SOUTH CENTRE

Research Paper 65

February 2016

THE RISE OF INVESTOR-STATE DISPUTE SETTLEMENT IN THE EXTRACTIVE SECTORS: CHALLENGES AND CONSIDERATIONS FOR AFRICAN COUNTRIES

Kinda Mohamadieh and Daniel Uribe

RESEARCH PAPERS

65

THE RISE OF INVESTOR-STATE DISPUTE SETTLEMENT IN THE EXTRACTIVE SECTORS: CHALLENGES AND CONSIDERATIONS FOR AFRICAN COUNTRIES

Kinda Mohamadieh and Daniel Uribe*

SOUTH CENTRE

FEBRUARY 2016

* Kinda Mohamadieh is a Research Associate and Daniel Uribe is a Visiting Researcher at the South Centre in Geneva. The authors are grateful to Carlos M. Correa and Manuel F. Montes for their review of the paper. The authors take full responsibility for all the data, analyses, and views in this paper, none of which should be necessarily associated with the South Centre.

THE SOUTH CENTRE

In August 1995 the South Centre was established as a permanent inter-governmental organization of developing countries. In pursuing its objectives of promoting South solidarity, South-South cooperation, and coordinated participation by developing countries in international forums, the South Centre has full intellectual independence. It prepares, publishes and distributes information, strategic analyses and recommendations on international economic, social and political matters of concern to the South.

The South Centre enjoys support and cooperation from the governments of the countries of the South and is in regular working contact with the Non-Aligned Movement and the Group of 77 and China. The Centre's studies and position papers are prepared by drawing on the technical and intellectual capacities existing within South governments and institutions and among individuals of the South. Through working group sessions and wide consultations, which involve experts from different parts of the South, and sometimes from the North, common problems of the South are studied and experience and knowledge are shared.

NOTE

South Centre
Ch. du Champ d'Anier 17
POB 228, 1211 Geneva 19
Switzerland
Tel. (41) 022 791 80 50
Fax (41) 022 798 85 31
south@southcentre.int
www.southcentre.int

TABLE OF CONTENTS

I. INTRODUCTORY NOTES

African countries have been active in concluding international investment treaties. According to the United Nations Conference on Trade and Development (UNCTAD), as of end 2013, 793 bilateral investment treaties (BITs) have been concluded by African countries, representing 27% of the total number of BITs worldwide[1] (See Annex 1). UNCTAD reports as well that several African countries are actively negotiating additional agreements. For example: the Southern African Customs Union (SACU)[2] is negotiating with India and the East African Community, including Burundi, Kenya, Tanzania, and Uganda, are in discussions with the United States.

Moreover, African countries are increasingly subject to investor-state dispute settlement (ISDS) cases, including claims that challenge the regulatory actions of host countries in a wide range of areas, including public services[3] and race relations[4]. Out of all cases registered under the International Centre for Settlement of Investment Disputes (ICSID) Convention and Additional Facility Rules, Sub-Saharan Africa accounts for 16% of these cases[5]. In 2014, cases against Sub-Saharan Africa amounted to 20% of the overall number of new cases brought under ICSID during that year (See Graph 1).

At the same time, African States have developed the 'Africa Mining Vision'[6], which is aimed at introducing policy and regulatory frameworks intended to maximize the development of the region through the use of natural resources as catalyst for industrial development in order to diversify the economy. Africa is one of the most important producers of mineral commodities; however most of the minerals are exported in raw form (ores concentrates or metals). In response, the 'Africa Mining Vision' is intended to promote added-value mechanisms within the region with a view to fully benefiting from the potential of mining.

The approach reflected in the 'Africa Mining Vision' is similar to policies several other developing countries have been considering in order to increase their participation on strategic sectors and enhance benefits from resource wealth in order to serve development and industrialization objectives. For example, several Latin American countries, including Ecuador, Bolivia and Venezuela, have applied active policies to regain the State's policy space to develop, plan, regulate and actively participate in strategic sectors such as mining,

---

[1] According to UNCTAD, the number of international investment agreements (IIAs) in 2014 came up to 3,271 agreements, including 2,926 BITs and 345 other IIAs.

[2] SACU is a customs union among: South Africa, Namibia, Lesotho, Botswana and Swaziland.

[3] Biwater Gauff (Tanzania) Ltd. v. Tanzania, ICSID Case No. ARB/05/22, Award (July 24, 2008) (involving water and sewage management). Available from https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1589_En&caseId=C67.

[4] Piero Foresti, Laura de Carli & Others v. The Republic of South Africa, ICSID Case No. ARB(AF)/07/01, Award (Aug. 4, 2010). Available from https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1651_En&caseId=C90.

[5] International Centre for the Settlement of Investment Disputes, The ICSID Caseload – Statistics (Issue 2013-2). Available from https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/2013-2.pdf.

[6] African Union, Africa Mining Vision (2009). Available from http://www.africaminingvision.org/amv_resources/AMV/Africa_Mining_Vision_English.pdf (accessed 25 November 2015).

water, energy and telecommunication in order to guarantee the use of natural resources for an economically, environmentally and socially sustainable development of the State[7].

This paper discusses the potential challenges that could arise out of rules established by international investment treaties and ISDS to the policy space of African countries and the operationalization of the 'Africa Mining Vision'. It provides an overview of the rising number of ISDS cases in the mining and extractive industries, including cases brought against African countries. It also reviews how investment treaties are increasingly imposing a wider net of prohibitions around performance requirements, which could potentially be crucial for the operationalization of the 'Africa Mining Vision'.

The paper concludes that in the case of African countries, similar to other developing countries, the expansion of international investment agreements (IIAs) could carry significant risks to policy space and policy tools necessary for industrialization and development. In the case of African countries, this implies risks to the potential use of sectoral policies, such as policies in the extractive industries and the 'Africa Mining Vision', in order to support and promote African countries' industrialization objectives.

[7] See: National Plan for Good Living 2013 – 2017 (Ecuador) <http://www.planificacion.gob.ec/wp-content/uploads/downloads/2013/12/Buen-Vivir-ingles-web-final-completo.pdf>, Homeland Plan (Venezuela) < http://www.asambleanacional.gob.ve/uploads/botones/bot_90998c61a54764da3be94c3715079a7e74416eba.pdf> , National Development Plan (Bolivia) <http://www.planificacion.gob.bo/pdes/> accessed 25 November 2015.

II. THE INVESTMENT PROTECTION REGIME UNDER SCRUTINY

Much of the recent debate and controversy in regard to the international investment protection regime have revolved around their implications on policy space that developing countries need to promote development. The rising number of ISDS cases revealed how the rules established under international investment agreements (IIAs), and the way they have been expansively interpreted by private investment arbitrators, encroach on government's ability to regulate in the public interest.

The problem of the investment protection regime is multilayered and is rooted in the following deficiencies:

i. an imbalance in the provisions of the investment treaties (including broad definitions of investment and investor, free transfer of capital, rights to establishment, the national treatment and the most-favoured-nation (MFN) clauses, fair and equitable treatment, protection from direct and indirect expropriation and prohibition of performance requirements)[8], which focus on the investors' rights and neglect investors' responsibilities, while often lacking express recognition of the need to safeguard the host states' regulatory authority;

ii. vague treaty provisions, which allow for expansive interpretation by arbitrators and for the rise of systemic bias in favor of the investors in the resolution of disputes under investment treaty law[9]. Such trends are often not in line with the original intent of the States negotiating the treaty;

iii. the investor-state dispute settlement mechanism, which is led by a network of arbitrators dominated by private lawyers, whose expertise often stem from commercial law[10]. Arbitrators have asserted jurisdiction over a wide range of issues, including regulatory measures on which constitutional courts had made a decision in accordance with the national law. The way the ISDS system has operated so far generates deep concerns in regard to democratic governance and accountability;

iv. the lack of transparency and available public information on ISDS procedures limit the space of public participation and accountability. Currently only 608 ISDS cases are known. UNCTAD notes that since most IIAs allow for fully confidential arbitration, the actual number is likely to be higher[11]. Within this context, claims or threats by investors to bring forward a claim against a particular state are increasingly

---

[8] See: Nathalie Bernasconi-Osterwalder, Aaron Cosbey, Lise Johnson, Damon Vis-Dunbar, "Investment Treaties and Why They Matter to Sustainable Development" (2011), International Institute for Sustainable Development (IISD), available at: https://www.iisd.org/publications/investment-treaties-and-why-they-matter-sustainable-development-questions-and-answers.

[9] For more information see the work of Gus Van Harten.

[10] See: Transnational Institute (TNI), "Profiting from Injustice: How law firms, arbitrators and financiers are fueling an investment arbitration boom".

[11] UNCTAD, *World Investment Report 2015*, page 112. Available from http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf.

> used as ways to prevent new legislation and other measures from being adopted or applied, thus effectuating the 'chilling effect' on the regulatory process[12].

Several countries, both developed and developing, have been reviewing their approach to investment treaties, including looking at ways of reducing their legal liability under bilateral investment treaties (BITs), especially given the surge in investor-to-state dispute cases (ISDS) from these treaties. According to the UNCTAD 2014 World Investment Report, at least 40 countries and 4 regional integration organizations are currently or have been recently revising their model IIAs[13]. UNCTAD points out that "the question is not whether to reform or not, but about the what, how and extent of such reform"[14].

