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**Final Paper**

# WHAT AM I SIGNING?

## *Discipline and Effects of Bilateral and Regional Investment Treaties in Sub-Saharan Africa*

### *INTRODUCTION*

As the title suggests, the objective of this paper is to give a basic insight of what Bilateral or Multilateral Investment Treaties are, why do countries sign them and what are the consequences that they have on the States' traditional prerogatives of regulating and adjudicating in their own territory.

The first part of the paper will try to challenge the reason that is most commonly used to push countries towards the conclusion and ratification of an investment protection agreement: the entry into force of a BITs will attract foreign direct investment and these will help the country grow and develop. By crossing data from the United Nations Conference on Trade and Development and from the World Bank a different view will be presented: there is no manifest direct relationship between increasing the number of BITs signed by a country and the volume of FDI attracted and, furthermore, attracting more FDI does not necessarily increase the rate of a country's growth in terms of GDP and of GNI *per capita*.

Following this assessment, the paper will proceed by analyzing the standard features and protections frequently included in BITs by using a sample of three BITs signed between African and capital exporting countries and one multilateral infra-African investment agreement. The analysis will include the definition of investment given by the treaties, the substantive protections granted to the investor and their evolution under international law and the dispute settlement system that, often, allows investors to bypass national Courts and sue the State for a violation of the BIT directly in front of an international arbitral Tribunal.

## *The Relationship Between BITs FDI and Growth*

Official Development Assistance directed towards Sub-Saharan Africa have been progressively decreasing in the last decade. If in 1998 the aid flow that was devoted to the region was totaling some $ 187 billion, in 2001 the amount was down to 110 billion[1]. The downward tendency has thenceforth continued and ODA has reached a mere 42

1 Asiedu, E., *Foreign Direct Investment in Africa: The Role of Natural Resources, Market Size, Government Policy, Institutions and Political Instability*, The World Economy Vol. 29, 2006, p. 64.

billion in 2009[2].

As the NEPAD plan called for[3], the capital void caused by the reduction in ODA flows has been somehow filled in by an overall significant increase in Foreign Direct Investment. According to the 2012 World Investment Report Issued by the United Nations Conference on Trade and Development (UNCTAD), since 2006 the inbound flows of FDI received from Africa has increased by 16%: from $ 36,783 millions to 42,652. What is more striking about this tendency, however, is how the increase in FDI is distributed inside the African continent. In 2006, in fact, the North Africa region accounted inbound flows for $ 23,194 millions constituting 63% of the whole total, leaving the rest of the continent with only 13,589 millions representing the 43%. Five years after, in 2011, the situation is completely overturned: Northern Africa has seen its her inbound FDI drop to as low as $ 7,886 millions (18% of the African total), while the other part of the continent received a significant bump attracting the 82% of all the investment for a figure equal to $ 34,966 millions[4].

Although the internal continental distribution of investment surely resents of the 2010 wave of revolutions and protest that characterized the North Eastern part of Africa also known as the *Arab Spring*, a fact remains certain: between 2006 and 2011 Western, Central and Southern Africa combined have experienced a staggering 157% increase in the FDI flow.

2 AA.VV., *Towards Human Resilience: Sustaining MDG Progress in an Age of Economic Uncertainty*, United Nations Development Programme, Bureau for Development Policy, 2011, p. 153.

3 Asiedu, E., *Foreign Direct Investment in Africa: The Role of Natural Resources, Market Size, Government Policy, Institutions and Political Instability*, cit. p. 64.

4 United Nations Conference on Trade and Development, *World Investment Report 2012*, Annex I, United Nations Publications, 2012, pp. 169-170, available at http://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf

This swift change in response from foreign investors towards Sub-Saharan countries can induce two orders of considerations:

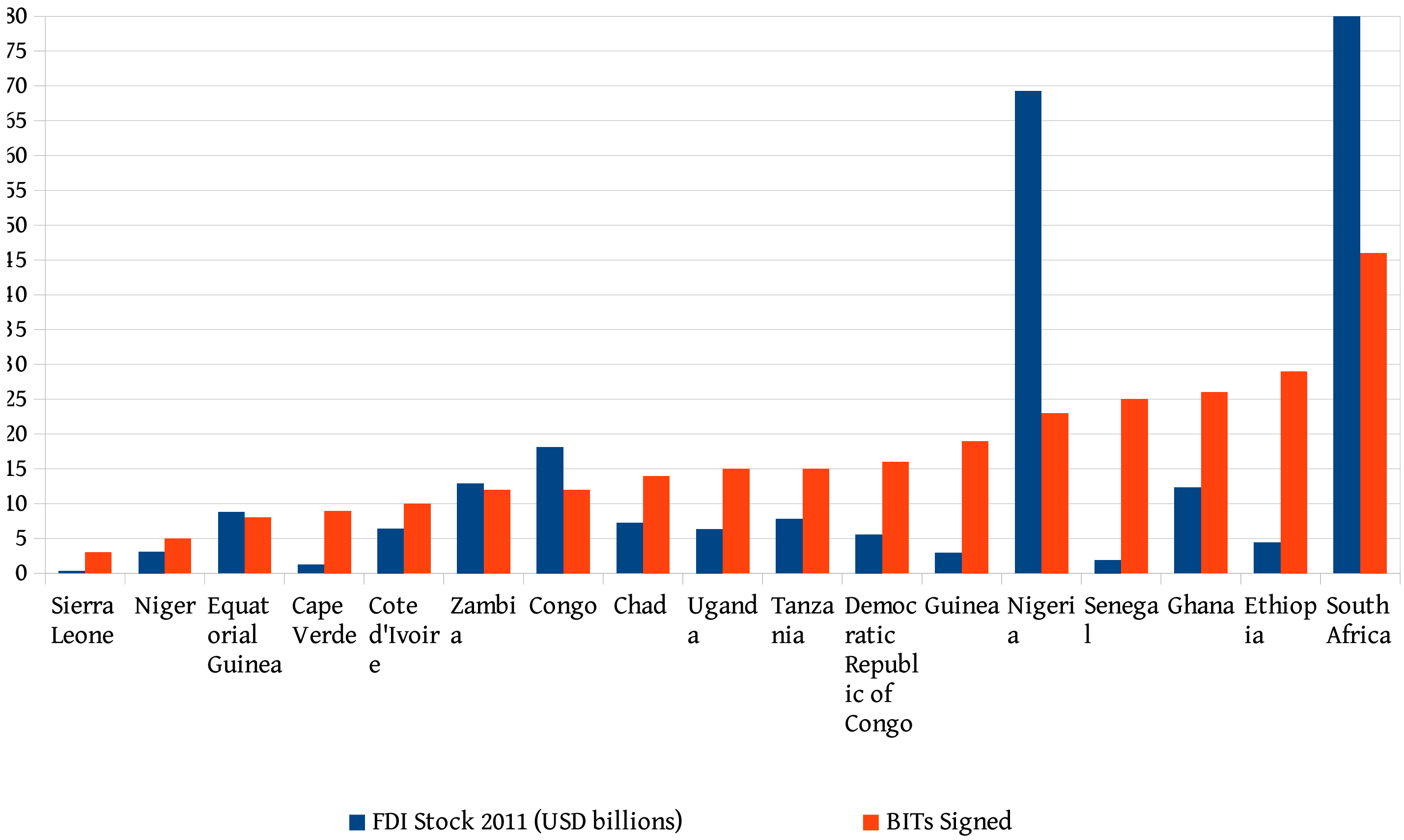
1. how has the conclusion of BITs influenced the FDI flow towards Africa.
2. how such increase in foreign investment has played in regards to African countries' growth.

