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AFRICANIZING BILATERAL INVESTMENT TREATIES ('BITS'): SOME CASE STUDIES AND FUTURE PROSPECTS OF A PRO-ACTIVE AFRICAN APPROACH TO INTERNATIONAL INVESTMENT

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Abstract

The issue of African contributions to the development of international investment law is one that has been almost completely neglected by international legal scholarship, as very few examples of such contributions – if any – can be found in the investment treaty experience of African countries since the decolonisation of the continent. This paper is aimed at drawing attention to the adequacy of current international investment law standards, practices and rules in contemporary Western and Southern African Bilateral Investment Treaties ('BITs'), that are designed to tackle issues arising from the interaction between developing host states and investors coming from both developed and developing countries. To do so, the paper examines two recent framework agreements (the COMESA Common Investment Agreement and the SADC Protocol on Finance and Investment) and two examples of African bilateral investment agreements, namely the SADC Model BIT and the 2013 Benin-Canada BIT. The overall aim of the assessment is to verify whether these constitute a shift from the traditional African protectionist approach of the regulation of foreign direct investment towards the opening of Southern and Western Africa to the inflow of foreign capital, and how the two examined agreements address the issue. Finally, the paper analyses such examples from the perspective of Southern African and Western African approaches and standpoints on the future development of international investment law and policy.

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INTRODUCTION

While Southern and Western African countries' contributions to the international legal regulation of economic relations have been identified by international legal scholarship,[1] the same cannot be said about African contributions to the development of rules of international law that apply to the conduct, responsibilities and duties of foreign investors ("international investment law").[2] One might find this remarkable given that African countries have had their fair share of foreign investments since decolonization,[3] and even more remarkable as they have also experienced, and still do experience - perhaps even more than any other continent of the world - issues related to the exploitation of natural, non-renewable natural resources and the recently emerged problem of the 'grabbing' of agricultural lands as a result of the land deals involving international investors and foreign companies.[4] This situation is the result of investment and trade relationships built over the years between Western capital-exporting countries and African former colonies, as any reading of the official websites of the main NGOs working in the fields of poverty alleviation and human rights will easily reveal.[5] At the same time, advocates of the "multicultural" (i.e., non mono-cultural and Euro-centered) approach to international economic relations demand a concerted acknowledgment of the relevant histories which lie outside the Western European

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1. *See*, among others, T. O. ELIAS, AFRICA AND THE DEVELOPMENT OF INTERNATIONAL LAW 43 *passim* (1972); BRENDAN VICKERS, FOREIGN DIRECT INVESTMENT (FDI) REGIME IN THE REPUBLIC OF SOUTH AFRICA § 3.2 (Feb. 2002); Luke Eric Peterson, *South Africa's Plans for Black Economic Empowerment Confronting Foreign Investor Rights*, INVESTMENT L. & POL'Y NEWS BULL., May 9, 2003, at § 4, *available at* http://www.iisd.org/pdf/2003/investment_investsd_may9_2003.pdf; AARON COSBEY, HOWARD MANN, LUKE ERIC PETERSON & KONRAD VON MOLTKE, INVESTMENT AND SUSTAINABLE DEVELOPMENT: A GUIDE TO THE USE AND POTENTIAL OF INTERNATIONAL INVESTMENT AGREEMENTS 4-5 (2004), *available at* http://www.iisd.org/publications/pub.aspx?id=627; Joshua Boone, *How Developing Countries can Adapt Current Bilateral Investment Treaties to Provide Benefits to Their Domestic Economies*, 1 GLOBAL BUS. L. REV. 187 (2011), *available at* http://engagedscholarship.csuohio.edu/gblr/vol1/iss2/5.

2. *Cf. Draft Convention on Investments Abroad*, 9 J. PUB. L. 115, 119-24 (1960); Emmanuel Laryea, *Evolution of International Investment Law and Implications for Africa*, *in* NATURAL RESOURCE INVESTMENT AND AFRICA'S DEVELOPMENT 293-318 (Francis N. Botchway ed., 2011); Junji Nakagawa & Nokuhle Madolo, *The Importance of the Voice from Africa in the 'Global' International Economic Law, in* AFRICA AND INTERNATIONAL ECONOMIC LAW (Nokuhle Madolo ed., 2014) (forthcoming).

3. *See, e.g.*, William I. Zartman, *Europe and Africa: Decolonization or Dependency?*, 54 FOREIGN AFFAIRS, no.1 (Jan. 1976), *available at* http://www.foreignaffairs.com/articles/25081/i-william-zartman/europe-and-africa-decolonization-or-dependency; Fantu Cheru, Renu Modi & Sanusha Naidu, *Catalyzing an Agricultural Revolution in Africa: What Role for Foreign Direct Investment? in* AGRICULTURAL DEVELOPMENT AND FOOD SECURITY IN AFRICA: THE IMPACT OF CHINESE, INDIAN AND BRAZILIAN INVESTMENTS 12 *passim* (Fantu Cheru & Renu Modi, eds., 2013).

4. *See* LORENZO COTULA, THE GREAT AFRICAN LAND GRAB? AGRICULTURAL INVESTMENTS AND THE GLOBAL FOOD SYSTEM 86, 83 (2013) (who also stresses that numerous and heterogeneous factors contribute to the competition for land and other natural resources in the African continent, including the high demand for agro fuels, the high food costs, the first and second world countries' increased dependency on food imports to obtain cheap farmland in developing countries, and the search for new investment opportunities in the aftermath of the financial crisis).

5. *See, e.g.*, STOP AFRICA LAND GRAB, http://www.stopafricalandgrab.com (last visited Oct. 11, 2013).

and US quarter, an engagement that will draw up against practices of a near past as well as the dramatic intensities of the present.

By first surveying Southern and Western African approaches to the international law on foreign investment, our work will assess current international investment law's general ability to address social and economic issues that arise from practices like "grabbing" of agricultural lands and other natural resources. Our work will also focus particularly on the Investment Agreement for the COMESCA Common Investment Area ("CCIA Agreement") and the 2012 Southern African Development Community Model BIT ("SADC Model BIT").

To elaborate on these materials, and as the framework of our investigation – that is, to ascertain whether a tendency can be registered towards African contributions to the development of new principles and rules of international investment law as the result both of a growing consciousness of the significance of foreign direct investment for the development of African economies and of an overall more significant involvement of African countries in drafting investment treaties – we have adopted the following structure: in section I, we consider some recent examples of African approaches to the international law on foreign investment as exemplified by framework agreements such as the COMESA Common Investment Agreement and the SADC Protocol on Finance and Investment. In section II, we move to the structure and main contents of two relevant examples of the most recent African BITs practice, namely the 2012 SADC Model BIT and the 2013 Benin-Canada bilateral investment treaty.[6] The reason for this methodological choice lies in the fact that these two instruments are representative of two different, although contemporary, practices. On the one hand, as illustrated by this article, the 2012 SADC Model BIT is an output of recent policies in Southern African countries to revisit their investment policies in the aim of restoring a certain degree of balance between the rights of foreign investors in their territories and the sovereign powers to regulate the flow of investment coming from abroad. On the other hand, the signature in 2013 of the Benin-Canada BIT, which is significantly shaped by the 2004 Canada Model BIT, shows that the influence of Western, capital-exporting states on African countries' investment policies is still very much a reality and may well constitute a serious obstacle towards African contributions to the development of international investment law. Therefore, in section III, we assess these two case-studies from the point of view of their capability to provide a suitable model for the future investment treaty practice of developing countries, and represent an African contribution to the development of international investment law. Finally, section IV is devoted to final reflections and concluding remarks.

I. AFRICAN APPROACHES TO INTERNATIONAL INVESTMENT LAW AND POLICY

The starting point of our analysis is the African countries' overall attitude towards foreign direct investments ("FDI"). It is worth underscoring at the outset

6. *Agreement Between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investment*s, FOREIGN AFF. TRADE & DEV. CAN. (2013), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/benin-text.aspx?lang=eng&view=d.

that African countries have often shown mixed feelings over the role of foreign investment in their socio-economic growth and development.[7] This is indeed one of the reasons why African countries still receive relatively small amounts of FDI, at least as compared to other developing countries in the world.[8]

Their common approach towards FDI has dramatically evolved in recent years as a result of various factors – both domestic and foreign – involving, among others, the eradication of a wide range of obstacles to international investments such as the over-reliance on foreign aid to support the continent's economic growth projects, lack of economic integration,[9] nationalization of foreign companies,[10] heavy state intervention in the economy, and direct legal restrictions on FDI.[11] Moreover, the enactment of more liberal economic reform strategies as well as the adoption of new private investment regimes, especially in sub-Saharan Africa, may indeed have contributed to this drastic change of direction.[12] Furthermore, the same can also be said about the increasing foreign investment flows between African states – the so-called "South-South FDI flows."[13] This overall change in attitude developed alongside greater efforts to enhance and protect foreign direct investment[14] within the economically emerging African markets, in particular by means of the drafting and signing of new treaties and agreements introducing new rules and general principles.[15] Chief among these efforts is the COMESA Common Investment Agreement ("CCIA Agreement") that the COMESA Authority of

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7. Todd J. Moss, Vijaya Ramachandran & Manju Kedia Shah, *Is Africa's Skepticism of Foreign Capital Justified? Evidence from East African Firm Survey Data,* (Ctr. for Global Dev., Working Paper No. 41, 2004), *available at* http://www.cgdev.org/files/2748_file_cgd_wp041rev.pdf; *see also* Paul Bennell, *Foreign Direct Investment in Africa: Rhetoric and Reality*, 17 SAIS REV. 127 (1997) (stressing inter alia that '[d]uring the 1960s and 1970s, the majority of newly independent African governments adopted socialist or quasi-socialist development strategies'); K. Daele, *Investment Disputes Across Africa: Lessons to Be Learned,* AFRICANLAW, *available at* http://www.africanlaw.org/images/papers/daelepaper.pdf (stressing that almost half of the African ICSID members have not been involved in proceedings) (last visited Oct. 9, 2013).

