Northwestern Journal of International Law & Business

Volume 26
Issue 1 *Fall*

Fall 2005

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Recommended Citation

Victor Mosoti, Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between, 26 Nw. J. Int'l L. & Bus. 95 (2005-2006)

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Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between?

Victor Mosoti[*]

I. INTRODUCTION

The increased Foreign Direct Investment ("FDI") flows in the past few years have strengthened the belief among many developing countries, especially African countries, that such FDI flows could help in reducing the resource, technology and foreign exchange gaps that constrain their economic development.[1] As a result, many developing countries have been

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[1] CARLOS CORREA & NAGESH KUMAR, PROTECTING FOREIGN INVESTMENT: IMPLICATIONS OF A WTO REGIME AND POLICY OPTIONS 1 (2003). FDI in this sense is only one aspect of the commonly mentioned broad term, "capital flows," which refers to different kinds of transactions, including: both short-term and long-term lending from banking institutions; investments in the purchase of public or private bonds; investment in equities; and direct investment in productive capacity. Depending on the quantities of such flows, each has a different impact on the rate of "economic growth" and certainly, different levels of risk. For a discussion of the definitions of "investment" and its constituent elements, see U.N. Conf. on Trade & Dev. (UNCTAD), *Scope and Definition: UNCTAD Series on Issues in International Investment Agreements*, U.N. Doc. UNCTAD/ITE/IIT/11(Vol.II) (Jan. 1, 1999). Several papers submitted to the WTO Working Group on the Relationship Between Trade and Investment, especially those on "Scope and Definitions" are useful in indicating the various differences between WTO Members in the understanding of what exactly constitutes foreign investment. *See* Communication from China, *Scope and Definition*, WT/WGTI/W/159 (Apr. 14, 2003); Communication from Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, *Scope and Definition*, WT/WGTI/W/126 (June 28,

diligently working to attract foreign investment, for which these countries give some of the highest returns;[2] in the process, these countries make concessions that they would have found unthinkable in the past, when autarchic economic policies were prevalent.[3] For example, due to the liberalization of capital accounts, a foreign investor in Kenya is guaranteed limitless capital and interest repatriation and dividends remittance as long

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2002); Communication from the European Communities, *Concept Paper on the Definition and Scope of Investment*, WT/WGTI/W/115 (Apr. 16, 2002); Communication from Korea, *Scope and Definition*, WT/WGTI/W/114 (Apr. 14, 2002); Communication from Japan, *Scope and Definition*, WT/WGTI/W/111 (Apr. 12, 2002). *See also* Working Group on the Relationship Between Trade & Inv., *Note by the Secretariat: Scope and Definitions: Investment and Investors*, WT/WGTI/W/108 (Mar. 21, 2002).

[2] WILLIAM EASTERLY, THE ELUSIVE QUEST FOR GROWTH: ECONOMISTS' ADVENTURES AND MISADVENTURES IN THE TROPICS 56 (2002) (noting that: "any country that starts out with low capital will offset this unlucky heritage with very high returns to capital. Since international finance capital flows to countries with the highest rate of return . . . capital will flow to this high-return, low capital country.") Of course this particular assertion that capital follows investment returns is rather simplistic and does not quite capture the nuances that inform the choice of location in an investment decision-making process. *See* Clive Crook, *Why Does So Little Capital Flow from Rich Countries to Poor?*, ECONOMIST, May 1, 2003 (discussing the theory that capital bottled up in individual rich countries should flow into poorer ones with higher returns works "only sometimes," not always). According to some commentators, the theory:

> did work for sustained periods during the past century or two. In the last quarter of the 19th Century, British capital equivalent to five percent of host country Gross Domestic Product ("GDP") and more flowed out each year to the United States, Canada, France, Australia and Argentina. France and Germany were big exporters of capital too. The flows paid for a large part of the investment undertaken in the capital-importing countries. This golden age of financial globalization ended in 1914.

Id.

[3] This thinking promoted the idea of domestic savings as opposed to over-reliance on external financial injections into developing countries. Its most influential exponent was the Argentinean economist, Dr. Raul Prébisch, who cautioned in 1971 that:

> if the next few years are to witness a transition to a satisfactory rate of development, investment with domestic resources will have to increase . . . . To allow a considerable external debt to pile up, without energetically promoting the mobilization of the region's own resources until the point was reached at which they could fully meet capital formation requirements, would be to invite deplorable consequences.

RAUL PRÉBISCH, CHANGE AND DEVELOPMENT: LATIN AMERICA'S GREAT TASK 11 (1971). *See also* Raul Prébisch, *Five Stages in My Thinking on Development*, *in* PIONEERS IN DEVELOPMENT 175, 177 (Gerald M. Meier & Dudley Seers eds., 1984) (stating that he was merely articulating ideas that countries were already implementing: "In reality, my policy proposal sought to provide theoretical justification for the industrialization policy which was already being followed (especially by the large countries of Latin America) to encourage the others to follow it, too, and to provide . . . an orderly strategy for carrying this out.")

as he can show that he has already paid the requisite taxes.[4] Besides domestic law, provisions granting more or less similar opportunities for foreign investors have been included in the various Bilateral Investment Treaties ("BITs") that have been signed by African countries over the years.

The majority of developing countries and least developed countries are, at present, importers and, to a much lesser extent among a few of them, exporters of foreign investment, a factor which impacts both their policy and legislative controls over foreign investment.[5] At the same time, without exception, these countries abide by the prevailing orthodoxy that FDI is a major pre-condition for their economic advancement.[6] The United Nations Conference on Trade and Development ("UNCTAD") has come to the conclusion that "developing countries need a substantial inflow of external resources in order to fill the savings and foreign exchange gaps associated with rapid rate of capital accumulation and growth needed to overcome widespread poverty and to lift standards to acceptable levels."[7] In contrast to such assertions, other studies have asserted that "investment . . . [does]

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[4] Foreign Investment Protection Act § 3(2) (1976) (Kenya), *available at* http://www.kenyalaw.com/theForeignInvestmentsProtectionAct.htm; *see also* UNCTAD, Investment Policy Review: Kenya, U.N. Doc. No. UNCTAD/ITE/IPC/2005/8 (July 2005); Akilano M. Akiwumi, *The Need for the Harmonization of African Investment Laws*, 2 AFRICA & L. INT'L REV. 1, 5 (Oct. 1985) (surveying investment laws of various African countries, discussing how they were designed purely to "attract" foreign investors, and noting the welcoming and unrestricted nature of African investment laws) [hereinafter *Harmonization of African Investment Laws*]. Akiwumi writes that "many African investment laws make no distinction between foreign private investment and locally generated investment and show little or no regard for the nationality of the investor." *Id.* And with respect to the standard of treatment, Akiwumi goes on: "Both foreign and private local investment, if they qualify for favoured treatment, receive equal treatment before the law and are eligible for the same incentives except for the repatriation of capital remittance of profits and protection from nationalization . . . ." *Id.*

[5] Working Group on the Relationship Between Trade & Inv., *Note by Secretariat: Development Provisions,* WT/WGTI/W/119 (June 11, 2002).

[6] The wisdom that currently holds sway is attributed to economic policies promoted by the World Bank and other multilateral economic institutions. According to the World Bank:

> The future of the developing countries is largely in their own hands . . . . The right strategy for the developing countries, whether external conditions are supportive or not, is to invest in people, including education, health, and population control; help domestic markets to work well by fostering competition and investing in infrastructure; *liberalize trade and foreign investment; avoid excessive fiscal deficits and high inflation.*

UNCTAD, WORLD DEVELOPMENT REPORT 149 (1991), *available at* http://www.worldbank.org/wdr/ (emphasis added).

[7] UNCTAD, *Capital Flows and Growth in Africa*, ¶ 1, U.N. Doc. UNCTAD/GDS/MPB7 (Oct. 17, 2000) [hereinafter *Capital Flows and Growth in Africa*]. *See also* UNCTAD, *Economic Development in Africa: Trade Performance and Commodity Dependence*, U.N. Doc. UNCTAD/GDS/AFRICA/2003/1 (2003).

not have a tight link to growth in the short run, and not even much of a link in the long run in Africa"[8] and that "investment does not necessarily promote growth."[9] Other scholars have concluded that "while many analysts decry the lack of sufficient investment in Africa, [there is] no evidence that private and public investment are productive."[10] On the concept of "savings" upon which the argument that Africa needs foreign capital injections rests, its veracity has been termed "questionable" and arguments have been advanced that Africa does not in fact suffer from "low savings rates," leaving an "investment gap" that then has to be filled in by FDIs.[11] Writers that hold this view have challenged the truth behind UNCTAD's claims and have stated that Africa's savings rate is high, but that some savings are not described as such by the dominant economic literature.[12]

Suffice it to say, these are largely academic issues, and mainly in the realm of economists. They do, however, paint an ideal background for the main issues in this paper, and serve to show why there is increasingly serious concern on how to regulate FDI inflows and how best to make such inflows contribute towards realizing the development aspirations of poor economies. The dimensions of the regulatory difficulties that developing countries face revolve around conflicts between investors and host countries. Sometimes there are disagreements concerning the distribution of benefits and differences regarding the role of investment in development, to the extent that one of the enduring points of opposition to a multilateral agreement on investment is the pervasive role of multinational corporations, which are the primary vehicles for FDI movement. While on the one hand many developing countries insist that they should retain some measure of control over foreign investors, including foreign multinationals (particularly regarding location, profit repatriation and other performance requirements such as employment and technology transfer), foreign investors do not want

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[8] *See* DAVID DOLLAR & WILLIAM EASTERLY, THE SEARCH FOR THE KEY: AID, INVESTMENT AND POLICIES IN AFRICA 3 (1999); *see also* WILLIAM EASTERLY, THE ELUSIVE QUEST FOR GROWTH: ECONOMISTS' ADVENTURES AND MISADVENTURES IN THE TROPICS 47–59 (2002).

[9] *See* DOLLAR, *supra* note 8, at 23; *See also* Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI?: Only a bit. . .and they could bite* (World Bank, Working Paper No. 3121, June 2003), *available at* http://econ.worldbank.org (stating that contrary to popular perception, liberalization efforts through signing bilateral investment treaties do not in fact lead to significant increases in investment flows).

[10] Shantayanan Devarajan, et al., *Low Investment is Not the Constraint on African Development* (2002) (Working Paper No. 13), *available at* http://www.cgdev.org/content/publications/detail/2778.

[11] Yash Tandon, *African Meeting – Discussion Notes: The Role of Foreign Direct Investment in Africa's Human Development* (May 10, 2000), http://www.ictsd.org/dlogue/2000-05-10/FDI.pdf (last visited Oct. 20, 2005).

[12] *Id.*

their transaction costs to be increased by seemingly burdensome requirements beyond the evaluation and entry process. Foreign investors are therefore usually keen to know what standards of "treatment" (such as 'fair and equitable treatment') they will be subjected to upon entry. Many investment disputes hinge on the standards of treatment accorded to a foreign investor.[13] Until a few years back, ideological differences hinging on the merits of private as opposed to public enterprise, and the contention by some scholars and policy makers that foreign investment is a form of economic imperialism, were also prominent points of divergence in the approaches to foreign investment regulation.[14] In most African countries today, the desire for FDI overwhelmingly precludes the possibility of effectively using the results of a thorough analysis of economic, political, and social or other gains that may come from such inflows, and therefore what laws and policies need to be erected to realize such gains.[15]

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[13] AHMAD KHALAF MASA'DEH, INVESTMENT AND COMPETITION IN INTERNATIONAL POLICY: PROSPECTS FOR WTO LAW 45 (2004) (noting that "The legal treatment of FDI channeled by MNEs has traditionally been a fertile source for conflict.") For an early view on this, see also *Harmonization of African Investment Laws*, arguing that:

> since most African countries are capital importing and therefore depend on outside sources rather than internal or African sources to finance development, they must, if they do not cooperate in the spirit of collective reliance, perforce dance to the tune of the one that pays the piper. *Their laws must reflect the protection which the foreigner expects* and if the laws do not so provide, investment contracts are made and official assurances are given. Thus, we find that in several cases, the investment laws make inordinately generous concessions to the foreign investor.

Harmonization of African Investment Laws, *supra* note 4, at 11 (emphasis added).

