals whose jurisdiction is limited to resolving investment disputes with no power to adjudicate upon matters involving public law and policy. The problem is that the scope of this power is limited to the application or interpretation of investment treaties. A dispute over the validity of an investment treaty is not an investment dispute because it concerns whether the treaty is legally valid and can bind the parties.

Therefore, it is for the parties to resolve such a dispute and they may do so through diplomatic channels or state-to-state dispute resolution tribunal. If one of the parties are still not satisfied with the decision of this tribunal, they may have a dispute over the validity of an investment treaty resolved by the ICJ. The jurisdiction of the ICJ, comprises all cases which the parties refer to it. Under Article 36(1) and (6) of the Statute of the ICJ the states parties may at any time declare that they recognise as compulsory *ipso facto* and without special agreement the jurisdiction of the Court in all legal disputes concerning any question of international law or the existence of any fact which, if established, would constitute a breach of an international obligation.

If these avenues fail to resolve the procedural or substantive invalidity of an investment treaty there is very limited scope to void it under the VCLT. The status of existing treaties becomes a matter of legal argument once action is taken to enforce it. The solution to the difficulty of voiding treaties under the Constitution and the VCLT would require fresh legal arguments in an international legal environment that is receptive to concerns that states should not be able to enter into treaties that prevent them from fulfilling their public interest obligations. It is conceivable that the parties might agree, or the ICJ might rule, in the future to void a treaty on the basis that the core duties of states prevented them from entering into the treaty in the first place.

That is not the situation now. Given the need to maximise the space to regulate in the public interest, and recognising the limited scope to void a treaty or escape its binding effect

⁷ Ghana-China Investment Treaty, art 9; Ghana-Malaysia Investment Treaty, art 8; Ghana-Denmark Investment Treaty, art 11; Ghana-Netherlands Investment Treaty, Art 13; and Ghana-United Kingdom Investment Treaty, art 11.

under current interpretations of the VCLT, the following specific proposals would severely restrict the scope of investment treaties to make them compatible with The Imperatives Theory.

First, 'investment' should only be entitled to coverage under an investment treaty where it has made a tangible contribution to the development of Ghana in one of the ways identified in the Constitution.

Next, indirect expropriation must be done away with completely. There are several reasons for this. One is specific to Ghana: the requirement for payment of compensation for indirect expropriation under the investment treaties conflicts with the Constitution. Article 20(1) and (2) recognises payment of compensation only for *compulsory taking possession or acquisition of property by law*.

A more general principled reason is that the rule on indirect expropriation does not respect the objective underlying governmental regulation and its indirect nature indicates no intent of such regulation to harm the investor. Losses arising from indirect regulation must be seen as incidental to the doing of business with or in a state. Foreign investors should be entitled to protection against only direct expropriation which is explicitly aimed at taking away a right, returning to the original objective of investment treaties. The effect of direct expropriation and indirect expropriation may be the same, and it might be argued that a state should not achieve indirectly what it cannot do directly. However, against the backdrop of the right to regulate in the public interest, treating them as one and the same thing does not preserve the necessary room for regulation justified by domestic and international law. States have a legitimate expectation to exercise their freedom to regulate and that foreign investors will not seek to profit from exercises of that freedom when they adversely affect the value of their investments. Therefore, if there is not a confiscation or explicit taking of an investment, a right to remedy should not arise.

Third, the thesis argues against the inclusion of national treatment and most-favoured-nation treatment (MFN) in future investment treaties of Ghana. The state exists first for its own citizens and should not place foreigners and citizens on the same level in terms of economic protection. Ghana should be able to initiate and implement measures solely in the interests of citizens whether they are engaged in the same or similar business as foreign investors without having to incur investment treaty liability. Therefore, national treatment must never be included in future investment treaties. Deciding whether particular measures serve the national interest is the prerogative of Ghana. So national treatment should be a choice not an obligation giving rise to compensation.

