The Changing Pattern and Future of Foreign Investment Law and Policy in Ghana: The Role of Investment Promotion and Protection Agreements

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Abstract

This article assesses the implications of investment promotion and protection agreements (IPPAs) for domestic investment law and policymaking in Ghana. It reviews the terms of domestic investment legislation prior to and after Ghana entered into IPPAs to ascertain the differences in the content of domestic laws and the role of the IPPAs in the changing pattern of foreign investment law and policy in Ghana. The review shows fundamental differences. Whereas, for example, under the pre-investment treaty domestic investment laws, a proposed investment could be admitted only if it would contribute to the national economy, the post-investment treaty domestic investment law requires only minimum capital for admission. What explains the fundamental change in the content of the post-investment treaty domestic law? The literature reveals that the change in government policy from a regulatory to a more investment promotion-oriented policy explains the shift in the content in investment law in Ghana. The post-investment treaty domestic law was enacted against the backdrop of structural adjustment policies that emphasised liberalization. The article argues complementarily that the coming into force of the IPPAs of Ghana also explains the changing pattern in the content of domestic investment law. Given the definitions of investment and the substantive obligations under the IPPAs, Ghana could not, even without independent policy change, retain the content of domestic investment law as was the case when she was not party to any IPPAs. The thesis is that IPPAs have the effect of limiting regulatory autonomy and will limit future legislative powers of the State in defining the content of domestic investment law and policy. This will ultimately determine the pattern and trend of domestic investment law and policy in Ghana. The article proposes that the IPPAs should be renegotiated to take into account the constitutional responsibility of the Government to protect the welfare of the people of Ghana.

Keywords

Domestic law – Ghana – investment – investment agreement – investment treaty – policy – regulatory autonomy – pre-investment treaty – post-investment treaty – treaty

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[T]he legislative power of Ghana shall be vested in Parliament and shall be exercised in accordance with this Constitution.¹

A supranational order subordinates the power of its members to the order as a whole. Thus, when states enter into treaty relations that are premised on supranationalism, the express or implied commitment is to a partial or total surrender of sovereignty.²

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1 Introduction

Ghana, like most other African countries, needs foreign investment for a number of reasons. First, Ghana has plenty of natural resources but lacks the technology to explore and exploit them effectively. Secondly, Ghana has historically been overly dependent on cocoa as the country's primary export commodity, which creates balance of trade problems.³ Thirdly, despite the recent addition of oil to Ghana's exports after oil exploration and production began in 2010, the economy today remains largely dependent on importation of goods and services. So there is the need for Ghana to attract appropriate foreign invest-

1 Constitution of the Republic of Ghana, Article 93(2).

2 K.O. Kufuor, 'When Two Leviathans Clash: Free Movement of Persons in ECOWAS and the Ghana Investment Act of 1994', 6 *African Journal of Legal Studies* (2013), 1–16, at 12.

3 The absurd import dependence of the country on foreign goods and services was well summed by Nana Akufo-Addo in the following apt words: "Right now, if you go to the market and just look, the absurdity of our situation is bound to hit you. We allow our fruits to rot and import fruit juice." 'Speech delivered by Nana Addo Dankwa Akufo-Addo, 2012 Presidential Candidate of the New Patriotic Party at the Evening Encounter organized by the Institute of Economic Affairs on the 21st of August 2012.' See also G. Kwaku Tsikata, Y. Asante and E.M. Gyasi, *Determinants of Foreign Direct Investment in Ghana* (Overseas Publication Institute, London, 2000).

ment for the exploration and exploitation of natural resources and for other relevant sectors of the national economy and to receive the benefits associated with foreign investment, such as developing a wider range of export commodities and promoting domestic industries capable of producing goods currently imported.⁴ Foreign investment has the potential to “ease the foreign exchange situation through the infusion of foreign capital”⁵ and the development of local industries in sectors of the economy such as agriculture, manufacturing, and processing of local produce. Other possible benefits of foreign investment include profits from the investment project where the government is a partner, taxes due to the government from foreign investors; increased output in other sectors of the economy arising from demands for goods and services generated by the investment project and possible contribution to Gross National Product and growth.⁶

There are also a variety of potential costs of foreign investment generally to host nations, developed or developing. The negative effects or losses that may arise from a contemplated foreign investment may be divided into quantifiable and non-quantifiable costs. A variety of quantifiable potential costs identified by authors include Government's share in the initial outlay and operational costs of a foreign investment project, losses through tax exemptions given to foreign investors, losses arising to the state from import and export duty exemptions, and costs arising from pollution, industrial diseases and accidents and population relocation, especially in oil and gas and mining-related investments.⁷ Non-quantifiable potential costs of foreign investment, depending on the nature of the project involved, include “dilution of the native culture, an increase in crime, or the other possible societal consequences of a project”,⁸ environmental pollution and contamination of drinking water,⁹ and human rights abuses including possible loss of lives.¹⁰

Investment promotion and protection agreements (IPPAs) may also have the effect of limiting the ability of states to make policies and laws required in

4 K. Yelapaala, ‘Costs and Benefits from Foreign Direct Investment: A Study of Ghana’, 2 *New York Law School Journal of International and Comparative Law* (1980–1981), 72–82, at 73.

5 *Ibid.*, 79.

6 *Ibid.*, 99.

7 *Ibid.*, 98.

8 *Ibid.*, 99.

9 P. Muchlinski, *Multinational Enterprises and the Law*, 2nd edn. (Oxford University Press, Oxford, 2007), 542–543.

10 E. Morgera, ‘Human Rights Dimensions of Corporate Environmental Accountability’, in P.-M. Dupuy, E.-U. Petersmann and F. Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, Oxford, 2009), 512–513.

the public interest and to implement them because “regulatory conduct in a wide range of fields – industrial development, taxation, public health and environment, broadcasting, utilities regulation, and so on – now falls within the comprehensive jurisdiction of international arbitrators.”¹¹ Ghana like most other host governments to foreign investment stands the risks of losing from IPPAs in terms of the foregoing negatives that may arise from investment operations. There is the need to be concerned about IPPAs limiting states’ regulatory autonomy because as rightly argued by Professor Kelsey, every reduction of the legal authority of the state through binding and enforceable international economic agreements limits future domestic political control over matters of public interest.¹²

In sum, there are both costs and benefits of foreign investment. There is, therefore, the need for a critical examination of the effectiveness of Ghana’s foreign investment policies, particularly as they relate to the ability of the Government of Ghana (the GoG or Government) to initiate development policies and implement them and to protect human rights and the environment as required by the Constitution of the Republic of Ghana. Are these policies capable of attracting appropriate and adequate amounts of foreign investment that meets the needs of Ghana, without narrowing the country’s policy flexibility and regulatory autonomy needed to makes laws and policies relating to foreign investment?

In light of the foregoing issues, this article assesses how IPPAs¹³ limit policy space and regulatory autonomy in Ghana with particular reference to the making of domestic laws and policies on foreign investment and the constitutionality of investment treaties limiting the law-making powers in Ghana. The article specifically assesses the extent to which IPPAs limit or may limit

11 G. Van Harten, ‘Investment Treaty Arbitration and Its Policy Implications for Capital-Importing States’, in D. Sánchez-Ancochea and K.C. Shadlen (eds), *The Political Economy of Hemispheric Integration: Responding to Globalization in the Americas* (Palgrave Macmillan, Basingstoke, 2008) 102.

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

13 This article uses “investment promotion and protection agreements”, “international investment treaties” or just “investment treaties” interchangeably to refer to international agreements entered into between countries, in this context, Ghana and her contracting parties, to protect foreign investment. The article also uses “foreign investment law and policy”, “pre-investment treaty domestic foreign investment laws” and “post-investment treaty domestic foreign investment laws” synonymously to mean local or municipal laws for the promotion and protection of foreign investment as distinct from international investment treaties.

legislative discretion and autonomy by dictating the content of domestic laws and policies on foreign investment and how such dictation influences or may potentially influence the pattern and trend in domestic investment law and policy in Ghana. The article reviews past and current governmental policies on foreign investment evidenced by legislation and regulations. It then compares the content of domestic foreign investment legislation prior to Ghana entering into investment treaties (defined here as the “pre-investment treaty domestic foreign investment laws”) and after the said treaties came into force (defined here as the “post-investment treaty domestic foreign investment laws”) to see how IPPAS have influenced or may influence the content of existing or future domestic law and policy in Ghana.

Practical and comprehensive analysis of how the coming into effect of an investment treaty influences or may influence the domestic law and policy-making on foreign investment in country-specific situations is rare particularly on the African continent. This article, therefore, makes an important original contribution to the debate on the legal implications of international investment treaty standards for domestic laws, policies, and regulation. Its findings should contribute to rethinking the national legislative and regulatory autonomy implications of IPPAS for governments, in the developing world and beyond, who desire to protect the public interest through domestic investment law.

2 Theoretical Framework: The Constitution and Treaty Limitation on Domestic Law and Policymaking in Ghana

A number of constitutional issues can be raised with regard to the effect of investment treaty standards on domestic law and policymaking and these need to be examined at this stage. One of them is whether IPPAS can validly limit the law-making and enforcement powers of Ghana. The Constitution states in the following articles (emphasis added) that:

93(2) *Subject to the provisions of this Constitution*, the legislative power of Ghana shall be vested in Parliament and shall be exercised in accordance with this Constitution.

58(1) The executive authority of Ghana shall vest in the President *and shall be exercised in accordance with the provisions of this Constitution*. (2) The executive authority of Ghana shall extend to the execution and maintenance of this Constitution and all laws made under or continued in force by this Constitution.

37 (2) The State shall enact appropriate laws to ensure – (a) the enjoyment of rights of effective participation in development processes including rights of people to form their own associations free from state interference and to use them to promote and protect their interests in relation to development processes, rights of access to agencies and officials of the State necessary in order to realise effective participation in development processes; freedom to form organizations to engage in self-help and income generating projects; and freedom to raise funds to support those activities; (b) the protection and promotion of all other basic human rights and freedoms, including the rights of the disabled, the aged, children and other vulnerable groups in development processes. (3) In the discharge of the obligations stated in clause (2) of this article, the State shall be guided by international human rights instruments which recognize and apply particular categories of basic human rights to development processes.