Developing countries seeking to reform their approach to investment protection treaties have reviewed their existing IIAs and their implications. Some have set a moratorium on signing and ratifying new agreements during the time of the review. Some countries like South Africa, Indonesia, Ecuador and Bolivia chose to withdraw from all or some treaties. South Africa chose to replace BITs with a new national Investment Act entitled "Promotion and Protection of Investment Bill" that clarifies investment protection standards consistent with the South African constitution. Indonesia chose to develop a new model BIT, so did India[15]. Ecuador reverted to investment contracts as the main legal instrument defining the relation with investors, including setting clear obligations on the investor, such as performance requirements. Some states are pursuing alternatives at the regional level, through developing model rules that take into consideration the developmental concerns they face collectively.

Furthermore, there is growing evidence that the main economic justification for investment treaties is rarely fulfilled in practice. Investor surveys show that very few seem to consider investment treaties when they are making investment decisions. Similarly, public and private risk insurers do not consider whether the host countries have BITs in force when underwriting investment projects to these countries[16].

According to a World Bank study (2011), "both a review of the empirical literature and analysis using new data sources suggest that business opportunities—as represented by, for example**,** the size and growth potential of markets—are by far the most powerful determinants of FDI"[17]. Moreover, according to UNCTAD's Trade and Development Report (2014), "...results do not support the hypothesis that BITs foster bilateral FDI. Developing country policymakers should not assume that signing up to BITs will boost FDI…they should remain cautious about any kind of recommendation to actively pursue BITs" [18].

---

[12] See: "A Need for Preventive Investment Protection?" by Cezary Wiśniewski and Olga Górska on September 30, 2015, Kluwer Arbitration Blog, available at : http://kluwerarbitrationblog.com/blog/2015/09/30/a-need-for-preventive-investment-protection/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+KluwerArbitrationBlogFull+%28Kluwer+Arbitration+Blog+-+Latest+Entries%29.
[13] See: UNCTAD (2014), World Investment Report, p. 115 & UNCTAD - June 2014 - IIA issue note 3, "Reform of the IIA Regime: Four Paths of Action and a Way Forward".
[14] UNCTAD, World Investment Report – Overview 2015, page 27.
[15] At the time of writing this article, both the Indonesian and Indian model BITs were still under discussion.
[16] See: UNCTAD (2014) Trade and Development Report, Chapter VI & Poulsen, "The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence", Yearbook on International Investment Law and Policy 2009-2010 (Oxford University Press).
[17] Kusi Hornberger, Joseph Battat, and Peter Kusek, "Attracting FDI; How Much Does Investment Climate Matter?", *View Point: Public Policy for the Private Sector* (2011). Available from http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/327-Attracting-FDI.pdf.
[18] See: Trade and Development Report 2014, p. 159, available at: http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=981.

The experience of developing countries that have taken active steps to reform their approach to investment protection treaties, including through withdrawing from existing treaties, shows that their reform decisions do not have a negative impact on the flows of foreign direct investment (FDI) into the country. For example, South Africa has been ranked by UNCTAD as the top recipient of FDI inflows among the African countries in 2013[19], despite its decision to terminate existing BITs and renegotiate treaties on the basis of a new model. Similarly in Bolivia, FDI inflows have steadily increased despite Bolivia's withdrawal from its investment treaties[20]. In 2006, Bolivia started to systematically withdraw from every BIT that reached its expiration date. In May 2013, Bolivia collectively denounced all its remaining BITs. Concurrently, FDI inflows into Bolivia have steadily increased, reaching an unprecedented peak of USD1.75 billion in 2013. Brazil was ranked the 5th largest recipient of FDI in the world in 2013[21] despite having not ratified any investment agreements up till that period.

[19] UNCTAD press release (June 2014), UNCTAD/PRESS/PR/2014/024.
[20] CEPALSTAT (2014). *Bolivia (Plurinational State of): National Economic Profile*, cited in "Opening the Door to Foreign Investment? An Analysis of Bolivia's New Investment Promotion Law", by Martin Brauch – August 11, 2014.
[21] Source: UNCTAD - excluding the estimate for the British Virgin Islands.

III. THE RISE OF ISDS IN THE EXTRACTIVE SECTORS

The majority of the ISDS cases registered at ICSID are in the gas, oil, and mining sector; out of all the ISDS cases registered at ICSID until 2014, 26% were concentrated in the oil, gas, and mining sectors (See Graphs 2 and 3). This figure is 35% for the year 2014 alone. By contrast, in the year 2000, there were only three pending ICSID cases related to oil, mining, or gas[22].

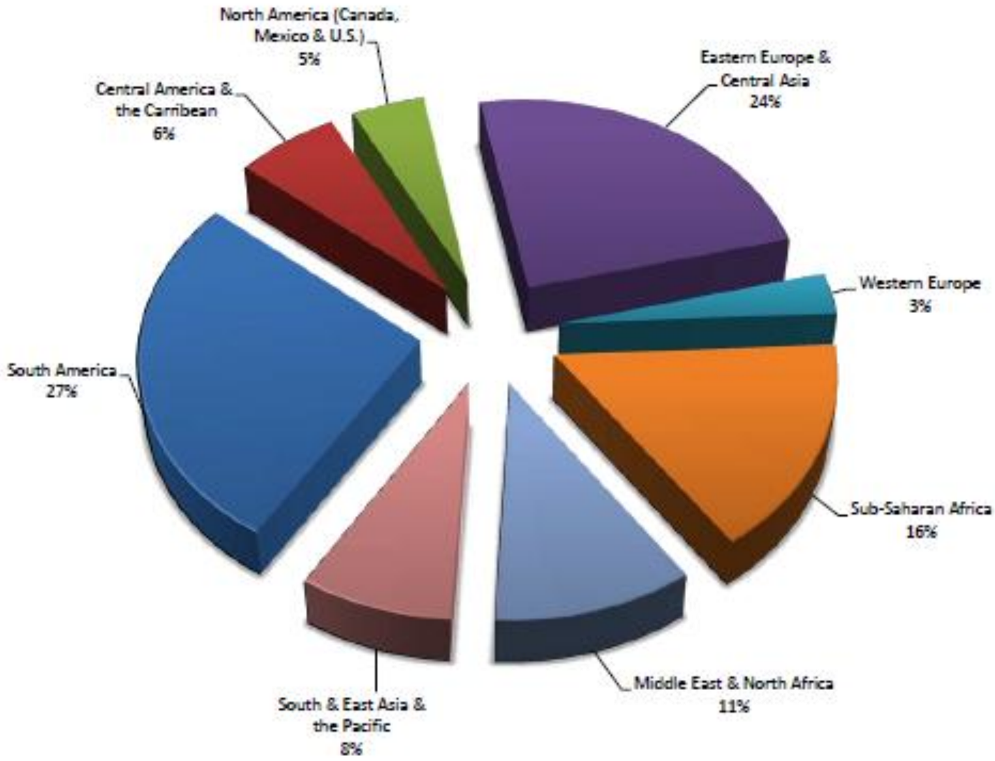
Through resorting to investor-state dispute settlement (ISDS) mechanisms, investors are challenging a broad range of government measures, not only challenging outright expropriation. Investors brought cases in relation to revocations of licenses (e.g., in mining, telecommunications, tourism), alleged 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, tax measures and other regulatory interventions[23].

Moreover, arbitral awards decided by ISDS tribunals are increasing in size. In 2014, three awards amounting to USD50 billion were decided against Russia in the cases brought by Yukos oil company majority shareholders. In the same year, an ICSID tribunal ordered Venezuela to pay USD1.6 billion, increased by compounded interest at the rate of 3.5 per cent, as compensation to Exxon Mobil. In October 2012, Ecuador was ordered to pay USD1.7 billion plus interest to the US-based Occidental Petroleum Corporation for having canceled its operating contract in 2006. In March 2010, Ecuador had lost another oil-related case – this one brought by Chevron for approximately USD 700 million. These two awards combined are the equivalent to approximately 3.3% of that nation's GDP[24]. In 2014, an ICSID tribunal awarded the mining company Gold Reserve USD 713 million plus costs in an arbitration against Venezuela.

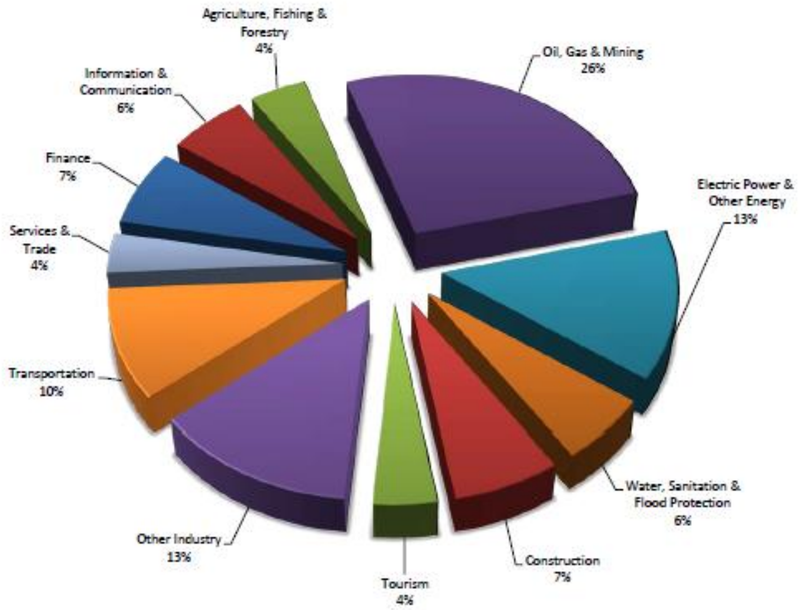
Graphs (1), (2) and (3) below show, respectively, the geographic distribution of all ISDS cases registered under the ICSID Convention and Additional Facility Rules until 2014, the sectoral distribution of all ISDS cases registered under the ICSID Convention and Additional Facility Rules up until 2014, and the sectoral distribution of ICSID cases brought in 2014 alone.