[14] AHMAD KHALAF MASA'DEH, INVESTMENT AND COMPETITION IN INTERNATIONAL POLICY: PROSPECTS FOR WTO LAW 45 (2004) (noting that "The communist oriented Soviet Revolution also affected some notions related to FDI . . . [I]t enhanced the idea that nationalisation of FDI for economic reform is possible . . ..") *See also* E.I. NWOGUGU, THE LEGAL PROBLEMS OF FOREIGN INVESTMENT IN DEVELOPING COUNTRIES 9–10 (1965); G. SCHWARZENBERGER, FOREIGN INVESTMENT AND INTERNATIONAL LAW 3–11 (1969). For an erudite critique of the intersections between international law, globalization and development, and the place of the third world, see Joel Ngugi, *Making New Wine for Old Wine-Skins: Can the Reform of International Law Emancipate the Third World in the Age of Globalization?* 8 UC DAVIS J. INT'L L. & POL'Y 73 (Winter 2002).

[15] In other instances, foreign investment (and *a fortiori*, foreign aid), has been used negatively by some government regimes and has had disastrous effects. For example, the immediate former governing regime in Kenya did everything possible to attract foreign investment and foreign aid, which "enabled the party to acquire the amount of force it needed and keep all other political demands permanently out of power by silencing actors who insisted against [the country's] undemocratic regime." Berhane G. Mariam, Challenges to Democratic and Economic Transition in Kenya, Ethiopia and Sudan: A Comparative Study of the Political, Economic and Social Structures in the Three Countries 133 (2001) (unpublished Ph.D. dissertation, Carl von Ossietzky University of Oldenburg), *available at* http://docserver.bis.uni-oldenburg.de/publikationen/dissertation/2002/marcha02/

Under customary international law, the autonomy and ability of a State to regulate such inward foreign investment flows arises out of its sovereignty.[16] As such, there is no right of admission or right to invest in a foreign country. States retain the power, at least theoretically, to determine which foreign investors or investments to allow, under what conditions, and in what sectors.[17] Within their national laws, countries are therefore free to make provisions for appropriate controls or to deny entry to foreign companies as they might see fit. With respect to businesses with branches or subsidiaries in other countries, some early commentators noted this residual power in the state as follows:

> By virtue of the phenomenon of frontiers which come between home offices and various branch offices [of transnational enterprises], each state may provide a different set of rules for the branches which are on its territory and subject to its control. The universality of the business concern cannot be realized unless all of its parts are in the same country (which is the case in a national business concern), otherwise there results a veritable juridical splitting-up.[18]

In this sense, "national business concern" refers to a business that is wholly registered and therefore has the nationality of the host state, one that is in some way under the full or partial jurisdiction of the host state perhaps because some of its shareholders are nationals of that particular state. Many countries retain a screening criterion that is largely unimplemented. Under Kenya's *Foreign Investment Protection Act*, foreign investment is only allowed if it promotes economic development or is "likely to benefit" the

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marcha02.html.

[16] According to Sornarajah, the right of a State to control foreign direct investment is based on the international law regarding aliens and the right of a State to deny entry to such aliens. *See* M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 83 (1994). Fatouros extends the rights of States in this regard to cover "trade and foreign investors." *See* A.A. FATOUROS, *Towards an International Agreement on Foreign Direct Investment?* 10 ICSID REV.–FOREIGN INVESTMENT L.J. 181, 193 (1995).

[17] Samuel K.B. Asante argues that:

> a state has the right to regulate the entry of foreign capital or investment into its territory. This involves the right to exclude foreign investment or impose conditions on the entry of foreign investment or the acquisition of property by foreign capital or the operations of foreign companies in the territory of the host state, and the exercise of general jurisdiction over such companies.

Samuel K.B. Asante, *International Law and Foreign Investment: A Reappraisal*, 37 INT'L & COMP. L.Q. 589, 606 (1988).

[18] Kenneth Carlston, *Concession Agreements and Nationalization*, 52 AM. J. INT'L L. 260, n.37 (1958).

Kenyan economy.[19] Any rights or obligations that an investor may have with respect to foreign investment in a host State are therefore *born of treaties and other instruments of international law negotiated by choice with or among other States*. National laws on or touching upon investment also play a role in defining the rights and obligations of foreign investors once they have secured entry into the host state. In this regard, they are complementary to any rights and obligations contained in treaties and other international law instruments. The problem is that national legislation of the majority of developing countries is spurred by the single-minded purpose of investment attraction. Hence, the concessions granted to foreign investors are almost always overly extensive, and worse, might limit the possibility of meaningful one-off, investor-state negotiations.

As is well known, there is currently no comprehensive multilateral instrument for the regulation of foreign investment. Foreign investment is therefore only subject to a motley of BITs, regional investment treaties, and, at the multilateral level, the World Trade Organization's ("WTO") limited-scope *Agreement on Trade Related Investment Measures* ("TRIMs")[20] and the *General Agreement on Trade in Services* ("GATS").[21] At the regional level in Africa, cross-border investment regulation frameworks are in their nascent stages. In the Southern Africa Development Community ("SADC"), for example, the trade protocol provides rather vaguely that "Member States shall adopt policies and implement measures within the Community to promote an open cross-border investment regime, thereby enhancing economic development, diversification and industrialization."[22] Some commentators have indicated that the protocol has indeed resulted in "increased business opportunities" in the region, which may be attributed to a liberalized investment climate.[23]

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[19] Foreign Investment Protection Act §3(1) (1981) (Kenya), *available at* http://www.kenyalaw.com/theForeignInvestmentsProtectionAct.htm.

[20] *See* Trade-Related Aspects of Investment Measures, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 143–46 (1999). For a good analysis of the narrow scope of the agreement, see Patrick Low and Arvind Subramanian, TRIMs in the Uruguay Round: An Unfinished Business Presentation at the Uruguay Round and the Developing Economies World Bank Conference (Jan. 26, 1995).

[21] General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1125 (1994).

[22] Declaration and Treaty of South African Development Community, Aug. 17, 1992, Protocol on Trade, art. 22, 32 I.L.M. 116 (1993). *See generally* Rose Thomas, Why Increasing Investment into SADC is Critical for Improving the Region's Ability to Trade, Presentation at the NEPAD Opportunities for Africa's Business, Entrepreneurs and SME Communities (Apr. 22, 2002).

[23] *See* Samson Muradzikwa, *Foreign Investment in SADC* 9 (Univ. of Cape Town Dev. Policy Research Unit, Working Paper No. 02/67, 2002), *available at* http://www.commerce.uct.ac.za/dpru/WorkingPapers/wp.asp?WP_ID=2002/67 ("[T]he

There has been discussion within the Common Market for Eastern and Southern African ("COMESA") on the creation of a "common investment area," although this is also at its initial stages.[24] Given the fledgling regional approach to investment regulation in the region, BITs between African countries and countries from other parts of the world have been the main way through which investment has been controlled or managed.

At the multilateral level, the debate as to whether or not there should be a proper and comprehensive multilateral framework on investment has continued unabated since the idea was mooted in the first WTO Ministerial Meeting at Singapore in 1996. The 1996 *WTO Annual Report* stated that one of the options WTO members should consider is integrating the disparate investment agreements "into a comprehensive and global framework that recognizes the close linkages between trade and investment."[25] With the failure to agree on whether to embark on negotiations for a multilateral framework at the WTO Ministerial Conference in Cancun in September 2003 (as some contend it had been agreed in the language of the 2001 *Doha Ministerial Declaration*)[26] and the

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SADC states have eased restrictions on foreign entry and ownership, although some still maintain restrictions either on foreign and/or private ownership in certain sectors considered as strategic.") *See also* Paul Kalenga, *Regional Trade Integration in Southern Africa: Critical Policy Issues* (Univ. of Cape Town Dev. Policy Research Unit, Working Paper No. 00/42, 2000); Sheila Page, *Some Implications of the SADC Trade Protocol* (Trade & Indus. Policy Strategies, Working Paper No. 2, 1997) (on file with author).

[24] A discussion paper posted on the COMESA website recounts efforts towards the creation of the investment area. *See* COMESA, *Implementing the COMESA Investment Area, at* http://www.comesa.int/investment. It states as follows:

> The Authority of Heads of States and Government at its meeting in Kinshasa, Democratic Republic of Congo decided that the COMESA region should become a Common Investment Area (CCIA). The overall objective of establishing the CCIA is to enable the region to attract greater and sustainable levels of investment into the region through creating an international competitive investment area, which allows for free movement of capital, labour, goods and services across borders of Member States. The creation of a CCIA is particularly useful, as national markets in most COMESA countries are too small to attract investment on their own. Furthermore, multinationals, fund managers and other investors now give preference to regional, rather than national markets in making decisions where to invest.

Id.

[25] *See* WORLD TRADE ORGANIZATION, ANNUAL REPORT 59 (Geneva 1996).

[26] Paragraph 20 of the Doha Ministerial Declaration stated as follows:

> Recognizing the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 21, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.

still polarized views on the issue, it is unclear how long the issue of investment will be off the table at the WTO. What is clear however is that, more than ever before, developing countries are angling for FDI and doing everything possible to make such flows a reality. The creation of a favorable environment for the free flow of FDI is a development strategy that is increasingly central in government policies throughout the developing world. One way through which countries have endeavored to make themselves attractive to FDI has been by signing BITs that offer various protections to foreign investment.[27] By the end of 2002, a total of 533 BITs, to which an African country was a party, had been signed.[28] For the 53 countries in the continent, this works out to an average of ten BITs per country.[29]

This paper argues that as these countries struggle to attract FDI, they have signed BITs in which they have made commitments that are inconsistent with their stated reasons against a multilateral agreement on

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See WTO, Ministerial Declaration of Nov. 14, 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002). The meaning of the phrase "explicit consensus" generated quite a bit of controversy in the run-up to the subsequent ministerial meeting in Cancun.

[27] *See* Hallward-Driemeier, *supra* note 9, at 22 (stating, to the contrary, that "[a]nalyzing twenty years of bilateral FDI flows from the OECD to developing countries finds little evidence that BITs have stimulated additional investment.") However, she also acknowledges that:

> [a] BIT could help attract investment by serving as a commitment device. It is hypothesized that countries with weak domestic property rights can increase their attractiveness as a potential host by explicitly committing themselves to honouring the property rights of foreign investors. In particular, a BIT could be a commitment device to overcome dynamic inconsistency problems. Hosts would have an incentive to make those promises necessary to bring investors in, but once the sunk costs are made, the host then has the incentive to deliver only to the level that will keep the investor from leaving. The presence of the BIT, with its dispute resolution mechanisms and provisions for compensation in the case of expropriation, guard against host country actions that would adversely impact the profitability of the investment.

Id. at 2. To facilitate the process of signing BITs, UNCTAD "launched an initiative . . . to give developing countries and particularly Least Developed Countries (LDCs) an opportunity to negotiate bilateral investment treaties for the promotion and protection of investment and double taxation treaties." *See* UNCTAD, *Round of Negotiations of Bilateral Investment Treaties for English-Speaking African Least Developed Countries: Final Report* (July 4, 2003), *available at* http://www.unctad.org/sections/dite_pcbb/docs/dite_pcbb_ias0012_en.pdf. Several rounds of negotiations have been organized since 1999. The session held from June 30 to July 4, 2003 yielded nineteen BITs, six of which were signed at the UNCTAD XI, in Brazil. *See* UNCTAD XI, Bilateral Investment Treaties: Signing Ceremony, *at* http://www.unctadxi.org/templates/Event____149.aspx?selected=conclusions (last updated July 10, 2004).

[28] UNCTAD, BILATERAL INVESTMENT TREATIES: A COMPILATION, *available at* http://www.unctadxi.org/templates/DocSearch____779.aspx.

[29] *Id.*

foreign investment. They may therefore preclude the possibility of reasonably resisting such an agreement for much longer. In addition, these BITs have resulted in a corresponding diminishment of the policy space available for them to channel FDI inflows in a manner that corresponds to and meets their development needs.

This paper proceeds as follows: Part II charts the history of trade and foreign investment in Africa. Part III focuses on the antecedents to the development of standards for foreign investment regulation by host states. Part IV broadly discusses BITs, their popularity, content and trends, in particular regarding their scope of application, market access, establishment and investment protection, and dispute settlement. Part V discusses the possibility that BITs could give rise to elements of customary international law on investment.

II. A REVIEW OF THE EVOLUTION OF TRADE AND FOREIGN INVESTMENT IN AFRICA

It has been estimated that by 1913 foreign investment in sub-Saharan Africa, most of which originated from European countries, stood at about \$3.3 billion;[30] by 1929, this figure had doubled to about \$6 billion.[31] As a percentage of the total volume of global foreign investment, sub-Saharan African's share amounted to about four percent in 1913 and about seven percent in 1929.[32] By comparison with recent estimates, on the average, this figure seems to have declined. As reported in UNCTAD's *World Investment Report*, for example, in 2001 sub-Saharan Africa received about 2.3% of the total global volume of FDI flows.[33] A dramatic decline in FDI inflows was recorded in 2002.[34] Despite unprecedented efforts by African countries to attract foreign investment, investment has actually declined.