8. U.N. Conference on Trade and Development, Geneva, 2005, *Economic Development in Africa: Rethinking the Role of Foreign Direct Investment*, at 4, U.N. DOC. UNCATD/GDS/AFRICA (Jan. 2005), *available at* http://unctad.org/en/docs/gdsafrica20051_en.pdf.

9. *See also* HENRY KYAMBALESA & MATHURIN C. HOUNGNIKPO, ECONOMIC INTEGRATION AND DEVELOPMENT IN AFRICA 17 (2012) (who stress that in an area characterized by a strong sense of national sovereignty – and subsequent lack of cooperation - such as the post-colonial Africa, economic integration has traditionally been a chimeric goal – and most of the efforts towards economic integration have been frustrated by insufficient (when not non-existent) implementation).

10. *See* Chantal Dupasquier & Patrick N. Osakwe, *Foreign Direct Investment in Africa: Performance, Challenges and Responsibilities* (African Trade Pol'y Ctr., Working Paper No. 21, 2005), *available at* http://repository.uneca.org/bitstream/handle/10855/12601/bib.%2053710.pdf?sequence=1 (who stress that the need to attract foreign capital in order to enhance the economic development of the African region has often clashed with a sort of protectionist approach towards the natural resources within the territory).

11. *See* Moss et al., *supra* note 7, at 13.

12. *See* Callisto Madavo & Jean-Louis Sarbib, *Africa on the Move: Attracting Private Capital to a Changing Continent*, 17 SAIS REVIEW 111 (1997).

13. *See* U.N. Conference on Trade and Development Secretariat, *South-South Investment Flows - A Potential For Developing Country Governments to Tap For Supply Capacity Building*, Doha, Qatar, Dec 5-6, 2004, *available at* http://www.g77.org/doha/Doha-BP03-Investment_Flows.pdf.

14. *See* Madavo & Sarbib, *supra* note 12, at 111.

15. Landry Signe, *Emerging African Markets - A Golden Opportunity for the Golden State*, COMMONWEALTH CLUB CAL. (2012), *available at* http://www.commonwealthclub.org/node/61845.

Heads of State and Government – COMESA's highest organ where key ministers meet – adopted at its 12th Summit held in Nairobi, Kenya, in May 2007. This Agreement, which is aimed at establishing "a competitive COMESA Common Investment Area with a more liberal and transparent investment environment among Member States,"[16] introduced significant innovations with the arbitral procedure available for investor-State disputes.[17] These innovations addressed concerns over the lack of transparency and participation of third parties in such proceedings, and attempted to strike a balance between the rights and obligations of investors with regard to their right to bring claims. For example, subsections (5) and (7) of Article 28 provide for the public availability of all the documents pertaining to the proceedings and introduces the publicity of hearings on procedural as well as substantive issues, subject to measures – at the discretion of the tribunal – to protect confidential business information.[18] In addition, Article 28(8) provides that 'an arbitral tribunal shall be open to the receipt of amicus curiae submissions'.[19] Moreover, the CCIA Agreement provides for guidelines for the creation of a stable region and good investment environment, the promotion of cross-border investments and protection of foreign investment, and, more generally, the enhancement of COMESA's attractiveness and competitiveness within the whole COMESA region. In the opinion of its drafters, this agreement on investments in the region is essential for the development of COMESA member states, as well as for establishing a closer customs union and proceeding towards the formation of a common market.[20] The CCIA Agreement confirms this, as it requires Contracting States to draft any future international investment treaty ('IIT') in accordance with its aims and core provisions – in practical terms, such treaties must be drafted taking into account the realities of poor countries and the peculiar conditions which have an impact on the approaches generally adopted to international commercial arbitration in the African continent.[21] More specifically, the CCIA provides that international investment agreements shall be drafted so as to grant "investors with certain rights in the conduct of their business within an overall balance of rights and obligations between investors and Member States."[22]

The scope of the aforementioned CCIA provision is not surprising if considered in the context of the interaction between developing host states and foreign investors. A number of issues have become increasingly relevant due to the growth of investment flows towards Africa. While these issues can be considered significant in any relationship between investors from developing countries and

16. Common Market For Eastern And Southern Africa, *Investment Agreement for the COMESA Common Investment Area*, art. 2 [hereinafter *CCIA*].

17. *Id.* at art. 28.

18. Peter Muchlinski, *The COMESA Common Investment Area: Substantive Standards and Procedural Problems in Dispute Settlement*, SOAS SCH. L. LEGAL STUD. RES. PAPER SERIES NO. 11 (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1698209.

19. *CCIA, supra* note 16, at art. 8, ¶ 3 ("The CCIA Committee may establish and make available to the public a standard form for applying for status as amicus curiae. This may include specific criteria which will help guide a tribunal in determining whether to accept a submission in any given instance.").

20. *See* Muchlinski, *supra* note 18, at 12.

21. Muchlinski, *supra* note 18, at 13; *see also* JAMES THUO GATHII, AFRICAN REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES 172-74 (2011).

22. Muchlinski, *supra* note 18, at 3.

developing host states, it is hardly questionable that they affected the African approach to foreign investment. Chief among these issues is that of sovereignty, which is constrained by investment treaties in the sense that such treaties partially limit the host State's powers to take certain legislative and administrative actions.[23] Another issue is the generally standardized form and content of BITs, which leads to the inability to tailor the provisions of investment treaties to the needs of the host State.[24] BITs may hinder efficient contracting between foreign investors and host States as their terms are usually "lopsided" in favour of the investor,[25] and problems also arise from the interaction between provisions in investment agreements and State contracts.[26] The fact that it is virtually impossible for host States to bring claims against foreign investors is another factor that has influenced the sceptical approach African countries have had towards investment treaties for years.[27] This is an aspect that weighs in as increased litigation significantly affects the development of long-term harmonious relationships between foreign investors and host States.[28]

Moving now to the attitudes of Southern and Western African countries as a whole towards international investment legal rules, the following assumptions are traditionally adopted in the debate: firstly, the essentially (and still enduring) diverse physiognomy of the African region as compared with the EU region or US

23. *See* Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, in THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOW 109 (Karl P. Sauvant & Lisa E. Sachs eds., 2009); *see also* United Nations Conference on Trade and Development, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries*, U.N. Doc. UNCTAD/DIAE/IA/2009/5 (2009), *available at* http://unctad.org/en/docs/diaeia20095_en.pdf.

24. *See* Mahnaz Malik, *South-South Bilateral Investment Treaties: The Same Old Story?*, INT'L INST. FOR SUSTAINABLE DEV. (IV Annual Forum for Developing Country Investment Negotiators Background Papers, New Delhi) (Oct. 27-29, 2010).

25. Sam Foster Halabi, *Efficient Contracting Foreign Investors and Host States: Evidence from Stabilization Clauses*, 31 NW. J. INT'L L. & BUS. 261, 265 (2011).

26. United Nations Conference on Trade and Development, *Systemic Issues in International Investment Agreements (IIAs)*, U.N. Doc. UNCTAD/WEB/ITE/IIA/2006/2 (2006), *available at* http://bit.escwa.org.lb/CMSPages/GetFile.aspx?nodeguid=2370f97d-26c1-4f14-a7e1-ea42c8490ef5 [hereinafter *UNCTAD Systemic Issues*] (stressing that "[p]rovisions of IIAs may sometimes have 'contradiction' interactions with provisions of State contracts. For example, IIA prohibitions on performance requirements may limit the host country's ability to include certain requirements in a State contract. Similarly, IIA provisions on non-discrimination might limit the ability of the host country to guarantee preferential treatment to a particular investor in a State contract.").

27. Gustavo Laborde, *The Case for Host State Claims in Investment Arbitration*, 1 J. INT'L DIS. SETTLEMENT 97, 101 (2010).