[22] See: Sarah Anderson & Manuel Perez Rocha, "Mining for Profits in International Tribunals: Lessons for the Trans-Pacific Partnership", Institute for Policy Studies, April 2013.
[23] Source: http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf (2012).
[24] Sarah Anderson & Manuel Perez Rocha, "Mining for Profits in International Tribunals: Lessons for the Trans-Pacific Partnership", Institute for Policy Studies, April 2013.

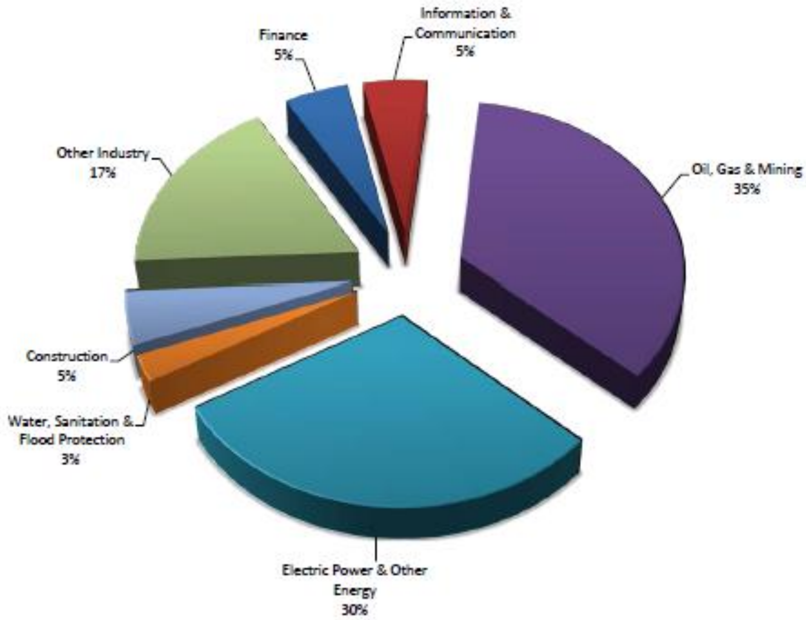
Graph 1: *Geographic distribution of all ISDS cases registered under the ICSID Convention and Additional Facility Rules* (by State Party, source: ICSID 2014)



Graph 2: *Sectoral distribution of all ISDS cases registered under ICSID Convention and Additional Facility Rules* (Source: ICSID 2014)



Graph 3: *Sectoral distribution of ICSID cases brought in 2014 under ICSID Convention and Additional Facility Rules* (Source: ICSID 2014)



Highlights from ISDS cases in the extractive sectors; Challenges to State's industrialization and regulatory space

Investors have resorted to ISDS to challenge multiple forms of governmental action related to the extractive sectors. These include measures taken as part of broader development and industrialization strategies, as well as measures to enhance beneficiation and fair allocation of rents between companies and the public. This section provides an overview of selected ISDS cases in this sector[25].

ConocoPhillips, US-Dutch Oil Company v. Venezuela

In 2007, Venezuela adopted Decree No. 5200 according to which oil companies operating in the Orinoco Belt Region (OBR) had to change their association contracts to mixed enterprises, in what was known as the 'migration' process. This process involved the transfer of 60% of shares to PDVSA (Petroleos de Venezuela SA), the government-owned oil company. This served to bring the OBR projects "in line with the legal requirements and fiscal conditions applicable to all other companies with oil activities in Venezuela, as set out in the 2001 Organic Law of Hydrocarbons"[26]. In effect, this operation required companies operating in the OBR, such as ConocoPhillips, to sell part of their equity participation to PDVSA, which was challenged in a number of ISDS cases against the country.

The changes undertaken by Venezuela are part of broader policies adopted by a number of Latin American countries, including Ecuador, Bolivia and Venezuela, to increase their participation in strategic sectors, particularly, oil and mining, access to water, energy and telecommunication services. The objective of these policies is to regain the State's space to

---

[25] This section is based on reporting provided by IAReporter.

[26] Juan Carlos Boué, "Conoco-Phillips and Exxon-Mobil v. Venezuela: Using Investment Arbitration to Rewrite a Contract". Available from https://www.iisd.org/itn/2013/09/20/conoco-phillips-and-exxon-mobil-v-venezuela-using-investment-arbitration-to-rewrite-a-contract/ (4 November 2015).

develop, plan, regulate and actively participate in these sectors in order to guarantee the use of natural resources for economically, environmentally and socially sustainable development[27].

Conoco turned to arbitration in 2007[28], alleging expropriation of its investments in two heavy-oil projects in Venezuela's Orinoco Belt in breach of the Netherlands-Venezuela BIT. The case raised several concerns in regard to the establishment of 'new standards' for compensation in cases of expropriation.

Under customary international law, expropriation or nationalization is warranted as long as the act is taken for public purposes, is non-discriminatory and conforms to principles of due process, and the host state compensates the foreign investor[29]. In line with customary law, investment treaties usually allow expropriation but under strict conditions of compensation, requiring that expropriation be for public purpose, non-discriminatory thus not targeted at a specific company or nationality, and in accordance with due process of law[30]. In general, the standard for compensation is commonly considered equivalent to the market value of the nationalized asset. Nevertheless, such market value is not in itself a unique accounting mechanism to determine the value of the assets. Generally, some accounting mechanisms could include discount cash flow (DCF), book value or replacement value[31]. The Venezuelan government offered the payment of compensation based on book value, while the company considered that the compensation should be done on the basis of DCF; the disagreement led to the initiation of arbitration by the investor.

The arbitral tribunal was of the opinion that Venezuela had breached its obligation to negotiate 'in good faith' compensation for "its taking of the ConocoPhillips assets (…) on the basis of market value as required by Article 6(c) of the BIT"[32]. The tribunal emphasised that there is an "obligation to negotiate in 'good faith' for compensation", taking into account that the compensation formulas included in the association contracts "were not, on the evidence before it, brought into the negotiations about compensation"[33].

---

[27] See: National Plan for Good Living 2013 – 2017 (Ecuador) <http://www.planificacion.gob.ec/wp-content/uploads/downloads/2013/12/Buen-Vivir-ingles-web-final-completo.pdf>, Homeland Plan (Venezuela) < http://www.asambleanacional.gob.ve/uploads/botones/bot_90998c61a54764da3be94c3715079a7e74416eba.pdf>, National Development Plan (Bolivia) <http://www.planificacion.gob.bo/pdes/> accessed 25 November 2015.
[28] ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits, 3 September 2013.
[29] UNCTAD, International Investment Rulemaking, Note by the UNCTAD Secretariat, TD/B/COM.2/EM.21/2 (New York and Geneva, United Nations, 2007).
[30] See: IISD, "Investment Treaties and Why They Matter to Sustainable Development", p. 15.
[31] The discounted cash flow value relies upon the expectations of the business to generate cash flows in the future, and not on public market factors or historical precedents. The book value responds to the worth of a company after liquidation of its assets and payment of debts and liabilities. The replacement value implies the compensation of the cost of the expropriated asset in the current market without considering depreciation.
[32] ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits, para. 401. Article 6 of the Netherlands-Venezuela BIT provides that: "Neither Contracting Party shall take any measures to expropriate or nationalise investments of nationals of the other Contracting Party or take measures having an effect equivalent to nationalisation or expropriation with regard to such investments, unless the following conditions are complied with:
(a) the measures are taken in the public interest and under due process of law;
(b) the measures are not discriminatory or contrary to any undertaking which the Contracting Party taking such measures may have given;
(c) the measures are taken against just compensation. Such compensation shall represent the market value of the investments affected immediately before the measures were taken or the impending measures became public knowledge, whichever is the earlier, it shall include interest at a normal commercial rate until the date of payment and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants".
[33] ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits, para. 402.

On this question, Professor Georges Abi-Saab, Venezuela's nominee to the tribunal, submitted a dissenting opinion in which he addressed the majority's conclusion on the obligation to have negotiations based on good faith for the determination of 'just compensation'. Professor Abi-Saab considered that the obligation to pay 'just compensation' requires two elements: first that such compensation should consist on the offering or payment of a given sum at the time of nationalization[34]; and secondly, that such compensation should not be illusory[35]. According to Abi-Saab, the obligation to pay just compensation requires that "at, or around, the time of nationalization the State provides for such a payment, for example, by establishing a procedure for its determination or by offering a given sum"[36]. Such obligation will not be fulfilled if the State "refuses from the outset to pay any compensation"[37], or if such compensation results are illusory. Therefore, Professor Abi-Saab concluded that *there is no such thing as an obligation under international investment law to negotiate compensation in good faith*.

Indeed, Article 6(c) of the BIT signed between the Netherlands and Venezuela provides that compensation "shall represent the market value of the investment affected" but does not include any mentioning of an 'obligation to negotiate in good faith' such compensation. This decision could have large-scale effects on more than 20 arbitration cases pending at ICSID over related matters.