The chart in *Figure 1* confronts the number of Bilateral Investment Treaties signed by several African countries with the stock value of the FDI received by that country as to 2011[5]. The choice of taking the stock value, rather than the flow value is motivated by the fact that, although the greatest part of BITs have been signed after 1990 and the fall of Communism, the practice originated in 1959 and some African countries like Guinea, have BITs from as early as the 1960s. The stock value sums the value of foreign investment year after year and, therefore, the 2011 number can speak to the effect of BIT signing throughout the whole 50 years of existence of the regime.

At the same time it is worth remembering that many of the BITs signed by the African countries have yet to come into force.

5 Data from the UNCTAD *World Investment Report 2012* cit. and from the UNCTAD database on Bilateral Investment Treaties available at http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20%28IIA%29/Country-specific-Lists-of-BITs.aspx

*Figure 1*




Unexpectedly, the gathered data data does not seem to suggest any particular relationship between the number of BITs signed and the volume of foreign capital attracted. Having signed 29 and 25 BITs each does not seem to have helped Ethiopia and Senegal gaining a greater number of investments, on the other hand, the countries that receive the greatest part of the investments: South Africa (by large), Nigeria, Congo, Ghana and Zambia are the countries with the greatest quantity of natural and mining resources of the lot. Those countries have traditionally been the object of the interests of mining and drilling companies from all over the world far before the signature of any treaty and an argument could be made that they would likely have received foreign investments even without having signed any treaty.

The fact that offering greater protection to investors by undertaking international obligations expressly aimed towards that goal does not in fact appear to stimulate additional investments, seems to be partially inconsistent with Asiedu's view on how African countries should "*streamline their investment framework*" in order to attract FDI[6].

It is furthermore worth noticing that, although the surveys included in Asiedu's research indicated corruption (alongside with FDI regulatory framework) as a major restraining factor in the reception of FDI by African countries[7], and Nigeria, in particular, was singled out as the most corrupted country in the analyzed sample[8], *Figure 2* shows that the Western African country had an 82% increase in FDI flows between 2006 and 2011.

*Figures 2* and *3* draw the landscape of the tendency in the attraction of FDI between 2006 (the year of publication of Asiedu's research) and 2011. The object of the charts is to show which relationship ties the reception of FDI flows with two standard growth

6 Asiedu, E., *Foreign Direct Investment in Africa: The Role of Natural Resources, Market Size, Government Policy, Institutions and Political Instability*, cit., p. 66.

7 *Ivi*, p. 67.

8 *Ivi,* p. 70.

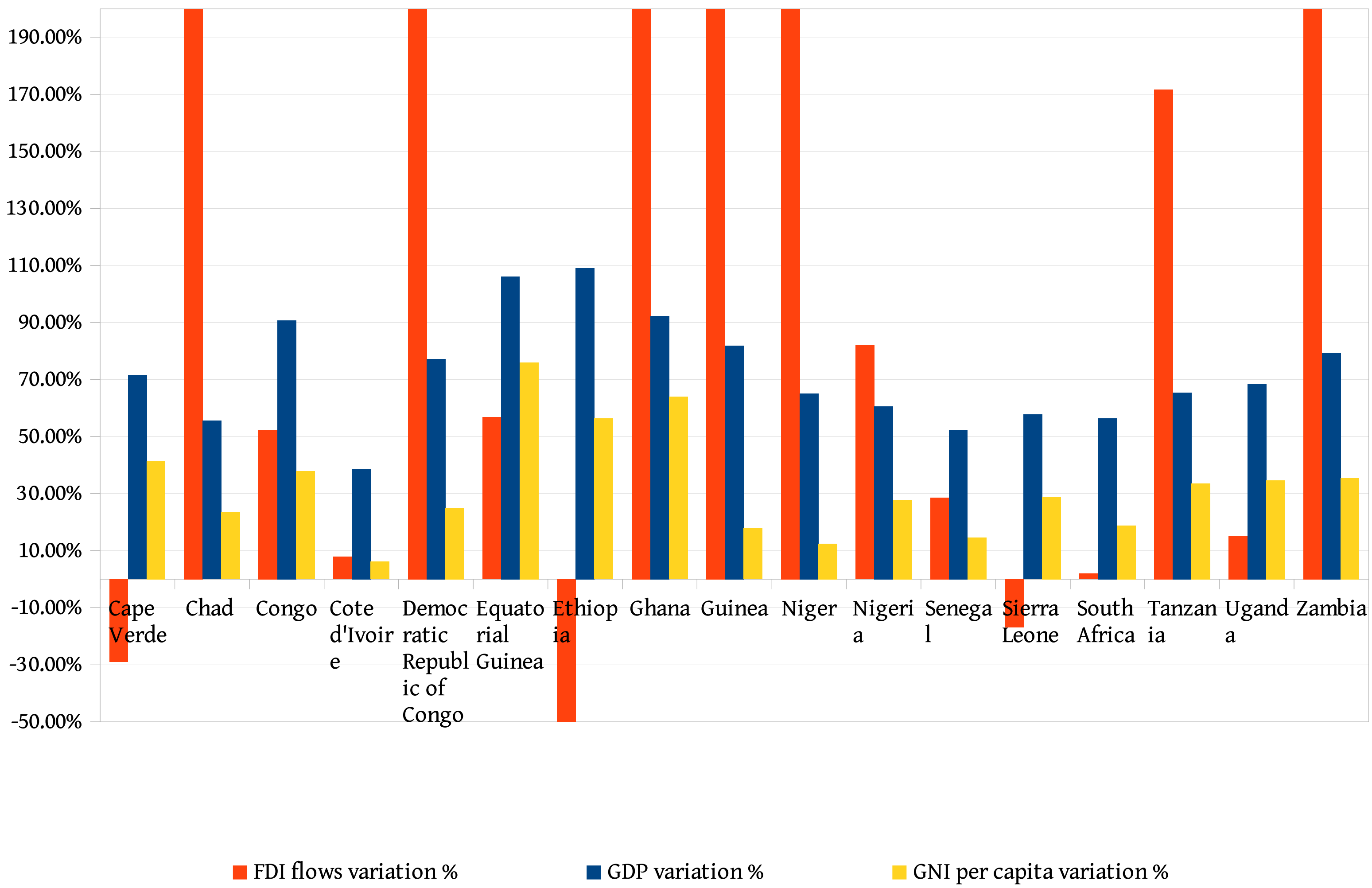
indicators: GDP and GNI *per capita*. The sources of the data considered are, once again, the 2012 World Investment Report issued by the United Nations Conference on Trade and Development[9] for what concerns the FDI flows and the World Bank database[10] for the changes in GDP and GNI *pro capita*.