28. Roberto Echandi, *Towards a New Approach to Address Investor-State Conflict: Developing a Conceptual Framework for Dispute Prevention* (NCCR Trade Regulation, Working Paper No. 46, 2011), *available at* http://www.nccr-trade.org/fileadmin/user_upload/nccr-trade.ch/wp2/publications/wp%202011%2046_Echandi.pdf. *See also* Mudziviri Nziramasanga, Frederick S. Inaba, & Sanatan Shreay, *Do Bilateral Investment Treaties Deliver the Goods? Evidence from Developing Countries*, 7 REV. APPLIED ECON. 17, 18 (2011) (stressing that: "[I]nvestor-host country disputes regarding the jurisdiction of the applicable BIT reduces the benefits of BITS by raising investor concerns about investor rights in the both the particular host country and possibly other host countries as well."); Joseph E. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities*, 23 AM. U. INT'L L. REV. 451 (2008).

region;[29] and secondly, the relatively recent birth of the vast majority of the African countries and, therefore, the fact that they have contributed little, if at all, to the framing and enhancement of the international law of foreign investment.[30] This far too simple characterization in "black and white" is indeed representative of the way in which the historical and political growth of our time is perceived in part of the literature on international investment law. Indeed, it is coherent, but nonetheless deceitful.

Generally speaking, most of the African countries – with the notable exceptions of Guinea, Ghana, South Africa and Ethiopia – did not exist during the colonial period in their current political form[31] and, therefore, they have provided little, if any, contributions to the embodiment and evolution of legal rules and principles on international investment. Nevertheless, this does not automatically lead to the conclusion that the decolonized African countries are political entities that have arisen "out of the blue" in the scenario. In fact, their background as colonies has also added to their homogeneity. They are still generally named "new" for no other reason than that the political nature of the existing society has been relatively recently characterized by the achievement of statehood. However, no matter how lasting their political unity is, from the international legal point of view they are new (or, better, recent) in the sense that they have not been sovereign states until relatively recently, and thus proper subjects of the international legal order.

This construction, though legally conceivable, offers little help to fully understand the behaviour of post-colonial African countries in international investment markets. For example, it does not help to understand why several African countries, such as Kenya, Mozambique and Zambia, have traditionally treated foreign investors with a certain degree of suspicion.[32] This construction therefore leads to two possible visions, or understandings, of post-colonial African states and their relationship with the international law on foreign direct investments. First, it can be held that, since most of them were not subjects of international law during the colonial period, they had almost no knowledge of international investment legal rules nor did they contribute to its shaping and development. However, even before decolonization, political communities in Africa (regardless of whether they were named communities, tribes, states or any other denomination) did have regular legal contracts with the Western European countries that they considered binding upon themselves. Indeed, it was not always

29. *See* RICHARD FRIMPONG OPPONG, LEGAL ASPECTS OF ECONOMIC INTEGRATION IN AFRICA 6 (2011) (stressing that Africa has traditionally been characterized as lacking economic integration – an issue that was not solved even in the early years of the COMESA experience).

30. *See* Laryea, *supra* note 2, at 293.

31. *See generally* MATTHEW CRAVEN, THE DECOLONIZATION OF INTERNATIONAL LAW: STATE SUCCESSION AND THE LAW OF TREATIES (2007); GIAMPAOLO CALCHI NOVATI, AFRICA: LA STORIA RITROVATA (2007).

32. *See* Daele, *supra* note 7, at 1 (stressing that such an approach can easily be found in a wide range of domestic investment laws as recently as the 1990s).

the African party to an agreement that considered that agreement a non-legally binding agreement.[33]

Another hypothesis ostensibly more attenuated, leads to acknowledging the existence of those former legal agreements while excluding the notion that the African countries of the colonial period did contribute to, or had an influence on, the configuration of what is currently named contemporary international law on foreign investment (or the international investment law of the global era).[34] The lapse of time correlated with the notion of modern international law on foreign investment cannot be estimated precisely, but can be reasonably held to dating after the 1960s of the 21st century.[35] In that period, the significance of the pre-existing legal relationships with African countries was inexorably and gradually downgrading, mainly as a result of the decolonisation process in the region. Thus, it was not indispensable to challenge the binding force of such prior legal relationships because they could not really have an impact on the fast developing international investment law of the post-colonial era.[36] This second hypothesis seemed to be more vigorous than the first, hence strengthening the foundation of modern international investment law. Such strength, however, was based on the non-inclusion of the former African countries in the international community. A possible evolution of these countries as new sovereign states that could present themselves as the lawful (or avowed) successors in law of the former African nations might have clearly compromised this strength. Indeed, the decolonization process had precisely this outcome. The reasonably flawless argument of this second hypothesis became politically flawed and juridically unsettled.

Here, two fundamental queries arise. First, given the role of consent in the binding force of international law, is it really admissible to force decolonized countries of Africa to comply with general principles and rules on international foreign investments, which unquestionably were totally or largely drafted and implemented without their approbation or contribution? Second, is it possible to hold that, regardless of their intention to commit themselves, the decolonized African countries, by their simple presence in the international community, were legally bound by international legal rules and principles on foreign investment then in force?

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33. *See* Ibironke T. Odumosu, *South-South Investment Treaties: An Analysis of their Rise in Africa*, AFRICANLAW, *available at* http://www.africanlafw.org/images/abstracts/odumosuabstract.pdf (last visited Oct. 9, 2013).

34. *See* Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157 (2006); Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance* (Ill. L. & Econ., Working Paper No. LE06-027, 2006).

35. On the topic, see O. Thomas Johnson & Jonathan Gimblett, *From Gunboats to BITs: The Evolution of Modern International Law, in* Y.B. INT'L INV. L. & POL'Y, 650 (Karl P. Sauvant ed., 2012); MARIA ROSARIO MAURO, GLI ACCORDI BILATERALI SULLA PROMOZIONE E LA PROTEZIONE DEGLI INVESTIMENTI 300 (2003); Vandevelde, *supra* note 34, at 157; Giorgio Sacerdoti, *Has the Proliferation of BITs Gone Too Far?: Is it Now Time for a Multilateral Investment Treaty?*, 5 J. WORLD INV. & TRADE 97 (2004).

36. On the history of BITs from the perspective of three areas (ie., colonial era, post-colonial era and global era), see Vandevelde, *supra* note 34, at 157; Leon E. Trakman & Nicola W. Ranieri, *Foreign Direct Investment: A Historical Perspective*, *in* REGIONALISM IN INTERNATIONAL INVESTMENT LAW 14 (Leon E. Trakman & Nicola W. Ranieri eds. 2013).

To give a positive answer to the first query might entail resorting to the concept of political coercion, which, nevertheless, may no longer be so smoothly applied today.[37] When tackling the second query, one also encounters some contentions from the decolinized states themselves.[38] It is this discordance of views and attitudes that has led to what is often recognized, at least when international investment law is conceived as a public law framework imposing restrictions on the conduct of states,[39] as a factor of crisis in the field of international law on foreign investment. According to some writers and political commentators, it is precisely the attitude of the decolonized African countries that has led to the above-recalled "crisis."[40] It would thus be appropriate to consider what are those practices and views of the decolonized African countries; for if it seems that the crisis is not, or is only partially, the outcome of the approaches and views of decolonized African states, the misinterpretation of which must be rectified.

It is with this perspective that initiatives such as those of the SADC must be evaluated. The aforementioned SADC Model BIT, which will be described in detail in section II below, is the direct descendent of the SADC Finance and Investment Protocol issued in 2006 ("SADC Protocol").[41] It is worth comparing, for the purposes of our analysis, the SADC Finance and Investment Protocol with the COMESA Common Investment Agreement already analysed in this section. The SADC Finance and Investment Protocol is aimed at providing a framework for investment protection and economic development. The Protocol "seeks to foster harmonisation of the financial and investment policies of the State Parties in order to make them consistent with objectives of SADC and ensure that any changes to financial and investment policies in one State Party do not necessitate undesirable adjustments in other State Parties."[42] The Preamble of Annex I, devoted to Cooperation on Investment Protection, underscores the need for economic growth and sustainable development (much like the Preamble to the CCIA) and points out that "without effective policies on investment protection and promotion, the Region will continue to be marginalized in terms of investment inflows and sustainable economic development" – again, not unlike the CCIA, which highlights the need for the State parties to strengthen the FDI regimes in the COMESA region. The

37. *See generally* Stuart S. Malawer, *Imposed Treaties and International Law*, 7 CAL. W. INT'L L.J. 1 (1977).

38. *See* VALENTINE NDE FRU, THE INTERNATIONAL LAW ON FOREIGN INVESTMENTS AND HOST ECONOMIES IN SUB SAHARAN AFRICA 63 (Münster: Verlag, 2013).

39. For more on this approach, see Benedict Kingsbury & Stephen Schill, *Public Law Concepts to Balance Investors' Rights with States Regulatory Actions in the Public Interest – The Concept of Proportionality*, *in* STEPHEN W. SCHILL, INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 75 (2010); *see also The Jurisprudence of Investment Treaty Tribunals: Between Public Good and Common Concern*, *in* FOREIGN INVESTMENT, INTERNATIONAL LAW AND COMMON CONCERNS 9 (Abingdon: Routledge, 2014).

