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International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa

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1. Introduction

At a time of great change in the global economy, there is an intensifying and widening debate on the implications of international investment agreements (IIAs) (including bilateral investment treaties or BITs) for sustainable development. This debate is both overdue and relevant. It is overdue because the principles that underpin IIAs, conceived as they were in the immediate post-colonial period and in the context of the Cold War, are increasingly at odds with new and emerging challenges confronting the international community.[1] The debate is particularly relevant in Africa as the continent's new economic development programme to effect structural transformation and achieve sustainable development may well be constrained by the terms and conditions imposed by IIAs.

This paper aims to draw lessons of that debate for Africa's economic development strategy and objectives. To this end, it outlines the broad features of alternate policy approaches to foreign direct investment (FDI) and the policy perspectives embedded in IIAs. The paper then provides a critique of IIAs with respect to their structure and core provisions, particularly in respect of investor-state dispute settlement provisions. It continues by providing an overview of the results of studies on the relationship between IIAs and FDI flows. The penultimate section outlines how governments around the world are responding to the challenges. It pays particular attention to South Africa's experience with and policy approach to IIAs. The final section draws out the main lessons of the paper as they relate to Africa's emerging economic development strategies for structural transformation and sustainable development. It concludes by proposing some recommendations for consideration by African policy makers.

2. Policy Perspectives on FDI and IIAs

FDI can play an important role in economic development, as it is associated with a long-term commitment to the host country that generates inflows of capital and finance, technology, managerial best practice and access to global markets. Nevertheless, two paradigms broadly shape government policy towards FDI. One perspective tends to assume that all investment is good, and that all investment promotes growth and development. The derived policy implications are that Governments should attract FDI by providing strong protection to foreign investors, liberalise investment regimes, reduce or limit regulations and conditions on investors and, in so doing, realise the benefits of FDI. This policy perspective is embedded in the structure and content of existing IIAs; certainly those to which South Africa has been party.

The alternate view recognizes that FDI may indeed contribute to sustainable development but that the benefits to host countries are not automatic. It posits that regulations are needed to balance the economic requirements of investors for protection with the need to ensure that investments make a positive contribution to sustainable development in the host state. The associated spill-over benefits of FDI as they relate to technology transfer, managerial best practice, skills development, research, as well as building beneficial linkages to the national economy need to be purposefully built into the regulatory regime, and not taken for granted. In this view, benefits are measured by the degree to which FDI supports national development strategies and objectives.

While there are certainly many examples of FDI contributing positively to economic development, there is also evidence of the risks FDI can pose to the balance of payments, environment or distorted enclave-type development etc. IIAs are not designed to address such issues, as their overriding focus is to protect foreign investment. In fact, IIAs are structured in a manner that primarily imposes legal obligations on governments to provide wide-ranging rights protection to investment by the countries that are party to the treaty. This pro-investor imbalance can constrain the ability of governments to regulate in the public interest. Under the dispute settlement provisions, only investors can initiate disputes, and governments have no recourse under IIAs to challenge errant behaviour by investors.

Furthermore, under the current regime, IIAs open the way for foreign investors to challenge any government measure that an investor views as diminishing 'expectations' of returns to the investment. The current regime can thus impose a 'chill' on government policy-making, and legislative and regulatory authority. Rebalancing the relationship between investor protection and

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government's right to regulate in the public interest has moved to the centre of the debate on the future of IIAs. The problems are, however, deep-seated.

3. Growing Risks with IIAs and International Investor-State Arbitration

It is now widely acknowledged that IIAs, particularly early generation treaties, contain provisions that are vague and imprecise and, when subjected to international arbitration, leave wide scope for inconsistent and unpredictable outcomes. Typical provisions in IIAs, covering definitions of 'investor' and 'investment', and standards of protection such as 'fair and equitable treatment', protection against 'expropriation', and indirect expropriation have all been the subject of extensive legal wrangling, varying interpretations and conflicting arbitration awards.[2]

Expansive definitions of "investment" provide protection to any "asset" in the other treaty partner's territory, whether it is intended to be a productive enterprise (traditional FDI) or not. Against that broad definition, arbitral tribunals continue to interpret the provision on 'fair and equitable treatment' in a manner that imposes broad limits on government authority by granting investors the right to a "stable and predictable regulatory environment." This interpretation has been used successfully to challenge changes to regulations, including taxation. Similarly, the definition of "expropriation" is interpreted to include not only direct expropriation, such as takeovers of property, but also so-called "regulatory takings" which can cover any new policy measures that affect investors. These provisions, along with broad readings of, for example, the 'fair and equitable treatment' provision, act to limit scope for government policy.