Three important points need be made from these constitutional stipulations. The first point is that the power to make laws is vested in Parliament and the Executive has the duty to execute (enforce) and maintain the law including the Constitution itself. The second point is that the power to make laws goes with the discretion to determine the content of the law. The third point is that the executive and legislative powers must be exercised within the terms of the Constitution; no other law may limit the powers of government save as limited by the Constitution. Not only does the Constitution assert its supremacy over all other laws made by Parliament,¹⁴ there is indeed case law by the Supreme Court that holds the view that since the Constitution is the supreme law of the land, all laws made by Parliament, whether municipal law or international law, must be consistent with the Constitution. The power to make treaties is a constitutional power and has to be exercised within the limits imposed by Articles 1 and 75 of the Constitution of Ghana. Laws that in substance and procedure contravene the Constitution are null and void and of no legal effect in Ghana.¹⁵

In a written constitutional dispensation, such as pertains in Ghana, constitutional duties and rights can be abrogated only by way of express change or amendment of the Constitution in the manner laid down in the Constitution itself. Where such change or amendment is not made, then the constitution must be obeyed in all its terms; the duties it imposes must be performed and

14 Constitution of Ghana, Article 1(2).

15 *New Patriotic Party v. Attorney-General* [1997–1998] 1 GLR 378 at 412–413 and *New Patriotic Party v Attorney-General* [1993–1994] 2 GLR 35, 176.

the rights it protects and guarantees must be respected and upheld. The constitutional position in Ghana remains that it is the duty of Parliament to make laws, that Parliament has the inherent discretion to determine the content of the law it makes so long as the content is consistent with the Constitution and the Executive has the duty to implement the law in consonance with the Constitution. Therefore, Parliament and the Executive may not by municipal law or investment treaties limit any of the legislative, judicial and executive powers permitted under the Constitution. Both municipal law and international treaties that seek to limit the powers of the Government or take away from the Government the duties assigned to it, such as the duty of the judiciary to administer justice, may be held to be unconstitutional and of no legal effect in Ghana.

It is certainly an undoubted rule of international law that a state which has broken a stipulation of international law or treaty cannot justify the breach by reference to municipal laws, including the Constitution.¹⁶ This rule is premised on the duty of every state to carry out its treaty obligations in good faith.¹⁷ Further, a state's consent to a treaty may not be invalidated even if the treaty was not concluded in accordance with domestic law.¹⁸

However, the position of international law is also that a state may 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 if the violation was "manifest and concerned a rule of its internal law of fundamental importance."¹⁹ The Constitution of Ghana, like most other constitutions, is antecedent to the Government, it created the Government, defines the structure and functions of the Government and protects and guarantees fundamental rights that have to be upheld and respected. It can be argued that the Constitution is of such "fundamental importance" in the constitution of the Government and in the protection of rights that its terms must not be violated by acts of government officers. Thus, where investment treaties limit the powers of government to protect the welfare of the people, it can be said such a limitation encroaches on rights and roles so fundamental to the existence of society that the treaties must give way to the constitutional order. An IPPA provision that may be deemed to be inconsistent with the duty of the Government

16 *Vienna Convention of the Law of Treaties*, agreed in Vienna on 23 May 1969 and entered into force on 27 January 1980 ("VCLT"); and M.N. Shaw, *International Law*, 6th edn (Cambridge University Press, Cambridge, 2008), 133.

17 *Draft Declaration on the Rights and Duties of States* 1949, Article 13.

18 VCLT (note 16), Article 46(1).

19 *Ibid.*

to promote and protect the welfare of the people, for example, is the national treatment standard. By its nature, this treaty standard prohibits measures intended for the benefit of domestic investors if similar or the same treatment will not be extended to foreign investors irrespective of how crucial those measures may be needed for the survival of domestic industries. Although economically national treatment and public welfare may not be mutually exclusive, any disadvantage to the domestic industry in the interest of national treatment will be constitutionally unwarranted since the Constitution requires that in all cases the Government must act to advance the common good.

Political power according to John Locke is the “right of making law . . . and of employing the force of the community in the execution of such laws . . . *all this only for the public good*”.²⁰ The “great chief end”²¹ that people seek in uniting and putting themselves under a government “is the preservation of their property.”²² In every human society people want: “an established, settled, known law, received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies”;²³ “a known and indifferent judge, with authority to determine all differences according to established law”;²⁴ and “power to back and support the sentence when right, and to give it due execution.”²⁵ These are often met in the form of a written constitution and other inferior legislation. A constitution and other laws that are made and in enforce have to be perpetually executed and maintained. Therefore, it is necessary that there should be a power always in state institutions to see to the execution of those laws.

The power to make laws for the society and to execute those laws thus inheres in the very nature of government. Under the Constitution of Ghana, liberty, equality of opportunity, prosperity, and the welfare of the people are central to the establishment of government.²⁶ It may not be wrong, therefore, to adopt as applicable in Ghana, Jeremy Bentham’s proposition that “the happiness of the individuals, of whom a community is composed, that is their pleasures and their security, is the end and the sole end which the legislator [and the executive] ought to have in view.”²⁷ Thus, the power to make laws and execute them to meet the above-stated interests is inherently governmental and must

20 J. Locke, *Of Civil Government* (EP Dutton, London, 1924) at p. 118. (emphasis added)

21 *Ibid.*, 180.

22 *Ibid.*

23 *Ibid.*

24 *Ibid.*

25 *Ibid.*

26 Constitution of Ghana, Preamble and Article 1(1).

27 J. Bentham, in W. Harrison (ed.), *A Fragment on Government* (Blackwell, Oxford, 1960), 147.

not be given out or unreasonably restricted, whether by international investment treaties or by municipal law. Restricting the powers of government in this regard will amount to compromising, or placing at risk, the constitutional mandate to protect the welfare of the people, which constitutionally should not be traded for anything whatsoever. Treaties that conflict with constitutional duties and rights must be revised to bring them in conformity with the Constitution if they are needed at all. Any future treaties will also have to be entered into taking into consideration their implications for the full discharge of the legislative, administrative, judicial, and executive functions of the GoG under the Constitution.

3 The Pre-Investment Treaty Domestic Investment Laws in Ghana: 1963–1994

3.1 *The Criteria for Admission of Foreign Investment and Regulatory Powers in Ghana*

Prior to 1957, when Ghana became politically independent of colonial rule from the United Kingdom, investments in the Ghana (Gold Coast, as it was then called) were confined to very few sectors. The economy was designed and operated to supply raw materials (for example, cocoa, minerals and timber) to foreign consumers. Attempts at investment promotion and protection could be traced to the enactment of the Tax Ordinance of 1943, among others. That law gave power to the Ministry of Finance to grant income tax holidays to projects that were certified to be of pioneer status.

The Tax Ordinance was followed by the Pioneer Industries and Companies Act of 1959 (PICA). The PICA exempted pioneer companies and industries from payment of income tax for periods up to ten years. For all approved private foreign investments after 1950, transfer of all profits and repatriation of the capital investment itself was unconditionally guaranteed in the currency originally invested at any time the investor desired. Similarly, Under the Local Industries (Customs Duties Relief) Act of 1959, local industries could be granted remission of customs duties on raw materials imported for use in the manufacture of their products. The Government of Dr. Kwame Nkrumah also established the Investment Promotion Board to help foreign businesses establish industries and enacted the Capital Investment Act in 1963.²⁸ The enactment of the

28 S.O. Doodoo (ed.), *Parliamentary Debates: Second Session of the First Parliament of the Third Republic of Ghana – Second Year of the Third Republic* (Third Series, Vol. 6, 1980–1981 Session, 29 April 1981–21 August 1981), 1079 (“1980–981 Parliamentary Debates”).

Companies Act (Act 179) in 1963 also took into account the need to encourage African enterprises and foreign investment in Ghana.²⁹

The Capital Investment Act 1963 (Act 172) (CIA) is the first legislation in Ghana after Independence from Britain in 1957, purposely designed to promote and protect foreign investment. The long-title of the CIA states that it was enacted to “encourage the investment of foreign capital” in Ghana. The law was intended to address uncertainties in the minds of business people about the future of private investment. It was intended for those business persons who were genuinely interested in Ghana and were prepared to help in the country’s reconstruction.³⁰ The CIA established the Capital Investment Board (CIB) as the regulatory institution responsible for the purposes of the Act.³¹ The functions of the CIB were to initiate and organise activities to encourage the investment of foreign capital, grant approval for capital investment, and maintain liaison between investors and other government institutions. It was also charged with the responsibility to give and disseminate information on foreign investment and recommend the grant of applicable exemption, reduction, facility or licence in respect of any enterprise, property, investment or loan likely to assist in the attainment of the objectives of the CIA.³²

Under the CIA, an approval for capital investments was to be in the form of an agreement entered into between the CIB and the investor setting out the conditions of the approval and the benefits conferred by the agreement.³³ Thus, foreign investment was governed by both the CIA and the agreement that gave approval for capital investment. Such an approach obviously gave some regulatory autonomy to the regulatory institution, in this case, the CIB. This was particularly so because the conditions to be set out in the agreement were at the discretion of the CIB. That way, the CIB could take its policy space and regulatory autonomy into consideration in setting out the conditions to be observed and conferring benefits on the foreign investor or it could decide to impose few or no conditions. Certainly, since the approval was in the form of

29 *Final Report of the Commission of Enquiry into the Working and Administration at the Present Company Law of Ghana* (1963). The Companies Act of 1963 was preceded by the Companies Ordinance of 1907 that was enacted as a result of the influx of a number of companies from South Africa.

30 Parliamentary Debates: Third Session of the First Parliament of the Republic of Ghana – Third Year of the Republic (Government Printing, Accra, Session 1962–1963, 26 February–5 April 1963), 554 (“1962–1963 Parliamentary Debates”).

31 CIA, Section 1(1).

32 *Ibid.*, Section 2(1). Enterprise is used here simply and broadly to refer to a business entity or business project or undertaking permitted under the laws of Ghana.

33 *Ibid.*, Section 2(3).

“agreement”, the foreign investor’s interests would also have been factored into the agreement.