40. *See, e.g.*, Muthucumaraswamy Sornarajah, *The Case Against a Regime on International Investment Law*, *in* REGIONALISM IN INTERNATIONAL LAW, *supra* note 36, at 475, 480 ("The U.S. assertion of norms had been resisted by Latin American practice [...]"); A. ADU BOAHEN, AFRICAN PERSPECTIVES ON COLONIALISM 95 (1987).

41. Southern African Development Corporation, *Finance and Investment Protocol*, *available at* http://www.sadc.int/documents-publications/show/Protocol_on_Finance__Investment 2006.pdf (last visited May 9, 2014) [hereinafter *SADC Finance and Investment Protocol*].

42. *Id.* at art. 1.

CCIA, however, goes further by providing for non-waivers or derogation from labor, public health, safety and environmental measures, making them not subject to dispute settlement by investors. Among others, the SADC Protocol includes provisions on most of the standards for investment protection, although with some amendments with respect to the most common formulas used to include these standards in BITs. For instance, the fair and equitable treatment standard is modified by providing that States may "grant preferential treatment to qualifying investments and investors in order to achieve national development objectives."[43] Repatriation of funds is permitted only in accordance with the rules and regulations of the host State,[44] like in the CCIA, which, however, makes repatriation of funds subject to "serious balance of payment and external financial difficulties."[45] Moreover, the national treatment standard has been omitted from the Protocol.

It is worth noting that these exceptions cannot be found in the CCIA. This shows the consciousness of SADC States about their national development needs and their aim to establish a common approach to foreign investment in the region. On the other hand, the CCIA underscores the differences in the legal system and the level of development of the state parties, which prevent the establishment of a single international standard in this context. Other than these aspects, the balance of rights and obligations between investors and host States is similar in the SADC Protocol and the CCIA – in both instruments the only substantial obligation of the investor is the compliance with the law of the host State, although subsection 9 of Article 28 of the CCIA refers to this obligation of the investor specifically by allowing State parties to use it as a defence, counterclaim, set-off or other claim. Moreover, the CCIA raises the question of transparency by stating that arbitration documents are to be made public, *amicus curiae* submissions may be accepted and hearings shall be open to the public. The SADC Protocol provides for the usual dispute settlement clause pointing at ICSID arbitration, although it requires the exhaustion of local remedies.[46]

II. CASE-STUDIES ON CONTEMPORARY WESTERN AND SOUTHERN AFRICAN BIT PRACTICE

Investors and host States currently find themselves in the situation of having to operate within a complex system of investment rules interacting at the international and domestic level that may contain overlapping or inconsistent provisions.[47] However, new agreements are being drafted and signed "featuring a structure and approach to investment issues not found in earlier agreements" and that foresee different solutions to the same long-lasting problems of investor-States relationships.[48] The aim of this section is to analyse two representative cases of contemporary Western and Southern African BITs in order to identify two alternative routes that African countries may follow in their future foreign

43. *Id.* at Annex 1, art. 7.
44. *Id.* at Annex 1, art. 9.
45. *CCIA*, *supra* note 16, at art. 25, ¶ 1.
46. *SADC Finance and Investment Protocol*, *supra* note 41, at Annex 1, art. 28.
47. *UNCTAD Systemic Issues*, *supra* note 26, at 2.
48. *UNCTAD Systemic Issues*, *supra* note 26, at 2.

investment policies. The agreements mentioned in this section are only examples, which do not reflect an empirical study of these BITs. Rather, they demonstrate that BITs could be tailored to address broader concerns. Without careful drafting, however, policy space acquired through these variations, especially by omitting or limiting national treatment in some cases, could be diminished.

Southern African countries entered into a number of BITs in the 1990s.[49] The Southern African countries' bilateral treaty program is a more recent trend than some of the other emerging markets, notably India and China. Consequently, Southern African BITs have arisen as rather structured, that is, they encompass substantial investor guaranties and protections.[50] As of 2013, African countries have signed a large number of BITs for the protection and promotion of investments, the majority of which are fully operational.[51] These agreements are mostly with developed countries, underscoring the status of Southern Africa as perhaps one of the largest direct foreign capital-importing regions among developing regions. As such, a consideration of its existing BIT program should acknowledge Southern African states' overall strategy of seeking to attract incoming foreign investments, rather than to favour their own investors overseas.[52] However, a partial change of attitude toward foreign investments emerged in the state of South Africa from the fact that all the 13 BITs with EU countries are currently rumoured to be up for repeal.[53]

A good starting point for the analysis of the African approach to regulating foreign direct investments through BITs is an assessment of Southern African BITs ("SA BITs"). With the exception of some recent agreements, most SA BITs follow the common formulation of BITs[54] by greatly favouring investors over a governmental ability to exercise powers over foreign investment.[55] Moreover, SA

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49. *See* Bilateral Investment Treaties Database, ICSID, https://icsid.worldbank.org/apps/ICSIDWEB/resources/Pages/Bilateral-Investment-Treaties-Database.bak.aspx (last visited Oct. 12, 2013) [hereinafter Bilateral Investment Treaties Database]; *see also* Robert Andrzejczuk, *Theoretical Assumptions Concerning the Protection of Foreign Investments in the Light of Bilateral International Agreements*, 29 POL. Y.B. INT'L L. 159 (2006); Giorgio Sacerdoti, *The Proliferation of BITs: Conflicts of Treaties, Proceedings and Awards*, *in* APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 127 (Karl P. Sauvant & Michael Chiswick-Patterson, eds., 2008).

50. *See* Luke Eric Peterson, *South Africa's Bilateral Investment Treaties Implications for Development and Human Rights*, DIALOGUE ON GLOBALIZATION (November 2006), http://library.fes.de/pdf-files/iez/global/04137-20080708.pdf (last visited Jan. 15, 2014); s*ee generally* Richard K. Lebero, *The International Law Framework for Foreign Investment Protection: An Analysis of African Treaty Practice, UNIVERSITY OF GLASGOW PHD THESIS* (2012), *available at* http://theses.gla.ac.uk/3833/1/2012LeberoPhD.pdf (last visited Jan. 15, 2014).

51. *See* Bilateral Investment Treaties Database, *supra* note 49.

52. *See* Adam Green, *South Africa: BITs in Pieces,* FINANCIAL TIMES (Oct. 19, 2012), http://blogs.ft.com/beyond-brics/2012/10/19/south-africa-bits-in-pieces/#axzz2pR5oyUGB (last visited Jan. 15, 2014) ("South Africa signed them in a hurry to attract investment after apartheid, since BITS were seen as a quick way to stimulate foreign investment.").

53. *Id.*

54. *See generally* JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES (2010).

55. *See* Peterson, *supra* note 50, at 11 ("[f]or e.g., many SA BITs do not contain a clause similar to the one found in Article 3 of the 1998 treaty between the Czech Republic and South Africa, which provides that guarantees of National Treatment and Most-Favoured Nation Treatment for foreign investors: 'shall not be construed so as to oblige one Party to extend to the investors of the other the benefit of any treatment, preference or privilege which may be extended by the Former Party by virtue

BITs provide foreign investors with the right to take their claims against the host state to investment arbitration for breach of treaty provisions, allowing for treaty interpretation and adjudication outside of the state's judicial system.[56]

A change of direction may be represented by the aforementioned SADC Model BIT.[57] Published in 2012, the model treaty drafted by the Southern African Development Community can be used as exemplary for the analysis of the Southern African approach to the regulation of foreign direct investments through BITs.[58] Model agreements are emblematic of a country's approach to foreign investments since they epitomize the policy issues that are most relevant to the issuing country.[59] In other words, the duties encompassed in model BITs are those that the relevant country would contract and demand in an optimal situation.[60] The SADC Model BIT can be considered the first African instrument that puts forward, in a strong fashion, Southern African perceptions of the international law on foreign investment – that is, underscoring the role of cooperation among players by trying and providing some innovative features rather than aligning themselves with the dogmatic approach to BITs drafting. Whether these aims can be actually achieved is a matter that will be clearer once the Model is signed by SADC with other states. For the purposes of our analysis, however, it is important to highlight the features of the SADC Model BIT in order to show the potential direction of international investment law once African contributions to the development of this branch of international law are indeed implemented.

The SADC BIT gives an enterprise-based definition of "investment," suggested by an open-list, asset-based approach and thus encompassing almost every kind of asset.[61] One of these is intellectual property (i.e., copyrights, know-how, goodwill and industrial property rights such as patents, trademarks, industrial designs and trade names) "to the extent they are recognized under the law of the Host State."[62] This advances a flexible understanding of the concept, possibly granting Southern African companies greater protection when operating in foreign

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of … any law or other measure the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, previously disadvantaged by unfair discrimination'.").