The investor-state dispute settlement (ISDS) system itself is fragmented with various venues on offer for arbitration, each with its own rules of procedure, history and culture. Arbitrators are chosen in an *ad hoc* manner and, in the absence of an appellate process that ensures consistency and the correct application of international law, the system is prone to inconsistent and diverging interpretations in cases addressing the same provisions and similar facts. Recurring inconsistent awards and interpretations by panels deepen the uncertainty about the meaning of key treaty obligations and compound the problems of the unpredictability of treaties. There is also growing evidence of dissenting views amongst members of panels.[3]

Questions are also raised as to whether arbitration processes conducted by three individuals, appointed on an *ad hoc* basis, possess sufficient legitimacy to assess acts of States, particularly on sensitive public policy issues. The system lacks an institutional framework that enshrines the principles of judicial accountability or the independence of arbitrators, and arbitrators can award damages without having to apply the various limitations on state liability that have evolved in domestic legal systems.

A new billion dollar industry has emerged out of this system. The number of investment arbitration cases, as well as the sum of money involved, has surged in the last two decades. Legal and arbitration costs average over US$8 million per investor-state dispute, exceeding US$30 million in some cases. The industry appears to be dominated by a small group of law firms and arbitrators that rotate between representing claimants, respondents as well as sitting on arbitration panels, raising concerns of conflict of interest.[4]

These risks are amplified by the rapid growth in investor claims around the world that are challenging a widening ambit of government measures.[5] There has been a dramatic increase in the number of claims brought by foreign investors against governments with the first in 1987, growing cumulatively to 50 by 2000, and 514 by 2012. In 2012, 62 claims were initiated, representing the highest number of claims for one year. A total of 95 governments have faced challenges under the ISDS system of which 61 (more than two-thirds) were developing country governments. The success rate for claims is growing: In 2012, 75% of all awards were in favour of investors. In 2009/2010, 151 investment arbitration cases involved corporations claiming up to US$100 million from states and one of the largest awards in favour of investors was delivered in 2012 against Ecuador for an amount of US$2.4 billion. Importantly for Africa, 25% of all reported investor-state arbitrations involve mining, oil and gas investments, all critical sectors for the future development of African economies.

Claims have been brought against government measures related to revocations of licenses (in mining, telecommunications, tourism), alleged breaches of investment contracts, alleged irregularities in public tenders, changes to domestic regulatory frameworks (gas, nuclear energy, marketing of gold, currency regulations), withdrawal of previously granted subsidies (solar energy), direct expropriations of investments, tax measures and others. Several cases have their origin in the recent financial crisis and are aimed against the austerity measures certain governments have had to introduce including as part of international financial support conditions. States have also continued to face investor claims concerning measures of general application introduced on environmental grounds.

In short, concerns about IIAs and the investor-state dispute settlement system are deep-seated and varied. The system is perceived as being biased towards the interests of investors over governments and the wider concerns of society. Imprecise provisions in IIAs combined with an arbitration process that lacks an institutional framework to safeguard legal certainty, correctness and predictability, suggesting a crisis of legitimacy.

4. IIAs and FDI Flows: A Grand Bargain?

If the concerns with inherent imbalance in IIAs are legitimate, it would be logical to ask what are the benefits of signing IIAs. The central argument advanced by proponents is that by granting the strong legal protection sought by investors, countries will receive greater inflows of FDI. In other words, in exchange for giving up policy space and some measure of regulatory autonomy, host states can expect or hope to receive increased flows of investment. What does the evidence show?

A 1998 United Nations Conference on Trade and Development (UNCTAD) analysis found a weak correlation between the signing of BITs and increased FDI inflows.[6] After conducting a cross-sectional data analysis for 133 countries between 1993 and 1995, a report by UNCTAD in 1998 found that the impact of bilateral investment treaties (BITs) on FDI is non-existent or small and secondary to the effects of other determinants, especially market size.