Admission to make capital investment in any sector of the national economy was conditioned upon an application setting out the particulars of the project and describing the enterprise intended to be carried on.³⁴ Particulars required in the application included an investment and financial plan, showing the amount of investment in local or foreign currency; a production scheme, indicating the volume and value of the production; a services scheme, indicating the creation of services and the volume and value of the services intended to be rendered; an import scheme or export scheme indicating the anticipated imports and exports; an employment scheme, including a programme to train citizens of Ghana for the acquisition of requisite skills in the enterprise concerned; and the industry to be established and the product to be produced.³⁵ These requirements allowed the State to judge the commercial viability of a proposed investment undertaking in relation to the national interests before it could be admitted. The fact that an application met these application particulars did not mean that the applicant was entitled to an automatic grant of an entry to invest. The grant could only be made subject to the investment project meeting the criteria of investment. Thus, an approval for capital investment could be:

[g]ranted for the purposes of contributing to the attainment of (a) the development of the productive capacity of the national economy through the efficient utilization of its resources and economic potential; (b) the full utilization and expansion of the productive capacity of existing enterprises; (c) the saving of imports, the increase of exports, and the improvement of services which will assist the strengthening of the payments position of the country; (d) or a high level of employment and impartation of technical skill to . . . citizens of Ghana.³⁶

Upon the grant of an approval to invest and upon entry and establishment of the business, CIA required that any person to whom the approval had been granted:

[s]hall (a) during the continuance in force of the agreement . . . institute arrangements for the training of persons who are citizens of Ghana in

34 *Ibid.*, Section 4(1).

35 *Ibid.*, Section 4(2).

36 *Ibid.*, Section 5.

administrative, technical, managerial and other capacities, with a view to securing the benefit of their knowledge and experience in the conduct of the project concerned; and (b) provide adequate facilities for the benefit and enjoyment of employees.³⁷

Any person to whom an approval had been granted to invest in Ghana was also under obligation upon demand by the CIB to furnish it with any information relating to the implementation of the investment project and fulfilment of the conditions of the approval, the conditions of any permit and the determination of the extent of any benefits.³⁸

The foregoing provisions under the CIA have been quoted to underscore the point that development and the public interest generally were central to foreign investment regulation under domestic law in Ghana. It is very clear from the relevant provisions that foreign investment was encouraged to benefit the nation and that the public interest was a fundamental priority in the investment regulation framework under the regime of Dr. Kwame Nkrumah. Foreign investors were not simply admitted on the assumption that the State stood to benefit from the operations, but whether, on a careful assessment, a proposed investment project was commercially viable in relation to the public interest. Indeed, Dr. Kwame Nkrumah, after his overthrow in 1966, noted that under his “government . . . all policies were devised and implemented with one objective only, to promote the well-being and happiness of the Ghanaian people as a whole . . .”³⁹ This is certainly obvious from the legal regime of foreign investment under his administration, particularly the CIA, which as its content shows, placed the public interest at the forefront of investment promotion and protection. It is admitted, certainly, that what exists in law does not mean that is how it operates in practice.

When the political party that overthrew Dr. Kwame Nkrumah by a coup on 24 February 1966, led by Joseph Arthur Ankrah, came into office, the CIA was not abrogated; it continued into force until it was repealed by the Capital Investment Decree (NLCD 141) which came into force on 10 January 1973. This was during the military regime of Ignatius K. Acheampong. The changes effected by the Capital Investment Decree (CID) were superficial: the name of the previous law, the Capital Investment Act, was changed to Capital Investment *Decree* and in substance most of the content of the CIA was retained under the CID.

37 *Ibid.*, Section 6.

38 *Ibid.*, Section 7.

39 K. Nkrumah, *Revolutionary Path* (Panaf Books, London, 2001), 417.

3.2 *The Criteria and Objectives of the Protection of Foreign Investment*

The CID and the Investment Policy Decree 1975 (NRCD 329) (IPD) were repealed and replaced by the Investment Code 1981 (Act 437) (IC 1981)⁴⁰ during the regime of Dr Hilla Limann. The IC 1981 was enacted against the backdrop of the recognition that attempts by successive governments to attract foreign investment and to secure finance had not met with adequate success. The failure to sufficiently and productively attract and retain foreign investors was attributed to four reasons: first, the lack of a standardized consolidated reference law and regulations for the general guidance of foreign investors; second, a lack of security of capital; third, the lack of the economic and political environment conducive for free enterprise; and fourth, the lack of fiscal and regimes that would not militate against the taking of business risks in productive activities.

A number of committees were set up in March 1980 to assess the country's potential to attract foreign investment and to prepare the way to address the factors militating against the attraction of investment. The various committees recognised the need for a realistic investment law that would prescribe the conditions necessary to attract large-scale investments into productive sectors of the economy.⁴¹ The committees also "highlighted the opportunities for investment in the economy advocating a policy of liberalization, open and mixed economy . . ."⁴² It was in furtherance of the goal of creating the necessary legal and fiscal framework for attracting investments that the IC 1981 was proposed and enacted.⁴³ The objectives of the IC 1981 were to codify and consolidate under one legislative piece all existing legislation; redefine the areas and the extent to which non-Ghanaians were allowed to invest in Ghana; redefine priority areas of investment and conferring additional and wider range of benefits for investors; and to provide for various incentives and protections to foreign investors.⁴⁴

The policy orientation of the Limann administration was thus to operate a "mixed economy",⁴⁵ that is, an economy consisting of state intervention in the economy and the private sector operating under market forces. The IC 1981 sought to promote both foreign investment and local investment in the national economy, objectives that were to be achieved separately under the

⁴⁰ IC 1981, Section 50.

⁴¹ Dodoo, 1980–1981 *Parliamentary Debates* (note 28), 1075–1076.

⁴² *Ibid.*, 1078.

⁴³ *Ibid.*

⁴⁴ *Ibid.*, 1080.

⁴⁵ IC 1981 para. 3 of the Preamble.

CIA, the Ghanaian Business (Promotion) Act⁴⁶ and the IPD. In effect, the IC 1981 merged the previous investment laws preceding it as it was intended to:⁴⁷

[c]onsolidate and amend the law relating to investment, to encourage foreign investment in Ghana by the provision of incentives, to promote the development of Ghanaian entrepreneurs, to indicate enterprises in which the States and Ghanaians are required to participate in any investment and the extent of such participation, to make provision for the registration of technology transfer and for other matters.

The government's position on the role of foreign investment in development is clear from the law wherein it was stated that it was:⁴⁸

[v]ital to attract foreign investments in Ghana and also to encourage the investments in Ghana by Ghanaian entrepreneurs to contribute to an increase in fixed capital formation for the exploitation of the resources of Ghana for an increased production and creation of wealth, employment and improvement in skills and the social conditions of the citizens of Ghana.

A "policy of liberalization and an open economy"⁴⁹ was seen as "one of the most important steps necessary to be taken in order to achieve"⁵⁰ the goal of promoting and protecting capital investment by both Ghanaian and foreign investors. To further the foregoing policies, the IC 1981 was aimed at redefining the areas of investment in which non-Ghanaians were encouraged to invest, to indicate the areas in which the State and Ghanaians were to participate in business enterprises and to set out the incentives available to investors in the various fields of investment.⁵¹

The IC 1981 established the Ghana Investment Centre (GIC) and assigned to it the functions of "promotion and regulation of investments in all sectors of the economy of Ghana."⁵² Like previous domestic investment laws, the IC 1981 placed development and the public interest at the centre stage of investment

46 1970 (Act 334).

47 IC 1981, Long Title.

48 *Ibid.*, para. 1 of Preamble.

49 *Ibid.*, para. 2 of Preamble.

50 *Ibid.*

51 *Ibid.*, para. 4 of Preamble.

52 *Ibid.*, Sections 1(1) and 10(1).

promotion and regulation in Ghana. In this regard, it is pertinent to note that the criteria for approval of a proposed business undertaking as an investment were basically the same as under the CIA. The relevant provision required that an approval of investment had to have regard to the ability of the investment to contribute, among other things, to the encouragement of a fair country-wide distribution of investments, the importation at reasonable cost, transfer of technology and technical skills and the effect that the project is likely to have on the environment.⁵³ In effect, admission to invest in Ghana was conditioned upon the development implications of the proposed investment.

The importance of regulating foreign investment solely by domestic law is immediately obvious from the legal provisions outlined above: domestic investment law gives states the flexibility to define in their own terms what an investment is or to decide what benefits they expect from investment and to define the criteria for approval of a proposed investment based on those expectations. The criteria for admission of an investment in Ghana was not based on general notions that the State would benefit from a proposed investment project. The State was interested in measuring something more concrete before admission or approval was granted. This article thus interprets the relevant provisions of the laws before the Ghana Investment Promotion Centre Act of 1994 (Act 498), particularly the 1985 Investment Code (below), as requiring the State to accept a proposed project if the State perceived it stood to benefit so much from the foreign investment in return for the incentives and other protections the State accorded to foreign investors. The law might not have operated as expressed. Nevertheless, it can be argued that in substance there were provisions that specifically factored national interests in the investment protection framework; there was something concrete in the law that the State could lay claims to if it became necessary to protect her interests. The law as it existed then, at least in theory, made a difference from a completely liberalised investment protection where everything is left in the hands of the forces of the market.

The IC 1981 was repealed by the Investment Code 1985 (PNDC 116) (IC 1985).⁵⁴ Like the IC 1981, the IC 1985 also provided for priority areas of investment with special incentives,⁵⁵ and defined areas of investment that were wholly reserved for Ghanaians.⁵⁶ The IC 1985 was enacted during the administration of Jerry Rawlings and against the backdrop of the Structural Adjustment Programme

53 *Ibid.*, Sections 11(1) and 23.

54 IC 1985, Section 39(1).

55 *Ibid.*, Section 12.

56 *Ibid.*, Section 16, Schedule 5.

(SAP) or the Economic Recovery Programme (ERP) under which the GoG took “realistic steps to make”⁵⁷ the “economic environment more competitive for investment.”⁵⁸ The Government considered it:⁵⁹

vital to encourage investment in the Ghanaian economy to enable increased production and productivity for national development, and to enable the exploitation of the immense natural resources of Ghana in a manner conducive to the mutual benefit of investors and the nation, to promote effective employment and the development of skills and technology requisite for the progress of Ghana.

The GIC was continued under the IC 1985 as the institution responsible for the “encouragement, promotion and co-ordination of investments in the Ghanaian economy.”⁶⁰ Like previous laws, the IC 1985 placed the public interest at the centre of foreign investment admission and protection in Ghana. This is obvious from the criteria of an investment and the requirements for admission of enterprises to do business in Ghana. In this regard, it is instructive to note the objectives that a proposed project was required to meet before it could be approved. The relevant provision required the same criteria for admission of investment as was the case under the IC 1981.⁶¹

In granting approval for investment, the GIC could stipulate conditions in the approval certificate to be complied with by the investor, having regard to the training of Ghanaians in administrative, technical, managerial and other skills related to the operation of the enterprise, the prevention and control of any damage to the environment, and the utilisation of local raw materials.