56. Peterson, *supra* note 50, at 11.

57. *SADC Finance and Investment Protocol*, *supra* note 41, at preamble. (The SADC Member States are Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.).

58. *SADC Finance and Investment Protocol*, *supra* note 41, at § I.

59. Mark A. Clodfelter, *The Adaptation of States to the Changing World of Investment Protection Through Model BITs*, 24 ICSID REV. FOREIGN INVESTMENT L.J. 165 (2009); *see also* Peter S. Jenkins, *Virtual Worlds As A New Game Theoretic Model For International Law: The Case Of Bilateral Investment Treaties*, 6 SCRIPT-ED: A J.L. & TECH 4 (2009).

60. *See* Clodfelter, *supra* note 59, at 166.

61. *See SADC Model Bilateral Investment Treaty Template With Commentary*, S. AFR. DEV. COMMUNITY (July 2012), http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf (last visited May 12, 2014) [hereinafter *SADC Model BIT*].

62. *Id*.

states like the United States, with its consolidated tradition of intellectual property ("IP") rights, than would be allowed at home.[63]

The characterization of "investor" encompasses a natural person or a juridical person (i.e. a company, which itself is classified as a corporation, association or firm established under the laws of the host state).[64] This appears to be sufficiently broad to accommodate almost any form of commercial entity. Foreign investments are subject to pre-entry screening, aimed at verifying that they are in line with the host States' laws and regulations on environmental protection and social impact.[65] Such screening, however, could alternatively be based on "the laws of the Home State . . . or the International Finance Corporation's performance standards on Environmental and Social Impact Assessment," depending on which criteria are more rigorous.[66] It is worth underscoring that this provision effectively excludes the application of the national treatment standard to foreign investments that have not yet established in the host state. Investments are to be provided fair and equitable treatment,[67] although with no explanation of the meaning of that statement. There is also a full security provision, conceivably referencing to some of the SADC countries' reduced capacity to deal with widespread civil turmoil.[68] Most Favoured Nation ("MFN") guarantees are embodied,[69] subject to exceptions for bilateral investment treaties, free trade agreements and any multilateral or regional agreement relating to investment or economic integration in which a State Party is participating or may participate.[70] A substantial defence against expropriation is accorded, including measures equivalent to expropriation that foresees the more contentious indirect expropriation. Any expropriation should be made for a public aim in accordance with the law, and compensation for

63. For up-to-date references on African investments abroad, see Sheila Page & Dirk Willem te Velde, *Foreign Direct Investment by African Countries,* OVERSEAS DEV. INST., London (2011), *available at* http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/5739.pdf (last visited Oct. 12, 2013).

64. *SADC Model BIT*, *supra* note 61, at art. 2.

65. *See* M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 97-116 (2010).

66. *SADC Model BIT*, *supra* note 61, at art. 13, ¶ 1.

67. *SADC Model BIT*, *supra* note 61 at art. 9, ¶ 1 (providing "[a] State Party shall accord Investments of Investors of the other State Party protection and security no less favourable than that which it accords to investments of its own investors or to investments of investors of any third State."); *see also SADC Model BIT*, *supra* note 61 at art. 3, ¶ 1; *see generally* MARTINS PAPARINSKIS, THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT (2013).

68. *SADC Model BIT*, *supra* note 61, at art. 9, ¶ 2 (stating "[i]nvestors of one State Party whose Investments in the territory of the other State Party suffer losses as a result of a breach of paragraph 9.1, in particular owing to war or other armed conflict, revolution, revolt, insurrection or riot in the territory of the Host State shall be accorded by the Host State treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the Host State accords to investors of any third State.").

69. *SADC Model BIT*, *supra* note 61, at art. 4, ¶ 2 (providing "[s]ubject to paragraphs 4.4-4.6, each State Party shall accord to Investors and their Investments treatment no less favourable than the treatment it accords, in like circumstances, to investors of any other State and their investments with respect to the management, operation and disposition of Investments in its territory.").

70. *SADC Model BIT*, *supra* note 61, at art. 6, ¶¶ 4-6, art. 21, ¶ 1 ("Notwithstanding any other provision of this Agreement, a State Party may grant preferential treatment in accordance with their domestic legislation to any enterprise so qualifying under the domestic law in order to achieve national or sub-national regional development goals.").

expropriation must be "fair and equitable," representing "the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation") and shall not reflect any change in value occurring because the intended expropriation had become known earlier."[71]

However, it is interesting to point out that the often-seen requirement that an expropriation should be non-discriminatory has been eliminated. According to the SADC Model BIT's official commentary, the reason is that in several instances, expropriations are specific and targeted, and therefore, in a strict legal sense might be classified as discriminatory by their own character.[72] Unlike other Model BITs which encompass what are generally referred to as standstill or "no-backsliding" clauses on investment liberalization – imposing, in other words, a commitment not to decrease the level of protection accorded to investors[73] – the SADC Model BIT does not entail any international law commitments with regard to investment liberalization.[74] However, it does entail a commitment to apply the domestic law relating to admissions of investments in good faith.[75] This, unless excluded from dispute settlement, would establish legal duties under the agreement for how the government treats a potential investor.[76]

One of the revolutionary features of the SADC Model BIT is the fact that it would be the first investment law instrument that establishes obligations upon foreign investors. Part 3, named "Rights and Obligations of Investors and State Parties," provides for a number of norms dealing with corruption, compliance with domestic law, transparency, respect of environmental, labor, human rights and corporate governance standards, with enforceable obligations upon investors before arbitral tribunals or the courts of the host State.[77]

The dispute settlement provisions under the SADC Model BIT clarify that there should be an attempt by the Contracting Parties to resolve disputes by means of negotiations prior to starting formal procedures.[78] If this fails, disputes can then be presented either to a competent judicial authority of the host country or to international mediation.[79] The preference for mediation hereby reflects the SADC countries' willingness to seek the least intrusive form of dispute resolution possible. If mediation fails, then the dispute can be presented to the domestic courts of the host State for the purpose of pursuing local remedies, provided that the

71. *SADC Model BIT*, *supra* note 61, at art. 4, ¶ 2.

72. *SADC Model BIT*, *supra* note 61, at 25.

73. For a discussion of this issue, see Anne Van Aaken, *Smart Flexibility Clauses in International Investment Agreements, Investment Treaty News*, INT'L INST. FOR SUSTAINABLE DEV. (June 26, 2013) http://www.iisd.org/itn/2013/06/26/smart-flexibility-clauses-in-international-investment-agreements/ (last visited Oct. 12, 2013).

74. *See SADC Model BIT*, *supra* note 61, at art. 15.

75. *SADC Model BIT*, *supra* note 61, at art. 15.

76. *SADC Model BIT*, *supra* note 61, at art. 15.

77. *SADC Model BIT*, *supra* note 61, at art. 10-19.

78. *SADC Model BIT*, *supra* note 61, at art. 29, ¶ 1 (providing "[i]n the event of an investment dispute between an Investor or its Investment (referred to as an 'Investor' for the purposes of the Investor-State dispute settlement provisions) and a Host State pursuant to this Agreement, the Investor and the Host State should initially seek to resolve the dispute through consultation and negotiation, which may include the use of nonbinding, third-party mediation or other mechanisms.").

79. *SADC Model BIT*, *supra* note 61, at art. 29, ¶. 3.

parties have exhausted any previous administrative remedies.[80] An investor may agree to submit the dispute to arbitration, but only if the full range of conditions for submission of a claim to arbitration have been fulfilled.[81] Parties can otherwise agree to use ad hoc arbitration under UNCITRAL rules,[82] or the ICSID Additional Facility Rules.[83] Provisions are also listed on the methods of selection of arbitrators.[84] Unlike most BITs that include a State-State dispute settlement provision, the SADC Model BIT distinguishes two possible roles of mechanisms relating to State-State dispute settlement: a State claiming reparation for damages on behalf of an investor for an alleged violation of the agreement; and a "pure" dispute between the State parties themselves on the application or interpretation of the agreement. Significantly, the former is made subject to the same exhaustion of local remedies requirements as those on investor-State, should governments decide to encompass investor-State arbitration.[85] Lastly, the SADC Model BIT encloses a very broad duty to enhance FDI, with no mention to any specific initiatives to achieve this aim.[86]

Some noteworthy differences between the SADC Model BIT and contemporary international investment law practice will now be considered. The outcomes of the ICSID proceedings that have been initiated so far against African contracting States are particularly noteworthy. Once again, we will focus on the idea that the SADC Model BIT seems to have foreseen the preservation of the rights of investors rather than the protection of the rights of host States.