*Figure 2*

| | FDI inflows 2006 | FDI inflows 2011 | FDI flows variation % | GDP 2006 | GDP 2011 | GDP variation % | GNI per capita 2006 | GNI per capita 2011 | GNI per capita variation % |
|---|---|---|---|---|---|---|---|---|---|
| Cape Verde | 131 | 93 | -29.01% | 1108 | 1901 | 71.57% | 2830 | 4000 | 41.34% |
| Chad | 279 | 1940 | 595.34% | 6099 | 9486 | 55.53% | 1110 | 1370 | 23.42% |
| Congo | 1925 | 2931 | 52.26% | 7731 | 14748 | 90.76% | 2380 | 3280 | 37.82% |
| Cote d'Ivoire | 319 | 344 | 7.84% | 17367 | 24075 | 38.62% | 1630 | 1730 | 6.13% |
| Democratic Rep. of Congo | 256 | 1687 | 558.98% | 8824 | 15642 | 77.27% | 280 | 350 | 25.00% |
| Equatorial Guinea | 470 | 737 | 56.81% | 9603 | 19790 | 106.08% | 13700 | 24110 | 75.99% |
| Ethiopia | 545 | 206 | -62.20% | 15164 | 31709 | 109.11% | 710 | 1110 | 56.34% |
| Ghana | 636 | 3222 | 406.60% | 20388 | 39200 | 92.27% | 1110 | 1820 | 63.96% |
| Guinea | 125 | 1211 | 868.80% | 2821 | 5131 | 81.89% | 890 | 1050 | 17.98% |
| Niger | 51 | 1014 | 1888.24% | 3645 | 6017 | 65.08% | 640 | 720 | 12.50% |
| Nigeria | 4898 | 8915 | 82.01% | 146867 | 235923 | 60.64% | 1800 | 2300 | 27.78% |
| Senegal | 220 | 283 | 28.64% | 9378 | 14291 | 52.39% | 1710 | 1960 | 14.62% |
| Sierra Leone | 59 | 49 | -16.95% | 1422 | 2243 | 57.74% | 660 | 850 | 28.79% |
| South Africa | 5695 | 5807 | 1.97% | 261007 | 408237 | 56.41% | 9080 | 10790 | 18.83% |
| Tanzania | 403 | 1095 | 171.71% | 14331 | 23705 | 65.41% | 1130 | 1510 | 33.63% |
| Uganda | 644 | 742 | 15.22% | 9977 | 16810 | 68.49% | 980 | 1320 | 34.69% |
| Zambia | 616 | 1982 | 221.75% | 10702 | 19206 | 79.46% | 1100 | 1490 | 35.45% |

9 UNCTAD *World Investment Report 2012* cit.
10 World dataBank available at: http://databank.worldbank.org/ddp/home.do

*Figure 3*




As for *Figure 1* the data does not seem to confirm the underlying assumption that a significant relationship exists between the FDI flows and the other parameters. If on one hand, indeed, an increase in GDP is mirrored by an increase in GNI *per capita*, and it hardly could be different, on the other, the height of the columns reflecting the variations in FDI and in GDP seem to have no coherence. The 30% drop in Cape Verde FDI inbound flows form 2006 to 2011, did not prevent the country to see its GDP increase by a rate of over 70% in the same period. Even more striking is the case of Ethiopia whose FDI flow fell down by over 60% in 5 years time, but that contemporaneously enjoyed a record 109% GDP growth. At the same time, vertiginous rises in FDI inbound flows, although generally accompanied by a general growth, did not necessarily reflect as generously on GDP and GNI *per capita* rates. It is the case, for example, of Chad, The Democratic Republic of Congo and Niger. All these countries have registered impressive increases in FDI flows, in particular Niger sets a record with an unbelievable +1,888% in only five years, but their growth in GDP was all considered modest. Niger and Chad, in particular, grew less than the sample average with respectively a 65% and a 55% of GDP increase compared to an average of 72%.

This results necessarily leave with a question on whether the hype on the relationship between FDI and growth is justified, at least from the point of view of less developed countries. While it might be the case that FDI contribute up to a certain amount to the growth of LDCs, after all all the countries that showed an increase in FDI showed an increase in GDP and GNI *per capita* as well, the data does not seem to tie foreign investment with improvements in the overall national productivity so tightly as one would have though or might have been brought to think.

Similarly it is interesting enough also acknowledging that there is no clear dependence, or at least not as clear as one would expected, between how many investment protection treaties a country signs and how many FDI she would receive. Other factors seems in play, mainly the existence in the territory of natural resources to be exploited.

Those intricate relationships, evidently, cannot be explained with a simple mathematical approach that compares treaties signed, flows received and gained growth, further research is therefore needed in order to establish a clearer path towards development for countries from Sub-Saharan Africa.

As mentioned in the Introduction, the purpose of this paper is not exhausted by showing the relevance (or not) of these difficult connections. On the contrary, once established that there is no sure equal sign between BITs and FDI attraction (let alone the fact that it is not clear how much FDI are effective in promoting LDCs development), it is of the foremost importance to consider what Bilateral Investment Treaties comport for the signatory states and how much of their sovereignty they relinquish in order to comply with the treaties' provisions.

## *INTERNATIONAL INVESTMENT PROTECTION AGREEMENTS*

Worldwide, international investment regulation is achieved for the greatest part trough bilateral agreements. At the end of 2011, the world accounted for 3164 International Investment Agreements, which included 2833 BITs and 331 other forms of agreements, mainly multilateral[11]. Of the 196 independent countries of the world (including Taiwan and excluding Palestine) 181 have signed at least one BIT[12]. African countries are parties

11 cfr. UNCTAD, *World Investment Report 2012*, cit. p. 84.