Nusa Tenggara Partnership B.V. and PT Newmont Nusa Tenggara v. Republic of Indonesia

The case[38] arises from the enactment of Law No. 4/2009 on Mineral and Coal by the Government of Indonesia. The Law required any company holding a mining permit or a special mining permit to process and purify minerals domestically prior to their export[39], and provided for companies to adopt these mechanisms no later than five years after the enactment of the Law. The Law also provided that, after 5 years of production, foreign-owned corporations should divest their shares to public bodies or national private companies[40], meaning that foreign companies would have to sell their shares up to 51% to the Indonesian Government, municipalities or domestic companies[41]. According to the preamble of the Law, the objective of enacting it is to manage mineral and coal in a way that gives "real added value to the national economy in pursuit of people's welfare and prosperity in a just manner" and to give "real added value to the national economic growth and sustainable regional development"[42].

---

[34] ICSID Case No. ARB/07/30, Dissenting Opinion to Decision on Jurisdiction and Merits, 19 February 2015, para. 116.
[35] ICSID Case No. ARB/07/30, Dissenting Opinion to Decision on Jurisdiction and Merits, 19 February 2015, para. 119.
[36] ICSID Case No. ARB/07/30, Dissenting Opinion to Decision on Jurisdiction and Merits, 19 February 2015, para. 116.
[37] ICSID Case No. ARB/07/30, Dissenting Opinion to Decision on Jurisdiction and Merits, 19 February 2015, para. 119.
[38] ICSID Case No. ARB/14/15, 15 July 2014.
[39] Law No. 4/2009, 12 January 2012, article 103.
[40] Ibid, Article 112.
[41] Hilde van der Pas and Riza Damanik, "The Case of Newmont Mining vs Indonesia", Briefing (Transnational Institute, November 2014). Available from https://www.tni.org/files/download/newmont-indonesia-case-4.pdf (accessed 5 November 2014).
[42] Law No. 4/2009, Preamble.

Newmont Mining operated the Batu Hijau copper and gold mine in the West Nusa Tangarra Province. The operation was governed by the Contract of Work (CoW)[43] which, as stated by the company, “provided assurance and stability to encourage significant, long-term investments”[44]. The CoW was a contract signed by Indonesia and Newmont in 1986 that established the obligations and rights of Newmont in the Batu Hijau project, including “taxes and other financial obligations of the company”[45].

In July 2014, Newmont announced the filing of international arbitration against Indonesia at ICSID. The company argued that the provisions of the CoW have continued to govern the operation of the mine despite changes in the legislation of Indonesia over the years[46]. It also argued that the imposition of new export conditions, a new export duty, and a ban on the export of copper concentrate in January 2017 breached the CoW and a BIT signed between Indonesia and the Netherlands. It is worth noting that at the time that the CoW was signed, PT Newmont Nusa Tenggara was solely owned by Newmont Indonesia Limited, a company incorporated in the State of Delaware, USA, and having its registered office in Melbourne, Australia[47].

In August 2014, the claimants and Indonesia arrived at a settlement and the Secretary-General of ICSID took note of the discontinuance of the procedure pursuant to Rule 44 of the ICSID Rules of Procedure for Arbitration Proceedings[48]. The agreement between Indonesia and Newmont includes the establishment of a 7.5% export duty and the signing of a Memorandum of Understanding between the parties, which includes resuming mining operations with the condition of constructing a processing plant to strengthen the mineral industry domestically. It is worth noting that despite Indonesia’s denouncement of the BIT with the Netherlands, the protections of the treaty will still apply to investments made prior the date of treaty termination, for a period of fifteen years after the date of its termination (i.e. after 30/06/2015)[49].

Pan American Energy LLC v. Plurinational State of Bolivia

The case was filed by Pan American Energy (US Company) under the US-Bolivia BIT challenging the nationalization of its subsidiary Chaco Petroleum in 2009. The arbitration was registered by ICSID in 2010[50], even though Bolivia withdrew from the ICSID Convention in 2007.

---

[43] Contract of Work between the Government of Indonesia and PT Newmont Nusa Tenggara (CoW), 2 December 1986. Available from https://firdausilyas.files.wordpress.com/2011/06/nnt_contractofwork_icw.pdf (accessed 5 November 2015).

[44] PT Newmont Nusa Tenggara, “Arbitration Filed Over Export Restrictions in Indonesia”, Press release, 1 July 2014. Available from http://www.newmont.com/files/2014/Press%20Releases/Press%20Release%201%20Juli%202014%20-%20Arbitration%20Filed%20Over%20Export%20Restrictions%20i%20%20%20_v001_e210p1.pdf (accessed 5 November 2015).

[45] CoW, Article 13.

[46] PT Newmont Nusa Tenggara, Press release, 1 July 2014.

[47] CoW.

[48] ICSID Case No. ARB/14/15, Order of the Secretary-General Taking Note of the Discontinuance of the Proceeding, 29 August 2014.

[49] Agreement between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia on Promotion and Protection of Investment, signed 6 April 1994, Article 15(2). Not in force. See also: UNCTAD (http://investmentpolicyhub.unctad.org/IIA/country/97/treaty/1988).

[50] ICSID Case No. ARB/10/8

The claimant argued that the transfer of its majority stake in Petrolera Chaco to a state-owned company amounts to expropriation, and asked for USD1.49 billion for damages. The Bolivian authorities argued that the transfer of majority of shares in Petrolera Chaco to Yacimientos Petroliferos Fiscales Bolivianos (YPFB) fell within a nationalization policy of strategic resources provided for by the Bolivian Constitution. Likewise, Bolivia added that due compensation will be offered to the investor once debts, liabilities and taxes are deducted.

Bolivia started a process of nationalizing the hydrocarbons sector in 2006, including negotiating agreements with foreign companies in which the state-owned petroleum company YPFB would take a majority ownership in existing projects[51]. Bolivia's new constitution (2009) enshrines its policy of nationalizing 'strategic resources'. Article 351 of the constitution declares that the State will "assume the control and direction over the exploration, exploitation, industrialization, transport and commercialization of natural resources."

Later, the parties agreed to a settlement and the procedures were discontinued on the basis of ICSID Arbitration Rule 43 (1). According to the Attorney General of Bolivia[52], the settlement included the payment of less than 30% of the amount demanded by the investor.

ISDS cases related to the extractive sectors against African countries

Similarly, ISDS have increasingly been used by investors in the extractive industries in several African countries, challenging governmental reform action, such as policy against speculation in the oil industry as well as tax measures. Below are selected examples from among multiple other such cases.

Vanoil Ltd. v. Kenya (2014)

Vanoil Ltd., a Canadian oil company, threatened to bring a case against Kenya after failure to secure extension of a pair of production-sharing contracts for onshore oil exploration in Kenya. Rights to onshore blocks in the Anza basin region in Kenya were acquired by the company in October of 2007. An October 2014 press release from Vanoil indicates that the company made good on its own threat and commenced arbitration against the Kenyan state under concession agreements, seeking USD 150 million in compensation[53]. The company discloses that it is also at odds with Kenyan authorities over an attempt to acquire a larger stake in an offshore Kenyan block. Canada and Kenya do not have a bilateral investment treaty, however the company has access to other treaties that could be used as basis for bringing the claim, given its holding structure.

African Petroleum Gambia Limited v. Gambia (2014)

The claimant is a British corporation that acquired a 60% interest in hydrocarbon licenses for exploration of oil offshore of Gambia in 2010. The first exploration period granted by the licenses expired in December 2013, and the Gambian government terminated the licenses in January 2014. The company disputed these terminations and initiated contract-based claims in relation to the cancelled licenses.

---

[51] See: Fernando Cabrera Diaz (February 2009), "Bolivian voters approve new constitution as government continues to nationalize oil assets", available at: www.iisd.org.

[52] http://www.wsj.com/articles/bolivia-pan-american-energy-reach-accord-1408724484

[53] Source: IAReporter, "An Update on Investor-State Claims against Kenya" (July 22, 2015) by Jarrod Hepburn, available at: http://www.iareporter.com/articles/an-update-on-investor-state-claims-against-kenya/.

The licenses were terminated under a general policy against speculation in the oil industry in Gambia. Licenses granted to other companies[54] were also terminated under this policy. After the licenses were terminated, the Government issued a statement in which it said that “[T]hese Licences (Sic) have been terminated with immediate effect. The Gambia government will not allow any institution to acquire licences (sic) only to keep them for speculation. In our bid to harness our natural resources for the benefit of Gambians, we are not going to deal with speculators”.[55]

On March 2014, African Petroleum Gambia Limited initiated procedures against Gambia taking ICSID as a forum. Nevertheless, by December 2014, the parties to the dispute reached a settlement in which the State reinstated the licences and extended the initial exploration period.

Total E&P Uganda BV v. Uganda (2015)

Total E&P Uganda BV (Dutch), subsidiary of French company Total S.A., brought a claim in relation to a stamp duty imposed by the Uganda Revenue Authority on the acquisition of stakes from London-listed Tullow Oil[56]. Total and China Offshore Oil Corporation (CNOOC) acquired 66.6% of certain Ugandan energy assets from Tullow Oil in February 2012[57].

The claim is based on the Netherlands – Uganda BIT and brought under ICSID rules. Total argues that it is entitled to a tax waiver by virtue of its contract with the government of Uganda. It is worth noting that Tullow Oil lodged a contract-based ICSID arbitration in mid-2013 in relation to a tax assessment imposed upon this operation. Tullow was assessed capital gains tax of USD 473 million by Ugandan authorities on that transaction, and it contested the legality of that assessment[58].