As previously stated,[87] the need for economic integration has been reflected by national and regional efforts to improve the investment environment in the region. At the regional level, initiatives within the COMESA framework such as the CCIA[88] tend towards aiming to preserve the rights of host States while at the same time ensuring certain rights to investors. It is indeed possible to observe a shift towards more sophisticated BITs in line with the tradition initiated by the 2004 US Model BIT.[89] The significance of the US Model is apparent not just in the light of the BITs signed by the U.S., using the 2004 and the 2012 evolution of the model, but also and pre-eminently by the fact that a number of other States, both developed and developing countries, have recently issued Model BITs based on the US Model in terms of the drafting of the core-provisions. It can be stated with reasonable certainty that gone are the days of the ten-article BITs featuring just the most common provisions (definition of investment, standards of protection, pre-

80. *SADC Model BIT, supra* note 61, at art. 29, ¶. 4.
81. *SADC Model BIT, supra* note 61, at art. 29, ¶ 4.
82. *SADC Model BIT, supra* note 61, at art. 28, ¶ 9.
83. *SADC Model BIT, supra* note 61, at art. 29, ¶ 12, point d).
84. *SADC Model BIT, supra* note 61, at art. 29, ¶. 18.
85. *See SADC Model BIT, supra* note 61, at 53.
86. *SADC Model BIT, supra* note 61, at art. 29, ¶. 18.
87. *See infra* Section II.
88. *See infra* Section II.
89. Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Model, 2004 [hereinafter U.S. 2004 Model BIT]. *See* Laura Henry, *Investment Agreement Claims Under the 2004 Model U.S. BIT: A Challenge for State Police Powers?,* U. PA. J. INT'L L. 935 (2010).

and post-establishment requirements and dispute settlement clauses). The new generation BITs provide for detailed provisions on the application of protection standards, transfers, publication and application of domestic laws, and norms implementing human rights, labor and environmental standards in the investment-State relationship.[90] The outlook of this change in perspective is that BITs based on the US Model look less lopsided towards the protection of foreign investors, and provide for investment protection measures balanced with an array of powers in the hands of the host State to freely (or almost-freely) exercise their sovereign powers on matters of public relevance. It is important to underscore that this is consistent with the outcome of the 76 ICSID proceedings that have been brought so far against African countries. Notwithstanding the perception of a bias against developing countries in general and African States in particular in ICSID arbitration, it has been pointed out that "the latter have fared reasonably well in these proceedings."[91]

Is this the case for African countries though? A significant case study to assess the aforementioned shift in perspective of African BITs is represented by the BIT signed by Benin and Canada in 2013.[92] The Benin-Canada BIT is shaped upon the 2004 Canadian Model BIT,[93] and it is set to create an investor-friendly environment, marking the recent trend of abandoning the protectionist approach that permeated investment law in Africa in the 1990s. It has to be pointed out here that, like other recently signed African BITs,[94] the treaty hereby under consideration is based on a model drafted by a historically capital-exporting country. This is reflected by the content of most of the provisions in the BITs. The question, therefore, is whether the post-2004 (as in after the release of the 2004 US Model BIT) standard for investment treaties would represent enough of an incentive for African countries to drop the protectionist approach that characterized the consideration of foreign investment by African countries.[95]

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90. *See, e.g.*, *SADC Model BIT*, *supra* note 61, Bilateral Agreement for the Promotion and Protection of Investments Between the Republic of Colombia and [Country]: Colombian Model, Aug. 2007; Agreement between the Kingdom of Norway and [Country] for the Promotion and Protection of Investments, Draft Version 191207; Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, Chapter 11. For a development-oriented perspective, see Howard Mann, Konrad von Moltke, Luke Eric Peterson, Aaron Cosbey, *IISD Model International Agreement on Investment for Sustainable Development*, IISD (Apr. 2005), *available at* https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf.

91. *See* Karel Daele, *Africa's Track Record in ICSID Proceedings,* KLUWER ARBITRATION BLOG (May 30 2012), *available at* http://kluwerarbitrationblog.com/blog/2012/05/30/africa%E2%80%99s-track-record-in-icsid-proceedings/; *see also* Oladiran Ajayi & Patricia Rosario, *Investments In Sub Saharan Africa: The Role of International Arbitration in Dispute Settlement,* EXPRESSO (Apr. 2009), *available at* http://documents.jdsupra.com/11313b50-b485-478d-b198-de8a3949f843.pdf.

92. *See infra* Section II.

93. Canada Model Bilateral Investment Treaty, Model, 2004; *see also* David Schneiderman, *Investment Rules and the New Constitutionalism*, 25 LAW & SOC. INQUIRY 757 (2002).

94. *See, e.g.,* South African Bilateral Investment Treaty, South Africa-Israel, Oct. 20, 2004; South African Bilateral Investment Treaty, South Africa-Angola, Feb. 17, 2005; South African Bilateral Investment Treaty, South Africa-Congo, Jan. 12, 2005.

95. *See* Layrea, *supra* note 2, at 295 *passim*; A. Mutharika, *Creating an Attractive Investment Climate in the Common Market for Eastern and Southern Africa (COMESA) Region*, 12(2) ICSID REVIEW – FOREIGN INVESTMENT L.J. 237, 241 (1997).

The definition of investment in Article 1 of the Benin-Canada BIT, like the SADC one, is based on the notion of "enterprise" (also defined in Article 1), and encompasses a wide range of activities, excluding only sales of goods, credits arising from commercial transactions and any claim in money not expressly included in the definition.[96] The provisions on national treatment, most-favoured nation treatment and minimum standard of treatment,[97] although drafted consistently with the pre-2004 BIT tradition, are accompanied by explanations and reservations that limit the application of such standards. In particular, Benin reserved the right "to adopt or maintain any measure that does not conform to the obligations" established by the national treatment standard with respect to measures related to the maintenance of public order, the establishment or acquisition in Benin of investments in the service sector, the residency requirements applicable to landowners and the investments concerning national heritage objects having artistic, historic or archaeological value.[98] Benin will also not apply the most-favoured nation treatment in respect to investments covered by BITs or multilateral agreements signed before 1994, or to investments covered by future bilateral and multilateral treaties that grant "advantages to bordering countries to facilitate border traffic," establish, strengthen or expand free-trade zones or custom unions, or that grant "advantages to African countries to implement commitments contracted under an intergovernmental agreement on commodities, with the exception of metals, minerals and petroleum."[99] It is also expressly stated in Article 7 of the treaty that the minimum standard of treatment does not create new obligations beyond those required by customary international law. Furthermore, Article 18 of the BIT excludes the application of the national and most-favoured nation treatment and the requirements relating to management, board of directors, entry of personnel and performance to pre-existing non-conforming measures and subsequent measures related to governmental interests in State enterprises and entities.

Three further aspects of the Benin-Canada BIT have to be underscored as provisions aimed at seeking a balance between the establishment of an investor-friendly environment and the preservation of the host State's powers. The first one is Article 20, according to which "a Contracting Party may adopt or enforce a measure necessary (i) to protect human, animal or plant life or health, (ii) to ensure compliance with domestic law that is not inconsistent with [the BIT], or (iii) for the conservation of living or non-living exhaustible natural resources," provided that such measures are non-discriminatory and do not represent "a disguised restriction on international trade or investment." A similar provision can be found in Article 8

96. Agreement Between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments, 2013, at art. 1 [hereinafter Benin-Canada Model BIT] ("'[E]nterprise' means an entity constituted or organized under applicable law, whether or not for profit, whether privately owned or governmentally owned, including a corporation, trust, partnership, sole proprietorship, joint venture or other association and a branch of any such entity.").

97. *Id.* at art. 5, 6 & 7.

98. *Id.* at Annex II.

99. *Id.*

of the 2004[100] and the 2012 US Model BITs,[101] and its significance is almost self-explanatory. Reasons of protection of the environment and sovereignty on natural resources can allow the host State to adopt measures that can potentially affect foreign investment within their territory. The impact of this provision is somehow relative, given the fact that the non-discrimination requirement is one that can also be found in customary international law. However, Article 20 expressly mentions the matters in which the host State can adopt measures regardless of how they would affect investment activities.[102] This limits the possibility of such measures constituting a treaty violation to those cases in which said measures are discriminatory in nature.

The second aspect worth underscoring is to be found among the detailed provisions on investor-State dispute settlement. Article 33 of the Benin-Canada BIT provides for arbitral hearings to be open to the public, barring any necessity of protection of confidential information, and for the accessibility of documents by the public.[103] Moreover, Article 34 gives arbitral tribunals the authority "to consider and accept written submissions from a person or entity that is not a disputing party with a significant interest in the arbitration."[104] These provisions surely represent a step forward towards giving significance to public scrutiny on investment disputes, and allowing NGOs and other non-State actors to highlight possible misconduct by investors.

The third aspect worth highlighting is the provision at Article 16 of the Benin-Canada BIT. The norm in question is aimed at creating an obligation upon States to "encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies," and specifically points at "issues such as labor, the environment, human rights, community relations and anti-corruption."[105] However, unlike Article 20 and the provisions opening (at least partially) investment arbitration to public scrutiny, Article 16 of the Benin-Canada BIT is unlikely to be significantly beneficial to the host State. While the SADC Model, at Part 3, establishes obligations of corporate social responsibility upon investors, the Benin-Canada BIT merely requires the home State to encourage investors abroad to adopt and respect instruments of soft law. It is highly unlikely that any misconduct of the investors can lead to any liability, much less State responsibility for a violation of Article 16. The language of the provision does not create any real obligation upon the State or the investors. Lacking any enforceability of corporate social responsibility, the very significance of this provision is questionable at best.