In effect, the IC 1985 retained most of the criteria of investment as pertained under the IC 1981. However, the requirement under the IC 1981 that in granting approval for investment the GIC should have regard to the effect of the project on the environment had not been expressly included. Also, very significantly, whereas, under the IC 1981 the GIC was only required to have regard to the ability of a proposed project to contribute to the national economy, the IC 1985 made it mandatory that unless a proposed investment project met the criteria of investment, the GIC was not to grant an application to do business in Ghana. The position on the grant of an application to do business in Ghana under the IC 1985 is a fundamental shift from the position of the law under

57 *Ibid.*, para. 3 of Preamble.

58 *Ibid.*

59 *Ibid.*, para. 2 of Preamble.

60 *Ibid.*, Section 1(1).

61 *Ibid.*, Section 22(1)(a)–(i).

previous legislation and was probably meant to emphasize the importance the Government attached to the contribution that particular investments to be received in Ghana could make to the national economy.

Under both the IC 1981 and the IC 1985 the GIC could cause the cancellation of a license or an approval for investment on the grounds of improper use of any article imported free of duty, improper use of any benefit, liquidation of any license industry or approved enterprise, failure without reasonable cause to submit a report or to commence operations within the time stipulated in the approval instrument.⁶² In addition to these requirements, the IC 1981 and the IC 1985 required that an approval for investment be cancelled if the approval was obtained on the basis of fraud or deliberate negligent submission of false or misleading facts and statements, or where an approval had been assigned without the prior written consent of the GIC.⁶³

Under both laws, the GIC could cancel or suspend an approval or license to invest if the law, regulations or any conditions of the approval or license had not been complied with by the investor. Where a cancellation of an approval or licence had been effected, the GIC could require the investor to pay all fees, taxes, duties and other charges that the investor enjoyed.⁶⁴ Further, there was the additional requirement under the IC 1985 for the GIC to advise the Bank of Ghana to suspend any remittances including the transfer of capital profits and dividends, where an approval to invest had been cancelled or suspended.⁶⁵ This requirement was absent in the IC 1981, meaning there was no power to deal with non-compliance. The main function of the GIC not only to promote but also to regulate investments in all sectors of the economy⁶⁶ had shifted to one of only encouragement, promotion and co-ordination of investments in all sectors of the economy other than in mining and petroleum.⁶⁷ Although the

62 IC 981, Section 27(3) and IC 1985, Section 32(2)(a)(c).

63 IC 1981, Section 27 and IC 1985, Section 32(1)(a) and (b).

64 IC 1981, Section 27(2) and IC 1985, Section 32(3)(B). The difference in the requirements of the two legislation is that whereas the IC 1981 required that repayment be made within twenty-nine days, the IC 1985 gave the GIC discretion to determine when the repayment was to be made. Further was the additional requirement under the IC 1985 for the GIC to advise the Bank of Ghana to suspend any remittances including the transfer of capital profits and dividends. *Ibid.*, Section 32(3)(c). This requirement was absent in the IC 1981.

65 IC 1985, Section 32(3)(c).

66 IC 1981, Section 10(1).

67 IC 1985, Section 1(1) read together with Preamble paras 6, 7 and 8. The limitation of the scope of the powers GIC to exclude investments in petroleum and mining was due to the fact specific sector legislation, Petroleum (Exploration and Production) Law 1984 (PNDC 84) had been enacted and while the repealed Minerals and Mining Law, 1986 (PNDC 153) was due to be enacted.

word “regulation” had been removed from the main and operative provision of the law defining the role of the GIC, concrete regulatory powers had been given to it to regulate foreign investors’ operations in Ghana. The problem of policy space and regulatory autonomy being constricted was therefore absent or limited.

3.3 *The Definitions of Investment in Ghana*

The CIA defined the concept of “investment” tautologically as *investment* under the Act. And investment under the Act appeared to have been used interchangeably or inclusively with concepts as such “capital investment” or investment “project”. Capital investment was not defined under CIA. The CIA defined “project” as an industry, undertaking, business, property, and investment and any enlargement of any of them.⁶⁸ The CID retained the definition of “project” under the CIA,⁶⁹ but still did not define the concept of investment. The IPD also did not define the concept of investment. It defined only “capital” exclusively as meaning equity shares, capital contributions, or capital of a business entity.⁷⁰ Similarly, the IC 1981, like the IPD, defined “capital” exclusively as meaning “all cash contributions, plant, machinery, equipment, buildings, spare parts, raw materials and other business assets other than good will.”⁷¹ This definition was retained under the IC 1985. The IC 1985 also defined “foreign capital” as meaning, convertible currency, plant, machinery equipment, spare parts, raw materials and other business assets other than good will intended for the production of goods and services related to an approved investment project.⁷²

From 1963 to 1994, when the IC 1985 was repealed, investment was defined in assets-based terms. The intangible aspect of investment was not pronounced. Government’s responsibility with respect to the protection of investment could, therefore, be said to be limited to those tangible investments the investor had made.

4 The Making of International Investment Treaties in Ghana

This Part outlines, in broad terms, the IPPAS of Ghana. The implications of some of the terms of the IPPAS in relation to domestic law and policy space

⁶⁸ CIA, Section 31.

⁶⁹ CID, Section 31.

⁷⁰ IPD, Section 39.

⁷¹ IC 1981, Section 47.

⁷² IC 1985, Section 4(1).

are considered separately below. Ghana entered into an IPPA with her former coloniser, the United Kingdom in 1989. The agreement entered into force in 1991⁷³ (Ghana-United Kingdom IPPA). Ghana also entered into an IPPA with the Kingdom of The Netherlands⁷⁴ and the People's Republic of China,⁷⁵ both of which took effect in 1991 (referred to as Ghana-Netherlands IPPA and Ghana-China IPPA, respectively).

It might be said that Ghana's domestic investment laws were already business friendly and Ghana was very open to receive foreign investment.⁷⁶ There exists no record showing that prospective investors from China, the Netherlands, and the United Kingdom had issues with the domestic legal regime of foreign investment in Ghana; neither is there evidence showing that Ghanaian investors, who intended to do business in these countries, if any at all at the time, had issues with local investment laws of these countries. Therefore, the necessity for IPPAs for the promotion and reciprocal protection of investment between Ghana and her contracting parties is not immediately obvious. The preambles to the various investment agreements, however, express their stated purposes.

In substance, the Ghana-United Kingdom IPPA was intended to "create favourable conditions for greater investments by nationals and companies of one state in the territory of the other State"⁷⁷ because 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 in both State".⁷⁸ The Ghana-China IPPA⁷⁹ and the

73 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 on 22 March 1989 and entered into force 25 October 1991.

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

75 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 and entered into force on 22 November 1991.

76 It is noted, of course, that during the regime of Kutu Acheampong, 1972–1975, investment inflows into the country were low. This was partly due to the repudiation of the country's external debts with private investors and bilateral and multilateral agencies. There were also some nationalisations. See Tsikata et al. (note 3), 2. Those incidents, however, are very remote from the making of Ghana's investment treaties beginning in 1989.

77 Ghana-United Kingdom IPPA, Preamble.

78 *Ibid.*

79 Ghana-China IPPA, Preamble.

Ghana-Netherlands IPPA⁸⁰ are similar to the Ghana-United Kingdom IPPA in terms of objectives.

The impression created by the foregoing claims is that favourable conditions did not exist in Ghana and the territories of her contracting parties for foreign investment and that it was IPPAs that would create that favourable climate. The IPPAs also reiterate the traditional view that investment treaties lead to an increase in investment inflows and development. The creation of favourable conditions for the stimulation of business activities, the flow of capital and technology for increased prosperity, development of economic cooperation and development were thus central to the making of investment treaties between Ghana and her contracting parties. Yet, it is not clear that there was an empirical basis that IPPAs would bring about increased investment inflows and development in Ghana.

Unlike the domestic legal regime of foreign investment, which defined investment in more tangible terms, the Ghana-United Kingdom IPPA, for example, defined investment very broadly. Investment is defined as including: every kind of asset including movable and immovable property and property rights such as mortgages, liens or pledges; shares in and stocks and debentures of a company; any other form of participation in a company; claims to money or to any performance under contract having a financial value; intellectual property rights, goodwill, technical processes and know-how; and business concessions conferred by law.⁸¹

The definition has the effect of broadening the scope of the concept of investment under domestic law, since domestic laws have to be made to conform to international treaty commitments. Also, interestingly, while the parties acknowledged in the Preamble that the “encouragement and reciprocal protection under international agreement of investments will be conducive to the stimulation of individual business initiative and *will increase prosperity* in both States...”,⁸² they failed to incorporate national interests or development into the definition of investment.⁸³ The IPPA does not also show how

80 Ghana-Netherlands IPPA, Preamble.

81 Ghana-United Kingdom IPPA, Article 1(1).

82 *Ibid.*, Preamble (emphasis added).

83 This approach is not Ghana-specific but a standard United Kingdom approach. See for example the definitions of investment under Article 1 of *United Kingdom of Great Britain and Northern Ireland and Argentina Agreement for the promotion and protection of investments*, No. 30682, Signed at London on 11 December 1990; and article 1 of the *Sri Lanka-United Kingdom: Agreement for the Promotion and Protection of Investments*, done at Colombo, 13 February 1980.

encouragement of investment *per se* will “increase prosperity” particularly when the terms of the treaty do not specifically address development concerns. The definition of investment is skewed in favour of what is in the interest of the foreign investor; and yet it is not clear that what is in the interest of the investor will necessarily be in the interest of the host country. From the definition of investment and terms of the Ghana-United Kingdom IPPA, it is not immediately clear how increase in investment *qua* increase investment (if increase will occur at all) will lead to an increase in prosperity. Similar comments can be made about the Ghana-China IPPA and Ghana-Netherlands IPPA which similarly define investment to mean every kind of asset (corporeal and incorporeal).⁸⁴

The domestic investment legislation reviewed above allowed the Government to accept an investment only if the proposed investment project was going to make the specified contribution to the national economy. The pre-investment treaty domestic legislation further required the Government to provide the necessary protection to an investment once the investor was admitted. The pre-investment treaty domestic legislation in essence, revealed the desire of past governments in Ghana to attract foreign investment “in a controlled manner”.⁸⁵ The IPPAs of Ghana only provide for the rights of the investors and impose obligations on the State to bring about the realisation of investor rights, suggesting that their primary focus is foreign investors’ interests.