As in modern times, South Africa dominated the African continent's trade and investment sector in the 1800s due mainly to the discovery and profitable exploitation of mineral wealth and the presence of a zealous entrepreneurial class. In 1885, the year before the discovery of the Witwatersrand goldfields, South Africa's volume of foreign trade amounted to about \$65 million. By 1897, this figure had risen to \$220 million, which amounted to about two-thirds of sub-Saharan Africa's foreign trade.[35] From this point on, it is reported that "South Africa therefore became a major market for European overseas investment."[36] This fact remains so today.

[30] J. D. FAGE & WILLIAM TORDOFF, A HISTORY OF AFRICA 238 (2002).
[31] *Id.*
[32] *Id.*
[33] UNCTAD, WORLD INVESTMENT REPORT 13–14 (2002).
[34] UNCTAD, WORLD INVESTMENT REPORT 8–9 (2003).
[35] FAGE, *supra* note 30, at 385.
[36] *Id.*

In UNCTAD's *World Investment Report 2003*, South Africa was cited as one of the highest recipients of FDI in Africa, with flows of up to 40% of the total continental inflows. Its companies were also the most active in investing elsewhere in the continent.[37]

The principal interest that the colonial powers had in Africa was rooted in economic benefit, basically trade and investment, from the start. According to economic historians, "the acquisition of colonies was necessary if there was to be major growth in European foreign trade and industry."[38] European powers simply had to have new markets and new sources of cheap raw materials and labor if their industrial and commercial growth was to be maintained. To take the case of Germany for example, John D. Hargreaves, a leading authority on African and imperial history, eloquently captured the drive for expansionism, fueled by an interesting mix of political influence, imperial ambitions and the search for commercial opportunities. He states that Count Otto von Bismarck, who served as Germany's Chancellor for the latter part of the nineteenth century, at first was reluctant to defend Germany's overseas trading interests by acquiring colonies or by other methods likely to create conflicts with other powers.[39] Due in part to the "growth of imperialist sentiment among the German public and intellectuals and to the development of German foreign trade," Bismarck later changed his approach and proclaimed sovereignty over substantial sections of the African coast.[40] This opened up opportunities to German traders, for, as Hargreaves notes:

> It is true that since the 1830's traders from Hanseatic ports had been operating in West Africa with increasing success. The most important firm was that founded by Carl Woermann of Hamburg; entering the Liberian trade in 1849, by 1884 his house had achieved a dominant position in that state, spread successfully to Gabon and the Cameroons, and opened regular steamship services to the coast. Adolph Woermann, who succeeded his father as head of the firm in 1880, was a man of influence in German politics, a National Liberal Deputy to the Reichstag after 1884, a friend and reputedly a confidant of Bismarck himself. In a manner reminiscent of the history of Régis, Woermann's business spawned others, as former agents struck out independently in the African trade, using capital and experience acquired in the service of the parent firm.[41]

Additionally, some historians have attributed the scramble to the

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[37] UNCTAD, WORLD INVESTMENT REPORT (2003).
[38] FAGE, *supra* note 30, at 328.
[39] JOHN D. HARGREAVES, PRELUDE TO THE PARTITION OF WEST AFRICA 316 (1963).
[40] *Id.*
[41] *Id.*

opening of a major British investment in 1869, the Suez Canal. Other European powers were alive to the strategic and commercial importance of the canal and were interested in having their own high-value acquisitions. The British whetted the imperial appetites of other Europeans, notably the Germans and the French, even further by their discovery of valuable minerals in South Africa shortly after the opening of the Suez Canal.[42] These desires resulted in the partition of Africa at the 1885 Berlin Conference, attended by representatives from Britain, Austria-Hungary, France, Germany, Russia, the United States, Portugal, Denmark, Spain, Italy, the Netherlands, Sweden, Belgium and Turkey. The conference yielded the *General Act of 26 February 1885* in which the colonial powers demarcated their spheres of economic and political influence.[43]

Recent scholarship also notes the centrality of the trade theme to the conference. "Issues concerning free trade in the Congo basin, and free navigation of the Congo and Niger rivers were intensely discussed."[44] The resulting document, the *General Act*, was basically an economic treaty between the conference participants, stating in Article I that the "commerce of all nations shall enjoy complete liberty,"[45] and in Article III that "[m]erchandise of every origin imported into these territories, under whatever flag it may be, by route of sea or river or land, shall have to discharge no other taxes than those which may be collected as an equitable compensation for expenses useful to commerce."[46] "[T]hese territories" were, of course, a reference to Africa. According to Article IV, it was also agreed that merchandise would not be subject to any import or transit duties.[47] In effect, the treaty created a "free for all, take what you get" trading regime, with the most stringent caveat being a minor notification requirement in Article XXXIV of the *General Act*, to the effect that any new "territory" acquisitions, subsequent to the conference, would have to be notified to the "other Signatory Powers of the present Act, in order to put them in a condition to make available, if there be occasion for it, their reclamations."[48]

Following the successful partitioning, the metropolitan imperial powers imposed their legal and trading regime on the territories that were under their occupation. In British colonial Africa, for example, alongside

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[42] *See generally id.* § 7.

[43] *See General Act of the Conference of Berlin Concerning the Congo*, 3 AM. J. INT'L L. 7 (Supp. 1909).

[44] Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 58 (1999).

[45] *General Act*, *supra* note 43, at art. I.

[46] *Id.* at art. III.

[47] *Id.* at art. IV.

[48] Anghie, *supra* note 44, at 61. According to Anghie, this provision was at best vague, as "[n]o clarity existed as to how or in which forum such claims were to be resolved." *Id.*

the introduction of a currency economy, the native population was also subject to English common law. The trade and investment regime that existed was therefore controlled and directed to the benefit of the imperial powers. The rights and obligations of investors were defined and circumscribed in accordance with the domestic law of the imperial power. Investors in the colonies, though in fact "foreign investors," could never be defined as such because they were private citizens dealing with their own governments and on the basis of their own laws,[49] which had been transplanted to these far-off lands during the colonial experiment.[50]

As indicated earlier, "foreign investors" in Africa during the colonial period were invariably dealing with their own governments and were, therefore, not really "foreign investors" as we understand the phrase today. Further, the understanding was that each European power, having carved its own niche in Africa, would confine itself to this sphere of influence. From necessity, the mutual suspicion and unbridled imperialist ambitions of the European powers, and their tense relations, made it possible for them to keep to their own demarcated turfs, at least during peace time. There was, therefore, never any need to set down further agreements on trade and

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[49] Joseph Oloka-Onyango, *Arbitration*, *in* DFM DOCUMENT SERIES, DOCUMENT NO. 1: DEBT RE-STRUCTURING 23 (U.N. Institute of Training & Research 1992).

[50] When the British colonial enterprise was nearing its universal demise, the limits of the idea of transplantability of law came to be recognized more accurately, perhaps, as a function of the chastisement resulting from a failed empire initiative. In *Nyali Ld. v. Attorney General*, Lord Denning famously acknowledged that: "Just as with the English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed, but it needs careful tending." *See* Nyali Ld. v. Attorney General, 1 Q.B. 1, 16 (Eng. C.A. 1956). This acknowledgment led to a certain degree of regard (if a tinge disdainful) for existing structures and norms. Deference to existing African structures of governance, practices, and norms is not a new phenomenon to the Western world, especially when it is in the Western world's best interests to do so. For example, the idea of "indirect rule" in British colonial Africa was never out of some benevolent understanding of the ramifications of a total subjugation of a people. It was, rather, a realization that the so-called "dual mandate" could only be best and most cost-effectively achieved by utilizing the existing tribal administrative structures so that, according to Frederick Lugard, the architect of "indirect rule," the "industrial classes of Europe could gain their due reward for using their brains, capital and energy, in developing the resources of Africa." *See* FREDERICK LUGARD, THE DUAL MANDATE IN BRITISH TROPICAL AFRICA 617 (1965). Lugard further states:

> Let it be admitted from the outset that European brains, capital and energy have not been, and never will be, expended in developing the resources of Africa from motives of pure philanthropy; that Europe is in Africa for the mutual benefit of her own industrial classes, and of the native races in their progress to a higher plane; that the benefit can be made reciprocal, and that it is the aim and desire of civilised administration to fulfil this dual mandate.

Id.

investment regarding the colonies.

Between the United States, many European powers, and other U.S. allies, there were a number of treaties on friendship, commerce and navigation ("FCN") that included investment protection provisions.[51] The first of these FCN treaties was signed between the United States and France in 1778.[52] It could be said that African territories under occupation by European powers that signed FCN treaties were also subject to such treaties. For much of the period in which Africa was under colonial rule, formal trade and investment remained under the complete legal and political control of the imperial occupying power and, despite talk about a "dual mandate" within the hierarchy of the British colonial administration, were really directed towards the exclusive economic benefit of the occupying powers.

III. THE ANTECEDENTS TO DEVELOPING STANDARDS FOR FOREIGN INVESTMENT REGULATION

After the Second World War, however, things began to change. The independence struggle was then in its nascent stage in much of the developing world. At the time of the Havana Conference in 1947, few developing countries could take part in the negotiations as independent states. From Africa, only Egypt, Liberia, Southern Rhodesia and South Africa took part.[53] Having gone through the Second World War and the destruction that resulted, European powers were most interested in reconstruction and development. They wanted to be sure that they would retain the ability to direct any investments, whether local or foreign, in a manner that would yield the most benefit to their economies. They were, therefore, not very keen on a strong multilateral control process.

Whereas the text of the *1947 General Agreement on Tariffs and Trade*[54] did not have any provisions specifically dealing with investment,

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[51] KENNETH J. VANDERVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE (1992).

[52] *Id.* at 14.

[53] The following developing countries were also represented at Havana: Afghanistan, Argentina, Bolivia, Brazil, Burma, Ceylon, Chile, China, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, India, the Republic of Indonesia, Iran, Iraq, Lebanon, Mexico, Nicaragua, Pakistan, Panama, Peru, the Philippines, Syria, Transjordan, Turkey, Uruguay and Venezuela. United Nations Conference on Trade and Employment, Havana Charter for an International Trade Organization and Final Act and Related Documents, Havana, Cuba, November 21, 1947, to March 24, 1948, *available at* http://www.wto.org/English/docs_e/legal_e/havana_e.pdf [hereinafter Havana Charter]. *See also* Tatsuro Kunugi, *State Succession in the Framework of GATT*, 59 AM. J. INT'L L. 268 (1965).

[54] *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

the stillborn *Havana Charter for an International Trade Organization* ("ITO") contained a separate chapter on "Restrictive Business Practices," including several provisions on the regulation of foreign investment.[55] To put this into context, by this time, the hitherto great world powers such as the United Kingdom, France and Germany had ceased to be capital exporting countries and were faced with an upsurge in American foreign investment after the war. They therefore had to erect, or leave space for, formal and informal mechanisms to ensure that their national interests were protected. During this time, the formal mechanisms that these countries used included foreign exchange controls and regulations against foreign investment in sensitive sectors, such as defense and cultural industries.[56] Informally, they used mechanisms such as "takeover restrictions, undertakings and voluntary restrictions by transnational corporations in order to restrict foreign investment and impose performance requirements."[57] To leave enough room for such controls, the Havana Charter provided in Article 12:1(c) that each member was allowed "to determine whether and, to what extent and upon what terms it will allow future foreign investment"[58] and "to take any appropriate safeguards necessary to ensure that foreign investment is not used as a basis for interference in its internal affairs or national policies."[59]

As is well known, the Havana Charter never entered into force, as it was repeatedly rejected by the United States Congress. Recalling that the GATT 1947 had no specific provisions on investment, it should not be surprising that for many years thereafter, the GATT played a very marginal role as a multilateral forum for the control of measures regulating foreign investment. In 1955, GATT Contracting Parties adopted a resolution, *International Investment for Economic Development*.[60] The resolution recognized that an increase in the flow of capital into countries in need of foreign investment, especially developing countries, would contribute towards the achievement of the objectives of the GATT.

It was recommended that countries in a position to provide capital for international investment and those which desired to obtain such capital,

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[55] Havana Charter, *supra* note 53. *See* Robert E. Hudec, *GATT and the Developing Countries*, 1992 COLUM. BUS. L. REV. 67, 71 (1992); CLAIR WILCOX, A CHARTER FOR WORLD TRADE 141 (1949); WILLIAMS ADAMS BROWN, JR., THE UNITED STATES AND THE RESTORATION OF WORLD TRADE: AN ANALYSIS AND APPRAISAL OF THE ITO CHARTER AND THE GENERAL AGREEMENT ON TARIFFS AND TRADE 30–33 (1950).