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100. U.S. 2004 Model BIT, *supra* note 89.

101. Treaty between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Model, 2012 [hereinafter U.S. 2012 Model BIT].

102. *Id.* at art. 20.

103. Benin-Canada Model BIT, *supra* note 96, at art. 33.

104. Benin-Canada Model BIT, *supra* note 96, at art. 34.

105. Benin-Canada Model BIT, *supra* note 96, at art. 16.

Another relevant difference between the Benin-Canada BIT and the aforementioned SADC Model lies in the provisions on expropriation. While the SADC Model provides for a revolutionary notion of expropriation, one that admits the legality of discriminatory measures, Article 11 and Annex I (which provides a definition of indirect expropriation) of the Benin-Canada BIT, incorporate the notion of expropriation as recognized by customary international law – namely, the one that considers an expropriatory measure lawful when it is "for a public purpose, in accordance with due process of law, in a non-discriminatory manner and on payment of compensation."[106]

III. ASSESSING THE SADC AND BENIN'S APPROACHES FROM THE PERSPECTIVE OF THE DEVELOPMENT OF INVESTMENT LAW

The analysis above was aimed at illustrating the main features of both the SADC Model and the Benin-Canada BIT. It has also highlighted the main differences between the two instruments, focusing on how two different approaches to the same problem – in this case, the protection of foreign investors in a developing country – can lead to very different outcomes; the main reason behind these differences lies, in our opinion, in the diverse *rationes* behind the two instruments.

If one takes a look at how post-WWII international law was shaped, it becomes evident how what we call "modern" international law was mostly thought, drafted and implemented by Western, developed countries.[107] This has led to the perception that international law is in fact not the instrument for establishing and maintaining international justice that it is supposed to be.[108] Such a perception is arguably well founded. Regardless of whether international law is actually "unfair," as an enquiry on such a question would require a thorough investigation on how international law affects actors and non-actors in the system, it is not in dispute that the binding force of international law is based on consent. States cannot be bound by rules they have not consented to; and they are only bound by those rules to which they have expressed their consent.[109]

A similar argument can be made on international investment law and its development.[110] For the purposes of our discourse, the roots of modern investment treaty law are to be found in the number of Treaties on Friendship, Commerce and Navigation ("FCN") signed after the end of WWII.[111] While only a limited number of States were involved in FCN treaties, it is easy to see how BITs are largely modelled on those instruments.[112] Indeed, the investment protection function of

106. Benin-Canada Model BIT, *supra* note 96, at art.11, Annex 1.

107. MALCOLM N. SHAW, INTERNATIONAL LAW 16-27 (7th ed. 2014).

108. SUNDHYA PAHUJA, DECOLONIZING INTERNATIONAL LAW – DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY 25 (2011); Craven, *supra* note 31, at 147.

109. SHAW, *supra* note 107, at 9.

110. M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 19 (2nd ed. 2010).

111. *See generally* Wolfgang Alschner, *Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law*, 5(2) GOETTINGEN J. INT'L L. 455 (2013).

112. *See generally* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 16 (2012); SORNARAJAH, *supra* note 110, at 223; SALACUSE, *supra* note 54, at 42.

these treaties became a dominant feature after WWII.[113] We can therefore see that, in the early stages of investment treaty law as we currently know it, much of the world was still under colonial domination. While colonialism is now a thing of the past, one may wonder what international law countries currently labelled as "developing" or "least developed" have consented to, and how much have they participated in its formation.

It can be argued, looking at the development of investment law, that post-colonial countries – which, at least from a Montevideo-based point of view, were to be considered "new" States[114] – had to enter a system which had already been prepared, with little or no choice, since refusing such a system would have had catastrophic effects on their chances to attract foreign capital.[115] Subsequently, in the 1980s and 1990s, attempts at reshaping the system towards a more developing country-friendly setting, like the development of the Calvo doctrine, failed in favour of Western-based liberalist approaches.[116] Investment law, in other words, has traditionally been an "opt-in" system, one that attracts players with the promise of more foreign capital inflow, but also one that left very little room for instances of reform for developing countries.

Some aspects of the investment law scenario have changed, however, since the mid-1990s. First of all, countries that have traditionally been capital-exporting ones, such as the US, Canada and the EU Member States, have seen their role in the system partially changing as they have progressively started to receive flows of foreign capital, finding themselves both in the positions of capital-exporting and capital-importing states.[117] Second, a number of developing countries have grown increasingly frustrated with the system of investment arbitration, perceived as strongly lopsided in favour of foreign investors. Third, and most importantly for the purposes of our analysis, some developing countries have promoted a revival of self-preserving policies and, as a consequence, started to re-think their role in the system. On the first point, Model BITs, such as the aforementioned US or Canadian, examples illustrate how States that were once almost exclusively capital-exporting have reacted to the flow of foreign capital into their territories, namely by drafting model treaties that allow them to exercise some control on the impact of such foreign capitals on their natural resources and other socially relevant issues.[118] On the second point, some States have denunciated the ICSID Convention in the

113. Kenneth J. Vandervelde, *A Brief History of International Investment Agreements*, *in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOW 935, 938 (2009).

114. Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403 (1998-1999); OBIORA CHINEDU OKAFOR, RE-DEFINING LEGITIMATE STATEHOOD: INTERNATIONAL LAW AND STATE FRAGMENTATION IN AFRICA 32-39 (2000); Maurice Zinkin, *After Colonialism, What?*, 14(6) International Relations 13 (1999); *see also infra* Section II.

115. SORNORAJAH, *supra* note 110, at 22, 38.

116. SORNORAJAH, *supra* note 110, at 459-60; *see* DOLZER & SCHREUER, *supra* note 112, at 79; SURYA P. SUBEDI, INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE 13-15 (2008).

117. SORNORAJAH, *supra* note 110, at 24-25.

118. *See infra* Section III.

aim of escaping from a system that they perceived as detrimental to their own economies.[119]

The SADC Model and the Benin-Canada BIT should be assessed with the third of the aforementioned developments in mind. African countries, being former colonies, can hardly be seen as having contributed to the development of international investment law. While it cannot be argued, in our opinion, that they have been forced to consent to any international law they did not want to, it can nonetheless be said that most African countries have had to take part in a game, the rules of which had been already made by bigger, more powerful players.

The SADC Model BIT represents a breaking point with such a tradition. Its revolutionary features, namely the provision of treaty-based liability of foreign investors and the abandonment of the requirement of non-discrimination for an expropriation to be legal, have already been discussed.[120] What needs to be addressed at this stage is the significance of such provisions for the future development of the international law on foreign investment. First and foremost, while there have been other Model BITs drafted by developing countries, a BIT based on the SADC Model would be the first one coming from Africa. The significance is far from being merely geographic, as it would represent a substantive step in the development of an effective and influential self-awareness of African countries about the role that they can play in shaping a field of international law that affects heavily their economic and development policies. It would also represent a clear detachment from the protectionist approaches that characterized African investment policies in the past: rather than being passive subjects of investment law, African countries would take a chance to actively leave their mark on the direction that investment law will take in a world in which the distinction between capital-exporting and capital-importing countries will eventually disappear. As previously mentioned, BITs are no longer a "North-South" affair, as the number of "South-South" investment treaties grows exponentially with the increase of "South-South" investment flows. Furthermore, the SADC Model goes a step further if compared to other Model BITs drafted by developing countries (e.g. Colombia). Indeed, traditional norms of customary international law are being rejected in favour of new ones that can be seen as more appropriate for the interest of developing countries. Drafting a provision that excludes non-discrimination from the requirements for a lawful expropriation goes against decades of customary international law,[121] and this could be seen as a

119. Bolivia, Venezuela and Ecuador have recently submitted notices under Article 71 of the ICSID Convention. *See* Andres A. Mezgravis & Carolina Gonzalez, *Denunciation of the ICSID Convention: Two Problems, One Seen and One Overlooked*, 7 TRANSNAT'L DISP. MGMT. (Nov. 2012), *available at* www.transnational-dispute-management.com; Mariana Durney, *Legal Effects and Implications of the Denunciation of the ICSID Convention on Unilateral Consent Contained in Bilateral Investment Treaties: A Perspective from Latin American Cases*, *in* 17 MAX PLANCK INST. COMP. PUB. L. & INT'L L. 223-304 (2013); Antonios Tzanakopoulos, *Denunciation of the ICSID Convention Under the General International Law of Treaties, in* INTERNATIONAL INVESTMENT LAW AND GENERAL INTERNATIONAL LAW: FROM CLINICAL ISOLATION TO SYSTEMIC INTEGRATION? 75 (2001).