The case against the MFN rule is that it can indirectly defeat the very purpose for which a state did not agree to a particular investment treaty term with a particular treaty partner. Put another way, a country that is not able to negotiate a desired standard with a treaty partner may gain the protection of that standard for its investors and their investments if the treaty partner grants that higher standard of protection to investors and investment of a third country in another treaty. There may be a special public interest reason why particular treatment may

have to be accorded to investors of one treaty partner instead of another. The State should not be burdened with additional responsibility to extend such special treatment to third state investors if it does not serve the public interest to do so. Like the national treatment standard, MFN should be a choice to be made by Ghana and not an obligation under an international treaty.

Fourth, the fair and equitable treatment protection has become one of the most controversial in international investment law because no one knows precisely what its contours are. Like indirect expropriation, it has become a powerful and flexible test for foreign investors to use to challenge regulatory actions. For a developing country like Ghana, such a term cannot continue to be agreed to in its current amorphous form. Its continued use is conditional on limiting its scope or demarcating its boundaries to preserve regulatory autonomy.

Finally, provisions on repatriation of investment and returns would need to preserve the right of the Government of Ghana to restrict transfers in the interest of financial stability and economic development. There must be absolute freedom to restrict transfers for purposes of stabilizing the economy in cases of economic and financial crises and the existence of that situation must be self-judging.

The terms that may appropriately be included in investment treaties then are direct expropriation and full protection and security which reflect what investment protection by treaty was originally about. There is doubt in the literature whether full protection and security covers protection against physical injury and non-physical injury to investment. This would need clarification in future investment treaties too.

In the future, Ghana must not enter into treaties that contain investor-state dispute settlement. The supremacy of national courts under the Constitution counsels against such arbitration. Ghana should require the use of national courts to resolve investment disputes, or develop alternative inter-state mechanisms that are more legitimate and accountable in terms of balancing competing public and private interests than the current system of investment tribunals that have narrow jurisdiction over investment disputes. The dispute settlement mechanism must be clear that judicial decisions and constitutional issues cannot be challenged in arbitration and limit remedies to actual loss and simple interest.

This case for the narrowing of investment protection in several core rules, and removing investor-state arbitration, raises the question of whether investment treaties are actually needed to provide protection for foreign investors. This question is particularly relevant as foreign investors can seek protection under the Constitution and Ghana Investment Promotion Centre Act 2003 (Act 865) for expropriation, repatriation of investment and returns, investment incentives and for breach of other specific commitments.

6.1.2 Renegotiation of Existing Investment Treaties

Only the Ghana-Denmark investment treaty makes explicit provision for the treaty to be amended in such manner as may be agreed between the contracting parties. Regardless of whether there is provision to amend the treaties, the parties are free to renegotiate the terms of their treaties just as they freely entered into them.

The starting point for such renegotiation would be the Ghana Model BIT that was finalised in 2008.⁸ The decision by the Government of Ghana to develop the Model BIT was presumably a response to the challenges to its domestic decisions in international arbitration and growing awareness of the implications of investment treaties. The Model BIT contains novel provisions that can help address some of the restrictive effects of investment treaties on regulatory autonomy, but they fall short of the proposals set out in Subsection 6.1.1.

The preamble to the Model BIT expressly links the encouragement and protection of investments to “long-term sustainable economic growth and development” and “human resources development arising from such investments.” The interpretation of future investment treaties modelled on the Model BIT would have to bear this objective in mind.

The Model BIT broadly defines investment as “every kind of asset.” However, it limits the scope of the concept of investment by specifying that an investment does not include claims to money that arise solely from commercial contracts for the sale of goods or services, or credits in connection with a commercial transaction if the original maturity date is less than three years. Claims to money arising from the operations of external credit undertaken in accordance with the laws and regulations of a contracting party and operations of public debt do not also constitute investments. To further limit the scope of investment, the Model BIT states that a change in the form in which assets were invested does not affect their character as investment, “provided such change is not contrary to the laws of the Contracting Party in whose territory the investment has been made.” A narrower definition of investment is necessary to ensure that not everything that the investor can lay claims to as benefiting it is entitled to protection under an investment treaty.