[56] HA-JOON CHANG & DUNCAN GREEN, THE NORTHERN WTO AGENDA ON INVESTMENT: DO AS WE SAY NOT AS WE DID 15–16 (2003).

[57] *Id.*

[58] Havana Charter, *supra* note 53, at art. 12, ¶ 1(c)(iii).

[59] *Id.* at art. 12, ¶ 1(c)(ii).

[60] International Investment for Economic Development, Mar. 4, 1955, GATT B.I.S.D. 49 (3d Supp. 1955).

should use their best endeavors to create conditions that would foster the cross-border flow of capital. Such endeavors would include providing security for existing and future investment, avoiding double taxation, and facilitating the transfer of earnings from foreign investments. Quite importantly, it urged GATT Contracting Parties to enter into consultations or participate in negotiations towards bilateral and multilateral agreements to protect foreign investments. Similar urging regarding a multilateral foreign investment framework was initially contained in Article 11:2(c), asking the would-be ITO to "formulate and promote the adoption of a general agreement or statement of principles regarding the conduct, practices and treatment of foreign investment."[61]

On November 18, 1963, the United Nations General Assembly adopted a resolution which welcomed a Joint Declaration of 75 developing countries concerning the then soon-to-be held United Nations Conference on Trade and Development ("UNCTAD I").[62] Participating countries were requested to seriously consider the content of the Joint Declaration.[63] Besides urging that international law should play a more central role in economic development, the Joint Declaration "called for the adoption of measures which would expand trade between developing countries, stabilize prices of primary products at fair and remunerative levels, expand markets for manufactured goods, and provide more adequate financial resources at favorable terms."[64]

In 1974, developing countries formulated their demands for change in the form of resolutions passed by the United Nations General Assembly, which together incorporated the call for a New International Economic Order ("NIEO").[65] The *Declaration on the Establishment of a New International Economic Order* ("NIEO Declaration")[66] was accepted by consensus in the General Assembly and articulated the principal demands of the developing countries for change and outlined the principles upon which the proposed new order would be based.[67] These included the

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[61] Havana Charter, *supra* note 55, at art. 11, ¶ 2(c).

[62] United Nations Conference on Trade and Development (UNCTAD I), G.A Res. 1897, U.N. GAOR, 18th Sess., Supp. No. 15, at 24, U.N. Doc. A/5515 (1963).

[63] *Id.*; Stanley D. Metzger, *Developments in the Law and Institutions of International Economic Relations*, 61 AM. J. INT'L L. 756, 759 (1967).

[64] Metzger, *supra* note 63, at 759.

[65] James Gathii has argued that "development" was the paradigmatic basis for many of the concerns expressed by developing countries during this period. James Thuo Gathii, *Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law*, 5 BUFF. HUM. RTS. L. REV. 107 (1999).

[66] *Declaration on the Establishment of a New International Economic Order ("NIEO Declaration")*, G.A. Res. 3201, 3202, U.N. GAOR, S–VI, Supp. No. 1, U.N. Doc. A/9559 (1974).

[67] For instance, the NIEO Declaration called for a just and equitable relationship between

principle of *full permanent sovereignty of every State over its natural resources and all economic activities.* In this regard, it was stated in the NIEO Declaration that "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."[68] Article 4(f) stated the principle that "all States, territories and peoples under foreign occupation, alien and colonial domination or *apartheid* have the right to restitution and full compensation for the exploitation and depletion of, and damages to, the natural and all other resources of those States, territories and peoples,"[69] while Article 4(h) emphasized the "right of developing countries and the peoples of territories under colonial and racial domination and foreign occupation to achieve their liberation and to regain effective control over their natural resources and economic activities."[70] Finally, the NIEO Declaration aimed to "[secure] favorable conditions for the transfer of financial resources to developing countries."[71]

Among developed countries, there were serious misgivings that the NIEO principles, particularly as outlined above, were "totally incompatible and highly damaging to the standards of protection of foreign investment established in customary international law."[72] The *Charter of Economic Rights and Duties of States* ("CERDS")[73] passed later that year, was an attempt to affirm and strengthen the legal principles intended to form the basis of the NIEO.[74] The language in CERDS was toned down somewhat on the insistence of developed countries. One of the provisions that remained intact, however, was Article 2, which gave States the right:

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the price of raw materials, primary commodities, manufactured and semi-manufactured goods exported by developing countries, and the prices of raw materials, primary commodities, manufactures, capital goods and equipment imported by them, with the aim of bringing about sustained improvement in their unsatisfactory terms of trade and the expansion of the world economy. *Id.* ¶ 4(j). The idea that world commodity prices should be fixed in order to guarantee fair prices to exporters has never been acceptable to western industrialized countries and their opposition to this idea, as well as to the NIEO in general, never changed in any material way.

[68] *NIEO Declaration, supra* note 66, ¶ 4 (e) (emphasis added).

[69] *Id.* ¶ 4(f).

[70] *Id.* ¶ 4(h).

[71] *Id.*

[72] Eileen Denza & Shelagh Brooks, *Investment Protection Treaties: United Kingdom Experience*, 36 INT'L & COMP. L.Q. 908, 909 (1987).

[73] *Charter of Economic Rights and Duties of States,* G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1974) [hereinafter CERDS]. *See also* G.A. Res. 3082, U.N. GAOR, 28th Sess., Supp. No. 30, at 40, U.N. Doc. A/9946 (1973).

[74] G.A. Res. 40/182, U.N. GAOR 2nd Comm., 40th Sess., Supp. No. 53, at 145, U.N. Doc. A/40/53 (1985)

> 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.[75]

Many developing countries, most of which were newly independent, took this treaty language very seriously, and many expropriations were actually carried out.[76] Some writers have noted that: "[h]ardly a month passed without some new confiscatory law landing on the desks of Ministries of Foreign Affairs, filling the financial pages of the newspapers, eroding the confidence of the prospective foreign investor."[77] Once developed states realized that the charter was being used by developing countries in such an assertive manner, the charter was denied legal authority and status by many capital exporting countries, although it was passed by a majority in the General Assembly.[78]

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[75] CERDS, *supra* note 73, at 52. The use of the word "appropriate" here should be juxtaposed with the customary law practice that had developed from the ruling of the Permanent Court of International Justice in the *Chorzów Factory* case, which stated:

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that *reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would,* in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which restitution in kind would bear [must be made].

Factory at Chorzów, (Germany v. Poland), P.C.I.J. (ser. A) No. 17, at 47 (Sept. 1928) (emphasis added).

[76] Francesco Francioni noted:

> One may wonder, in the light of the present realities of international affairs, when, on the one hand, the gap between the countries that are rich and the countries that are poor is widening instead of narrowing, and, on the other, an impressive new wave of nationalization measures is taking place in many countries of the Third World.

Francesco Francioni, *Compensation for Nationalisation of Foreign Property: Borderland Between Law and Equity*, 24 INT'L & COMP. L.Q. 255, 255–83 (1975).

[77] Denza, *supra* note 72, at 909.

[78] In regards to international trade, both the CERDS and the NIEO incorporated principles that constituted a radical challenge to the existing international institutional structures, and in particular to the GATT. The CERDS called for an expanded system of trade preferences going far beyond the tentative steps of the GATT regime taken a few years

Increasingly, to guarantee what they considered to be better protection for domestic investments, developed countries turned to bilateral arrangements, where they could leverage greater bargaining power. Due to the protests of developed countries, the NIEO Declaration was never tested or implemented. The consequence of the failure to adopt the recommendations in the NIEO Declaration was that the law on compensation reverted to the judicial standard of "appropriate compensation," which was interpreted to include future or potential benefits of the expropriated enterprise or property. More importantly, through bilateral agreements the *de facto* norm of full compensation emerged with unquestionable clarity and legal authority.

IV. THE ERA OF BITS

In response to economic globalization, and following the orthodoxy of multilateral economic institutions such as the World Bank, developing countries began to emphasize the need for foreign investment in order to realize economic development. They immediately ran into the so-called "problem of perception."[79] According to one writer, the "feeling of insecurity" on the part of the many foreign investors who chose not to invest in developing countries until they could secure agreements protecting their investments was the major deterrent to the flows of FDI to developing countries.[80] In order to attract such foreign capital, many developing countries stopped nationalizing foreign-owned assets in their countries and began to enter into bilateral arrangements that ensured foreign investment protection. Most African countries now do everything in their power to create an environment that is conducive to FDI, which represents a tectonic shift from the prevailing autarchic thinking of the 1970s.[81] The vast

earlier with the authorization of the Generalized System of Preferences. While the radical program of the NIEO was never implemented, the traditional institutions of the post-war international economic order did make at least one important concession in principle to the developing countries. A rather mild but real derogation from the GATT principle of non-discrimination was adopted by the GATT's members in 1971 after several years of discussion within UNCTAD and other fora.

[79] The "perception problem" refers to the general idea that developing countries, and in particular African countries, are unsafe for foreign investors.

[80] Adeoye Akinsanya, *International Protection of Direct Foreign Investments in the Third World*, 36 INT'L & COMP. L.Q. 58, 58–77 (1987).

[81] Professor M. Sornarajah notes these changes in strategy in the following terms:

> [M]uch of the 1970s was spent by developing States asserting their economic sovereignty over foreign investments which entered their territory. Doctrines like permanent sovereignty over natural resources have now become so stabilized that they are regarded as stating mere truisms. Developing States have now moved away from this rhetorical stage into the pragmatic stage, where the aim is to attract as much investment as possible into their territory and ensure that such investment is harnessed to their developmental objectives.

majority of these countries now universally welcome foreign investment almost unreservedly,[82] have signed many BITs and have heavily engaged in

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M. Sornarajah, *Protection of Foreign Investment in the Asia-Pacific Economic Co-operation Region*, 29 J. WORLD TRADE 105, 126 (Apr. 2005). In attracting foreign investment, developing countries have to overcome the perception that they are "unsafe" destinations for foreign capital. In a comprehensive and wide-ranging study conducted by the Consumer Unity and Trust Society ("CUTS"), an Indian civil society organization, it was found, for instance, that:

> negative perceptions hamper the implementation of FDI policies. For instance investors may feel insecure about, or lack confidence in South Africa due to a high crime rate, uncertainty over property rights, government policies and political violence. There are also spillovers of the Zimbabwe land crisis, the civil wars in Angola and the Democratic Republic of Congo.

Sanchita Chatterjee, *Foreign Direct Investment in Developing Countries* (Consumer Unity and Trust Society, Investment and Development Project Report 2002). Developing countries' quest for a greater share in global foreign investment flows has inspired much literature in the past two decades. In particular, there has been a sustained focus on how to manage the risks associated with the investment. *See, e.g*, Paul E. Comeaux & N. Stephen Kinsella, *Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA & OPIC Investment Insurance*, 15 N.Y.L. SCH. J. INT'L & COMP. L. 1 (1994). As Abba Kolo noted, "nothing is more important to maintaining the profitability of international companies than the successful management of exposure to political, economic, and financial risks." Abba Kolo, *Managing Political Risks in Transnational Investment Contracts*, 1 CEPMLP INTERNET J. 4, ¶ 1, *at* http://www.dundee.ac.uk/cepmlp/ journal/html/Vol1/article1-4.html (last visited Oct. 20, 2005).

[82] Several developing African countries have recently announced policies that welcome foreign investment. *See Gambia Woos Foreign Investors*, BBC NEWS, July 4, 2002, *available at* http://news.bbc.co.uk/1/hi/business/2091010.stm; *South Africa Targets More Investment*, BBC NEWS, Feb. 25, 2002, *available at* http://news.bbc.co.uk/1/hi/business/ 1840165.stm; *Nigeria Seeks Foreign Investment*, BBC NEWS, Sept. 24, 2002, *available at* http://news.bbc.co.uk/1/hi/business/1561585.stm; William Wallis, *Nigeria Unveils Sell-Off Plans*, FIN. TIMES, Feb. 14, 2000, at 10; Victor Mallet, *Mbeki Shifts the Emphasis to Business*, FIN. TIMES, Feb. 5, 2000, at 7. *See also* Laith Al-Qasem, who noted that:

> FDI has become an important developmental tool for counties [sic]. Large transnational corporations have billions of dollars to invest in countries, which can provide needed services and capabilities. Foreign direct investment once attracted is a substantially more stable form of funding than either development assistance (aid) or loans. This should lead developing countries to favor foreign direct investment over other types of capital flows. Additionally, foreign direct investment appears to facilitate a one for one increase in domestic investment.