120. *See infra* Section III.

121. *See* SHAW, *supra* note 107, at 827; PAOLO VARGIU, *Environmental Expropriation in International Investment Law, in* FOREIGN INVESTMENT, INTERNATIONAL LAW AND COMMON

revolutionary move in itself. The significance of this provision, however, is much more relevant: States adopting a provision such as Article 6 of the SADC Model BIT would be sending a message to the investment law community. Such a message would be aimed at investors and States. To investors, the message is clear: expropriations are "specific and targeted,"[122] and the only grounds for a claim would be the lack of evidence on the public purpose of the measure, the lack of transparency or the failure to pay compensation. The message to other States, regardless of their level of economic development, would be even more noteworthy: as long as States consent to them, long-standing rules of investment law can be changed, and while it is important to create an investor-friendly environment, sometimes measures need to be adopted to protect the host State's interest to the detriment of one specific investor. In the end, the largely accepted Salini criteria require the investment to involve a certain 'qualified' risk, namely a type of risk that is higher than the normal risk of doing business.[123] Would there be any more "qualified" risk than being the specific target of an expropriatory measure?

The provision of specific obligations upon investors is also a revolutionary feature of the SADC Model BIT. Pre- and post-2004 BITs provide only for pre- and post-establishment requirements to be complied with by the investors and, in certain cases, a hardly enforceable obligation upon home States to encourage their investors to comply with corporate social responsibility standards in their endeavours abroad. The SADC Model BIT, however, puts enforceable obligations directly upon investors, opening the field to a number of possible arbitral disputes in which the State assumes the role of the claimant, and investors are actually called to respond on treaty violations. These norms go along specific provisions on the rights and obligation of the host State.[124] Their purpose, as it can be inferred from a general overview on the SADC Model BIT, is neither to limit the freedom of foreign investors within the territory of the host State, nor to react to decades of perceived imbalance between treaty-based rights of foreign investors and obligations of host States. The SADC Model BIT, as previously stated, is a model treaty aimed at creating an investor-friendly environment in the host State, and leaving the protectionist approach of the 1990s Africa behind.[125] However, leaving such protectionist approach, especially in post-colonial States, needs to be encouraged. Most of all, it needs to be incentivized at the treaty-making stage, in

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CONCERNS, *supra* note 39, at 213; SUZY H. NIKIEMA, L'EXPROPRIATION INDIRECTE EN DROIT INTERNATIONAL DES INVESTISSEMENTS 13-42 (2012).

122. *SADC Model BIT*, *supra* note 61, at art. 6.

123. *See* F. SEATZU, *La Nozione di "Investimento Internazionale" nella Convenzione di Washington del 1965 sulla Soluzione delle Controversie tra Stati e Nazionali di altri Stati alla Luce di una Recente Giurisprudenza Arbitrale*, *in* STUDI IN ONORE DI CARMINE PUNZI vol. II, 1393 (2008); Paolo Vargiu, *Beyond Hallmarks and Formal Requirements: a "Jurisprudence Constante" on the Notion of Investment in the ICSID Convention*, 10 J. WORLD INVESTMENT & TRADE 753 (2009); Julian D. Mortenson, *The Meaning of 'Investment': ICSID's Travaux and the Domain of International Investment Law*, 51 HARV. INT'L L.J. 257 (2010).

124. *See SADC Model BIT*, *supra* note 61, at art. 20-22.

125. *See infra* Sections II and III.

order to avoid "countermeasures" in terms of protectionist domestic laws,[126] as it was the case with, e.g. Malawi's Investment Promotion Act,[127] the 1993 Mozambique's Law of Investment, or Zimbabwe's Investment Code.[128] Establishing enforceable obligations upon foreign investors responds to such a need to safely opening up a developing country's economy to foreign investment.

Unlike the SADC Model BIT, the Benin-Canada BIT looks, from an African-centered perspective, very much like a missed opportunity. The positive aspect of this treaty lies in the fact that African countries are beginning to consent to treaties that allow for further scrutiny on investments in their territory, and that allow them to exercise some degree of control on matters that affect issues such as public health, labor standards and the environment. However, the significance of this development is largely undermined by the fact that the Benin-Canada BIT is based on the Canadian Model BIT – namely, a model drafted by, and based on reasons of protection of investors coming from, a Western, developed country. From a general reading of the Canadian Model BIT – or, similarly, the U.S. Model BIT – it can be clearly inferred that these models represent efforts made by developed States to face a situation in which they may find themselves, depending on the circumstances, on either side of the investor-State relationship. Nonetheless, they follow the traditional understanding of international investment law, and their innovative aspects mostly lie on the fact that the obligations of the host State – and the limitations to such obligations – are defined in much more detail than they were in BITs drafted prior to 2004. There are no enforceable obligations upon investors; no innovations on standards of treatment or rules on expropriation; and the schedules on reservations show that Canada has already identified those specific sectors that they consider strategic for their local businesses and will act accordingly, while Benin's reservations look more general and capable of creating controversies that could likely lead to arbitral disputes with the State as the respondent. Those few and general reservations are also unlikely to be at the basis of any contribution to the development of international investment law from Benin. Indeed, one must always keep in mind that the Benin-Canada BIT is not an African BIT, but merely a new-generation Western BIT signed by an African country.

IV. FINAL REMARKS

Southern and Western African countries have experimented with different approaches to protecting and enhancing foreign direct investment. In its early stages, post-colonial African countries were overall unfavourable to foreign investors regardless of whether they provided them with high degrees of protection. Curiously enough, nevertheless, this negative attitude did not hinder these countries from entering into a number of BITs, the number of which reached its peak in the

126. Please note that the term "countermeasures" here is used in its common (*i.e.* non-legal) connotation.

127. International Centre For Settlement of Investment Disputes, *Investment Laws of The World,* binder V, MALAWI Jun. 1993 (2014).

128. *Id*. at binder X, ZIMBABWE Jun. 1990.

1990s. The SADC Model BIT and the Benin-Canada BIT, each in its own way, aim to reverse that traditional approach by creating an investor-friendly environment. Unlike the Benin-Canada BIT that is based on the Canadian Model BIT – namely, a model drafted by, and grounded on reasons of protection of investors coming from a Western, developed country, the SADC Model BIT could represent a meaningful step towards regional integration by enhancing investment and economic cooperation among the States of the Southern African Development Community. In order to achieve that ambitious aim, nevertheless, the SADC member States should consider that leaving the above named protectionist approach has to be incentivized at the treaty-making stage. By doing so, the SADC member state may avoid "countermeasures" in terms of protectionist domestic laws, as was the case with, e.g., Malawi's Investment Promotion Act, the 1993 Mozambique's Law of Investment, or Zimbabwe's Investment Code.

What could then be the SADC Model BIT's main contributions to international investment law and policy? Possible drawbacks notwithstanding, at least four such distinct contributions can be easily spotted. First, and most relevantly, the SADC Model BIT has in several manners introduced new layers within the notions of FDIs and economic growth as synergic rather than contentious obligations under law of powerful and weak communities, prosperous and impoverished States. Second, it encloses the non-ambiguous acceptance by the SADC member States and their commitment to a rule-founded accountability for the promotion of good governance and economic growth as key components of the development process, thereby enhancing the likely distillation of these rules as general international law. Third, by committing SADC member States to a pro-active participation in the wide-ranging use of FDIs, the SADC Model BIT further legitimizes concepts that, as recently as the last decade, were roundly considered as conflicting both the notion of State sovereignty and the interest of developing countries. And lastly, although no less importantly, in uttering these as various other propositions as statements of responsibilities and rights, rather than simply as political goals or undertakings, the SADC Model BIT is fully engaged as a challenging tool in the process of the further development of international investment law. Indeed, the SADC Model BIT represents an African-made comprehensive stance that vigorously endorses the involvement of the SADC's elites in the contemporary perception of the international law on foreign investment as made by functional webs of cooperation among players rather than by engagement to any paramount normative dogma. It remains to be seen whether these aims will eventually be achieved once the Model will be implemented by SADC with other States.

Looking at the Benin-Canada BIT from the same perspective, we feel it is worth remarking that this BIT looks like a wasted chance. The encouraging features of this treaty are mostly due to the approach taken by Benin in that more attention is given to the type of investments that are allowed in the territory, and the fact that the host State retains, to a certain extent, a power of control on matters that affect issues such as public health, labor standards and the environment. Nevertheless, these features are significantly weakened by the fact that, ultimately, the Benin-Canada BIT remains a treaty based on a model drafted by a Western developed country, with all that ensues from this in terms of investment protection.

In a way, our inquiry on African contributions to international investment law leads to a number of answers with regard to how African countries are trying to establish their presence and role in the investment law scenario, but also leads to a question that will only be answered by time, experience and State practice: will efforts like those of the COMESA and the SADC lead to a development of investment law towards giving more attention to the needs of African developing countries, or will these efforts bump into the wall of traditional, Western investment law models?