The Model BIT also makes exception for each contracting party to restrict transfers temporarily where in exceptional circumstances, payments and capital movements cause or threaten to cause serious balance of payments difficulties. Such restrictions must, however, be imposed equitably, in a non-discriminatory manner and in good faith.⁹

Exception is also made under the Model BIT for measures “necessary for the fulfilment of ... obligations with respect to the maintenance or restoration of international peace or security, or the protection of ... essential public order or security interests.”¹⁰ In terms of the responsibilities of foreign investors in the host country, the Model BIT states that foreign investors “shall be bound by the laws and regulations in force in the host State, including its

⁸ Ghana Model BIT 2008, <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2866>>

⁹ Ibid at 6(2).

¹⁰ Ibid art 10.

laws and regulations on labour, health and the environment.”¹¹ They shall also “to the extent possible, encourage human capital formation, local capacity building through close cooperation with the local community, create employment opportunities and facilitate training opportunities for employees, and the transfer of technology.”¹² Further, foreign investors “shall behave in accordance with relevant guidelines and other internationally accepted standards applicable to foreign investors.”¹³

Article 7(6) of the Model BIT states that “non-discriminatory regulatory actions ... designed and applied to protect legitimate public welfare objectives, such as national security, public health, safety, and the environment, do not constitute indirect expropriations” except “in rare circumstances.”

In relation to investment arbitration, the Model BIT requires exhaustion of domestic remedies through administrative review procedures. It is only when a foreign investor is not satisfied with domestic administrative remedies that it has the choice to either go to a national court or international arbitration to have the matter resolved.

The Model BIT also makes provision for the establishment of a Joint Commission to supervise and review the implementation of the treaty and to give joint interpretations of a provision upon the request of one or both parties.¹⁴ The interpretation adopted by the Joint Commission is binding upon tribunals and awards must be consistent with such interpretation.¹⁵ Arbitral tribunals are to reach their decisions based the investment treaty, national laws and regulations and applicable rules of international law.¹⁶

The Model’s provisions clearly intend for the State to retain its regulatory autonomy. They are novel in the context of Ghana’s existing investment treaties. However, the changes do not satisfy the argument in this thesis that the State must only enter into investment treaties that conform to its obligations under the Constitution and general international law.

At a minimum further changes would be required. The definition of investment needs to be revised to embrace the need for an investment to make contribution to development before it can be entitled to protection. The proviso to indirect expropriation in Article 7(6) would potentially defeat its purpose; the reference to indirect expropriation should be removed from the expropriation provision altogether. The qualifications that restrict regulation of capital transfers are unnecessary, since they stand to defeat the very purpose of preservation of the right to restrict transfers as specified. It should be mandatory for an investor to exhaust their remedies in municipal courts before resort to international arbitration may be allowed. That arbitration should be through a state-state not an investor-state forum. Since the interpretations of the Joint Commission are binding on tribunals established under the BIT, the parties might as well develop a state-state dispute mechanism to resolve investment treaty disputes.

¹¹ Ibid art 12(1).

¹² Ibid art 12(2).

¹³ Ibid art 12(3).

¹⁴ Ibid art 13

¹⁵ Ibid art 14(9)(b).

¹⁶ Ibid art 14(9)(a).

There is an alternative. The approach under this Model BIT and similar moves by many other countries to preserve regulatory autonomy¹⁷ raises a legitimate question of whether the time has come to return to the protection of foreign investment under municipal law. Ongoing reforms of the investment treaty regime challenge the need to continue with them. Enforcing a narrower range of investor protections through domestic courts would also ensure that foreign investors can be effectively made subject to the laws of the host country in which they invest, and not seek to evade that accountability by challenging new regulations or even judgments before international investment tribunals. Ghana needs to seriously engage with the prudence in being party to such an investment treaty regime.

6.1.3 The Interpretation of Existing Investment Treaties

If a dispute arises under Ghana's existing investment treaties, it must be interpreted having regard to the public interest obligations of the State and the specific legal justification for the exercise of the right to regulate in the public interest. Where the particular right to regulate is justified under both the Constitution and general international law, then normative priority should be given to the public interest regulation obligations. They should prevail over investment treaty obligations, since in such a case the superiority of international law over municipal law rule should be inapplicable. A balance cannot be achieved in the international investment regime if the legal justification for the adoption of a measure giving rise to a treaty claim is irrelevant in decisions on liability and award of damages. To justify their legitimacy as neutral and efficient forums for the resolution of investor-state disputes, investment tribunals must begin to give due consideration to the public interest justification of a challenged measure. There would be the need to consider the design and structure of investment tribunals if they are to play this new role.