Laith Al-Qasem, *Attracting Foreign Direct Investment as a Means of Developing ICT*, *at* http://www.worldbank.org/mdf/mdf4/papers/alqasem.pdf. The importance of FDI in the development of poor economies has also been recognized in a U.N. resolution. In December 1999, the Second Committee of the U.N. General Assembly approved a draft resolution calling for the creation of an "enabling environment" for FDI to developing states. Press Release, General Assembly Concluding Work for Fifty-Fourth Session, Second Committee Approves Texts on Globalization: Financing for Development, (Dec. 16, 1999), U.N. Doc. GA/EF/2907.

negotiations, especially those sponsored by UNCTAD.

On November 25, 1959, the first BIT was signed between Germany and Pakistan.[83] During this early period, most BITs were signed between developed and newly independent developing countries out of concern for whatever foreign investments there were in the developing country or for that which were foreseeable. Typically, the BITs were initiated by the developed, capital-exporting country, with the usual objective being to secure higher standards of legal protection and guarantees for the investments of its firms than those offered under the national laws of the capital-importing, developing country.[84]

Responding to the prevailing development orthodoxy, to the effect that "foreign investment is good for you," skeptical developing countries, on the other hand, signed BITs motivated by the desire to create an environment favorable and attractive to foreign investors.[85] Not surprisingly, in the 1960s, African countries signed more BITs than any other region in the world.[86] The current trend was that more and more BITs were being signed as between developing countries; only 11 as between developed countries because of the existing instruments adopted under the aegis of the Organization for Economic Co-operation and Development ("OECD").[87] According to UNCTAD, this trend has continued. During the 1990s, for example, the number of BITs increased by 279, from 149 at the end of 1989 to a total of 428.[88] Out of these 428, 221 treaties were concluded with developed countries (of which 172 were with members of the European Union and 168 with developing countries), 44 were concluded between African countries, 108 between Asian countries, 16 between Latin American and Caribbean countries, and 39 between Central and Eastern European countries.[89]

As will be discussed, over the years, it appears that a standard BIT has developed from which countries see little need for departure.[90] The primary

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[83] Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, Nov. 26, 1959, F.R.G.-Pak., ICSID 92–93 (1992); SORNARAJAH, *supra* note 16, at n.1; UNCTAD BILATERAL INVESTMENT TREATIES 1959–1999, at 57, U.N. Doc. UNCTAD/ITE/IIA/2 (2000), *available at* http://www.unctad.org/en/docs/poiteiiad2.en.pdf.

[84] Jürgen Voss, *The Protection and Promotion of European Private Investment in Developing Countries*, 18 COMMON MKT. L. REV. 363, 363 (1981); Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655, 655–75 (1990).

[85] BILATERAL INVESTMENT TREATIES, *supra* note 83, at 1.

[86] *Id.* at 5.

[87] *Id.* at 4.

[88] *Id.*

[89] *Id.* at 5–6.

[90] *See, e.g.*, Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An*

features have basically remained the same, especially regarding format, objectives and major provisions. There are typically four or five sets of major provisions. The first set usually outlines the scope and definition of foreign investment. Often, the definition of investment includes both tangible and intangible assets, direct and portfolio investments, and existing as well as new investments. The second set of provisions deal with the rules and conditions for admission of investments and focus on national, most-favored nation ("MFN"), and fair and equitable treatment. In the third set of provisions, the parties usually agree on some kind of guarantee and compensation scheme regarding the loss of investment due to expropriation, war or civil disturbances, guarantees of free transfer of funds and repatriation of capital and profits, subrogation on insurance claims, and State-to-State and investor-to-State dispute-settlement provisions. Not uncommonly, the fourth set, which deal with issues related to but distinct from those in the second set, touch on transparency and enforcement of national laws, performance requirements, entry and movement of foreign personnel, general exceptions, and extension of national and MFN treatment to the entry and establishment of investments.

A. Trends in Provisions on the Definition of Foreign Investment

At the WTO Working Group on Trade and Investment, developing countries have insisted that they would prefer a "narrow" definition of investment. In this regard, they have emphasized that the form of investment they would welcome should be that which seeks to establish lasting economic relations and thereby gives them the possibility of exercising some effective control over its management. They have asserted that they would be opposed to a definition of investment that covers both FDI and portfolio investment, and both direct investment in enterprises and direct investment in capital transactions. They perceive portfolio investments and flighty investment in capital transactions to be speculative and, with the wisdom of hindsight, potentially disruptive to their economies.

Developing countries have, however, shot themselves in the foot because most existing BITs have adopted a wide, open-ended definition and coverage of investment that includes both FDI, and financial and other portfolio investments. In the Germany-Namibia agreement,[91] the Germany-Botswana agreement,[92] and the Germany-South Africa agreement,[93]

Evaluation of Bilateral Investment Treaties and Their Grand Bargain, 46 HARV. INT'L L.J. 67 (2005).

[91] Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Jan. 21, 1994, F.R.G.-Namibia, art. 1, *at* http://www.unctadxi.org/templates/docsearch.aspx?id=779 [hereinafter Germany-Namibia Agreement].

[92] Treaty Concerning the Encouragement and Reciprocal Protection of Investments, May

investment is very broad and includes *inter alia*: movable and immovable property, shares of companies "and other kinds of interest in companies" and "claims to money which has [sic] been used to create an economic value or claims to any performance having an economic value."[94] This kind of broad definition is also to be found in more or less similar wording in the Germany-Burundi,[95] Netherlands-Nigeria,[96] France-Uganda,[97] Germany-Kenya,[98] United States-Cameroon,[99] United Kingdom-Lesotho,[100] United Kingdom-Swaziland,[101] Indonesia-Mozambique,[102] United Kingdom-Angola,[103] Mauritius-Switzerland,[104] Zimbabwe-Netherlands,[105] and the

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23, 2000, F.R.G.-Bots., art. 1, *at* http://www.unctadxi.org/templates/docsearch.aspx?id=779 [hereinafter Germany-Botswana Agreement].

[93] Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Sept. 11, 1995, F.R.G.-S. Afr., art. 1, *at* http://www.unctadxi.org/templates/docsearch.aspx?id=779 [hereinafter Germany-South Africa Agreement].

[94] Germany-Namibia Agreement, *supra* note 91, at art. 1.

[95] Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Sept. 10, 1984, F.R.G.-Burundi, *at* http://www.unctadxi.org/templates/docsearch.aspx?id=779 [hereinafter Germany-Burundi Agreement].

[96] Agreement on Encouragement and Reciprocal Protection of Investment, Nov. 2, 1992, Neth.-Nig., *at* http://www.unctadxi.org/templates/docsearch.aspx?id=779.

[97] Agreement on the Reciprocal Protection and Promotion of Investments, Jan. 1, 2002, Fr.-Uganda, *at* http://www.unctadxi.org/templates/docsearch.aspx?id=779 [hereinafter France-Uganda Agreement].

[98] Treaty Concerning the Encouragement and Reciprocal Protection of Investments, May 3, 1996, F.R.G.-Kenya, art. 1, *at* http://www.unctadxi.org/templates/docsearch.aspx?id=779 [hereafter Germany-Kenya Agreement].

[99] Treaty Concerning the Encouragement and Reciprocal Protection of Investment, Apr. 7, 1986, U.S.-Cameroon, art. I, S. Treaty Doc. No. 99-22 (1986) [hereinafter Cameroon-United States Agreement].

[100] Agreement for the Promotion and Protection of Investments, Feb. 18, 1981, U.K.-Lesotho, art. 1, *at* http://www.unctadxi.org/templates/docsearch.aspx?id=779 [hereinafter U.K.-Lesotho Agreement].

[101] Agreement for the Promotion and Protection of Investments, May 5, 1995, U.K.-Swaz., art. 1, *at* http://www.unctadxi.org/templates/docsearch.aspx?id=779 [hereinafter U.K.-Swaziland Agreement].

[102] Agreement for the Promotion and Protection of Investments, Mar. 6, 1999, Indon.-Mozam., art. I, *at* http://www.unctadxi.org/templates/docsearch.aspx?id=779 (stating "investment means every kind of asset admissible under relevant legal provisions of the Contracting Party . . ..") [hereinafter Indonesia-Mozambique Agreement].

[103] Agreement for the Promotion and Protection of Investments, July 4, 2000, U.K.-Angl., art. 1, *at* http://www.unctadxi.org/templates/docsearch.aspx?id=779 [hereinafter U.K.-Angola Agreement].

[104] Agreement on Promotion and Protection of Investments, Nov. 26, 1999, Mauritius-Switz., art. 1, *at* http://www.unctadxi.org/templates/docsearch.aspx?id=779 [hereinafter Mauritius-Switzerland Agreement].

[105] Agreement on Encouragement and Reciprocal Protection of Investment, Nov. 12, 1996, Neth.-Zimb., art. 1, *at* http://www.unctadxi.org/templates/docsearch.aspx?id=779 [hereinafter Netherlands-Zimbabwe Agreement].

Zambia-Netherlands[106] agreements.

The letter of submittal of the Mozambique-United States agreement[107] expressly states that the definition of investment is broad, recognizing that investment can take a wide variety of forms: "*Every kind of investment* is specifically incorporated in the definition."[108] The broad definitions of "investment," "company" and "company party" also mean that investments can be covered by the agreement even if ultimate control rests with non-Party nationals subject to certain limitations in Article XII. The Botswana-China agreement [109] probably has the widest and most tortuous investment definition: "every kind of asset invested by investors."[110] Although there is a list of what could be covered under "investment," the list is expressly described as merely indicative and not exhaustive. In some of the older BITs, such as in the Germany-Ethiopia agreement,[111] investment was also defined loosely and broadly as comprising "all categories of assets."[112]

B. Trends in Provisions on Non-discrimination and Standards of Treatment

In general, WTO members have emphasized the importance of the non-discrimination principle as one of the cornerstones of the multilateral trading system. There has not been much recognition of the fact that non-discrimination may be at odds with domestic development policies, which may discriminate in favor of certain types of FDI that promote technology transfer, capacity building and the creation of employment opportunities in certain sectors or regions of the host country. Sound national policy could also include special treatment of those foreign investors with favorable environmental policies.

Clearly spelling out the standards of treatment for foreign investment is usually a major objective of BITs. Most of those that have been signed by African countries have the general "fair and equitable treatment" standard as a prominent feature, most often at the outset, right after the definitions section. A leading commentator has noted, however, that this

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[106] Agreement on Encouragement and Reciprocal Protection of Investment, Dec. 11, 1996, Neth.-Zambia, art. 1, *at* http://www.unctadxi.org/templates/docsearch.aspx?id=779.

[107] Treaty Concerning the Encouragement and Reciprocal Protection of Investment, Dec. 1, 1998, U.S.-Mozam., art. I, S. Treaty Doc. No. 106-31 (2000) [hereinafter Mozambique-United States Agreement].

[108] *Id.* (emphasis added).

[109] Agreement on the Promotion of Investments, June 12, 2000, Bots.-P.R.C., art. 1, *at* http://www.unctadxi.org/templates/docsearch.aspx?id=779 [hereinafter Botswana-China Agreement].

[110] *Id.*

[111] Treaty Concerning the Promotion of Investments, Apr. 21, 1964, F.R.G.-Eth., art. 1, *at* http://www.unctadxi.org/templates/docsearch.aspx?id=779 [hereinafter Germany-Ethiopia Agreement].

[112] *See, e.g.*, *id.* at art. 8.

general standard is "invariably combined with national and MFN treatment."[113] Such a formulation is to be found, for example, in the Zambia-Netherlands[114] and the South Africa-Netherlands agreements,[115] which provide similarly at Article 3(1):

> Each Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors. Each Contracting Party shall accord to such investments full physical security and protection.[116]

Article 3(2) further provides that "[e]ach Contracting Party shall accord to such investments treatment which in any case shall not be less favorable than that which it accords to investments of its own investors or to investments of investors of any third state, whichever is more favorable to the investor concerned."[117]

The import of these obligations being included in the same Article is that an investor is entitled to the best treatment accorded by a host state to its or other countries' investors, and at a minimum, treated fairly and equitably—free from the whimsical or unreasonable demands or actions of a host government. Largely similar provisions are found in the South Africa-Greece agreement[118] and the South Africa-Sweden agreement.[119] With some variations, it is also in the Botswana-Germany agreement,[120] the

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[113] Giorgio Sacerdoti, *Private Foreign Investments in the Present International Economic System: Financial Flows, Economic Functions and Legal Regulation*, 269 RECUEIL DES COURS 251, 345 (1997).