5 The Post-Investment Treaty Domestic Investment Law in Ghana

5.1 *The Law and Policy Change*

This part reviews the Ghana Investment Promotion Centre Act 1994 (Act 478) (GIPCA). The GIPCA came into force in 1994 and established Ghana Investment Promotion Centre (GIPC),⁸⁶ replacing the previous GIC under the IC 1985. The object of the GIPC under the GIPCA was “to encourage and promote investment in the Ghanaian economy.”⁸⁷ The GIPCA, like the IC 1985, did not affect

84 Ghana-China IPPA Article 1 and Ghana-Netherlands IPPA, Article 1.

85 Yelapaala (note 4).

86 GIPCA, Section 1.

87 *Ibid.*, Section 2(1).

investments in mining and petroleum industries,⁸⁸ as these sectors were governed by sector-specific legislation.⁸⁹

One fundamental shift in the content of the post-investment treaty domestic investment law in Ghana is the requirement for admission of foreign investment in Ghana. The GIPCA's fundamental requirement for the eligibility for the admission of foreign investment into the Ghanaian economy primarily was minimum capital.⁹⁰ The GIPCA not only reduced the admission criteria to minimum capital, it also actually reduced the minimum capital requirement as pertained under the IC 1985. For joint ventures between Ghanaians and foreign investors the capital requirement under the IC 1985 was reduced from USD 60 000 to USD 10 000. With respect to wholly foreign owned enterprises, the minimum capital was reduced from USD 100 000 under the IC 1985 and USD 200 000 under the Investment Code (Amendment) Law, 1992 (PNDCL 292) to USD 50 000 under the GIPCA. The goal of these reductions was to encourage joint ventures between foreign investors and small and medium scale domestic businesses that required less expensive technologies. The goal of the reduction of capital requirement for wholly foreign owned enterprises was to encourage medium scale foreign enterprises also to invest in the economy.⁹¹ The GIPCA in Section 19 specified the relevant capital requirements.

Under the pre-investment treaty domestic legislation on foreign investment, such as the IC 1981 and IC 1985, in addition to the amount and source of capital, criteria such as training of Ghanaians, prevention and control of any damage to the environment and utilisation of local raw materials were important particulars required in an application for admission to the Ghanaian economy.⁹² These criteria were conspicuously absent under the GIPCA.

Another noticeable change in the content of the post-investment treaty domestic investment protection law in Ghana is in the area of what constitutes an investment. After the IPPAS came into force, the definition of investment fundamentally changed to focus on a pure theoretical conception of investment without associating, whatsoever, the definition or criteria with the public interest as was the case under legislation before the IPPAS. Thus the GIPCA defined investment as meaning "direct and indirect investments and portfolio investments".⁹³ The GIPCA defined direct investment as "invest-

88 *Ibid.*, Section 17.

89 For example, the Petroleum (Exploration and Production) Act of 1994 and Minerals and Mining Act 2006 (Act 703).

90 GIPCA, Section 19.

91 Ghana Investments Promotion Bill: Memorandum (20 November 1993), 2.

92 IC 1981, Section 23(2) and IC 1985, Section 26(2).

93 GIPCA, Section 40.

ment to acquire a lasting interest in an enterprise operating in the economy of Ghana and intended to give the investor an *effective control in the management of the enterprise*.⁹⁴ The GIPCA also defined portfolio investment as “an investment or bonds which are mandatorily convertible into shares or other securities traded on the Ghana Stock Exchange”⁹⁵ and indirect investment as any act or contract whereby an investor makes a contribution to an enterprise whether tangible or intangible without obtaining equity interest in the business entity but is entitled to returns based on profits generated by the business entity.⁹⁶ Thus, for the first time, the concept of investment was defined very broadly to include both tangible and intangible assets.⁹⁷ There was difficulty in obtaining information that helps to explain the adoption of the definition of investment under the GIPCA. It does seem this definition was adopted to make the definition of investment under domestic law consistent with that under Ghana’s IPPAS.

The meaning of investment in the GIPCA thus shifted to whether the proposed business entity could be classified as direct investment, indirect investment or portfolio investment with minimum capital as the sole criterion for admission. The criteria for admission that included meeting specific national interests,⁹⁸ it could be argued, were State impositions on foreign investors that could affect the viability of an investment project. However, the criteria could be interpreted as constituting the consideration the State bargained for in return for the protections, tariff, and tax incentives guaranteed to foreign investors. By those explicit requirements in the law, investors would most likely have operated on the understanding that the State had certain concrete expectations and that they could not operate to advance their business interests to the detriment of the State without having problems with the law. In the absence of those requirements, there would otherwise be nothing concrete and tangible the State could lay claim to in return for the protections accorded to foreign investors.

Again, it was after Ghana’s first IPPA came into effect that the number of enterprises or sectors of the national economy reserved wholly for Ghanaians was reduced from twenty broad areas under the IC 1981⁹⁹ and IC 1985¹⁰⁰ to

94 *Ibid* (emphasis added).

95 *Ibid*. Portfolio investment involves investment made in any business without interest in being involved in managing the business entity in which the investment is made.

96 *Ibid*.

97 *Ibid*.

98 IC 1985, Section 22(1).

99 IC 1981, First Schedule.

100 IC 1985, Section 16 and Schedule.

four broad areas by the GIPCA.¹⁰¹ By narrowing the range of business activities reserved for Ghanaians, the GIPCA effectively opened the country widely for foreign investment.

The GIPCA itself did not spell out the ground on which an investment contract or registration could be terminated as was the case under IC 1985, for example, where a registration or approval of a project could be cancelled or suspended if the investor failed to comply with applicable law or regulatory and administrative requirements.¹⁰² Again, under the IC 1985, GIC could decide that all fees, taxes, duties and other charges that were granted to an enterprise be paid back if the enterprise contravened relevant provisions of the law.¹⁰³ Further, under IC 1985 even remittances, including transfer of capital profits and dividends could be suspended where an approved enterprise applied any benefit conferred by law for purposes other than those for which the benefit was conferred or failed to submit a required report within the specified period.¹⁰⁴ The foregoing regulatory requirements are completely absent from the post-investment treaty law on investment in Ghana, the GIPCA. The GIPCA did not expressly impose any obligations on foreign investors and was, therefore, completely silent on the implications of failure or refusal of an investor to comply with its relevant provisions.¹⁰⁵

Thus, consistent with its policy of moving from regulation to promotion of investment, the GIPCA was the most liberal investment legislation ever to have been made in Ghana since Independence in 1957. And to the extent that it left everything to the forces of the market and completely removed governmental regulation and control of investment activities and operations, the GIPCA was the weakest and most imprudent legislation. The GIPCA completely failed to secure any rights or benefits in favour of Ghana; it stipulated and protected foreign investors' rights without linking the protections to the interest of the country or without the assurance that the protections accorded to foreign investors would naturally or automatically bring any good to the country. The GIPCA also did not make sufficient provision for the protection of domestic investors. Foreign investment does not come with automatic and guaranteed entitlements to the State; and if the State is to benefit from foreign investment, she must secure such benefits by law and regulation. Moreover, as noted by

¹⁰¹ GIPCA, Section 18 and Schedule.

¹⁰² IC 1985, Section 32.

¹⁰³ GIPCA, Sections 32(3)(b) and 32(2) read together.

¹⁰⁴ *Ibid.*, Sections 32(3)(c) and 32(2)(a) and (b) read together.

¹⁰⁵ But see GIPCA, Section 35.

Dr T.K. Aboagye “an Act of Parliament alone cannot ensure free flow of capital into Ghana.”¹⁰⁶

In essence, the basic difference between the pre-investment treaty foreign investment laws and the post-investment treaty foreign investment law is that, whereas the former specified the particulars required in an application for admission to invest, the latter specified only the incorporation process. The pre-investment treaty domestic foreign investment laws also required the investor, upon request, to show the regulatory institution that it had fulfilled the conditions of admission to invest, but the GIPCA did not. The pre-investment treaty domestic laws on foreign investment also specified the conditions for the cancellation or suspension of a licence to operate business whereas the post-investment treaty domestic law did not. Further, the definitions of investment under the pre-investment treaty laws on investment were asset-specific, such as a focus on capital and equipment, whereas the post-investment treaty domestic laws broadened the definition to include both tangible and intangible assets. Finally, but not least, the pre-investment treaty investment laws gave regulatory powers to the government agency responsible for investment promotion. The post-investment treaty investment law required the regulatory institution to undertake promotional work to attract more investment into Ghana. The law permitted officers to enter the business premises of an investor to monitor the functions of GIPC and specified penalty for obstructing an officer or agent of GIPC to enter the business premises but did not specify the penalties for non-compliance with GIPCA or instructions of GIPC.

The laws in Ghana before the IPPAS were made sought to secure specific benefits for the State under their terms in addition to providing for guarantees and protections to the foreign investors. The GIPCA on the contrary secured protections and rights for foreign investors without reference to the national interests in any specific terms. There is, therefore, the need for coherence and consistency in domestic investment laws of Ghana in light of the constitutional mandate of the GoG to bring about development and protect human rights and the environment.

5.2 *Explaining the Change in Investment Law and Policy in Ghana*

5.2.1 The Structural Adjustment Programme and Domestic Investment Law and Policy Change

How are the fundamental changes in the content of foreign investment law in Ghana to be explained? It could be argued that Ghana's pre-investment treaty domestic foreign investment laws did not lead to the attraction of the required

106 Dodoo, 1980–1981 *Parliamentary Debates* (note 28), 1166.

foreign investment and that there was the need to liberalise investment laws, hence the change of the investment policy orientation.¹⁰⁷ The preparatory material on the GIPCA, for instance, is very clear that it intended to liberalize the investment climate in Ghana by making the law less regulatory-oriented than the IC 1985. At the Second Reading of the bill emanating in the GIPCA in Parliament, the then Deputy Minister of Finance and Economic Planning stated the need for a new law on investment in the following words:¹⁰⁸

The need to revise the existing law arose because since its enactment there have been various attempts to modify some of the provisions of ... 1985 ... 'Investment Code.' The principal objective of the revision is to make the new Code more promotion-oriented than regulatory. Indeed the activities under the existing Code have been found to have a stifling effect on potential investment activities, especially, by foreigners who ended up getting frustrated and in some cases took their investment back to their countries. In the new Code, the Centre itself is re-established and emphasis is now placed on promotional activities both in and outside Ghana. Once the investment has taken place, the Centre will spend more time monitoring the activities of the investor to ensure that whatever the investor intends to do would be done legally and properly.