6.2 SPECIFIC CASES OF HOW TO PROTECT PUBLIC INTEREST REGULATION IN FUTURE INVESTMENT TREATIES

The examination of three different and fundamental arenas of public interest - the national judicial system, the environment and development – shows how these scenarios might be applied in the future.

6.2.1 Preserving the Jurisdiction of Municipal Courts

The foundation of international arbitration for the resolution of investment disputes is the presumed inefficiency and possible bias of municipal courts in the settlement of disputes between a host state and alien multinational business entities. International arbitration was

¹⁷ UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies* (United Nations, 2012).

seen as a mechanism that would provide foreign business entities and states alike with a neutral, independent and competent forum for the efficient, swift, cheap and flexible resolution of disputes relating to investments. However, the actual functioning of this mechanism reveals systemic and endemic deficiencies. Not only has international arbitration been used by foreign investors to challenge public interest regulation, it has also become a mechanism through which judicial decisions have been challenged before private arbitrators. Those challenges raise serious implications for the authority of municipal courts and the sanctity of their decisions.

There are substantial academic and policy debates over the wisdom and efficacy of the investor-state dispute settlement mechanism. The legitimacy, independence, transparency, impartiality and accountability of arbitral tribunals have been credibly questioned in the literature. A more foundational question which this thesis addressed is the competence of states to agree to a mechanism that enables foreign investors to bypass the jurisdiction of the courts, using legal rules that do not apply in domestic law, and potentially enables international tribunals to override the municipal courts whose jurisdiction under national constitutions is supreme, original, appellate and final. The decisions of municipal courts of Ghana have been challenged by foreign investors before investment tribunals which proceeded to make conflicting decisions and sought to replace the decisions of the courts with their own, without showing the courts were legally wrong or had failed to administer justice. In this respect, international arbitration can undermine the rule of law and the administration of justice in Ghana.

The thesis made a number of arguments and proposals. First, it challenged the notion that the national legal system is incompetent to resolve investment disputes given: (1) the structure of municipal courts with their self-correcting mechanisms of appeals and reviews of their decisions to ensure effective administration of justice; and (2) the role of municipal courts in the recognition and enforcement of foreign arbitral awards.

Second, the thesis argued that the investment tribunals' presumed competence to resolve substantive investment disputes under the investment treaties does not empower them to review municipal judicial decisions, nor do the tribunals have the legitimacy under constitutional law to do so.

Third, the fundamental principles of Ghana's legal system in which the courts have original, appellate and final jurisdiction over all legal disputes and persons, and in which the principles of probity, separation of powers, rule of law, accountability and transparency are entrenched and paramount, militate against the State agreeing to international arbitration.

In relation to existing investment treaties, the thesis questioned the legality of a general agreement to arbitrate given the original, appellate and final powers of the courts under the Constitution. The thesis also argued against agreeing to international arbitration in light of the fact that customary international law does not grant foreign investors an automatic right to an international dispute resolution body. Under customary international law, resort to a foreign

forum is justified if domestic remedies are not available at all or if they prove ineffective.¹⁸ Accordingly, it is proposed that the right to international arbitration under existing investment treaties must be interpreted as accruing only when an investor has had recourse to municipal courts and has not found a remedy, and that international forum can and should be a state - state, not investor-state forum, which requires the investor to have the endorsement of their parent state to pursue the dispute. This proposal will ensure that foreign investors have recourse to municipal courts before any attempt to have recourse to an international forum can be made. This procedure will help give effect to the provision on the original jurisdiction of the courts under the Constitution.

Any agreement in future to international arbitration has to take into consideration the arbitrability of the subject matter of a dispute in light of the Constitution and general international law and the ability of the foreign forum to balance both public and private interests.