Hallward-Driemeier, who looks at FDI data from 20 Organisation for Economic Co-operation and Development (OECD) countries flowing to 31 developing countries from 1980 to 2000, finds that treaties act more as complements rather than substitutes for good institutional quality and local property rights.[7] He points out that the rights given to foreign investors may exceed those enjoyed by domestic investors and expose policymakers to potentially large-scale liabilities that curtail the feasibility of different reform options. Over a twenty-year period of analysis, the report found little evidence that BITs stimulated investment. The empirical evidence especially highlighted how countries with weak domestic institutions had not received significant benefits following the signing of a BIT. Rather, countries with strong domestic institutions had the most to gain, with the BIT acting as a complement to, as opposed to a substitute for, broader domestic reform. Consequently, the report found "those that are benefiting from them are arguably the least in need of a BIT to signal the quality of their property rights."

This is seen most clearly in the number of countries that receive substantial FDI but do not hold BITs. Japan, the second largest source of FDI in the world, has only 4 BITs. The US does not hold a BIT with China, despite the latter being the largest developing country destination for US FDI. Brazil, a receiver of substantial FDI, does not hold any ratified BITs. Similarly, numerous countries that have ratified BITs are having difficulties attracting FDI, particularly in Sub-Saharan Africa. Recognising the significance of these trends, the report concludes, "a BIT is not a necessary condition to receive FDI".

The work by Tobin and Rose-Ackerman, who examine FDI for 63 countries from 1975 to 2000, finds a very weak relationship between BITs and FDI. It also finds that rather than encouraging greater FDI in riskier environments, BITs only have a positive effect on FDI flows in countries with an already stable business environment. Overall, BITs seem to have little positive effect either on foreign investment or on outside investors' perception of the investment environment in low- and middle-income countries.[8]

One study found a positive association between the adoption of BITs and foreign direct investment flows. Neumayer and Spess looked at 119 developing countries (29 of which are in Latin America) between 1970 and 2001.[9] They used as an independent variable the number of BITs a developing country has signed with OECD countries, weighted by the world share of outward FDI flow that the OECD country accounts for. They found that developing countries that sign more BITs with developed countries receive more FDI inflows.

In his 2010 study, Yackee concludes that "Countries that refuse to sign BITs, or who allow their BITs to lapse, will probably not see a meaningful reduction in investment flows…. BITs are not magic wands, the wave of which produces, with a poof and a cloud of smoke, a foreigner with pockets stuffed with cash. If developing countries wish to attract foreign investment, they probably need to do something other than sign and ratify BITs."[10]

In its more technical analysis of the impact of BITs on FDI flows, the 2014 UNCTAD Trade and Development Report concludes that "… the current state of the research is unable to fully explain the determinants of FDI, and, in particular, the effects of BITs on FDI. Thus developing-country policymakers should not assume that signing up to BITs will boost FDI ….."[11]

In short, and taken together, studies are unable to demonstrate a clear relationship between signing IIAs and receiving greater flows of FDI. At best, the relationship is ambiguous, and IIAs are neither necessary nor sufficient to attract FDI.

5. How Are Countries Responding?

Most governments that were active in negotiating BITs in the 1990s, have reviewed their early investment treaties, and have effected significant changes to their policy on investment treaties as they have come to recognise the shortcomings, flaws and risks inherent in those first generation BITs. The re-think on investment treaties is largely related to considerations of the link between investment treaties and flows on FDI and the legal and policy implications of commitments made by entering into IIAs.

UNCTAD has outlined the actions countries are pursuing to address these challenges as clarifying the meaning of treaty provisions (through authoritative interpretations), revising treaties (through amendments), replacing older treaties (through renegotiation), or terminating/consolidating treaties (either unilaterally or by mutual consent).[12] Interestingly, the report points out that, at the end of 2013, more than 1,300 bilateral treaties would have been at the stage where they could be terminated or renegotiated at any time. Furthermore, between 2014 and 2018, at least 350 more bilateral treaties will reach the end of their initial duration. Treaty expiration offers an opportunity to address inconsistencies and overlaps in the multi-faceted and multi-layered regime of international investment treaties, and to update the investment regime in light of development paradigm shifts. Over the past decade or so, reviews have been undertaken in Australia, Canada, Norway, the United States, Sweden, South Africa and more recently in the EU, Indonesia and in India.

6. South Africa's Review and Policy Response to IIAs

In the immediate post apartheid era (1994-1998), South Africa concluded around 15 bilateral investment treaties (BITs) mainly with European countries. At the time, this was a good faith attempt to assure investors that their investments would be secure under the new democratically-elected government. Signing these BITs was also seen as an important diplomatic signal confirming South Africa's re-entry to the international community after the years of isolation under apartheid.