The GPICA was, therefore, enacted to "place emphasis on the private sector as an important segment for accelerated economic growth."¹⁰⁹ By the new orientation towards investment promotion and protection, the GIPC was to be freed from its approval and regulatory regime under the IC 1985. The GIPC was now encouraged to undertake more promotional work for the purpose of attracting more investment into Ghana.¹¹⁰

There is no doubt that Ghana's economic and development programme brought about legislative changes around the time the GIPCA was enacted. One

107 In fact, it has been argued that the GIPCA was aimed at revising the IC 1985 "to place more emphasis on private sector investments as an important segment for accelerated economic growth and to consolidate recent amendments" of the IC 1985. This was particularly necessary because the IC 1985 was "regulatory in content and did not encourage the investment centre to engage in promotional activities." Tsikata, Asante and Gyasi (note 3), 32.

108 S.O. Dodoo (ed.), *Parliamentary Debates: Second Session of the First Parliament of the Fourth Republic of Ghana in the Second Year of the Fourth Republic* (Fourth Series, Vol. 4, 1994 Session, 6 January 1994–19 March 1994), 1428.

109 Ghana Investment Promotion Centre Bill: Memorandum (20 November 1993) at 1.

110 Dodoo (note 108), 1432.

such programme is the Structural Adjustment Programme (SAP) that Ghana undertook from 1983, in response to economic and financial deterioration in particular from the late 1970s, that continued into the 1980s.¹¹¹ The economy of Ghana had not been performing well since 1960 but the situation worsened in the period 1980–1983. The literature portrays the period prior to, and during, 1983, when the SAP was adopted as characterised by persistent inflation, fiscal imbalances, declining growth, political instability, decline in per capita income, worsening income distribution, unemployment, very low domestic savings and investments and absolute poverty.¹¹² Through a market-oriented approach, the SAP sought to reverse a protracted period of economic decline¹¹³ and to improve economic management and raise the standard of living of the ordinary people.¹¹⁴ The reforms were underpinned by International Monetary Fund (IMF) and World Bank conditions in return for assistance.¹¹⁵

Thus, with the launching of the SAP, the GoG set out to shift away from active control and centralised regulation of the economy in favour of a liberalised and market-oriented approach.¹¹⁶

The key elements of the reform strategy were (1) a realignment of relative prices to encourage more productive activity, promote exports, and strengthen economic incentives; (2) a progressive shift away from direct controls and intervention and toward greater reliance on market mechanisms; (3) the early restoration of fiscal discipline, an increase in public saving, and reduced recourse to bank financing of Government; (4) the rehabilitation of economic and social infrastructure; and (5) the implementation of structural and institutional reforms to enhance efficiency in the economy and encourage private saving and investment.

111 See World Bank Ghana: Policies and Programmes for Adjustment (World Bank, Washington, DC, 1984).

112 N. Kusi, Ghana: *Can Adjustment Reforms be Sustained?* (University of New England Faculty of Economic Studies Occasional Papers in Economic Development No. 42, Biddeford, ME, 1991), 2; K. Takyi, 'Structural Adjustment Programs and the Political Economy of Underdevelopment in Ghana', in K. Konadu-Agyemang (ed.), *IMF and World Bank Sponsored Structural Adjustment Programs in Africa: Ghana's Experience, 1983–199* (Ashgate, Aldershot, 2001), 17.

113 International Monetary Fund, Ghana: Enhanced Structural Adjustment Facility Economic and Financial Policy Framework Paper, 1998–2000, available online at <http://www.imf.org/external/np/pfp/ghana/ghanao.htm> (accessed 8 August 2012).

114 K. Donkor, *Structural Adjustment and Mass Poverty in Ghana* (Ashgate, Aldershot, 1997), 100.

115 Kusi (note 112), 1.

116 *Ibid.*

The private sector was to play a key role in the SAP, as it was expected to account for seventy percent (70%) of the rehabilitation costs. Therefore, the attraction of domestic and foreign investment (particularly into petroleum exploration and production, mining and mineral processing, timber logging, wood processing domestic resource-based manufacturing activities) was emphasised.¹¹⁷ The “most significant measure adopted to attract and encourage private investment”,¹¹⁸ however, was “the introduction of an Investment Code 1985 [IC 1985] and the Minerals and Mining Law of 1986 (PNDCL 153).¹¹⁹

The implementation of the SAP was enhanced and extended from 1998 and ended in about the year 2000.¹²⁰ The extended SAP aimed to build upon the previous phases by implementing further structural and institutional reforms. Accordingly, steps were taken towards a market economy: completion of exchange rate reforms, increasing reliance on market-based instruments of monetary policy, tax policy changes, reduction of inflation, completion of privatisation of State enterprises and provision of a supporting environment to private sector initiative and foreign investment by curtailing public sector involvement in the economy to secure a stable macroeconomic environment that supports economic growth.¹²¹ These policies in Ghana were consistent with neoliberal paradigm of the mid-1990s, that continued to be the baseline of development theorizing among development practitioners. Over the period, there had been little call for a return to interventionism, as the paradigm shift from regulation to market remained decisive.¹²²

The SAP thus provided new opportunities for the introduction of new laws on foreign investment and private capital. The GIPCA and the Free Zones Act of 1995, among others, were enacted against that backdrop of reforms, requiring liberalisation and deregulation. Therefore, policy reforms of the time influenced the investment law enacted within that context. In fact, there is evidence from the preparatory materials on GIPCA to the effect that the law was intended to “enhance the Economic Recovery Programme that was embarked upon as far back as 1983.”¹²³

117 Kusi (note 112), 16–17.

118 *Ibid.*, 17.

119 *Ibid.*

120 IMF (note 113), 149.

121 Takyi (note 112), 23–24.

122 D. Kennedy, ‘The “Rule of Law,” Political Choices, and Development’, in D.M. Trubek and A. Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, Cambridge, 2006), 150–151.

123 Dodoo (note 108) 1434.

However, while the policy backdrop of the GIPCA explains its enactment at the time, that backdrop does not fully explain why the criteria of investment, including contribution to the development of the productive sectors of the economy through efficient utilisation of national resources, encouragement of a fair country-wide distribution of investments, training and employment of Ghanaians and the likely effect of a proposed investment project on environment contained in the IC 1985, which was enacted while the SAP was ongoing, had to be completely removed under the GIPCA. The GIPCA was enacted, in part, to further the goal of the structural adjustment to bring about development. Yet it defined investment without reference to specific national interests an investment project should serve as pertained even under the pre-structural adjustment investment laws. In fact, the pre-investment treaty domestic investment laws in their preambles often defined national development goals as the basis of their enactment and their actual provisions were consistent with the goals set out in the preambles.

5.2.2 International Investment Treaties and Domestic Investment Law and Policy Change

It is settled that the GIPCA was enacted against the backdrop of the SAP. This article argues that the investment treaties of Ghana have the potential to bring about profound change in the content of domestic investment law and policy. Bilateral treaty negotiations require the making of concessions on the part of the parties. In the process of negotiating bilateral investment treaties with her contracting parties, Ghana conceded and sacrificed her policy space and legislative autonomy needed to make the domestic legal framework for protecting foreign investment.

In addition to finding a pure change in policy as the predominant factor for the change in nature of investment law in Ghana, the article argues that the change in the content and objectives of foreign investment law in Ghana could have been influenced anyway by the IPPAS on a number of grounds. First, the definitions of investment under the IPPAS do not include development and national priorities, which were criteria under domestic legislation before the IPPAS were made. The IPPAS primarily define investment in terms of the various activities foreign investors can undertake, their profits and returns, and tangible and intangible assets, which have to be protected at all cost. There is nothing in the definitions that focuses on the public interest. Therefore, the definition of investment to include national development and other objectives, as was the practice prior to the treaties, could not be retained under the post-investment treaty domestic foreign investment law because it would otherwise be inconsistent with the treaties' broad definitions of investment. If similar

provisions are provided in the post-investment treaty foreign investment law they may be challenged under the IPPAS as constituting measures amounting to expropriation or infringing performance prohibitions under the IPPAS.

Secondly, Ghana assumed substantive obligations under the IPPAS that potentially make it a challenge to retain the content of domestic investment law as was the case prior to the time the IPPAS were made. These include obligation to encourage and create favourable conditions for investment;¹²⁴ to treat foreign investment fairly and equitably, to provide full protection and security to investment;¹²⁵ to not impair by unreasonable or discriminatory measures, the management, maintenance, use, enjoyment or disposal of investment;¹²⁶ to not subject the investment or returns of foreign investors to treatment less favourable than that accorded to investment or returns of her own nationals or companies (national treatment);¹²⁷ and among others, to not nationalise or expropriate investment or to not subject investment to measures having effect equivalent to nationalisation or expropriation without compensation.¹²⁸

These substantive obligations under the IPPAS can broadly be interpreted as collectively requiring that administrative, legislative, and regulatory restrictions should not be placed in the way of foreign investors; investors must be allowed to operate with the maximum freedom and discretion to recoup the costs of their investment.¹²⁹ This means that there will be the need for Ghana to reconsider its domestic foreign investment law and policy in relation to investment treaty commitments which it has to observe.

Ghana's IPPAS, by their terms, have the potential to limit the policy space and regulatory autonomy of the country because they can constrain the Government from pursuing objectives that it would otherwise pursue under domestic law and policy if the Ghana had not entered into the IPPAS. The

¹²⁴ Ghana-United Kingdom IPPA, Article 2.

¹²⁵ *Ibid.*, Article 3(1).

¹²⁶ *Ibid.*, Article 3(2).

¹²⁷ *Ibid.*, Article 4(1).

¹²⁸ *Ibid.*, Article 7(1).