6.2.2 Preserving Environmental Regulatory Autonomy

Environmental regulation of foreign investments in such countries as Canada, United States, Mexico, Indonesia and Germany, have been challenged by foreign investors through ISDS for allegedly breaching the substantive standards of investment protection. Measures that have been challenged include: orders banning the export of chemicals and products that affect environmental quality, water and health; denial and revocation of environmental permits; legislation and regulations prohibiting the use of pesticides on environmental and public health grounds; expropriation of property for natural resources conservation purposes; imposition of conditions on environmental permits; and amendment of legislation to phase out nuclear power plant operation.¹⁹

These suits have raised academic and policy debate on how states might recapture environmental regulatory autonomy. Again, the unique contribution of this thesis has been to assess the implications of the constitutional and general international law duty of the State of Ghana to protect the environment in the making and interpretation of investment treaties. It showed that key aspects of the legal regime for environmental protection in Ghana, such as the cancellation and termination of environmental permits and regulation of the import, export or use of environmentally hazardous substances, could potentially be challenged by foreign investors under Ghana's investment treaties. The thesis argued that because environmental treaties promote the protection of the environment in the same manner as does the Constitution, their combined authority should be treated as taking precedence when there is a conflict with investment treaties, dictating the standards of investment protection the State can undertake and informing the interpretation of investment treaties.

¹⁸ *Elettronica Sicula SPA (ELSI)*, Judgment, ICJ Reports 1989, p. 15 paras 55, 56 and 59.

¹⁹ Jorge E. Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press, 2012) at 17-23.

It is only by entering into investment treaties whose terms respect constitutional and general international law norms such as environmental rights, the protection of the environment and conservation of natural resources that the State can retain environmental policy space and regulatory autonomy. Cases such as *Chemtura v Canada*²⁰ and *Methanex v United States*²¹ have endorsed the principle that where environmental regulation is justified in the public interest liability does not arise from the regulation. Also, where the activities of foreign investors have direct risk of damaging the environment and the State intervenes within the law to avoid or remove the risk, then due consideration should be given to the regulation and the legal justification in support.

6.2.3 Preserving Development Policy Autonomy

The relationship between Ghana's investment treaty obligations and its development policymaking and implementation obligations was illustrated with reference to industrial policy and capital control regulation. A number of arguments have been advanced. The State has the constitutional and general international law duty to make and implement development policies for the realisation of the legal right to development in Ghana, which means it must only make treaties that are consistent with and promote a national interest, such as development, and in particular, the human right to development.

Ghana's investment treaties were aimed at establishing standards of investment protection to attract foreign investment for development and not merely to protect foreign investment as an end in itself. The interpretation of the investment treaties must take account of that development objective, as well as the constitutional and general international law duty of the State to make and implement measures for the realisation of the right to development in Ghana. Where an investment has made no contribution to development, it should not be entitled to protection. The challenge posed to development by international investment law cannot be addressed effectively unless investment treaties are made subject to Ghana's regulatory powers under both the Constitution and general international law to make and implement development policies for the interests of citizens, from whom the powers of the State are derived.

Given that foreign investment is not the panacea for all development problems in Ghana, a restricted approach to investment protection must ensure the role of the State in development is not underestimated or undermined, and foreign investment is not given absolute protection above everything else. To reconcile investment treaty terms with the primary obligations of the State, investment treaties must be made and interpreted in a manner consistent with or to accommodate public interest regulation. There is the need to make provision in future investment treaties for an investment to be entitled to protection only if it makes contribution to development.

²⁰*Chemtura Corporation v Canada*, NAFTA /UNCITRAL, Award, 2 August 2010.

²¹*Methanex Corporation v. United States of America*, NAFTA, UNCITRAL, Final Award, 7 August 2005.

6.3 CONCLUSION

This thesis has focused on the capacity of Ghana to conclude investment treaties and the terms the State can or cannot agree to under those treaties in light its public interest obligations. It equally addressed the issue of how the limitation public interest obligation places on the treaty making capacity of the State should inform treaty interpretation. In doing so, the thesis provides a basis for how the challenge the investment treaty regime poses to regulatory autonomy might be addressed in future rather than providing a roadmap of how they should exactly look like. This is an issue that should engage the attention of Ghana in the future, as it should other countries. A principled basis for that reflection is crucial and this thesis is a contribution to that.

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