[114] Agreement on Encouragement and Reciprocal Protection of Investment, Apr. 30, 2003, Neth.-Zambia, art. 1, *at* http://www.unctadxi.org/templates/docsearch.aspx?id=779 [hereinafter the Zambia-Netherlands Agreement].

[115] Agreement on Encouragement and Reciprocal Protection of Investments, May 9, 1995, S. Afr.-Neth., *at* http://www.unctadxi.org/templates/docsearch.aspx?id=779.

[116] *Id.* at art. 3(1).

[117] *Id.* at art. 3(2).

[118] Agreement for Promotion and Reciprocal Protection of Investments, Nov. 19, 1998, Greece-S. Afr., *at* http://www.unctadxi.org/templates/docsearch.aspx?id=779 [hereinafter South Africa-Greece Agreement].

[119] Agreement on the Promotion and Reciprocal Protection of Investments, May 25, 1998, Swed.-S. Afr., *at* http://www.unctadxi.org/templates/docsearch.aspx?id=779 [hereinafter South Africa-Sweden Agreement].

[120] The Germany-Botswana Agreement states:

> Each Contracting Party shall in its territory promote as far as possible investments by national or companies of the other Contracting Party and admit such investments in accordance with its legislation. It shall in any case accord such investments fair and equitable treatment. Neither Contracting Party shall in any way impair by arbitrary or discriminatory

Germany-Namibia agreement,[121] and the Botswana-China agreement.[122] The France-Uganda agreement[123] adds that the parties shall extend fair and equitable treatment "in accordance with the principles of International Law."[124]

This general reference to international law would implicitly seem to incorporate other fundamental rules of customary international law regarding the treatment of foreign investment. The scope of these rules of international law is an open question. In addition to the provision on fair and equitable treatment, the France-Uganda agreement has a separate provision on national treatment and MFN treatment.[125]

Although the Zimbabwe-Netherlands agreement[126] has provisions exactly similar to those in the other agreements signed by the Netherlands with most other African countries, including South Africa and Zambia, a protocol to the agreement provides an addendum to Article 3 which states that "treatment less favorable" within the meaning of that article shall not apply in the acquisition of land or other immovable property, except when such property is directly connected with an investment.[127] Similarly, the Zimbabwe-Germany agreement exempts from the "treatment less favorable" standard any "[m]easures necessary for reasons of public security and order, public health or morality . . . ."[128] The United Kingdom-Angola[129]and the United Kingdom-Mauritius[130] agreements also provide for fair and equitable treatment, and national and MFN treatment under separate articles.

The Mozambique-United States agreement is an interesting case of a BIT with far-reaching provisions for the protection of investment. Article

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measures the management, maintenance, use or enjoyment of investments in its territory of nationals or companies of the other Contracting Party.

Germany-Botswana Agreement, *supra* note 92, at art. 2.

[121] Germany-Namibia Agreement, *supra* note 91, at art. 2.

[122] Botswana-China Agreement, *supra* note 109, at art. 3.

[123] France-Uganda Agreement, *supra* note 97, at art. 3.

[124] *Id.*

[125] *Id.* at art. 4.

[126] Netherlands-Zimbabwe Agreement, *supra* note 105.

[127] Protocol to the Agreement on Encouragement and Reciprocal Protection of Investments, Nov. 12, 1996, Neth.-Zimb., *at* http://untreaty.un.org.

[128] Protocol to the Agreement on the Encouragement and Reciprocal Protection of Investments, Sept. 29, 1995, F.R.G.-Zimb., addendum to art. 3(a), *at* http://www.unctadxi.org/templates/docsearch.aspx?id=779 [hereinafter Germany-Zimbabwe Protocol].

[129] U.K.-Angola Agreement, *supra* note 103, at art. 2(1).

[130] Agreement for the Promotion and Protection of Investments, May 20, 1986, U.K.–Mauritius, art. 2–3, *at* http://www.unctadxi.org/templates/docsearch.aspx?id=779 [hereinafter U.K.-Mauritius Agreement].

2(1) provides for national treatment and MFN at both the entry and post-establishment phases of the investment.[131] This effectively rules out the possibility that Mozambique could screen investment based on nationality during the investment process itself, and also during the post-establishment phase. It also introduces the "like situations" criteria, stating that according to the parties, national treatment means treatment no less favorable than that which a party accords, in like situations, to investments in its territory of its own nationals or companies.[132] Further, it states that MFN treatment, in the understanding of the parties, means treatment no less favorable than that which a party accords in like situations to investments in its territory of nationals or companies of a third country. It also requires that under no circumstances should a party accord an investor treatment less favorable than that required under international law.[133] State trading enterprises are explicitly included in the scope of the national treatment and MFN obligations. Despite the variations in wording, the bottom-line is that the vast majority of BITs contain some provision on the standard of treatment for foreign investors. In this regard, there seems to be a settled practice that a BIT would be seriously deficient without such a provision. It should be clear from the foregoing discussion that non-discrimination and fair treatment of a foreign investor have acquired such a high degree of recognition that it is difficult to imagine a BIT that does not in some way incorporate them.

C. Trends in Provisions on Dispute Settlement and Linkages with WTO Dispute Settlement

Due to the nature and value of foreign investments, provisions on how to resolve disputes between parties are usually a centerpiece of BITs. Increasingly, parties are resorting to arbitration as a way of resolving disputes.[134] Citing data from the International Center for the Settlement of Investment Disputes ("ICSID"), Luke Eric Peterson states that there is no doubt that arbitration under BITs is on the rise, with BITs cases accounting for 5 out of 12 new arbitrations in the year 2000, 12 out of 14 in 2001, and 15 out of 19 in 2002.[135] The common provision on interstate dispute

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[131] Mozambique-United States Agreement, *supra* note 107, at art. 2(1).

[132] *Id.*

[133] *Id.* at art. 2(3).

[134] Luke Eric Peterson, *Research Note: Emerging Bilateral Investment Treaty Arbitration and Sustainable Development* (Aug. 2003), *at* http://www.iisd.org/pdf/2003/investment_investsd_note_
2003.pdf. *See also* Mark Freidman & Gaetan Verhoosel, *Global Litigation—Arbitrating over BIT Claims*, NAT'L. L. J., Sept. 15, 2003, at 15.

[135] Freidman & Verhoosel, *supra* note 134, at 3 (noting that as of August 2003, 48 cases were pending at ICSID and of these, 38 arose out of alleged violations of BITs).

settlement in BITs is to the effect that should there be any differences between the parties in the interpretation or application of the treaty, which the parties have been unable to resolve through amicable or diplomatic channels, it should, at the request of either party, be submitted to binding *ad hoc* arbitration in accordance with specific rules laid down in each treaty. The rules span the entire process of arbitration and are usually both substantive and procedural. They spell out the composition of the arbitration tribunal, its rules of procedure, liability for costs and the law to be applied.[136]

It is also not unusual to find BITs that refer parties to international arbitration, especially in the event of an investor-state dispute with the government of a host country. The procedures for such disputes are usually well-established and have institutional backing. Thus, many bilateral investment treaties provide for arbitration of investor-state disputes in accordance with the ICSID Convention, while at the same time using the procedural rules of the United Nations Commission on International Trade Law ("UNCITRAL") or the International Chamber of Commerce ("ICC").[137] No doubt international arbitration has been of unique benefit to investor-state arbitrations, but it has been a rare occurrence in situations where a dispute arises as between two states party to a BIT.

In the United Kingdom-Nigeria agreement,[138] it is stated that the preferred mode for the settlement of disputes between the Contracting Parties is through diplomatic channels, in the failure of which either party shall be free to submit the dispute to an arbitral tribunal. Both parties also consent to submit to ICSID for settlement by conciliation or arbitration under the *ICSID Convention on the Settlement of Investment Disputes*

[136] *See* Mozambique-United States Agreement, *supra* note 107.

[137] For example, a 1998 WTO paper points out that:

> An important distinction regarding investor-state arbitration clauses in bilateral investment treaties is that between treaties in which the parties express their advance, unqualified consent to recourse to international arbitration by an investor of the other party and treaties in which a specific expression of consent by a party in a given case is necessary in order for an investor to be able to refer a dispute to international arbitration. Other differences that have been noted with regard to investor-state arbitration clauses in bilateral investment treaties relate to matters such as the scope of the disputes which can be referred to international arbitration and whether or not resort to international arbitration and resort to domestic courts are mutually exclusive.

See WTO Working Group on the Relationship Between Trade and Investment, Bilateral, Regional, Plurilateral and Multilateral Agreements, *Note by the Secretariat*, WT/WGTI/W/22, (Jan. 26, 1998), *at* http://docsonline.wto.org.

[138] Agreement for the Promotion and Protection of Investments, Dec. 11, 1990, U.K.-Nig., art. 9, *at* http://www.unctadxi.org/templates/docsearch.aspx?id=779.

between States and Nationals of Other States.[139] The Kenya-Germany agreement[140] similarly provides that disputes between the Contracting Parties concerning the interpretation of the treaty should first be resolved through diplomatic channels, and when this fails, through an *ad hoc* arbitration tribunal whose members shall be appointed by an agreed procedure. Disputes between a Contracting Party and a national of another Contracting Party should be resolved either amicably or through arbitration in accordance with the ICSID Convention.[141] Some BITs, such as the Mauritius-Switzerland agreement, provide that the *ad hoc* tribunals established to resolve an investor-state dispute will operate on the basis of the UNCITRAL arbitration rules.[142]

In the Mozambique-United States agreement, Article IX provides that an investor-state dispute may be settled in three ways: 1) the dispute may be submitted to the courts or administrative tribunals of the countries that are parties to the dispute; 2) the dispute may be resolved by invoking the dispute resolution mechanism previously agreed to by the national or company and the host country; or 3) the dispute may be resolved by invoking the dispute resolution mechanism identified in paragraph 3 of Article IX. Paragraph 3 states that an investor can submit an investment dispute to binding arbitration within 90 days of its having arisen. In this case, the investor may choose between submitting the claim to ICSID or the *ad hoc* arbitration under UNCITRAL rules or, in fact, any other arbitral institution or rules that the parties may have agreed to. The agreement provides that an aggrieved party can, in the interim, seek injunctive relief as long as it does not seek a damages award from local courts. To safeguard the enforcement of arbitral awards, the agreement provides that any arbitration besides that under the ICSID Convention shall take place in a country that is a party to the U.N. Convention on the Recognition and Enforcement of Arbitral Awards. Each party also commits itself to enforce arbitral awards. Article X deals with state-state dispute resolution and declares that this will be done through binding arbitration with specific procedural aspects spelled out.

African countries are no strangers to investment disputes. As we have seen in the brief survey, most BITs that they have signed provide an arbitration clause usually referring disputes to the ICSID. For example in *Antoine Goetz and Others v. Republic of Burundi,*[143] Antoine Goetz, a

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[139] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, art. 8, 4 I.L.M. 532 (1965) [hereinafter ICSID Convention].

[140] Germany-Kenya Agreement, *supra* note 98, at art. 10.

[141] ICSID Convention, *supra* note 139, at art. 11.

[142] Mauritius-Switzerland Agreement, *supra* note 104, at art. 9.

[143] Antoine Goetz v. Republic of Burundi, 6 ICSID Rep. 5 (2004). In 1995, the investors

Belgian investor, filed the case with ICSID on the basis of consent to arbitration under the ICSID Convention contained in the 1989 BIT between the Belgium-Luxembourg Economic Union and Burundi, arguing that the withdrawal of a "free zone" certificate granting a series of tax and customs exemptions to their investment in a precious metals business amounted to an expropriation. There have also been dramatic cases recently, such as *Patrick Mitchell v. Democratic Republic of Congo*,[144] in which the Minister of Justice in the Democratic Republic of Congo ordered the seizure of the law chambers and a large sum of money belonging to the American law firm Patrick Mitchell and Associates, which specialized in investment law,[145] for the reason that the law firm was supporting rebels that were fighting to overthrow the government of President Laurent Kabila.

At the WTO Working Group on Trade and Investment, one of the issues that has been widely discussed is what kind of dispute settlement provisions should go into a multilateral framework on investment. It should be noted that the possibility of a multilateral agreement on investment is still very real at the WTO. Hence, it is important to highlight the issue of inconsistency in dispute settlement procedures and remedies between what may broadly be defined as the "international investment framework," comprising the various agreements that outline investment relations between countries, and the rather limited WTO investment framework, mainly TRIMs and the relevant provisions of GATS.