¹²⁹ In *Metalclad Corporation v. the United Mexican States*, International Centre for Settlement of Investment Disputes (Additional Facility), 25 August 2000, the tribunal stated at p. 230, para. 103 that:

[E]xpropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.

general proposition is that, where a state performs an act prohibited by a treaty to which it is a party, the state is responsible for a breach of international law.¹³⁰ When a state enters into an investment agreement, such as Ghana did, it becomes bound by the investment protection obligations it has undertaken.¹³¹ The investment treaty commitments of Ghana include obligations with respect to expropriation and national treatment which are defined in very broad terms. An arbitral investment tribunal has held in respect of expropriation that a “deprivation or taking of property may occur . . . through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected.”¹³² Another tribunal has held that a governmental “measure or series of measures can still eventually amount to a taking, though the individual steps in the process do not formally purport to amount to a taking or to a transfer of title.”¹³³ In other words, the prohibition against expropriation, whether direct or by measures tantamount to expropriation, covers a wide range of activities including governmental measures expressly intended to expropriate and other measures that “indirectly or by their effect lead to the foreign investor losing acquired rights.”¹³⁴

The national treatment obligation which Ghana assumed under her IPPAS, on its part, requires that foreign investors should receive the same treatment as domestic investors receive. In other words, the standard requires that foreign investors should receive treatment no less favourable than treatment accorded to domestic or national investors in similar business activity.¹³⁵ Municipal laws such as Ghana’s domestic investment laws are treated in international law as a governmental “measure” which may affect a right and give rise to government liability.¹³⁶ All of the foregoing suggest, that Ghana can only retain the content

130 C. Amerasinghe, ‘State Breaches of Contract with Aliens and International Law’, 58 *American Journal of International Law* (1964), 881–913, at 910–911.

131 See *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16), Award, 2 October 2006, para. 423.

132 *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, Award No. ITL 32-24-1 (19 Dec 1983), 4 Iran-US. C.T.R. 122, 225.

133 *Compañía del Desarrollo de Santa Elena, SA v. The Republic of Costa Rica* ICSID Case No. ARB/96/, Final Award, 17 February 2000, para 76.

134 *Tradex Hellas SA (Greece) v Republic of Albania* Award ICSID Arbitration ARB/94/2, Award, 29 April 1999, para. 134.

135 Muchlinski (note 9), 621.

136 See, for example, *German Interests in Polish Upper Silesia (Merits)* 1926, PCIJ Series A, No. 7, 19 wherein it was stated that “From the standpoint of International Law and of the Court which is its organ, municipal laws . . . express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.”

of its domestic investment law as pertained prior to its entry into the IPPAs at the risk of the laws being challenged before investment tribunals if they affect foreign investment.

Ghana, having entered into these treaties has to now treat foreign investors in the same way that it treats domestic investors. It follows that those special provisions in domestic law that placed certain requirements in respect of foreign investors, but not in respect of domestic investors, would have to be done away with if foreign investors operate in the same field as domestic investors. Hence, the change in the content of pre-investment treaty domestic investment law could reflect the new way foreign investors ought to be protected. Also, by the substantive protections the IPPAs give to foreign investors and the external enforcement mechanisms, domestic foreign investment law is largely made an appendage or addendum to investment treaties in investment protection.

Therefore, future domestic investment law and policy will be affected by the terms of the IPPAs, especially if Parliament takes the treaty terms into consideration at the time of making domestic laws. If the laws are made without reference to investment treaties, they can be challenged if foreign investors think they affect their investments as the experience of Argentina shows.¹³⁷ A challenge of domestic laws before investment tribunals as affecting foreign investment can influence the thinking of Parliament in making future laws relating to foreign investment.

The Ghana Investment Promotion Centre Act 2013 (Act 865), which repealed the GIPCA, revised the existing foreign investment law in Ghana. Act 865 has been engineered by policy change in Ghana with respect to foreign investment promotion. The memorandum to Act 865 describes the GIPCA as having been overtaken by events, as the economic and investment climate that existed when the Act was enacted underwent changes. The shortcoming of the GIPCA added impetus to the need for new law on foreign investment in Ghana.¹³⁸ Hence, it can be argued that the movement from the GIPCA to the proposed new law is underpinned by a policy change that has nothing to do with the influence of IPPAs. However, there are provisions in the Act that seem to be inconsistent with Ghana's investment treaty standards which suggests that if Parliament were to take the investment treaty standards into consideration, some of the substantive provisions would not have found their way into the Act.

137 See for example *LG&E Energy Corp v. Argentina*, Decision on Liability, ICSID Case No. ARB 02/1, 3 October 2006; *Enron Corporation and Ponderosa Assets LP v. The Republic of Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007; *CMS Gas Transmission Company v The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005.

138 Memorandum to Ghana Investment Promotion Centre Bill 2013, para. 4.

Act 865 makes provision for the transfer of investment capital, payment in respect of loan servicing, fees and charges in respect of technology transfer agreements, dividends and remittance of profits.¹³⁹ However, the right of repatriation of investment and returns is subject to the Foreign Exchange Act 2006 (Act 723) and the regulations and notices issued under Act 865. In other words, the right to transfer investment and returns, fees and charges and dividends is not absolute; it is subject to domestic law and regulation.¹⁴⁰ The provision is novel in Ghana¹⁴¹ and is important for the assurance of regulatory autonomy to the State. However, such a provision could be found to be in contravention of Ghana's investment treaty commitment with the United Kingdom to guarantee "*unrestricted transfer of . . . investment and returns*".¹⁴² Again, nationalisation or expropriation and the right of the investor to not cede its capital to another person under Act 865 are subject to the Constitution of Ghana.¹⁴³ In other words, nationalisation or expropriation of foreign investment assets may be carried out only as permitted under or in consonance with the Constitution of Ghana.

Again, this is a novel provision intended to guarantee the State the policy space and regulatory autonomy with respect to nationalisation or expropriation. There is no reference in the GIPCA to the Constitution; the Act simply guarantees against expropriation.¹⁴⁴ The IPPAs of Ghana not only prohibit nationalisation and expropriation, but also prohibit measures tantamount to nationalisation or expropriation,¹⁴⁵ and require the payment of compensation: "equivalent to the value of the expropriated investments",¹⁴⁶ "adequate and effective"¹⁴⁷ amounting to the "fair market value of the investment affected",¹⁴⁸ the "genuine value of the investment expropriated"¹⁴⁹ or the "full and genuine

139 Ghana Investment Promotion Centre Act 2013 (Act 865), Section 32.

140 *Ibid.*, Section 32(1).

141 There was no equivalent provision under the GIPCA. See Section 27 of GIPCA. The right to transfer capital and returns is absolute under this provision.

142 Ghana-United Kingdom IPPA Article 8 (emphasis added).

143 Act 865, Section 31(1).

144 GIPCA, Section 28.

145 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 and entered into force 6 January 1995, Article 6(1); Ghana-Netherlands IPPA, art 6(1) and Ghana-United Kingdom IPPA Article 7(1).

146 Ghana-China IPPA, Article 4(2).

147 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 and entered into force 18 April 1997, Article 5(c).

148 Ghana-Malaysia IPPA, Article 5(c).

149 Ghana-Denmark IPPA, Article 6(1)(b); and Ghana-Netherlands IPPA, Article 6(1)(b).

value of the investment expropriated”.¹⁵⁰ The GIPCA required only the payment of “fair and adequate” compensation.¹⁵¹ Some of the Ghana’s IPPAS even specify the timeframe within which compensation must be paid and go ahead to stipulate for the payment of interest if the compensation is not paid.¹⁵² The domestic law on foreign investment does not specify the timeframe for the payment of compensation and is also silent on the payment of interest on compensation due. Under the IPPAS, there is no requirement for expropriation or nationalization to comply with domestic law, not even the Constitution. Clearly, therefore, the nationalization or expropriation obligations assumed by Ghana under the IPPA are far broader in scope than under domestic law. The lack of reference to domestic laws on expropriation or nationalization in some of the IPPAS of Ghana makes domestic legal provisions on nationalization or expropriation completely irrelevant and redundant especially in view of the legal propositions that a state may not invoke domestic law as an excuse to comply with an international obligation¹⁵³ and that a treaty must be interpreted further its object and purpose.¹⁵⁴ In effect, domestic legal provisions on nationalization or expropriation in Ghana could be found to be inconsistent with Ghana’s investment treaty standards.

Further, Act 865 provides that “a foreign investor, employer, or worker, shall enjoy the same rights and be subject to the same duties and obligations applicable to citizens.”¹⁵⁵ There was no equivalent provision under previous domestic investment laws. The provision imports national treatment since it suggests that specific investment promotion and protection policies or packages intended for the benefit of citizens of Ghana must also be extended to foreign investors. This requirement may be part of Government policy to assure foreign investors that they will not be disadvantaged relative to the protections accorded to domestic investors. The provision may not have been made with the conscious effort to align Ghana’s domestic law with the national treatment standard under her IPPAS. Given that investment treaty standards have often been interpreted as requiring stable and predictable legal environment for business, it is not prudent that the State would want to assume such an

¹⁵⁰ Ghana-United Kingdom IPPA, Article 7(1)(a).

¹⁵¹ GIPCA, Section 28(2)(a). See also GIPCA-213, Section 30(2)(a).

¹⁵² Ghana-Denmark IPPA, Article 6(1)(c) and (d); Ghana-Netherlands IPPA, Article 6(1)(c) and (d) and Ghana-United Kingdom IPPA, Article 7(1)(b).

¹⁵³ VCLT (note 16), Article 27; Shaw (note 16), 133; and *Draft Declaration on the Rights and Duties of States* (1949), Article 13.

¹⁵⁴ VCLT (note 16), Article 31(1).

¹⁵⁵ Act 865 Section 30(a).

obligation under her own law because a subsequent amendment or repeal of the provision could lead to claims of breach of treaty standards such fair and equitable treatment and full protection and security.

Act 865 reinstates some of the provisions of previous legislation prior to investment treaties entering into Ghana that allowed the regulatory institution to cancel or suspend the registration of an investment.¹⁵⁶ Act 865 specifies various offences¹⁵⁷ and penalties¹⁵⁸ and empowers the GIPC to suspend or cancel the registration of an enterprise; to order the payment of fees, taxes, duties and other charges in respect of which benefits were granted to the enterprise; to revoke some or all of the incentives granted to an enterprise; and to advise the Bank of Ghana to suspend any remittance including transfer of capital and dividends if the investor breaches any provisions of the law.¹⁵⁹ These regulatory actions involve the taking away or withdrawal of rights that may have already been granted to foreign investors and are, therefore, likely to be inconsistent with investment treaty standards relating to expropriation, repatriation of investment and returns, full protection and security, fair and equitable treatment and umbrella clause. Indeed, in practice the kinds of regulatory measures that Act 865 permits the GIPC to take have been the subject matter of investment treaty arbitration including abolition or modification of tariffs,¹⁶⁰ revocation of banking licenses,¹⁶¹ revocation of free zone certificates or licenses,¹⁶² enactment of legislation which directly or indirectly affects foreign investment,¹⁶³

¹⁵⁶ See, for example, Sections 31–33 of IC 1985.

¹⁵⁷ Act 865, Section 40.

¹⁵⁸ *Ibid.*, Section 41.

¹⁵⁹ *Ibid.*, Section 41(2)(a)–(f).