12 cfr. UNCTAD country-specific list of bilateral investment treaties, available at

to at least 335 BITs with other developing countries (many of them also African countries) and in 2008 Africa accounted for 27% of the world's BITs[13]. In addition to this already broad diffusion of bilateral instruments, the most recent tendency has seen an expansion also in the conclusion of multilateral investment agreements, either as autonomous treaties, or as part of broader regional trade agreements such as NAFTA, CAFTA, CEFTA, AESEAN and, more specifically in the African continent, COMESA and SADC[14].

The first modern BIT was signed in 1959 between Germany and Pakistan, but it was only after the fall of the Berlin Wall and its symbolic representation of a viable alternative to the capitalist system, that the greatest part of the world embraced the idea of the free market and the free circulation of capital[15].

The original idea behind Bilateral Investment Treaties was to protect the economic interest of citizens of capital exporting countries after the establishment of an investment in another country. Before BITs gained popularity, companies that wanted to start a greenfield project in another country or that acquired an existing business through a cross-border M&A, had to rely on private contracts signed with the host states and on the country's willingness to honor such agreements. In the event the state party breached the contract with the investor, the latter had to resort to the national remedies

http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20%28IIA%29/Country-specific-Lists-of-BITs.aspx

13 cfr. UNCTAD *Economic Development in Africa Report 2010: South – South Cooperation: Africa and the New Forms of Development Partnership*, pp. 91-92, available at http://unctad.org/en/Docs/aldcafrica2010_en.pdf

14 UNCTAD, *World Investment Report 2012*, cit.

15 Alvarez, J., *The Public International Law Regime Governing International Investment*, 344 Recueil des Cours 193, 2009, p. 283.

offered by the host state represented in the greatest part of the cases by local courts, and, if those means had proved unsuccessful, the investor could ask protection from its own state according to the rules of state's responsibility for injuries to aliens[16]. The endorsement by a state of the interests of a national that has been damaged in a foreign country, is a remedy that has been entrenched in customary international law since at least the beginning of the XX century and it could hardly be defined better than by the words he Permanent Court of International Justice:

*"It is an elementary principle in the domain of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in person of its subjects, respect for the rules of international law.[17]"*

Diplomatic espousal, however, presented some peculiar aspects that did not satisfy the countries that were looking for a modern and more effective way to protect the interest of their investors abroad. First of all, diplomatic protection required exhaustion of local remedies. As it is well specified in the PCIJ decision, in fact, it is only after a subject "*had been unable to obtain satisfaction trough ordinary remedies*" that the home state was entitled to take action. Furthermore, the home state had full discretion on whether to

16 *Ivi.* p. 203.
17 *Mavrommatis Palestine Concessions*, P.C.I.J., Ser. A, No. 2, 1924.

espouse the claim and on whether to transfer the whole or a part of the compensation (if any was awarded) to the injured national on behalf of which the claim was brought. Thirdly, certain countries like the United States were growing weary of the instrument of diplomatic espousal since they considered that it "politicized" too much the dispute and resulted in an excessive influence of the state in private matters[18].

Capital exporting states needed to find an instrument that allowed their nationals that brought their business abroad to do so without taking the risk of seeing their investments stripped out of their value at hand of the host country. BITs were therefore shaped in order to address the issue of providing such protection without having to resort to political endorsement of the claim by the home state.

### *BITS AND THEIR CONTENT*

Although every BIT has a particular set of dispositions and a particular language, several elements are shared between the majority of investment protection instruments. A fundamental feature common to all the BITs and that sets them apart from the traditional model of international treaties in a way similar to international human rights treaties, is the fact that they are international agreements between States that affirm and promote the rights of a third party. In order to grant the beneficiaries effective protection from the action of the states parties, BITs provide investors with a dispute settlement system that allows them to bring claims against the States for

18 Vandevelde, K., J., *Of Politics and Markets: The Shifting Ideology of the BITs*, It International Tax & Business Lawyer 159, 1993, pp. 160-161.

breaches of treaty obligations without the need of diplomatic espousal.

Features that are commonly found in investment agreements include:

- the definition of investment
- a set of substantial protections for the investor
- dispute settlement system

Each one of these aspects will be analyzed further on in this paper and special attention will be given to the forms that these elements have taken in agreements involving African countries. In particular it will be addressed the content of the Zimbabwe – Netherlands and the United Kingdom – Tanzania BITs, for they are agreements that have based relevant awards from an international dispute settlement system[19]; the investment chapter included in the COMESA treaty as an example of regulation between African countries[20]; the China – Botswana BIT due to the recent dramatic increase in the relationship between African countries and China. As the Chinese premier Wen Jiabao put it, in fact, "*The value of china's trade with Africa grew from USD 10 million in the 80's to 55 USD billion in 2006 and more than 100 billion in 2009*[21]".

### *Definition of Investment*

The definition of investment is usually included in the first provision of the agreement

19 Namely: *Biwater Gauff (Tanzania) Ltd.* v. *United Republic of Tanzania*, ICSID Case No. ARB/05/22 2008; *Bernardus Henricus Funnekotter and others* v. *Republic of Zimbabwe*, ICSID Case No. ARB/05/6, 2009

20 Countries members of COMESA: Burundi, Comoros, Democratic Republic of Congo, Djibuti, Egypt, Eritrea, Ethipia, Kenya, Libya, Seychelles, Madagascar, Malawi, Mauritius, Rwanda, Sudan, Swaziland, Uganda, Zambia, Zimbabwe.

21 Quote from Chinese Premier Wen Jiabao's speech at the 4th Ministerial Conference of Forum on China – Africa Cooperation, in Kidane, W. *China-Africa Dispute Settlement The law, Economics and Culture of Arbitration*, Kluwer Law International, 2012, p. 4.

and it is of foremost importance as it sets the boundaries of the application of the treaty. The protection standards granted in the successive clauses of the treaties apply only to those economic relationships that are comprised in the definitions, therefore the broader the definition, the larger the potential renounce from the state parties to their sovereign right to regulate.

In all four sources the definition of investment includes:

- all kind of property movable and immovable as well as mortgages, liens or pledges;
- shares, stocks and other financial instruments of participation in a company;
- claims to money or any performance having an economical value and deriving from a contract;
- intellectual and industrial property rights, goodwill, know-how and technical processes.

Despite the similarities, however, two blocks can be identified which have slightly different characteristics. In all three BITs, article 1 includes under the protected assets also all the rights and concessions related to cultivation, extraction and exploitation of natural resources[22]. COMESA art. 159 (2), on the other hand, nothing says about natural resources, but expressly considers investments loans as well as bonds and other

22 As an example: Zimbabwe – Netherlands BIT (available at http://unctad.org/sections/dite/iia/docs/bits/netherlands_zimbabwe.pdf):
Article 1
For the purposes of the present Agreement:
(1) the term "investments" shall comprise every kind of asset and more particularly, though not exclusively:
(a) movable and immovable property as well as any other rights in rem in respect of every kind of asset;
(b) rights derived from shares, bonds and other kinds of interests in companies and joint ventures;
(c) title to money and other assets and to any performance having an economic value;
(d) copyrights, industrial property rights, technical processes, trade marks, tradenames, know-how and goodwill;
(e) rights granted under public law, including rights to prospect, explore, extract and win natural resources.

financial instruments issued by the government or other public authority or international organization[23].