The current framework for investment and dispute settlement in the WTO can be found largely in the TRIMs agreement, which prohibits investment measures related to trade in goods that are inconsistent with the basic requirements of the GATT. In this regard, TRIMs contains provisions dealing with notification, transparency, non-discrimination, and balance-of-payment problems. The GATS addresses foreign investment in that it includes "commercial presence" as one of four modes of supply of services, such as introducing FDI into the WTO. The agreement on Trade-Related Aspects of Intellectual Property Rights provides for the protection of intellectual property rights as they relate to trade. It relates to investment in

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went into arbitration with the host state, which ended in mutual settlement in favor of the investors. Burundi was ordered to either compensate the investor or to reinstate their free-zone status. Burundi agreed to reimburse the investors all taxes and customs they had paid, amounting to almost $3 million, and to create a new free-zone regime. Arbitration as to whether Burundi is complying with the settlement is on-going. *See Disputes Before the Center*, 21 NEWS FROM ICSID 1, at 3 (Summer 2004), *at* http://www.worldbank.org/icsid/news/news_21-1.pdf.

[144] Patrick Mitchell v. Democratic Republic of the Congo, Case No. ARB/99/7 (Nov. 30, 2004), *at* http://www.worldbank.org/icsid/cases/mitchell-en.pdf (decision on stay).

[145] Apparently the firm acted on behalf of a range of major clients such as Banro Corporation, whose tin and gold mining concessions had been revoked by Kabila's government. Banro mounted an unsuccessful effort to challenge that action in the ICSID. *See* Banro American Resources, Inc. v. Congo, 17 ICSID Rep. 382 (2002).

that it regulates the transfer of technology through FDI, a subject that is of particular interest to developing countries looking to be at the receiving end of technology transfers. Finally, the Uruguay Round *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") governs the dispute settlement of investment issues since each of the above agreements are subject to the DSU.[146]

It is important to distinguish the goals of dispute settlement from the treatment thereof, in the context of trade and investment regimes. The goal of the dispute settlement system within the WTO is to bring a country member into compliance with its obligations *vis-à-vis* other members under the WTO agreements.[147] The WTO system makes no provision for private actors, as the system is set up to govern relationships between and among states. While state-to-state disputes may arise, at the root of investment disputes are private actors and the aim of the dispute settlement system under an investment agreement is usually to provide direct relief to the investor. As a result, BITs, and even some regional treaties, are structured in ways that will accommodate investor-to-state dispute settlement procedures, thus enabling private actors to bring an action against a state in an international forum. The foundations for these types of provisions stem from the principles of public international law that provide for state responsibility for injury to aliens or injury to the property of aliens.[148]

While trade disputes are resolved by the WTO's Dispute Settlement Body ("DSB"), as highlighted earlier, BITs typically provide for the resolution of investment disputes by way of arbitration in an international forum, such as the ICSID or arbitration centers such as the International Court of Arbitration of the ICC. More importantly, there is also a significant difference in the form of relief provided. The remedies given in arbitration awards in investment disputes typically provide for prospective relief in the form of a compensation award. This position stems from the so-called Hull formula, providing that "prompt, adequate and effective compensation" is the most appropriate form of relief in an investment dispute.[149] Developing countries have also been willing to sign on to BITs providing for compensation because BITs offer an opportunity to negotiate

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[146] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art 1.1, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND, vol. 31, 33 I.L.M. 1226 (1994), *available at* http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm [hereinafter DSU].

[147] *See generally* Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules Are Rules—Toward A More Collective Approach*, 94 AM. J. INT'L L. 335, 336 (2000); Joel Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333 (1999).

[148] *See* SORNARAJAH, *supra* note 16, at 219.

[149] *Id.* at 220. In general, capital importing countries (mainly developing countries) have tended to oppose the applicability of the Hull formula in favor of the "partial compensation formula." *See id.* at 258–59.

and offer concessions to a potential investor in competition to and, hopefully, at the exclusion of, other potential hosts. Most BITs also require that state-to-state disputes be settled by consultations, failing which the dispute is submitted for arbitration. The arbiter renders a decision, which may include a compensation award.

Under the WTO agreements, however, the emphasis is on obliging a Member to bring its practices into compliance with the agreement without requiring retrospective relief. To the extent that compensation is provided, it is usually as a way to ensure compliance and is on a voluntary basis only. Moreover, the TRIMs agreement, as a non-comprehensive investment agreement, is devoid of a provision for the repatriation of capital expropriation and compensation issues. Thus, the current WTO framework, and particularly the dispute settlement framework, is at odds with the standards that have been developed in international law for the settling of investment disputes. In terms of Article 3.7 of the DSU, the primary objective of the dispute settlement mechanism is to secure the withdrawal of trade measures found to be inconsistent with the WTO agreements, and thereby facilitate trade.[150] Anything short of this, for example the payment of compensatory market access or retaliation, is a further anomaly which negates the overall objective of free unhindered trade between WTO members.

Compensation is available as a temporary measure and only if the immediate withdrawal of the trade measure is impracticable. Article 3.7 of the DSU explicitly privileges compensation over the suspension of concessions.[151] However, the system is set up in such a way that compensation is not always a viable option while suspension of concessions often is. According to Article 22.2, members have to enter into negotiations with the other party with a view to "develop mutually acceptable compensation."[152] Not only is the possibility of reaching a mutually-agreed decision on compensation considerably low, the DSU provides for only 20 days after the expiry of the reasonable period of time to end negotiations, usually as considered by the offended WTO Member and determined as a matter of practice taking into consideration the complexity of the issues in the dispute.[153]

The result is that retaliation becomes the optimal remedy to dispute settlement. However, retaliation does not necessarily work in favor of developing countries, especially in the case of retaliation by a developing country against a developed country, where the developed country can afford to continue a violation despite the retaliation. In addition, it could be

[150] DSU art. 3.7.

[151] *Id.*

[152] *Id.* at art. 22.2.

[153] *Id.*

economically self-defeating for a developing country to suspend concessions and in the process lock out vital imports. Moreover, retaliatory measures may in fact provoke counter retaliation measures in non-trade related fields such as development aid. The recommended measure therefore is to enhance and improve the current provision in the DSU dealing with compensation. One way of doing it would be to provide that the panel make a recommendation on the level of nullification or impairment at the time of issuing its report. In determining the level of nullification and impairment, the complaining member will have to provide sufficient information to enable the panel to make an objective assessment.

If there is a failure to bring the inconsistent measure into compliance within the reasonable time period, the recommended level of nullification or impairment is treated as a compensation award and comes into effect.[154] The complaining member should then have the option of invoking the compensation award or requesting authorization from the DSB to suspend concessions. The recommendation diverges from the current agreement in two major respects. First, compensation is not negotiated by the members that are party to the dispute, but is a remedy that is decided upon by an adjudicating third party. This strengthens the provision and brings the WTO framework closer to conformity with the international investment framework, in which the decision of the arbitral tribunal is in most instances binding upon the parties. Second, it loses its nature as a voluntary option for the member in violation of the agreement and provides the complaining member, for whom retaliation is an unrealistic option, with an alternative tool to ensure compliance and restore the imbalance created by the inconsistent measure. The most appropriate remedy within the WTO framework should still be for a member to bring its measures into compliance with the WTO agreements. A stronger compensation mechanism, though, would not only encourage compliance overall, but also serve to improve developing countries' positions in the dispute settlement process.

D. Trends in Provisions on Investment Protection

Because "[n]ationalization poses the greatest threat to foreign investment,"[155] all BITs signed by African countries, as is true for all BITs worldwide, have specific provisions laying down the conditions under which expropriations and nationalizations can be carried out by a party. The provisions also deal with compensation claims and how such claims are to be settled. The discernible trend is that now, for various public purposes, "it is generally accepted that a State has a right to nationalize foreign-owned

[154] *Id.* at art. 22.1.
[155] SORNARAJAH, *supra* note 16, at 253.

property, subject to certain exceptions,"[156] usually spelled out in BITs. The level of compensation is mostly contested however, and as some commentators have noted, "it is idle to pretend that the position in *customary* international is other than uncertain."[157] What is clear, however, is that nationalization and expropriation without some form of compensation is increasingly a rare occurrence. Most countries accept that compensation will be paid. It is unlikely that this issue will be contested by developing countries, even if negotiations were to commence at the WTO on a multilateral agreement on investment. Already, as pointed out, all BITs contain a provision along these lines. What might be problematic will be the level of compensation and how it will be determined.

E. Trends in Provisions Restricting Outward Capital Flows

The ability to freely and promptly transfer funds related to foreign investment (such as profit, dividends, royalties and others), in freely and easily transferable currency is always a major concern of foreign investors. Currency restrictions and difficulties in remittance of funds are said to discourage foreign investors. The liberalization of capital markets in most of Africa, and the free convertibility of most African currencies into hard currencies, was viewed as a way of creating an environment conducive to foreign investment. Due to inadequate foreign exchange reserves, however, and the importance of such reserves in avoiding currency and price volatility, some countries in Africa have put in place currency externalization and capital movement restrictions. Usually, this is in keeping with their development strategies.

It is not surprising, therefore, that most BITs that have been signed by African countries have a provision devoted to making sure that parties to such agreements have the leeway to transfer funds out of the country whenever the need arises. In the United Kingdom-Swaziland agreement it is provided that:

> Each Contracting Party shall in respect of investments guarantee to nationals or companies of the other Contracting Party the unrestricted transfer of their investments and returns. Transfers shall be effected without delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed by the investor and the Contracting Party concerned. Unless otherwise agreed by the investor, transfers shall be made at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in

[156] *Id.*

[157] Eli Lauterpacht, *Issues of Compensation and Nationality in the Taking of Energy Investments*, 8 J. ENERGY NAT. RESOURCES L. 241, 243 (1990).

force.[158]

In the United Kingdom-Lesotho agreement, it is provided that "Each Contracting Party shall in respect of investments guarantee to nationals or companies of the other Contracting Party the free transfer of their capital and of the returns from it."[159] The Mozambique-Indonesia agreement provides for similar rights for transfer of investment capital and returns, adding that all transfers shall be effected without delay in any convertible currency at market rates[160] but that "in the absence of a market exchange rate, the rate to be used will be the most recent exchange rate applied to inward investments or the most recent exchange rate for conversion of currencies in special drawing rights, whichever is more favorable."[161]

In Article 5, the Mauritius-Switzerland agreement provides for free transfer of investment capital returns similar to the Namibia-Germany[162] and Zimbabwe-Germany[163] agreements. In Article V:1 of the Mozambique-United States agreement, each party agrees to "permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory" in "freely usable currency" and at the prevailing market rate of exchange. An indicative and non-exhaustive list of transfers that must be allowed is provided. A surprisingly friendly provision in paragraph 4 allows a party to prevent a transfer through the equitable, non-discriminatory and good faith application of laws relating to bankruptcy, insolvency, or the protection of the rights of creditors, securities, criminal or penal offences, or ensuing compliance with orders or judgments in adjudicatory proceedings.

F. Trends in Provisions on Investment Incentives and Performance Requirements

By their mere signature, countries usually aim to create a degree of legal security through BITs. Hence, they do not go out of their way to actually provide for financial or other economic undertakings in incentivizing foreign investors. Because foreign investment is often perceived as a tool for economic development, especially by African countries, many of the investor-incentive programs are agreed upon in mutual bilateral cooperation between the host and source states, mostly

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[158] U.K.-Swaziland Agreement, *supra* note 101, at art. 6.

[159] U.K-Lesotho Agreement, *supra* note 100, at art. 6.

[160] Indonesia-Mozambique Agreement, *supra* note 102, at art. VI(1).

[161] *Id.* at art. VI(2).

[162] Germany-Namibia Agreement, *supra* note 91, at art. 5.