However, South Africa soon became aware of challenges posed by international investment treaties. It observed the fractious debate in the OECD when its members were seeking to negotiate a multilateral investment agreement in the late 1990s. South Africa also participated in the discussions in the WTO that sought to include investment under the Doha Round negotiations, where many developmental concerns emerged in the engagements. More seriously, the spike in international investment arbitrations that followed the financial crisis in 2001 laid bare that bilateral investment agreements can pose profound and serious risks to government policy.

The experience demonstrated that that there was no clear relationship between signing BITs and seeing increased inflows of FDI. This had been a motivating factor in signing BITs in the 1990s. South Africa does not receive significant inflows of FDI from many partners with whom we have BITs, and at the same time, continues to receive investment from jurisdictions with which we have no BITs. In short, BITs have not been decisive in attracting investment to South Africa. In addition, over the last decade, South Africa had to confront several challenges, and threats of challenge, brought under various BITs. Most of the threats of challenge may be described as spurious but they all underscored the fact that BITs do not adequately take into account conditions found in South Africa, the complexities of socio-economic challenges and the broad objectives of government policy.

South Africa's post-apartheid Constitution is widely commended around the world for its strong assertion of human rights. Embedded in the Constitution is a transformation agenda that seeks to overcome deeply rooted inequities inherited from apartheid's exclusionary policies. There is little disagreement with the need to pursue this agenda to ensure an inclusive and just society. The Constitution also provides for non-discrimination between foreign and domestic investors. All investors need to undertake their activities in this context of the transformation agenda set out in the Constitution. However, as we assessed the bilateral investment treaties that we had entered into, we began to identify a range of inconsistencies with the Constitution.

This prompted South Africa's review of BITs in 2008. Extensive and intensive consultations were held in South Africa over a three-year period in which a wide range of national and international experts participated. The review identified the range of concerns associated with BITs as outlined earlier in this paper, notably the risks associated with imprecise legal commitments. South Africa was particularly concerned with investor-state dispute provisions that open the door for narrow commercial interests to subject matters of vital national interest to unpredictable international arbitration outcomes and that may constitute a direct challenge to constitutional and democratic policy-making.

Against this background, in April 2010 the South African Cabinet concluded that South Africa should: First, refrain from entering into BITs in the future, except in cases of compelling economic and political circumstances. Second, Cabinet instructed that all "first generation" BITs that South Africa signed shortly after the democratic transition in 1994, many of which have reached their termination date, should be reviewed with a view to termination, and possible renegotiation on the basis of a new Model BIT to be developed. Third, Cabinet decided that South Africa should strengthen its domestic legislation in respect of the protection offered to foreign investors. In this regard, key considerations would be to codify BIT-type protection into South African law and clarify their meaning in line with the South African Constitution. South Africa would also seek to incorporate legitimate exceptions to investor protection where warranted by public policy considerations, such as national security, health, environmental reasons or for measures to address historical injustice and/or promote development. Fourth, Cabinet elevated all decision-making in respect of BITs to an Inter-Ministerial Committee tasked with oversight of investment, international relations and economic development matters.

7. Recent Developments in South Africa

South Africa has initiated processes to terminate its BITs. Over the course of 2012 and 2013, South Africa formally notified those European countries with whom it had BITs that it would terminate the treaties.[13] South Africa had made its intention clear by publishing the Cabinet decision in July 2010, and in several formal engagements at multilateral meetings in UNCTAD and at the OECD. This was followed by several consultations with representatives of the affected Governments through their embassies in South Africa. In addition, South Africa has engaged with two Governments in Latin America to terminate BITs by mutual consent. In Africa, South Africa has sought to develop common regional and continental approaches to BITs that may in future replace the existing BITs that South Africa has with African countries.

South Africa also actively participated in the development of a new model BIT that has been adopted at the regional level in Southern Africa.[14] The new Southern African Development Community (SADC) Bilateral Investment Treaty Model sets out provisions that mitigate the risks of earlier treaties and leaves open the option for state-to-state dispute settlement in addition to, or as replacement of, investor-state dispute settlement procedures.[15]

At the domestic level, a new 'Promotion and Protection of Investment Bill 2013' was published for public comment in November 2013. The Bill was the outcome of extensive intra-governmental legal and policy consultations.[16] It does not introduce any new restrictions on investment. It clarifies the non-discriminatory protections offered to all investors from all countries and confirms that South Africa remains open to FDI, providing effective protection while preserving the sovereign right of the government to pursue legitimate public policy objectives in line with constitutional requirements.