It can be appreciated how broad the definition of investment is in all the instruments, if combined, the two groups are likely to include the greatest part of economic initiatives that a foreign national (but also a national for what it matters) could consider of pursuing. It is also worth observing how an inter-African treaty such as COMESA, mirrors almost perfectly the content of the definition included in the other agreements. This accounts for a consideration that broad protection of foreign investments might not be exclusively a feature present in North-South relationships, but also in South-South.

*PROTECTIONS*

The protection section is the core of investment agreements, it generally includes all the guarantees that a contracting state must accord to foreign investors for the activities that fall under the definition of which at the previous section.

The safeguards that traditionally have been included in similar treaties are:

23 COMESA Treaty (available at http://www.comesa.int/attachments/article/28/COMESA_Treaty.pdf):
Article 159 (2)
For the purposes of investment protection, the following activities shall be considered as investment:
(a) movable and immovable property and other property rights such as mortgages, loans and pledges;
(b) shares and any other rights of participation in the management or economic results of a company or a firm, whether incorporated or not, including minority shares, corporate rights and any other kind of shareholding;
(c) stocks, bonds, debentures, guarantees or other financial instruments of a company or a firm, government or other public authority or international organisation;
(d) claims to money, goods, services or other performance having economic value;
(e) intellectual and industrial property rights, technical processes, know how, goodwill and other benefits or advantages associated with a business; and
(f) such other activities that may be declared by the Council as investments.

- fair and equitable treatment;
- full protection and security;
- national treatment;
- most favored nation clause;
- protection against expropriation.

Almost every one of the above standards has been included in the treaties here under consideration, but every treaty has employed a different language for defining the limits of each safeguard. Furthermore, all the guarantees have undergone extensive interpretation by international arbitration bodies and, although the basic rule applying to investor state arbitration requires that each award deploys effects only between the parties and exclusively regarding the object of that particular dispute[24], it is an established practice among arbitrators to cite previous decisions and apply rationales used in the past. This, it may very well be objected, does not seem immediately consistent with the sources of international law as listed in art. 38 (1) of the Statute of the International Court of Justice[25], nor with art. 59 of that assigns to the Court

24 Cfr. Art. 53 (1) of the International Center for Settlement of Investment Disputes Convention, Regulation and Rules states that:
Article 53
(1) The award shall be binding on the parties and shall not be subject
to any appeal or to any other remedy except those provided for in
this Convention. Each party shall abide by and comply with the terms
of the award except to the extent that enforcement shall have been
stayed pursuant to the relevant provisions of this Convention.

25 Full text:
Article 38
1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations

decisions binding force only among the parties of the dispute. An argument can be made, nonetheless, that the interpretations chosen by panels in previous arbitrations, are to be considered as a subsidiary mean to interpret the rules of international law that are themselves indicated as instruments of treaty interpretation by art. 31 (3) (c) of the Vienna Convention on the Law of Treaties[26]. Given that the VCLT purports itself as the codification of customary international norms on the laws of treaties and is, therefore, binding for all states, it is reasonable to accept that the meaning given to a clause in one arbitral award may be utilized in a successive one with different parties. Moreover, as mentioned above, the habit of forming a *jurisprudence constante* is well entrenched into international arbitrators[27], that would rather look at previous judicial decisions rather than actual state practice and *opinio juris* when trying to establish the content of customary international law[28]. It would be therefore an empty task to look at the mere provisions included in the BITs without referring to how those rules have been built in

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d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

26 Full text:

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

the practice of the Tribunals.

With this in mind and without any claim of exhaustiveness, follows *infra* a brief description of each one of the mentioned protection.

*Fair and Equitable Treatment*

The first protection standard is the most difficult to define and at the same time the one which investors call upon and Tribunals rely on more often[29]. Curiously enough, is also a clause that appears in all the treaties here under examination and in none of them there is any qualification element that would help to better understand the intent of the Parties in regard to its meaning. For this reason, is paramount to reach for the instruments of international law and to judicial interpretation in order to understand what the content of fair and equitable treatment is.

The clause according fair and equitable treatment (FET) has been interpreted as widely as requiring a state to:

"*provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know before-hand any an all the rules and regulations that will govern its*

27 Alvarez, J., *The Public International Law Regime Governing International Investment*, cit., pp. 355-356.

28 See generally the Tribunal arguments on applicable law in *Metalclad Corp.* v. *Mexixo*, ICSID Case No. ARB(AF)/97/1, 2001; *Pope & Talbot* v. *Canada*, NAFTA Chap. 11 Arb. Trib., 2001; *CMS Gas Transmission Co.* v. *Argentine Republic*, ICSID Case No. ARB/01/8, 2005; *Waste Management, Inc.* v. *United Mexican States*, ICSID Case No. ARB(AF)/00/3, 2004.

29 Dolzer, R., and Schreuer, C., *Principles of International Investment Law*, Oxford University Press, 2008, p. 119.

*investments, as well as the goals of the relevant policies and administrative practice or directives, to be able to plan its investment and comply with such regulations [...] The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the state that were relied upon by the investor to assume its commitment as well as to plan and launch its commercial business and activity*[30]".

Including therefore not only an obligation for the State to disclose the characteristics of the regulatory environment in which the investment would be set (which is likely a necessary condition in order to receive a foreign investment), but also an obligation to maintain such environment by acting in a consistent way without promoting further regulations that would frustrate the investor's expectations. By the means of this interpretation, the FET clause would act as a stabilizer of the domestic legislation affecting the investment. A change in the legal context, in fact, would trigger the State responsibility under the treaty exposing her to the consequences prescribed in the dispute settlement provisions.

At the other end of the spectrum of the possible meanings of the FET clause, can be found the interpretation given by the NAFTA Free Trade Commission in 2001. In this joint statement, the three States parties of the NAFTA treaty declared that fair and equitable treatment and full protection and security clauses do not require additional protection beyond what is prescribed by international customary law with regard to minimum standard of treatment of aliens[31]. Although the Commission's interpretation

30 *TECMED* v. *United Mexican States*, ICSID Case No. ARB/AF/00/2, 2003, para. 154.
31 NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*, 2001, available at:

is binding only and for the Tribunals adjudicating investor-state disputes between the parties of the NAFTA under its Chapter 11[32], it is important to keep it in mind, as it can extend its range of application to other systems by the means of *jurisprudence constante* as mentioned above.