[163] Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Sept. 29, 1995, F.R.G.-Zimb., art. 5, *at* http://www.unctadxi.org/templates/docsearch.aspx?id=779 [hereinafter Germany-Zimbabwe Agreement].

regardless of what is contained in BITs. Some authors have noted the absence of incentive schemes in BITs and stated that it is "consistent with the obvious principle that no State can be compelled to grant preferential treatment to foreign investors, though it may of course elect to freely do so."[164] However, there are a number of general "investment promotion" provisions. The word "promotion" in this sense could include incentive schemes. An example of a BIT in which the parties agree to promote investment from the other would include the United Kingdom-Mauritius agreement, where each party agrees to "encourage and create favorable conditions for nationals or companies of the other party to invest capital in its territory."[165] Close language is also to be found in the Zimbabwe-Germany agreement,[166] United Kingdom-Angola agreement,[167] Germany-Ethiopia agreement,[168] and the Zambia-Netherlands agreement.[169]

Some BITs also preclude parties from imposing performance requirements as a condition to establishment, expansion or maintenance of investments. The United States-Mozambique agreement prohibits either party from mandating or enforcing specified performance requirements as a condition for establishment, acquisition, expansion, management, conduct or operation of a covered investment.[170] Article VI exhaustively lists the prohibited requirements as being: domestic content requirements, domestic purchase preferences, the balancing of imports or sales in relation to exports of foreign exchange earnings, requirements to export products or services, technology transfer requirements, and requirements relating to the conduct of research and development in the host state. According to the last sentence of Article VI, however, it is possible that conditions can be imposed "for the receipt or continued receipt of an advantage."[171]

G. Trends in Provisions on Entry, Movement and Employment of Personnel

Most major multinational companies doing business in Africa usually have foreign nationals, Europeans or Americans depending on the nationality of such corporations, at the top of the management structure. At the lower levels, these companies often employ nationals of the host state. Many BITs usually provide enough safeguards to ensure that foreign investors are able, first, to hire staff and have them gain entry and residential stay in the host state, and second, to ward off any economic

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[164] Sacerdoti, *supra* note 113, at 365.
[165] U.K.-Mauritius Agreement, *supra* note 130, at art. 2.
[166] Germany-Zimbabwe Agreement, *supra* note 163, at art. 2.
[167] U.K.-Angola Agreement, *supra* note 103, at art. 2.
[168] Germany-Ethiopia Agreement., *supra* note 111, at art. 1.
[169] Zambia-Netherlands Agreement, *supra* note 114, at art. 2.
[170] Mozambique-United States Agreement, *supra* note 107, at art. VI.
[171] *Id.*

policies in the host state that may preclude them from hiring top managers from any country, usually their home countries.

Of course, in most BITs there is a rider providing that such hiring policies have to be consistent with the national or domestic policies of the host state. In reality however, the clout that foreign investors have and the awe with which they are held in most African countries is such that they can get away with sometimes appalling human resource policies. Nevertheless, it is a common requirement that any national of a contracting party who wishes to seek entry and stay in a host state be accorded favorable treatment and that his purpose upon entry is connected with, or generally necessitated by, an investment.

In the Botswana-China agreement, for example, it is provided: "Subject to its laws and regulations, one Contracting Party shall provide assistance in and facilities for obtaining visas and work permits to nationals of the other Contracting Party engaging in activities associated with investments made in the territory of that Contracting Party."[172] Some other BITs are less clear, for example the Canada-South Africa agreement simply states that "Each Contracting Party shall encourage the creation of favorable conditions for investors of the other Contracting Party to make investments in its territory."[173] It would be reasonable to expect, however, that favorable conditions here would include assistance in obtaining visas and work permits in connection with investments.

Article VII of the United States-Mozambique BIT requires that each party allows, subject to its laws relating to entry and sojourn of aliens, the entry into its territory of the other party's nationals for certain purposes related to a covered investment and involving the commitment of a "substantial amount of capital."[174] Built into this provision is a safeguard against possible abuse of the claim for investor visas to both countries, by limiting them only to investors that will commit a substantial amount of capital. What is substantial capital is also a question of interpretation, but for certain, what will be insignificant capital in the United States will most certainly be deemed substantial capital in Mozambique. Paragraph 1(b) precludes any restrictions that the parties may impose simply because of numbers—Mozambique could never restrict entry of American investors even if one sector of its economy was totally dominated by such investors. At paragraph 2, the BIT requires that each party should allow covered investments to engage top managers of their choice, regardless of the nationality, although such personnel must independently qualify for an appropriate visa for entry into the territory of the other party, and further, it

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[172] Botswana-China Agreement, *supra* note 109, at art. 2.

[173] Agreement for the Promotion and Protection of Investments, Nov. 27, 1995, Can.-S. Afr., art. II(1), *at* http://www.unctadxi.org/templates/docsearch.aspx?id=779.

[174] Mozambique-United States Agreement, *supra* note 107, at art. VII.

does not give such personnel an automatic right of entry into a party's territory. This provision on the freedom to hire top managers from any part of the world "reflects the existence of a world market for professional competencies" and "remind[s] us of . . . the manifold restrictions, to which . . . movement across borders is currently subject, while trade and movements of funds is being liberalized at an increasing pace."[175]

V. WILL BITS GIVE RISE TO A COHERENT CORPUS OF CUSTOMARY INTERNATIONAL LAW?

There has been some debate among scholars as to whether, in fact, the commonality in the provisions of BITs could some day lead to a universalized corpus of customary international law on foreign investment.[176] The contrary view is that BITs create a *lex specialis* as between the parties and their provisions and, no matter how uniform in practice will therefore never advance to the level of customary law norms.[177] And further, that "the popularity of BITs should not be taken as evidence in support of customary international law."[178]

Some commentators take the view that "[i]t is possible that an accumulation of bilateral treaties which subscribe to the same standard of conduct could make that standard of conduct a principle of customary international law."[179] The bottom line remains, however, that despite objections by developing countries to the possibility that there are universal standards on foreign investment, they actually have in practice signed bilateral treaties reaffirming their support for the basic standards highlighted above and some of the traditional standards, such as the Hull rule of compensation. Collectively, this will make it difficult for them to intelligently object to a multilateral framework that encapsulates the standards they have already accepted at the individual state level through BITs.

As discussed in Part IV, developing countries have engaged in an

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[175] Sacerdoti, *supra* note 113, at 357.

[176] *See* Asoka de Z. Gunawardana, *The Inception and Growth of Bilateral Investment Promotion and Protection Treaties*, 86 AM. SOC'Y OF INT'L L. PROC. 544, 550 (1992) (stating that although the provisions of bilateral investment treaties may not have attained the status of customary international law, they will undoubtedly contribute towards the development of such principles).

[177] Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 NW. J. INT'L. L. & BUS. 327, 329 (1994) (stating that "each BIT is nothing but a *lex specialis* between parties designed to create a mutual regime of investment protection.")

[178] Andrew T. Guzman, *Explaining the Popularity of BITs: Why LDCs Sign Treaties that Hurt Them*, (Jean Monnet Working Papers, No. 12/97 § VII, 1997), *at* http://www.jeanmonnetprogram.org/papers/97/97-12.html.

[179] SORNARAJAH, *supra* note 16, at 226.

extensive exercise of BIT-signing to overcome the perception that they are unsafe destinations for foreign investment. Despite this, however, many of them continue to attract foreign investment, particularly in the unprocessed goods and extractive natural resources sectors. In attempting to regulate such foreign investment flows, they have entered into a number of BITs, most of which are initiated by developed countries. Many African countries enter into BITs with the hope that they may provide a measure of guarantee to potential foreign investors that their investments will be welcome and safe. The central theme in this paper has been that in the process, these countries have made concessions that they would have found unthinkable in the past, when autarchic economic policies were prevalent, and that will eventually work against their ability to credibly resist a comprehensive multilateral agreement on investment.

In supporting the central theme, this paper has examined some of the major provisions in a number of BITs. This survey reveals that in broad terms, BITs cover four areas: the scope of application of the treaty; market access; establishment and investment protection; and dispute settlement. In this article, we have focused mainly on various categorizations of the four broad concepts, with the intention of demonstrating to what extent African countries have bound themselves to obligations that they may find in a future multilateral foreign investment framework. The finding that there is a broad similarity in the key BIT provisions invites the never-ending debate as to whether in fact BITs give effect to existing international law principles. Whichever position one takes in this debate, the bottom-line is that African countries have precluded the chance to advance a defensible argument, particularly for a multilateral investment framework in the context of the WTO.

Annex I

Selected bilateral, regional and inter-regional agreements containing FDI provisions concluded or under negotiation, 2003–2004				
Year	***Title***	***Setting***	***Level***	***Status***
Developing countries				
Africa				
2004	ACP-EU Economic Partnership Agreement	ACP-European Community	Inter-regional	Under negotiation
2004	CEMAC-EU Economic Partnership Agreement	CEMAC (Central African Economic and Monetary Community)-European Community	Inter-regional	Under negotiation
2004	Economic Partnership Agreement between ECOWAS and the European Community	ECOWAS (Economic Community of West African States)-European Community	Inter-regional	Under negotiation
2004	Egypt-Singapore Free Trade Agreement	Egypt-Singapore	Bilateral	Under negotiation
2004	Economic Partnership between Eastern and Southern Africa and the European Union	ESA (Burundi, Comoros, Congo, DR, Djibouti, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles,	Inter-regional	Under negotiation

		Sudan, Uganda, Zambia, Zimbabwe)-European Community		
2004	Free Trade Agreement between SACU and the United States	SACU (Southern African Customs Union-Botswana, Lesotho, Namibia, South Africa, Swaziland)-United States	Bilateral	Under negotiation
2004	SADC-EU Economic Partnership Agreement	SADC (Southern African Development Community)-European Community	Inter-regional	Under negotiation
Asia and the Pacific				
2003	Framework for Comprehensive Economic Partnership Between the Association of Southeast Asian Nations and Japan	ASEAN-Japan	Bilateral	Adopted
2003	Chile-Republic of Korea Free Trade Agreement	Chile-Republic of Korea	Bilateral	Adopted
2003	Closer Economic Partnership Arrangement between China and Hong Kong (China)	China-Hong Kong (China)	Bilateral	Adopted
2003	Mainland and Macao (China) Closer Economic Partnership Arrangement	China-Macao (China)	Bilateral	Adopted
2003	Framework Agreement on Comprehensive Economic Cooperation Between the	India-ASEAN	Bilateral	Adopted

	Republic of India and the Association of South East Asian Nations			
2003	Framework Agreement for Establishing Free Trade Area Between the Republic of India and the Kingdom of Thailand	India-Thailand	Bilateral	Adopted
2003	Singapore-Australia Free Trade Agreement	Singapore-Australia	Bilateral	Adopted
2004	Bahrain-United States Free Trade Agreement	Bahrain-United States	Bilateral	Adopted
2004	Framework Agreement on the BIMST-EC Free Trade Area	India, Myanmar, Sri Lanka, Thailand, Bhutan, Nepal	Regional	Adopted
2004	Singapore-Jordan Free Trade Agreement	Singapore-Jordan	Bilateral	Adopted
2004	Framework Agreement on South Asian Free Trade Area	SAARC (South Asian Association for Regional Cooperation)	Regional	Adopted
2004	ASEAN-Republic of Korea	ASEAN-Republic of Korea	Bilateral	Under consultation
2004	ASEAN-CER	ASEAN-Australia-New Zealand	Inter-regional	Under negotiation
2004	Bahrain-Singapore Free Trade Agreement	Bahrain-Singapore	Bilateral	Under negotiation
2004	India-Singapore Comprehensive Economic Cooperation Agreement	India-Singapore	Bilateral	Under negotiation
2004	Korea, Republic of Singapore Free Trade Agreement	Republic of Korea-Singapore	Bilateral	Under negotiation
2004	SAARC agreement on the promotion and protection of investment	South Asian countries	Regional	Under negotiation

2004	Sri Lanka-Singapore Comprehensive Economic Partnership Agreement	Sri Lanka-Singapore	Bilateral	Under negotiation
2004	Thailand-United States Free Trade Agreement	Thailand-United States	Bilateral	Under negotiation
Latin America and the Caribbean				
2004	Central American Free Trade Agreement	CACM (Central American Common Market)-United States	Bilateral	Adopted
2004	Agreement Between the Caribbean Community (CARICOM), Acting on Behalf of the Governments of Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago, and the Government of the Republic of Costa Rica	CARICOM (Caribbean Community and Common Market)-Costa Rica	Bilateral	Adopted
2004	Free Trade Agreement between Andean Community-Mercosur	Andean (Colombia, Peru, Ecuador, Bolivia)-Mercosur (Brazil, Argentina, Paraguay and Uruguay)	Inter-regional	Adopted
	Free Trade Agreement of the Americas	Americas	Regional	Under negotiation
	Andean Community-Canada	Andean	Bilateral	Under negotiation
	Andean Community-United States Free Trade Agreement	Andean-United States	Bilateral	Under negotiation

	Brazil-Russian Federation	Brazil-Russian Federation	Bilateral	Under negotiation
	CARICOM-EFTA	CARICOM-EFTA	Inter-regional	Under negotiation
	CARICOM-EU	CARICOM-European Community	Inter-regional	Under negotiation
	Costa Rica-Panama Free Trade Agreement	Costa Rica-Panama	Bilateral	Under negotiation
	Mexico-Singapore Free Trade Agreement	Mexico-Singapore	Bilateral	Under negotiation
	***Source*: UNCTAD.**			