The Government of Uganda embarked on reviewing its legal and institutional framework for the management of oil revenues and environment aspects of production since 2006[59]. One of the pillars which this case affects is fiscal and monetary policy, particularly to need to enhance fiscal discipline over any revenues generated from oil and gas activities[60], including limiting tax incentives, such as waivers, for oil related gains and profits.

Swissbourgh Diamond Mines (Pty) Limited and others v. Lesotho (2012)

Swissbourgh Diamond Mines and others allege that they have suffered a denial of justice – following from a much earlier expropriation of mining rights in Lesotho[61]. The claim was

[54] According to IA Reporter, a licence for offshore oil exploration granted to Oranto Petroleum Limited was also cancelled by the Gambian government in January 2014. See: <http://www.iareporter.com/articles/egyptian-lng-dispute-lands-at-icsid-cancelled-licenses-in-gambia-open-door-to-arbitrations-including-by-investor-previously-at-odds-with-sierra-leone/> accessed 28 September 2015.

[55] Ibid.

[56] Source: Reuters Africa, “Uganda: Total seeks arbitration over Uganda tax dispute” (March 22, 2015) by Elias Biryabarema, available at: http://af.reuters.com/article/investingNews/idAFKBN0MR0SI20150331?sp=true.

[57] Ibid.

[58] Luke Eric Peterson, “Arbitrators Selected in ICSID Claims Brought by Tullow Oil Against Uganda”, June 30, 2014. Available from http://www.iareporter.com/articles/arbitrators-selected-in-icsid-claims-brought-by-tullow-oil-against-uganda/.

[59] See: http://www.energyandminerals.go.ug/downloads/NATIONALOILANDGASPOLICYFORUGANDA.pdf

[60] Ministry of Energy and Mineral Development, National Oil and Gas Policy for Uganda, February 2008. See: http://www.energyandminerals.go.ug/downloads/NATIONALOILANDGASPOLICYFORUGANDA.pdf.

[61] Source: IAReporter

brought based on the Southern African Development Community (SADC) Finance and Investment Protocol (FIP)[62] and applies the UNCITRAL procedural rules of arbitration.

The claim is also related to the decision by SADC Member Countries to close and reconfigure the regional court that had sat in judgment of investment and human rights cases. As part of SADC, Lesotho participated in the disbanding of the SADC Tribunal.

Among the claims pending at the time of the May 2011 decision to halt all case-activity at the SADC Tribunal was a claim initiated in 2009 by Swissbourgh and others against Lesotho, alleging breaches of the SADC Treaty[63]. Swissbourgh was pursuing legal claims at the SADC Tribunal against Lesotho for alleged expropriation of certain mining leases. The investor alleges that Lesotho's "participation in the disbandment of the SADC Tribunal constitutes an actionable international wrong".

In addition, the claimant alleges that Lesotho has committed a denial of justice under customary international law, as well as a breach of several substantive investment protections contained in the Protocol [FIP], including obligations on fair and equitable treatment, access to courts and tribunals, transparency, and a general undertaking to fulfill obligations arising from the protocol (FIP). As of August 2015, UNCITRAL tribunal seated in Singapore was addressing jurisdictional elements in the first phase of the case[64].

Table (1) provides a more extensive sample list of the ISDS cases in the area of oil, mining and gas, which have been brought by investors against African countries under the ICSID Convention.

TABLE (1): Oil, Mining, and Gas Cases against African countries under ICSID

Source: Extract from a table compiled by Sarah Anderson and Manuel Perez Rocha, "Mining for Profits in International Tribunals: Lessons for the Trans-Pacific Partnership", Institute for Policy Studies (April 2013), pp. 18-20. Updated by the authors.

Investor/Claimant	Respondent	Project	Year filed
Cortec Mining Kenya Limited (Kenyan), Cortec (Pty) Limited (British), Stirling Capital Limited (British)	Republic of Kenya	Cancellation of licenses on mining operations granted without "proper legal framework" for the process (after the dissolution of the 10th Parliament of Kenya).	2015
Total E&P Uganda BV (Dutch)	Republic of Uganda	Tax dispute based on the imposition of tax revenue on the acquisition of Total's interest in exploration area in Uganda[65].	2015

[62] Article 28 of Annex 1 of the FIP permits investors, broadly defined so as to allow persons who are not necessarily nationals of the SADC member states to seek arbitration with contracting-states "concerning an obligation of the latter in relation to an admitted investment of the former". Such arbitrations may be brought, by agreement of the parties, to the SADC Tribunal, to ICSID, or under the UNCITRAL rules. However, in the event that the parties do not agree within 3 months, the default option is the UNCITRAL rules.

[63] The investors acquired five mining leases in the mid-1980s, however Lesotho subsequently cancelled those leases in 1991 after it became clear that the areas in question would need to be flooded in order to build a World Bank-financed dam. (Source: IAReporter, Luke Eric Peterson, "Dismantling of South African Development Community Tribunal Spawns UNCITRAL Arbitration Claim for Denial of Justice" (May 7, 2013).

[64] Source: IAReporter, http://www.iareporter.com/articles/southern-africa-updates-on-lesotho-swaziland-mozambique-and-zimbabwe-investment-disputes/.

[65] See: http://www.rigzone.com/news/oil_gas/a/137916/Total_Seeks_Arbitration_Over_Uganda_Tax_Dispute.

BSG Resources Limited (British)	Guinea	Cancellation of rights to the Simandou Ore project presumably acquired through corruption in 2008.	2014
UK-based African Petroleum Gambia Limited	Gambia	Cancelled licenses for off-shore energy exploration.	2014
Tarique Bashir and SA Interpétrol Burundi	Burundi	Case related to "petroleum products supply", brought under the Belgium/Luxembourg-Burundi BIT.	2014
Unión Fenosa Gas, S.A. (Spanish)	Egypt	The alleged choke-off of gas supply to an LNG plant located in the port of Damietta. Claim of breach of the Spain-Egypt BIT.	2014
Tullow Uganda Operations PTY LTD	Uganda	Petroleum exploration, development and production agreement.	2012
Lundin Tunisia B. V.	Tunisia	Oil exploration and exploitation operations.	2012
Sudapet Company Limited	Sudan	Exploration and production of hydrocarbons.	2012
Ampal-American Israel Corporation and others	Egypt	Natural gas export.	2012
Hess Equatorial Guinea, Inc. & Tullow Equatorial Guinea Limited	Republic of Equatorial Guinea	Hydrocarbon concession.	2012
RSM Production Corporation	Cameroon	Hydrocarbons exploration and exploitation concession agreement.	2011
Diamond Fields Liberia, Inc.	Liberia	Mineral exploration operations.	2011
Natural Gas S.A.E.	Egypt[66]	Gas pipelines construction.	2011
RSM Production Corporation[67]	Central African Republic	Petroleum exploration and exploitation contract.	2011
International Quantum Resources Limited, Frontier SPRL & Compagnie Miniere de Sakania SPRL	Democratic Republic of the Congo	Mining concession.	2010
Carnegie Minerals (Gambia) Limited	Gambia	Mining concession.	2009
Maersk Olie, Algeriet A/S	Algeria	Exploration and production of liquid hydrocarbons.	2009
Antoine Goetz and others	Burundi[68]	Mining, banking and service enterprises.	2001

[66] Award (English), April 3, 2014, available at http://www.italaw.com/sites/default/files/case-documents/italaw4043.pdf.
[67] Claimant requested annulment.
[68] Award (French), June 21, 2012, available at http://www.italaw.com/cases/1487.

IV. USING PERFORMANCE REQUIREMENTS: CHALLENGES ARISING FROM INTERNATIONAL INVESTMENT TREATIES AND ISDS

IIAs often include rules that could severely limit the ability of developing countries to organize and channel investment flows to support their industrial development objectives. UNCTAD's World Investment Report (2014) notes that increasingly treaties are expanding to include elements of liberalization and prohibition of certain types of government conduct previously unregulated in investment treaties, including prohibitions of additional performance requirements[69]. Treaty restrictions on performance requirements have the effect of reducing scenarios in which mutual benefit could accrue to investors as well as the host state and local communities[70]. This section provides an overview of the scope of prohibitions on performance requirements established under IIAs.

The historical record of industrialized economies indicates that foreign investment flows are not inherently a positive influence for industrial development, and that performance requirements are indispensable to obtaining benefits from foreign investment. Among the potential contributions of foreign investor activities are access to foreign markets and increase in export capacities, value addition at the national level, technology transfer, research and development, employment generation, and spill over in management skills. However, while foreign companies have the capabilities in these areas, host countries will not automatically gain these benefits unless their own policies induce investors to make these contributions as part of their operations. The kinds of policy interventions that would be required to ensure positive benefits from foreign investment are those that have been historically applied by successful countries as part of their industrial policy[71].

Provisions prohibiting performance requirements under investment protection treaties differ in terms of scope, and consequently in the limitations they establish. Some provisions on performance requirements refer to the Trade-Related Investment Measures (TRIMs) Agreement under the WTO, thus importing the obligations of States under the WTO agreement into the investment agreement[72]. This reference makes the obligations under the TRIMs Agreement questionable through investor-state dispute settlement, if the latter is provided for in the investment treaty.