The meaning of interpretation issued by the NAFTA Commission, however, it is far from clear as it just transfers the issue from defining FET to defining international minimum standard of treatment. There is, in fact, lack of consistency between a set of early decisions that required the institutions of a country to behave in an "*outrageous way, in bad faith, in wilful neglect of their duties, or in a pronounced degree of improper action*[33]" in order to incur in a violation of the international minimum standard and more recent ones that seemed to have lowered the bar, in particular for what concerns the violation of international minimum standard for denial of justice[34]. In the *Neer* and *Chattin* cases it was necessary that the State conducted itself in bad faith or wilful neglect of its duties, showing therefore intent in treating the alien with a lower standard than what is internationally acceptable and obtaining an outrageous outcome as a consequence of such behavior. In *Mondev* and *Loewen*, on the other hand, the Tribunals pronounced themselves differently requiring only that the result of a judicial proceeding is manifestly unjust, without the need of discriminatory intent from the side of the State.

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http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en&view=d

32 Cfr. NAFTA art. 1131 (2).

33 Cfr. *L. F. H. Neer and Pauline Neer (U.S.A.)* v. *United Mexican States*, Recueil des Sentences Arbitrales Vol. IV, pp. 60-66.para. 5 and *B. E. Chattin (United States.)* v. *United Mexican States*, Recueil des Sentences Arbitrales Vol. IV, pp. 238-312. para. 10.

34 *Mondev International Ltd* v *United States of America* ICSID Case No. ARB (AF)/99/2, 2002; *Loewen Group, Inc. and Raymond L. Loewen* v. *United States of America*, ICSID Case No. ARB(AF)/98/3, 2003.

In particular, in a *dicta* the Loewen Tribunal affirmed that:

"*Neither State practice, the decision of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice. Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough*"[35].

The sense and the importance of the *dicta* in *Loewen* is all contained in the association between due process and international minimum standard of treatment. If a judicial system does not provide due process to the aliens that seek remedies in the national courts for violation of their rights, that judicial system would be accountable under international law for violation of minimum standard of treatment. Going back to the analysis of the BITs involving African countries, it can be observed that whatever interpretation of FET is chosen, it provokes a great deal of consequence in the regards of the State's prerogatives to issue legislation or adjudicate controversies. Even accepting the *Loewen* interpretation of FET, surely more strict if compared to the one given by the *TECMED* Tribunal, would allow investors to bring claims in front of international arbitral bodies (if this is the dispute settlement provided by the BIT) to review the decision of the local courts for possible violations of minimum standard of treatment, *de facto* constituting an additional appellate body. The consequences of such an instrument on the chances of obtaining effective relief for those who bring claims

35 *Loewen Group, Inc. and Raymond L. Loewen* v. *United States of America*, cit. para. 132.

against foreign investors could be devastating. After going trough the whole extent of domestic appeals in order to get an award, a claimant would have to wait also for the result of the international arbitration (which allows also for a further annulment proceeding) before receiving any compensation. Moreover, the arbitration proceeding allows the participation only of the investor and of the state, bu not of the original claimant that, therefore, could face the turning down of the sentence in her favor without even having a chance to formulate her defenses.

*Full protection and security*

Although the full protection and security clause is often seen together with fair and equitable treatment, this is not always the case. In the sample investment treaties here under consideration, for example, a full protection and security clause is included in all texts but for Chapter 26 of the COMESA treaty.

As reported during the analysis of fair and equitable treatment, the NAFTA Free Trade Commission has united the two safeguards in one, corresponding to the international minimum standard of treatment of aliens. In that occasion it was specified that neither FET nor full protection and security clauses require additional guarantees other than international minimum standard. Other decisions have constructed the full protection and security clause differently, giving her the meaning of protection from a physical harm or injury. In the *Saluka* v. *Czech Republic* case, the Tribunal stated that full protection and security is targeted towards situations in which "*the foreign investment* *has been affected by civil strife and physical violence*[36]" and that its goal is to "*protect more specifically the physical integrity of an investment against interference by use of force*[37]".

Whether the provision is maintained to have the same meaning as international minimum standard of treatment, or it is specifically considered as referring to physical threat, there does not seem to be an actual conflict of interpretations. It would seem odd to assert that a State grants a treatment consistent with international minimum standard (intended in its due process and protection of the law meaning), if it does not assure a law enforcement system such as the police or the military dedicated to the prevention and the prosecution of violent crimes.

*National Treatment and Most Favored Nation*

National treatment (NT) and most favored nation clauses (MFN) incarnate the essence of the principle of non-discrimination in regard of the nationality of the investor. Under their basic definitions, NT would comport the prohibition for the host State to award to its own investors (both companies and individuals) some sort of advantage over an alien investor, while MFN would prevent the State to award a better treatment to an investor from a third country. The practical consequences of these clauses are that if any other investor operating on the territory is receiving a treatment that can be considered more desirable than the one received by the hypothetical claimant, the latter shall be entitled

36 *Saluka Investments BV (The Netherlands)* v. *Czech Republic*, Partial Award, UNCITRAL Arbitration Rules, 2006. para. 483.

37 *Ivi*, para. 484.

to profit from said advantageous treatment as if it was directed to her as well.

The reach of those clauses varies from one treaty to another, a standard enunciation of the protections can be observed in art. 3 (2) of the Zimbabwe – Netherlands BIT:

"E*ach Contracting Party shall accord to such investments treatment which in any case shall not be less favorable than that accorded either to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the national concerned*".

When present in BITs or FTAs, national treatment and most favored nation clauses can be found either combined, like the Zimbabwe – Netherlands provision above, or separated in two distinct clauses, like in the China – Botswana BIT, but this does not seem to imply any difference in the actual protection. There are no NT and MFN clauses in the investment chapter of the COMESA treaty and, while the 3 BITs all include both NT and MFN, they provide also for relevant exceptions.

The Zimbabwe – Netherlands and the China – Botswana BITs share a common exception for measures taken by the host State as a consequence of its membership in customs union, economic unions, free trade zones and similar institutions. Art. 3 (3) of the Zimbabwe – Netherlands BIT limits such exception only to the MFN clause, while the China – Botswana BIT grants the exception both to MFN and national treatment. It would be interesting to see how a Tribunal would rule if assigned the task of determining whether a FET clause interpreted as protecting the investor's legitimate interests in a stable and predictable environment[38] allows the host State to join a free-trade agreement that requires advantageous treatments in favor of the investors of the other States members of the economical union. In other words, if a State that enters an economical union after the establishment of a foreign investment in its territory and that enacts measures in favor of the other members of the economical union (but not in favor of the investor) could be held responsible of violation of BIT. The matter is open to discussion and if the answer was to be positive, it would comport a significant additional burden on the host State.