¹⁶⁰ *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic* (ICSID Case No. ARB/97/3); Award, August 2007; and *BG Group Plc v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007.

¹⁶¹ *Alex Genin v Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001.

¹⁶² *Antoine Goetz v Republic of Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999; and *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt*, ICSID Case No. ARB/99/6), 12 April 2002.

¹⁶³ *ADC Affiliate Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, 12 April 2002; *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008; *Eastern Sugar v. Czech Republic*, SCC 0.88/2004, Partial Award, 27 March 2007; and *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, 5 September 2008.

restrictions on free transfer of funds,¹⁶⁴ legislative amendments affecting investment,¹⁶⁵ and denial of duty exemptions.¹⁶⁶

There is, therefore, the potential of the law in Ghana being challenged in investment treaty arbitration if the regulatory institutions exercise their law enforcement powers in relation to a foreign investor. The domestic law would not be challenged per se; it would be the application of the law to a particular investor in a specific situation that may lead to investor-state dispute. And it may be that Parliament, if it averted its mind to the precedent in investment arbitration and the investment treaty standards of Ghana, would not want to enact a law that infringes Ghana's investment treaty standards. It is in light of the practical examples of how governmental measures have been challenged before investment arbitration that it is argued that investment treaty standards do limit or have the potential to limit domestic law-making, regulatory, and administrative measures in Ghana and in any country that is party to investment treaties.

Government policy on foreign investment will always change without the influence of IPPAS as shown above in relation to SAP and laws made under it. However, it is also true that the content of government policy on foreign investment can be influenced or shaped by the nature of investment treaty commitments because no government will normally want to make a policy that is inconsistent with its international treaty obligations. This is particularly so in the case of the GoG which is expected to act in consonance with accepted principles of public international law and to respect treaty obligations.¹⁶⁷ For instance, Ghana's IPPAS prohibit impairment by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investment.¹⁶⁸ Yet Section 19(3) of GIPCA required trading enterprises investing in Ghana to employ at least ten Ghanaians. Such a provision could be held to be inconsistent with Ghana's investment treaty commitments

164 *Joy Mining Machinery Limited v Arab Republic of Egypt* (ICSID Case No. ARB/03/11).

165 *Archer Daniels Midland Company v United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007; *BG Group Plc v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007; *Semptra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, 28 September 2007; *LG&E Energy Corp v. Argentina*, ICSID Case No. ARB 02/1, Award, 25 July 2007; *Enron Corporation and Ponderosa Assets LP v The Republic of Argentina*, ICSID Case No. ARB/01/3, 22 May 2007; and *CMS Gas Transmission Company v. The Argentine Republic* ICSID Case No. ARB/01/8, Award, 12 May 2005.

166 *Duke Energy Electroquil Partners and Electroquil SA v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008.

167 Constitution of Ghana (note 1), Articles 75 and 40(c).

168 For example Ghana-United Kingdom IPPA, Article 3(2).

relating to non-impairment of the management of investment because the provision seeks to compel foreign investors as to who to employ in the running of their enterprises. Act 865 now provides that an investor may employ persons of any nationality to positions of management for the purpose of the conduct of investments and business activities.¹⁶⁹ This new provision, it could be argued, is intended to bring the law of Ghana into conformity with Ghana's IPPA standard relating to the management of investment.

The conclusion to draw from the foregoing analysis is that investment treaty standards do have the potential to influence the content of domestic law especially where the law-making body takes investment treaty standards into consideration at the time of making the domestic law. If the law-making body makes the law without reference to international legal obligations, the law-maker will have more freedom and scope in making the law and it may be presumed in that case that those international standards do not influence the making of domestic law. However, the fact that municipal laws are made without reference to international legal standards does not mean that those laws may not be found to be inconsistent with the international legal norms to which the state concerned is a party. This appears to be the case of Ghana particularly in respect of Act 865. Moreover, while a successful arbitration cannot require the government to repeal the law it provides monetary awards to the investor for the breach, including future losses incurred if the state continues its behaviour. This can serve as a deterrent to future domestic law-making and implementation.

A major governmental objective for protecting foreign investment is to maximise development. However, profit maximisation, which is the major objective of foreign investors is not necessarily consistent with the development goal which underlines a state's participation in IPPAs. This, in addition to the fact that IPPAs' terms do not make room for development policy and its implementation will lead to conflict between national interests and foreign investors' interests. Thus, it is the responsibility of the GoG to define what the nation's development priorities are and how foreign investment fits into that development framework and the Government's constitutional obligations. It is wrong to substitute or equate such a development plan with a foreign investment policy because not only is foreign development an aspect of development policy,¹⁷⁰ but a substitution of a broader development plan and national

169 Act 865, Section 34(3).

170 Tsikata et al. (note 3) at 8, have right rightly stated for example that: "Foreign investment can be understood as a package of resources that *complements* other financial flows and makes a distinctive contribution to the development process" (emphasis added).

regulatory and legislative autonomy with a foreign investment policy will lead to an abandonment of governmental regulation in other sectors of the economy that are equally necessary for national development. The fundamental weakness of foreign investment law and policy in Ghana, as reflected in the GIPCA, is the wrong assumption that open unregulated foreign investment means development. Foreign investment does not come with automatic development benefits or automatic detriments for the host nation. Yet, foreign investment “per se is not a panacea to Ghana’s economic and social difficulties.”¹⁷¹ International finance “is a necessary prerequisite to the reconstruction of the economy but no amount of foreign exchange per se can pull Ghana out of her economic doldrums as long as woeful mismanagement, corruption, and chronic indiscipline continue to plague the administration of the country.”¹⁷²

Therefore, Ghana needs to retain its policy space and regulatory autonomy to plan in other sectors of the economy including in human rights and environmental protection and development policymaking generally. Further, for investment protections and incentives to be truly effective they must do two things. First, they must bear a close and direct relation to the actual, or at least precisely stated, benefits¹⁷³ to the people of Ghana, and in the case of IPPAs, their terms must not restrict governmental regulation in the public interest. Second, for investment protections and incentives to be effective they must “bear a close relationship to the revealed preferences of individual investors and must outweigh the perceived risks and the disincentives which result from other aspects of government policy.”¹⁷⁴ Ghana’s approach to attracting foreign investment is not effective because it is based on a generalised approach to all potential investors¹⁷⁵ and does not relate investment protections to specific developmental benefits to the State.

6 Conclusion

Foreign investment has both benefits and costs to a host country. Foreign investment can lead to the creation of jobs, increase the tax base of a country

¹⁷¹ Dodo, 1980–1981 *Parliamentary Debates* (note 28), 1162.

¹⁷² *Ibid.*

¹⁷³ Yelapaala (note 4) at 97–100 provides a very useful model for assessing the costs and benefits associated with a project before it is admitted.

¹⁷⁴ *Ibid.*, 88.

¹⁷⁵ *Ibid.*, 85.

and help the local economy to function in sectors of the economy that local capacity and expertise are lacking. Ultimately, foreign investment can contribute in some measure to improvement in the national economy and in the lives of citizens, for example through the creation of employment opportunities. Equally, foreign investment carries its own costs. A state can lose revenue through foreign investment incentives, and tax rebates, and investment operations can create environmental and human rights concerns such as environmental pollution and contamination of drinking water, depending on the nature of investment activity involved.

This article assesses the history and evolving trend in foreign investment law and policy in Ghana and in particular how the international legal instruments used to protect foreign investment can affect the regulatory and legislative autonomy of a host state to foreign investment such as Ghana. It does this by comparing investment laws and policies of Ghana enacted before and after Ghana entered into IPPAs to ascertain how treaties shape and define the content of domestic law and policy.

The review shows that investment promotion and protection in Ghana, after its Independence in 1957, were basically governed by domestic law from 1963 to 1991. In substance, the pattern that emerged from all of the pre-investment treaty domestic legislation on foreign investment is that the public interest was very central in the criteria of investment and in the particulars required in an application for admission to invest in Ghana. Employment and training of Ghanaians, contribution to the productive capacity of the national economy and to the diversification and expansion of existing enterprises, environmental protection, increase in exports, and savings on imports were among the factors used to determine whether a proposed investment could or could not be admitted in Ghana. The laws also provided for various incentives and protections to foreign investors, thereby balancing both the State's and investor's interests.

Ghana subsequently entered into IPPAs with China, the Netherlands and the United Kingdom, among others, for the promotion and reciprocal protection of investment all of which came into force in 1991. These IPPAs define investment purely in financial terms and the public interest factors, which had hitherto constituted the criteria for admission of investment under the domestic laws are not reflected in the IPPAs' definitions of investment. Again, under the IPPAs, both Ghana and her contracting parties assumed substantive obligations, among others, to: treat investment fairly and equitably, provide full protection and security, not nationalise without compensation and to treat domestic and foreign investors equally and in a non-discriminatory manner. In 1994, Ghana enacted the GIPCA. Under the GIPCA, the main criterion for

admission of foreign investment fundamentally changed to only minimum capital requirement. The GIPCA defined investment in terms of direct and portfolio investments against the asset-based definitions under the pre-investment treaty domestic investment legislation. Development and other public interest oriented factors that formed the criteria for admission of investment under the pre-investment treaty domestic laws are not found in the GIPCA. The same trend is continued under Act 865, although this Act seeks to give much more regulatory powers to the GIPC than the GIPCA did.

This article has sought to address the question surrounding the change in the content of foreign investment law of Ghana and how the IPPAS of Ghana may have contributed to the change and the making of future foreign investment law and policy in Ghana. The article argues that the change in the content of domestic law on foreign investment can be explained in terms of policy change towards foreign investment attraction and liberalisation and privatisation under the SAP. The article also argues that given the terms of the IPPAS, such as national treatment and expropriation, maintaining the content of domestic law as pertained under the pre-investment treaty investment law has consequences since such content could conflict with investment treaty standards. In light of the facts that the treaties exclude national interests in the definition of investment, and Ghana assumed obligations under the terms of the IPPAS that her domestic laws have to conform with, the content of future foreign investment laws and policies will likely be determined by the terms of the IPPAS. This will particularly happen if Parliament takes treaty standards into consideration at the time of making domestic law.

Foreign investment *per se* is not a panacea to Ghana's development aspirations. Further, the flow of foreign investment is not necessarily related to the legal and regulatory regime for foreign investment promotion and protection. Therefore, it is imprudent to freeze current and future governmental regulation in areas critical to development (including human rights and environmental protection) in the interest of attracting foreign investment.

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