Some provisions on performance requirements prohibit the application of performance requirements after the investment is established in the relevant jurisdiction[73]. Other provisions expand the prohibition to the pre-establishment phase, including in relation to establishment, acquisition, and expansion[74] (See Annex 2 for an example).

---

[69] See: UNCTAD World Investment Report 2014, p. 118.

[70] See: International Institute for Sustainable Development, "Investment treaties and why they matter for sustainable development", page 29.

[71] Manuel Montes and Kinda Mohamadieh, "Throwing Away Industrial Development Tools: Investment Protection Treaties and Performance Requirements" , in *Investment Treaties: Views and Experiences from Developing Countries* (Geneva, South Centre, 2015).

[72] Example: India–Singapore free trade agreement (FTA), Article 6.23

[73] Example: Article 4.4 of India-Kuwait BIT

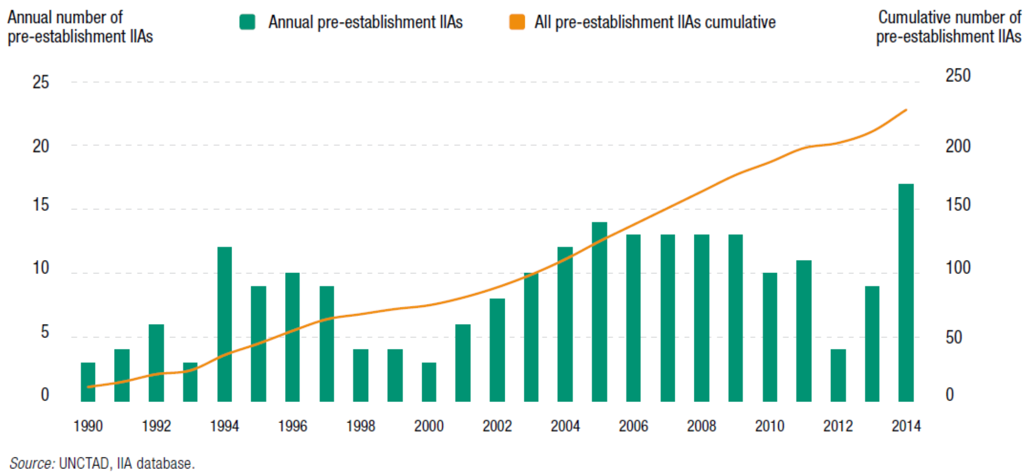
[74] Example: US–CAFTA-DR agreement, Art. 10.9; Article 8.1 of US model BIT; Japan–Mexico FTA, Art. 65. For more details, see: Suzy Nikiema (December 2014), "Performance Requirements in Investment Treaties", International Institute for Sustainable Development.

Pre-establishment rights refer to the right of entry of investments and investors of a Party (member country of a trade or investment agreement) into the territory of another Party. Including 'pre-establishment rights'[75] in an investment agreement extends national treatment and most-favored-nation treatment to the "establishment, acquisition and expansion" of investments. Accordingly, each Party allows investors of other Parties to establish an investment in their territory on terms no less favorable than those that apply to domestic investors (national treatment) or investors from third countries (most-favored-nation treatment). Including 'pre-establishment' rights, with no exceptions, in an investment treaty would prohibit the host state from imposing certain performance requirements as a condition for the establishment of an investment[76].

According to UNCTAD, an increasing number of IIAs in recent years has included pre-establishment commitments, extending national treatment and MFN obligations to the "establishment, acquisition and expansion" of investments. UNCTAD calculated that by the end of 2014, IIAs providing for pre-establishment totaled 228, mostly involving the United States, EU, Canada, Finland and Japan[77].

Graph 4, published in UNCTAD's 2015 World Investment Report, shows the rise in international investment treaties that provide for pre-establishment rights.

Graph 4: *Trends in pre-establishment IIAs signed between 1990 and 2014*
(Source: UNCTAD WIR 2015, p. 111)



[75] A sample provision that extends pre-establishment rights in the areas of national treatment and MFN: "Each Party shall accord to investors of another Party treatment no less favorable than that it accords, [in like circumstances], to its own investors [or investors of another state] with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."
[76] http://www.sice.oas.org/dictionary/IN_e.asp. Pre-establishment is rarely granted without exceptions since every country has sensitive sectors where foreign investment is not permitted. Parties to a trade or investment agreement usually list a number of measures (for example, laws and regulations) or entire sectors where pre-establishment (free entry of investments and investors) does not apply.
[77] See: World Investment Report 2015, p. 110. The 228 agreements include 103 bilateral investment treaties and 125 other international investment agreements.

Since the North American Free Trade Agreement (NAFTA, 1994), trade and investment agreements by the United States and Canada have contained provisions limiting the use of performance requirements.[78] Out of the 20 US free trade agreements (FTAs) that are currently in force, each includes provisions on prohibition of performance requirements under the investment chapter (except for the agreements with Bahrain and Jordan that do not include provisions on investment)[79].

It can be noted that investment rules under FTAs concluded by the European Union during later years, such as under the EU-Canada FTA concluded in 2014 (also known as the Comprehensive Economic and Trade Agreement (CETA)) have cast a wide net on a number of performance requirements that were not covered under the NAFTA model, such as requirements related to joint ventures, local minimum equity requirements/ maximum foreign limit, entry quotas, minimum/maximum number of employees, total number of firms or employees in a sector, among others. For more details, and for a comparison with the scope of prohibitions included under other agreements, see Table 2.

TABLE (2): Expanding prohibitions on performance requirements in investment treaties

Prohibitions on:	TRIMs	NAFTA (1994)	Singapore-India (2005)	ASEAN (2009)	US-Korea (2012)	EU-Canada (2014)
Export restriction	✓		✓	✓		✓
Local content	✓	✓	✓	✓	✓	✓
Export-Import balance	✓	✓	✓	✓	✓	✓
Export requirement	✓	✓			✓	✓
Restriction on sales	✓	✓			✓	✓
Local management		✓	✓	✓	✓	✓
Headquarters						✓
R&D Requirement		✓				✓
Technology transfer		✓			✓	✓
Exclusive supply		✓			✓	✓
Joint Venture requirement						✓
Local minimum equity requirement/max foreign limit						✓
Monopoly company						✓
Entry quotas of any kind						✓
Numerical quotas in sectors of any kind						✓
Minimum/max. number of employees						✓
Total number of firms						✓

[78] For more details, see: International Institute for Sustainable Development (2011), "Investment Treaties and Why They Matter to Sustainable Development", page 28.

[79] See: Suzy Nikiema (December 2014), "Performance Requirements in Investment Treaties", International Institute for Sustainable Development, page 9. See also: "Performance requirement prohibitions in international investment law: complex, constraining, and a potential thorne in US-India BIT negotiations", Alexandre Genest (2014), page 8.

or employees in a sector						
Source of table: Shintaro Hamanaka; Asian Development Bank 2013 - referenced by Howard Mann - presentation at the Annual Conference for Investment Negotiators organised by the South Centre and IISD, 3-5 November 2014. The column on TRIMs added by Manuel Montes and Kinda Mohamadieh (2015), in "Throwing Away Industrial Development Tools: Investment Protection Treaties and Performance Requirements".						

Investors are increasingly challenging governmental measures alleging they represent performance requirements prohibited under investment treaty protections, including tax measures, measures related to minimum investment in research and development activities, measures intended to boost renewable energy production and promote job growth in the green energy sector, and bans on elements that carry potential hazards to human health and environment.

Box (1) provides a summary of sample ISDS cases brought against Mexico and Canada on the basis of the NAFTA rules, under which investors challenged a variety of measures claiming they violate the rules on performance requirements under NAFTA.

BOX (1): SAMPLES OF ISDS CASES BROUGHT ON THE BASIS OF NAFTA CHALLENGING PERFORMANCE REQUIREMENTS

- **Archer Daniels Midland (ADM) & Tate Lyle Ingredients Americas (TLIA) v. Mexico** (ICSID No. ARB(AF)/04/5)), brought on the basis of Chapter 11 of the NAFTA. The claimants challenged a new tax (December 31, 2001) of 20% that was approved by the Mexican Congress on soft drinks and syrups sweetened with sweeteners other than sugar[80].
- **Mobil Investments Canada Inc and Murphy Oil Corporation v. Canada**[81] (ICSID's Additional Facility Rules No. ARB(AF)/07/4)), brought on the basis of Chapter 11 of NAFTA. The claimants argued that measures adopted by the province of Newfoundland under a 2004 Guidelines obliging them to invest a minimum amount in research and development activities within the province, constituted performance requirements in violation of Article 1106 NAFTA[82].
- **Mesa Power Group LLC v. Canada** (UNCITRAL, Permanent Court of Arbitration Case No. 2012-17). The dispute concerns Ontario's 2009 Green Energy Act, part of the province's climate change initiative, which is intended to boost renewable energy production and promote job growth in the green energy sector[83]. Mesa argues that Canada's local content requirements, which conditions holders of Feed In Tariff contracts to source a certain percentage of their equipment from local manufacturers, violate the rules of performance requirements under NAFTA.
- **Ethyl v. Canada** (UNCITRAL), brought on the basis of Chapter 11 of NAFTA. The case concerned a ban set by Canada in April 1997 on the import and inter-provincial

[80] Case registered in 2004. Award rendered in 2007.
[81] Copies of the case's legal documents are available at : http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/mobil.aspx?lang=eng.
[82] Source: IAReporter, "Mobil V. Canada Award Sets High Bar for NAFTA Art. 1105 Breach and Offers Reading of Performance Requirements Rules" (Nov 22, 2012), by Jarrod Hepburn.
[83] Mesa's dispute tackles the Act's Feed-In Tariff Program ("FIT Program"), under which a state enterprise owned and controlled by Ontario procures renewable energy through long-term purchase contracts with renewable energy producers. Under these power purchase agreements, wind producers selected by Ontario Power Authority (OPA) are entitled to benefit from a preferential tariff rate fixed for a twenty-year term, and guaranteed grid access for their energy production.

transport of methylcyclopentadienyl manganese tricarbonyl (MMT), an anti-knocking agent used to improve engine performance, due to its potential hazards to human health and environment. Among other allegations raised by the corporation, it argued that the ban was a "performance requirement" seeking to regulate how a foreign investor operated, which is forbidden under NAFTA Article 1106. The company's logic underlying the performance requirement claim was that the law would effectively require Ethyl to build a factory in every Canadian province to comply with the transport ban if it sought to make an MMT investment in Canada.