The United Kingdom – Tanzania BIT, provides a very interesting exception to the national treatment clause that seems to go in the direction of preserving the regulatory and policy making power of the host State in promoting local production:

"*Temporary special incentives granted by one Contracting Party only to its nationals and companies in order to stimulate the creation of local industries are considered compatible with this Article provided they do not significantly affect the investment and activities of nationals and companies of the other Contracting Party in connection with an investment*[39]".

The language of this article suggests that, in order to favor the establishment and future growth of domestic industries, forms of incentives to local entrepreneurs similar to affirmative actions would not be considered as violations of the treaty. On a second look, however, it is clear that the force of the provision depends entirely on the

38 Cfr. the TECMED case *supra.*

39 Bilateral Investment Treaty between the United Kingdom and the United Republic of Tanzania, art. 3 (3).

interpretation of the terms “significantly affect”. If the clause has to be intended as meaning that the host State can provide incentives to its nationals as long as they operate in market sectors different from those occupied by foreign investors, than it will not make for a particularly effective exception[40].

*Protection Against Expropriation*

Protection against expropriation is probably the most ancient safeguard against States' interferences with economic initiatives undertaken by investors on the territory of a foreign country. Lowenfeld dates the origin of the principle for which a public entity should abstain from any taking of private property unless motivated by a legitimate public interest and behind the payment of adequate compensation as back as the French Declaration of the Rights of Man and Citizen in 1789[41]. In the XX century, wide debate arose concerning the existence of a customary international rule that prohibited expropriation of property belonging to foreign nationals without compensation. The two main sides of the debate were represented by the western capitalist countries headed by the United States and by the Socialist block together with representatives from Latin American countries. The purest enunciation of the western interpretation of the rule is traditionally assigned to US Secretary of State Cordell Hull who, as a reaction to a nationalization program enacted by Mexico and that affected several US nationals, declared that:

40 Cfr. the Limitations and Exceptions clause in art. 13 of the Agreement on Trade-Related aspects of Intellectual Property Rights

41 Lowenfeld, A. F., *International Economic Law*, Oxford University Press, 2008, p. 740.

"*The Government of the United States merely adverts to a self-evident fact when it notes that the applicable precedents and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor*[42]".

The accent in Hull's declaration (henceforth known as the "*Hull Rule*") was evidently on the compensation requirement, rather than on the public purpose that the expropriation was purported to serve. Expropriation was seen as an extraordinary deviation from the standard rule according to which the right to private property was sacred and had to be protected on an international level. Therefore, even if takings were lawful under the law of a country and were not performed on a discriminatory basis, compensation had to be immediate and for the full market value of the property[43]. The idea behind the "*Hull Rule*" was that the right to private property held an absolute value and that expropriation was always an improper violation of such right that could only be restored if compensation was granted.

Opposed to the "*Hull Rule*" was the idea of an overarching State sovereignty over its resources that culminated in the adoption in 1974 of two resolutions by the UN General Assembly promoted by developing countries. The Declaration for the Establishment of a New International Economic Order (better known as the NIEO Declaration) which recognized:

42 Lowenfeld, A. F., *International Economic Law*, cit. p. 478.

43 In the case of Mexico, an agrarian reform was enacted in accordance with art. 27 of the Constitution that vested the ownership of the land in the Nation. The reform required extensive nationalization of plots of lands throughout the country. The measures affected both Mexican and foreign nationals and neither received immediate compensation.

"*Full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right*[44]"

And the Charter of Economic Rights and Duties of States (CERDS) that declared that every State had the right:

"*To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means*"[45].

The two Resolutions were a direct blow to the "*Hull Rule*", expropriation was not only declared legitimate and consistent with the idea of State sovereignty, but it was also

44 *Declaration on the Establishment of a New International Economic Order*, United Nations General Assembly Resolution n. A/RES/S-6/3201, 1974, art. 4 (e).

45 *Charter of Economic Rights and Duties of States*, United Nations General Assembly Resolution n. 3281 (XXIX), 1974, art. 2 (c).

specified that the matter of the amount of compensation due as a consequence of expropriation was to be settled by the laws of the country that enacted the measure.

Today the scholarly debate is still alive and vibrant on the value of the 1974 Resolutions and their role in changing an (allegedly) existing customary international rule requiring prompt, adequate and effective compensation for expropriation of private property of aliens[46]. The topic continues to deserve attention due to the role that international custom may play in the interpretation of BIT clauses that do not specify (for instance) the amount of compensation required for expropriation[47].

In the set of investment agreements studied here, a clear distinction can be drawn, again, between the BITs signed between African and European countries as opposed to the China – Botswana BIT and the COMESA investment chapter.

The Zimbabwe – Netherlands, the United Kingdom – Tanzania, respectively in art. 6 and in art. 5, require compensation representing the genuine value of the investment. The Zimbabwe – Netherlands treaty entrusts the determination of such value to an independent firm or auditor, while the UK – Tanzania BIT states that the value to be compensated should be the one the investment held immediately before the expropriation in order to avoid the consequent devaluation.

Art. 4 of the China – Botswana treaty at first sight seems to reproduce the content of the UK – Tanzania BIT by adopting language that calls for "*the compensation [...] shall be*

46 As recent examples cfr. Alvarez, J. *The Public International Law Regime Governing International Investment*, cit. p. 278 and Guzman, A., *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, Virginia Journal of International Law Vol. 38, 1998, pp. 646 – 651.

47 In force of the mentioned rule contained in art. 31 (3) (c) of the Vienna Convention on the Law of Treaties.

*equivalent to the value of the expropriated investments immediately before the expropriation is made* [...]". The same article, however, successively refers to the value to be compensated as to be determined "*in accordance with internationally recognized principles of valuation*". Provisions like this represent the best example of the importance that international customary law maintains even in a domain characterized by intense "*treatification*" like States' responsibility for expropriation of foreign property. Depending on whether the "*Hull Rule*" is considered custom or not, in fact, Tribunals will award greater or smaller compensations, but this is an assessment that can only be made on a case by case basis having as a starting point the black letter of the treaty provision.

Lastly, the COMESA treaty provides for vague parameters in order to determine the appropriate amount of compensation to be granted to the investor and speaks only of "*adequate compensation*" without further directions. Also in this case international law is essential in determining the appropriate amount of compensation.