The Bill clarifies standards of protection for investors – both foreign and domestic – by setting out provisions ordinarily found in BITs in a manner that is consistent with the Constitution and the existing legal framework. The Preamble confirms South Africa's commitment to an open, transparent environment for foreign investment that supports sustainable development and international human rights law. It defines investment to be protected under this legislation as 'enterprise-based' requiring 'material economic investment' and, thus, does not cover short-term portfolio investments. It provides that all foreign investors are granted the same protection as domestic investors in 'like circumstances' (i.e. national treatment).

Provisions on 'expropriation' and 'compensation' are aligned to the Constitution and recent jurisprudence. As such, property may only be expropriated in terms of a law of general application for a public purpose or in the public interest. Expropriation is subject to compensation that is "just and equitable" as set in the Constitution. Moreover, government measures that have an incidental adverse impact on investment, where the measure is to protect legitimate public welfare objectives such as public health or safety, environmental protection or state security, would not be considered expropriation.

Under the right to regulate, the Bill specifies that Government may take measures to - amongst other things- redress inequalities, preserve cultural heritage, foster economic development and industrialisation, achieve socio-economic rights and protect health and the environment. The provision on 'transfer of funds' confirms the existing practice in South Africa that allows investors to freely invest and repatriate returns, subject to taxation and other applicable legislation. For 'dispute settlement', should a foreign investor seek to challenge a government measure, the jurisdiction for the settlement of disputes will be with a competent South African court, statutory body or independent tribunal, with arbitration following the terms of South Africa's Arbitration Act of 1965. The Bill also provides for a dispute avoidance mechanism where an investor may engage Government in an effort to resolve any concern amicably, without resort to legal challenges.

Numerous detailed written submissions on the Bill were received by the end of the comment period. There were comments from all sectors: government, non-governmental organisations, policy think-tanks, academics, both domestic and international. Some submissions were critical in nature, noting that the Bill was too narrow in its scope, while others believed it was too broad. Some argued that it gives too wide protection for investors, for others, too little. While comments covered most aspects of the Bill, the bulk focused on: definition of investment, expropriation, levels of compensation and access to international arbitration. The South African Government carefully considered all submissions and submitted a second iteration of the Bill to the Cabinet. In June 2015, the Bill was presented to Parliament for ratification.

Through all these efforts, South Africa envisions a legal and policy framework for investment that learns from the lessons of the past and is better attuned to the challenges of sustainable development and inclusive growth. Equitable relationships between investors and government, based on respect for human rights, the rule of law and due process, and security of tenure and property rights will continue to be pursued within the framework established by the South African Constitution.

8. Responses by Other Governments

The United States and Canada have responded by effecting amendments to their Model Investment Treaties, adopting interpretative statements and redrafting key provisions in subsequent IIAs, clarifying certain provisions and seeking to give greater authority to governments in interpreting the meaning of the obligations undertaken. These reforms aim to address some of the challenges raised by IIAs.

As the competence for negotiating IIAs has moved from its Member States to the supranational level under the 2010 Lisbon Treaty, the EU has been re-thinking the traditional approach to these treaties. On 21 January 2014, the European Commission (EC) announced its intention to pause investment treaty negotiations with the United States under the Transatlantic Trade and Investment Partnership (TTIP) Agreement in order to address what it termed "unprecedented public interest" in the European Union (EU) on the matter of investment treaties.[17] The announcement identified some of the critical issues at stake, notably the need to reaffirm the right of government to regulate in the public interest - to "close loopholes", and to establish an arbitrator code of conduct to enhance fairness, transparency and even handedness in the current system. At the time of writing, the dialogue in the EU continues.

Australia decided in 2012 to exclude ISDS in future

IIAs, but this blanket prohibition on ISDS was later reversed. Several Latin American countries have withdrawn from the International Centre for Settlement of Investment Disputes and are withdrawing from IIAs. At the same time, they are seeking to establish a regional *alternative for dispute settlement under the* Union of South American Nations (*UNASUR). In 2014, Indonesia decided to terminate its BITs.* Brazil's case is interesting, as it has refused to enter into any IIAs on the basis that its Congress has seen these as unconstitutional.[18] It is instructive that Brazil still receives large inflows of FDI.

The essential lesson in all this is that many governments around the world are not at ease with the existing system of IIAs and ISDS. Differences in approaches may to some extent be a function of whether the countries undertaking reform are predominantly capital exporting or capital importing countries and whether there is confidence that the government's right to regulate can indeed be assured through appropriate reform of the system. In all cases, new approaches to investment treaty making aim to mitigate the risks of earlier agreements. There is some evidence of efforts to ensure IIAs support inclusive growth and sustainable development objectives, notably through strengthening the right of governments to regulate in the public interest. In some cases, there are attempts to locate investment protection within broader human rights frameworks.