V. ACTION UNDER AFRICA MINING VISION AND POTENTIAL CHALLENGES DUE TO IIAS AND ISDS

The 'Africa Mining Vision' (AMV) was adopted by African heads of state in 2009, and complemented by an Action Plan in 2011. It envisages mining becoming "a key component of a diversified, vibrant and globally competitive industrializing African economy". The 'Africa Mining Vision' identifies actions to be taken by key stakeholders in the region to encourage the achievement of these objectives, in particular initiatives to be adopted by States. These actions include the increase of local participation in the supply and value chain, the strengthening of research and development for the promotion of strategies aimed at diversifying the economy, technology sharing and empowering of small and medium enterprises as a cluster for multiplying the benefits of the mining and oil sector, for example by creating new jobs and migrating knowledge to other sectors of the economy. Operationalizing the 'Africa Mining Vision' will require the active participation of the State in the development of key policies for the promotion, protection and regulation of foreign investment.

The AMV calls for "transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development". Graham points out that "[T]he development strategy of the AMV runs substantially counter to the Washington Consensus inspired development strategies currently dominant in Africa. Its logic restores a leading role for the state in a range of areas beyond the currently dominant facilitating function, including planning and revival of industrial policy. It also requires a vigorous programme of local enterprise development and therefore a substantial tempering of the primacy of FDI which currently dominates policy"[84].

The importance of deliberate State policy as a driving factor in the development of commodity based linkages was emphasized by a study of eight African countries[85]. The report points to government policies needed to address both the development linkages from the commodities sector and those that have an indirect effect on linkage development[86]. The report proposed the following as needed governmental policy interventions: initiating and sustaining a process of strategic visioning and policy development, drawing in a range of relevant stakeholders to ensure value chain coalitions operate effectively including through an informed picture of the strengths and vulnerabilities of the major global firms operating in the sector; linkage development in local content policy, which is considered the single most

[84] Yao Graham, "Escaping the Winner's Curse - The Africa Mining Vision (AMV) and some challenges of the international trade and investment regime", Third World Network Africa, available online at: http://www2.warwick.ac.uk/fac/soc/law/research/clusters/international/devconf/participants/papers/graham_-_escaping_the_winners_curse.pdf.

[85] Morris, M., Kaplinsky, R. and Kaplan, D. (2012), *One Thing Leads to Another: Promoting Industrialization by Making the Most of the Commodity Boom in Sub-Saharan Africa*, available at: http://www.prism.uct.ac.za/Downloads/MMCP%20Book.pdf, referenced by Graham's "Escaping the Winner's Curse - The Africa Mining Vision (AMV) and some challenges of the international trade and investment regime".

[86] Morris, M., Kaplinsky, R. and Kaplan, D. (2012), *One Thing Leads to Another: Promoting Industrialization by Making the Most of the Commodity Boom in Sub-Saharan Africa*, page 210, available at: http://www.prism.uct.ac.za/Downloads/MMCP%20Book.pdf.

important policy driver of linkages in the commodity sector, according to the report[87]; government support directed to enhancing the development of local supplier firms and processors; development of appropriate local capabilities including investment in skill and institution development; and support for hard and soft infrastructure (i.e. roads, telecom and utilities, and customs clearance…) aiding the development of the commodity sector and its linkages[88].

The AMV acknowledges that mineral based industrialization would require "proactive and deliberate actions from key stakeholders particularly governments". The AMV Action Plan of 2011[89] identifies a number of policies that should be implemented at national and regional levels to advance the AMV's linkages and diversification within a broader industrialization agenda.

[87] The report notes that despite the limitations imposed by rules under the World Trade Organization, de jure leeway is given to least-developed countries for some years, and de facto, many countries find ways of sustaining local content policies for some years.
[88] Ibid, pages 210-213.
[89] The AMV Plan of Action 2011 is available at: http://www.africaminingvision.org/ .

BOX (2): EXTRACTS FROM THE ACTIVITIES PLANNED UNDER THE AMV ACTION PLAN (2011)

Under programme cluster on mining revenues and mineral rents management, which aims at "creat(ing) a sustainable and well-governed mining sector that effectively garners and deploys resource rents":

- Review mineral regimes in terms of optimising revenues;
- Negotiate or renegotiate contracts to optimize revenues and to ensure fiscal space and responsiveness to windfalls;
- Review terms of double taxation agreements and BITs with host countries of mining companies including the principle that minerals should be taxed at the point of extraction;
- Develop rent distribution systems for allocating part of mineral revenue to communities near mining areas and local authorities

Under programme cluster on research and development, which aims at "creat(ing) a knowledge driven mining sector that is a key component of a diversified, vibrant and globally competitive industrialising African economy":

- Develop mineral (and tax) law and policy instruments that will encourage R&D and HRD;
- Cultivate links of R&D policies on mining with national R&D policies

Under programme cluster on environment and social issues, which aims at "creat(ing) a mining sector that is environmentally friendly, socially responsible and appreciated by all stakeholders and surrounding communities":

- Develop and adopt common environmental, social, health and safety standards and norms for the mining sector

Under programme cluster on linkages and diversification, which aims at "creat(ing) a mining sector that catalyses and contributes to broad-based growth and development through upstream, downstream, sidestream and infrastructure linkages":

- Develop value addition policies and strategies (based on supply-chain analyses) including local content and beneficiation;
- Investigate the judicious use of export taxes to encourage beneficiation;
- Identify and promote viable beneficiation projects;
- Review and align international agreements to create space for mineral resource based industrialization and development

Since 2006, several African countries, including Ghana, Congo DR, Zambia, Liberia, Zimbabwe, Guinea, Cote d'Ivoire, Malawi, Sierra Leone, Burkina Faso, Kenya, Tanzania and Madagascar have taken actions in terms of regulatory or institutional changes, including amending laws or initiating the renegotiation of contracts with mining firms or indicated an intention to take one or both steps[90]. Graham[91] points out as well that a number of countries are debating approaches to the conception of domestic/local content within the context of the AMV. He notes that Guinea has increased state shareholding in mining firms without challenging the power of the foreign investors. Graham adds that Namibia set up a national mining institution, Zimbabwe is implementing a policy of indigenization seeking to shift majority ownership to nationals, and South Africa continues the debate about nationalisation despite the government's decision not to nationalise any mines.

BOX (3): NEW PETROLEUM LAWS IN MOZAMBIQUE AND UGANDA

Following the discoveries of large amounts of oil and liquefied natural gas (LNG) during the past decade, **Mozambique** commenced a review of its legal framework for petroleum operations. In August 2014, the Government of Mozambique enacted the new Petroleum Law with the objective of ensuring competitiveness and transparency in the market and to safeguard national interests (preamble). The law serves as an example of policies related to the 'Africa Mining Vision'.

The Law provides different requirements for the entry and establishment of direct investment in the oil and gas sector. Among others, the Law requires for any investor to enter into a partnership with the National Petroleum Company for the exploration of petroleum (Article 24.4). Likewise, the Law provides for the progressive increase of the State's participation in any oil and gas concession over time (Article 20). In addition, this new legal framework requires companies to ensure the employment of Mozambican nationals and their participation in the management of petroleum operations (Article 12.2).

Article 41 provides for foreign entities to associate with national entities in the supply of goods and services to the oil and gas sector in Mozambique, and give preferences to local products when comparable to international materials.

Similar provisions have been introduced in a new Petroleum Law adopted in **Uganda**[92] during 2013. The Law addresses State participation in petroleum activities (Article 124), provision of goods and services by Ugandan entrepreneurs, particularly the provision of goods and services produced and rendered by Ugandan citizens and companies (Article 125), and other norms related to the promotion of employment and training of Ugandans (Article 126) and technology transfer requirements (Article 127) in every license awarded for petroleum exploration, development and production.

The adoption of the new Petroleum Law of Mozambique and Uganda were meant to ensure the proper conduct by corporations and to promote a fair sharing of benefits for the fulfilment of their national objectives. They reflect a similar approach aiming at structural changes in the domestic legal frameworks for oil exploration, development and production, in order to guarantee the States' space to regulate in the public interest. They also seek enhancing the contribution of FDI to domestic beneficiation from the extractive sectors and broader development and industrialization objectives.

---

[90] Yao Graham, Ibid.
[91] Yao Graham, Ibid.
[92] Acts Supplement N. 3 to The Uganda Gazette No. 16 Volume CVI, 4 April 2013. See: http://www.ulii.org/ug/legislation/act/2013/3/Petroleum%20%28EDP%29%20Act%202013.pdf.