It is interesting to notice, in connection to what said *supra* concerning the relationship between the due process standard and national adjudicatory systems, that the Zimbabwe – Netherlands and the China – Botswana BITs contain two radically different provisions regarding the procedural guarantees to be respected in case of expropriation. Art. 6 (a) of the Zimbabwe – Netherlands treaty expressly requires that the measures involving the taking of property are enacted "*under due process of law*", while in the China – Botswana agreement, the expropriation must happen "*under domestic legal* *procedure*". As a consequence in the event of a dispute, while the Chinese or (more likely) the Botswanese government will be required only to show compliance with its own procedural rules (save outrageous abuses), the government of Zimbabwe will have to defend its actions from the claim that they are not consistent with an international standard that has shown significant fluctuation in its interpretation.

*Dispute Settlement Systems*

The last set of provisions analyzed in this paper concerns the various remedies that the agreements provide in the event of a dispute arising from alleged violations of the treaties.

As a preliminary consideration it is worth noticing that, in addition to a breach of the substantive protections included in the treaties, artt. 3 (4) of the Zimbabwe – Netherlands BIT and 2 (2) of the United Kingdom – Tanzania BIT provide a general clause that defers to the selected dispute settlement system all the claims deriving from further obligations that the host State has undertaken directly with the investor and concerning the investment. The two clauses, of almost identical content, provide that:

"*Each Contracting Party shall observe any obligation it may have entered into with regard to investment of nationals [or companies] of the other Contracting Party*[48]".

Provisions such as the one above have been defined "*umbrella clauses*" for their aptness to extend the protection of the treaty to any sort of obligation the State enters

48 The lettering "*or companies*" is included only in the United Kingdom – Tanzania BIT.

with regard to the investment[49]. This produces the consequence of further limiting the jurisdiction of the State in matter of foreign investments in favor of the chosen settlement dispute system and therefore, in case of provisions deferring the matter to international arbitration, further declining the possibility for the State of regulating the matter with the instrument of national legislation.

The fact that BITs accord investors the right to bring claims against the host State in front of international bodies can sound as an anomaly to many since, traditionally, international disputes have only States as Parties. Nonetheless it has been suggested *supra* that the investment protection system shares some aspects with the one devoted to the protection of human rights and some regional human rights Courts allow individuals to bring claims against the State that has committed the violations[50]. The considerations about the opportunity of this parallelism exceed the purpose of this paper and are therefore left to the reader, but it is at least necessary to stress that while all the human rights courts require the claimant to preemptively exhaust local remedies[51], bilateral investment treaties do not. As for any other protection or rule, it depends from the text of the treaty as the sample agreements will show.

As often already observed, the United Kingdom – Tanzania and the Zimbabwe – Netherlands BITs share a common approach also regarding dispute settlement. In the event of a controversy, both treaties identify the International Center for the Settlement

49 Alvarez, J., *The Public International Law Regime Governing International Investment*, cit. p. 215.
50 Cfr. Art. 5 (3) of the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights* and art. 34 of the *European Convention on Human Rights.*
51 cfr. art. 50 of the *African Charter of Human and Peoples' Rights*; art. 46 (1) (a) of the *American Convention on Human Rights*; art. 35 (1) of the *European Convention on Human Rights*.

of Investment Disputes (ICSID) as the instrument to call upon in order to define the matter. Before the claim can be brought in front of the international body, however, the treaties prescribe a six months *"cooling period"* during which the Parties will have to try and find an amicable solution to the dispute.

The China – Botswana BIT is the treaty that provides for the greatest variety of instruments of the sample. The six months "*cooling period*" is present here as well, but in the absence of a conciliation, either Party has the right to bring a claim in front of the national tribunals of the country hosting the investment. The Parties, however, have also the choice of submitting the dispute to an international arbitration under the ICSID rules or also to a three judges panel constituted *ad hoc*. The peculiarity of the China – Botswana treaty is that, in the event of international arbitration, the State Party to the dispute can "*require the investor concerned to exhaust the domestic administrative review procedure specified by the laws and regulations of the Contracting Party*[52]". To subordinate the initiation of an international arbitration to the prior exhaustion of local remedies suggests at least two line of comments. First of all, the dispute settlement system described in the China – Botswana BITs mirrors the one found in human rights instruments, giving, if not else, the idea that the violation of an investor's right (some of which could be argued as being referable to human rights themselves[53]) is not more important than, for instance, the right not to be tortured. Prioritizing local remedies

52 China – Botswana Bilateral Investment Agreement, art. 9.
53 The *Universal Declaration of Human Rights*, for example, affirms the right to private property:
Article 17
(1) Everyone has the right to own property alone as well as in association with others.
(2) No one shall be arbitrarily deprived of his property.

over an international private forum can also be seen as a way to reaffirm the State's sovereignty over its jurisdiction, but this is a slippery ground. As pointed out *supra* when illustrating the content of the fair and equitable treatment standard, there is a downside in allowing a supranational adjudicating body to review final decisions adopted by national Courts both from a time-cost point of view and from a legitimacy point of view. Obviously the longer the proceeding the more expensive it will be, but it is also to be considered the effect on the local judiciary system of transforming international arbitration into an appellate body that can second guess decisions issued by a country's Supreme Court.

Lastly, chapter 26 of the COMESA treaty does not provide at the moment with a clear indication of a dispute settlement system. Article 162 generally call the States members of COMESA "*to take necessary measures to accede to multilateral agreements on investment dispute resolution*" and specifically the Parties undertake to accede to ICSID among other agreements. No legal obligation is expressly created for the States that have actually entered ICSID or another multilateral investment dispute settlement agreement, to use only that system and excluding local remedies. As almost all the States members of COMESA have now signed the ICSID Convention[54], it will be only a matter of time before a clear word is said about whether the treaty's choice for international arbitration is exclusive or it allows the choice in favor of local tribunals.

54 Of all the 19 COMESA members, only the Republic of Djibouti, the State of Eritrea and Libya have yet to sign the ICSID Convention.

## *Final Remarks*

The analysis has shown that African countries sign and will sign bilateral investment treaties even though their positive effects are not directly evident. What are evident, on the other hand, are the limitations that these international agreements to State's sovereignty and, one may say, independence. Allowing international private adjudicators to determine whether a country has the right to enact a provision that, although in the public interest, it may damage the profit expectations of a foreign investor is hardly consistent with the tone of the declarations of independence that were adopted in the late fifties and sixties by the African countries in the aftermath of the decolonization. A People that does not have the right to pass legislation and bring justice in its own territory due to economical interest of other countries slipped in masked as instrument of growth and development, is not much more independent than a People that owes obedience to a foreign governor.

However, the experience of the COMESA and the different stance assumed by the inter-African treaty on matters like national treatment, most favored nation and expropriation, hints to the fact that African countries are not absorbing uncritically the BIT system as shaped by the western countries. Instead they are maybe trying to model instruments that promote free trade and circulation of capital while being more tailored to their own purposes and traditions.