9. IIAs and Africa's Agenda for Structural Transformation: Some Recommendations

Recent changes in the global economy have been accompanied by significant improvements in Africa's economic prospects. Africa is already the second fastest growing continent in the world, after Asia, and offers the highest return on investment among other regions. Africa's economic growth has been driven by a boom in mineral exports as well as growth in the agriculture, transport, telecommunication and retail sectors. Africa's enormous reserves include raw materials, 60% of the world's unused arable agricultural land, a young growing population, a growing middle class with considerable purchasing power, and urbanisation alongside steady improvements in economic governance - these factors underpin the view that Africa could become the next leading source of global economic growth.

Africa's paramount objective, however, is to move off a growth path based on consumption and commodity exports onto a more sustainable developmental path using its natural resource base as a platform for a new strategy for economic diversification and industrialization. Indeed, African governments and leaders have committed to this transformation. Achieving this objective will undoubtedly require a range of new and supportive policies and regulations including with respect to harnessing the benefits of FDI for sustainable development.

This paper has raised several issues that need to be considered to ensure that Africa's efforts at structural transformation are not frustrated. It was observed that IIAs are oriented in a manner that constrains the policy space of governments to implement measures in the public interest where these have a perceived negative impact on investor rights. It is further argued that the international investment regime exhibits a pro-investor bias over governments' right to regulate in the public interest.

The paper unpacked how the shortcomings and imbalances both in the IIAs and in the ISDS system that enforces those treaties constrain policy space. It pointed out that necessary change to policy and regulation such as the tax regimes (levies of mineral exports for example) that may be important to re-direct resources from primary sectors to support industrialisation may be challenged through international arbitration. Similarly, IIAs place constraints on government efforts to require investors to build linkages to domestic firms, upgrade skill or transfer technology. Efforts to enhance local content in production processes can also be stymied by IIAs.

In this light, it may be prudent for African policy makers and experts to consider the following. First, African Governments through the African Union may consider pursuing a comprehensive review of all the IIAs African countries have entered into. This review could focus on assessing the risks of IIAs to policy-making for structural transformation in Africa.

Second, African Governments may consider a pause in signing new IIAs until this assessment is complete. In doing this, it would be important to recall that there is no direct or clear link between inflows of FDI, which all African countries seek, and signing IIAs. Indeed, investors are motivated primarily by the prospects for returns to investment, which are high in Africa, and the extent to which national legal frameworks offer adequate protection to foreign investors. This also suggests the need to focus efforts on strengthening domestic legal frameworks to protect investment.

Third, African countries may need to consider how to deal with the stock of existing IIAs that they have signed on. As noted, termination, re-negotiation, and amendments are all options that countries around the world have undertaken. The challenges with each of these options could also be a subject for the review.

Fourth, it may be useful to begin consideration of an Africa-wide investment protection framework that mitigates risks of the earlier treaties and establishes a more appropriate balance between investor protection and the rights of government to regulate in the public interest. This may include consideration of an African-based investment arbitration centre.

Finally, in initiating a dialogue within Africa on these matters, African government policy makers and experts should participate more actively in the intensifying global debate on IIAs and the ISDS system.

End notes

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[11] UNCTAD, *Trade and Development Report 2014* (Geneva, September), pp. 155-160.

[12] UNCTAD, "International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal", IIA Issues Note No. 4 (Geneva, 2013).

[13] Termination notices were served to Belgium, Luxembourg, the UK, Germany, France, the Netherlands, Spain, Sweden, Denmark, Greece, Italy, Switzerland.

[14] See the Southern African Development Community's Investment Portal at http://www.sadc.int/opportunities/investment/.

[15] Southern African Development Community (SADC) Investment Portal

[16] For a copy of the draft Bill, see http://www.tralac.org/files/2013/11/Promotion-and-protection-of-investment-bill-2013-Invitation-for-public-comment.pdf.

[17] European Commission, Press Release: "Commission to consult European public on provisions in EU-US trade deal on investment and investor-state dispute settlement", Brussels, 21 January 2014.

[18] Brazil recently, in 2015, signed investment agreements with Mozambique, Angola, Malawi and Mexico and is negotiating with several other countries based on a new 'Cooperation and Facilitation of Investments' model.

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