VI. CONCLUDING REMARKS

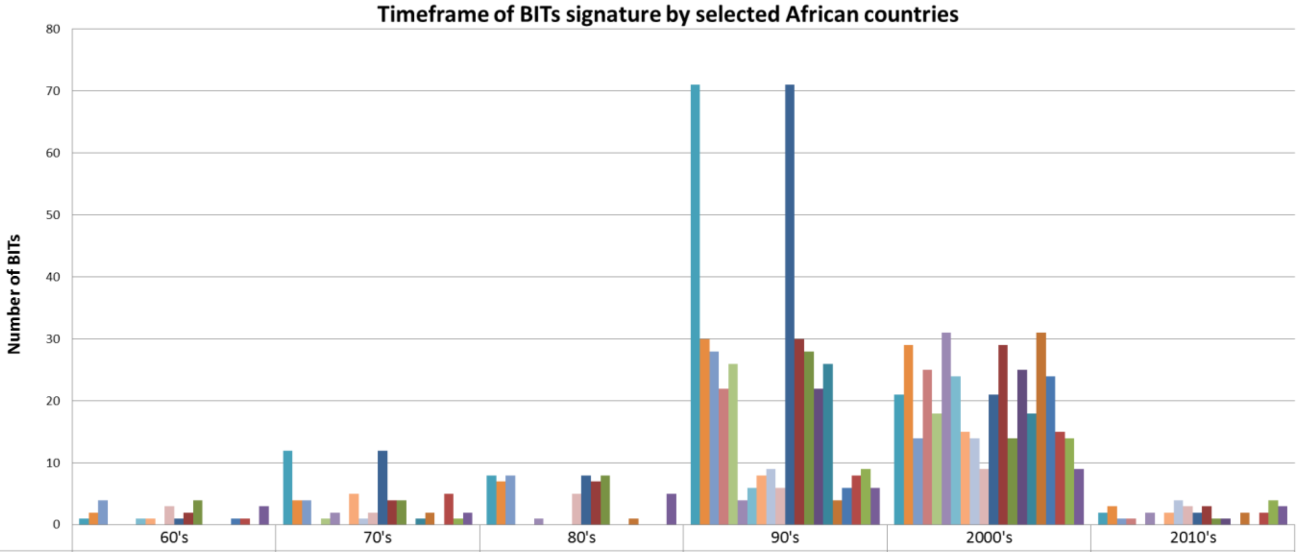
For developing countries, the expansion of international investment agreements could carry significant risks to policy space required to fulfill development and industrialization objectives. In the case of African countries, the expansion of IIAs could hinder the potential of achieving the envisioned objectives of the ‘Africa Mining Vision’. The kinds of policy changes and governmental action envisioned under the ‘Africa Mining Vision’ Action Plan could potentially be considered in contravention of the rules established under international investment agreements, especially agreements with far reaching prohibitions on performance requirements.

The constraints exerted by most BITs signed in recent years on policy options in host countries go well beyond the constraints established by the WTO TRIMs agreement. Akyuz points out that “[T]here are strong reasons for emerging and developing economies (EDEs) to avoid negotiating the kind of BITs promoted by advanced economies... Where commitments undertaken in existing BITs seriously impair their ability to use FDI for industrialization and development, they can be renegotiated or terminated, as is being done by some EDEs, even if doing so may entail some immediate costs”[93].

[93] Yılmaz Akyüz “Foreign Direct Investment, Investment Agreements and Economic Development: Myths and Realities”, in *Investment Treaties: Views and Experiences from Developing Countries* (Geneva, South Centre, 2015).

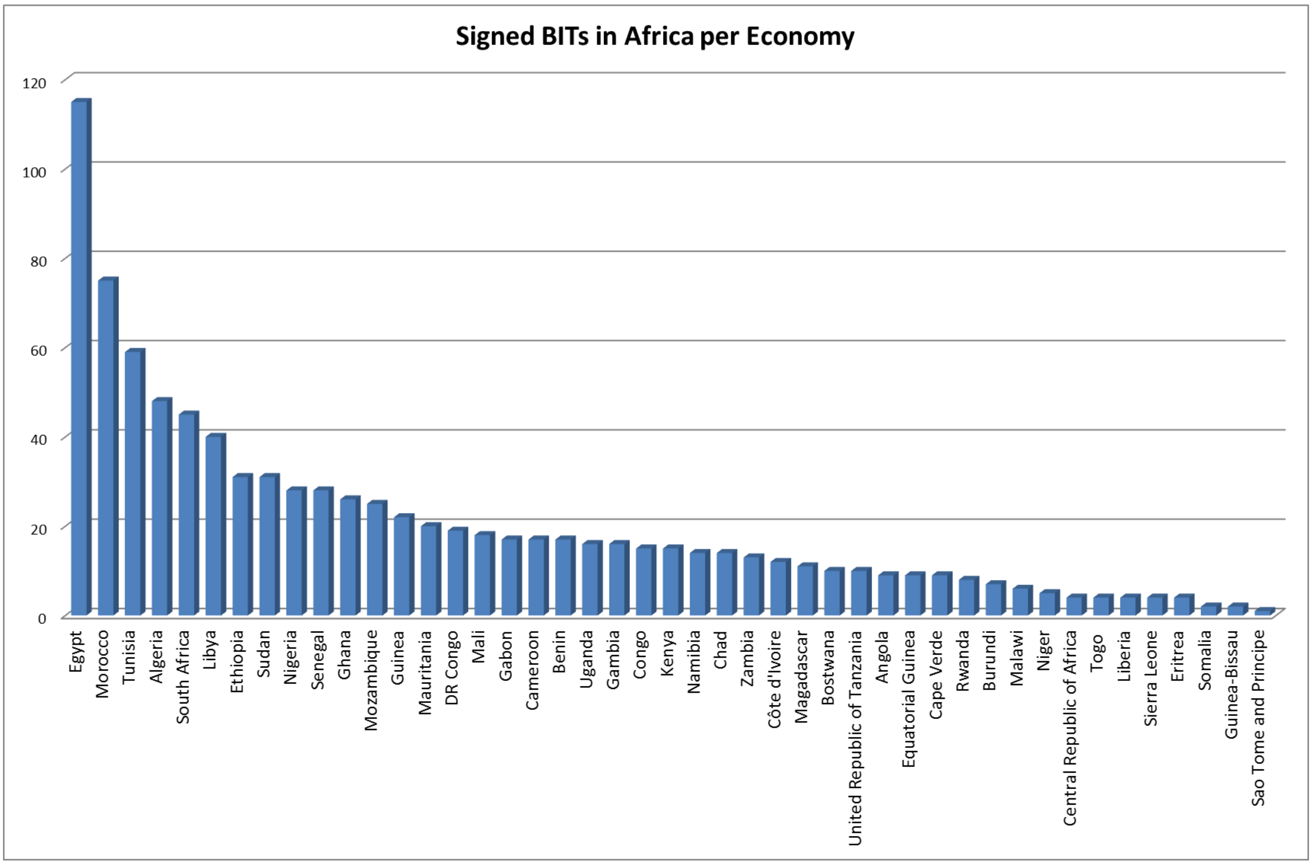
ANNEXES:

Annex 1: Bilateral Investment Treaties by African Countries



	60's	70's	80's	90's	2000's	2010's
Egypt	1	12	8	71	21	2
Morocco	2	4	7	30	29	3
Tunisia	4	4	8	28	14	1
Algeria	0	0	0	22	25	1
South Africa	0	1	0	26	18	0
Libya	0	2	1	4	31	2
Ethiopia	1	0	0	6	24	0
Sudan	1	5	0	8	15	2
Nigeria	0	1	0	9	14	4
Senegal	3	2	5	6	9	3
Egypt	1	12	8	71	21	2
Morocco	2	4	7	30	29	3
Tunisia	4	4	8	28	14	1
Alegeria	0	0	0	22	25	1
South Africa	0	1	0	26	18	0
Libya	0	2	1	4	31	2
Ethiopia	1	0	0	6	24	0
Sudan	1	5	0	8	15	2
Nigeria	0	1	0	9	14	4
Senegal	3	2	5	6	9	3

Source: Compiled by Daniel Uribe. Data Source: UNCTAD



Source: Compiled by Daniel Uribe. Data Source: UNCTAD

Annex 2: Excerpts from the 2008 US–Rwanda BIT

Article 8: Performance Requirements

1. Neither Party may, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement or enforce any commitment or undertaking:

(a) to export a given level or percentage of goods or services;

(b) to achieve a given level or percentage of domestic content;

(c) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;

(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;

(e) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;

(f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory; or

(g) to supply exclusively from the territory of the Party the goods that such investment produces or the services that it supplies to a specific regional market or to the world market.

2. Neither Party may condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, on compliance with any requirement:

(a) to achieve a given level or percentage of domestic content;

(b) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;

(c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or

(d) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

SOUTH CENTRE RESEARCH PAPERS

No.	Date	Title	Author
1	November 2005	Overview of the Sanitary and Phytosanitary Measures in QUAD Countries on Tropical Fruits and Vegetables Imported from Developing Countries	Ellen Pay
2	November 2005	Remunerating Commodity Producers in Developing Countries : Regulating Concentration in Commodity Markets	Samuel G. Asfaha
3	November 2005	Supply-Side Measures for Raising Low Farm-gate Prices of Tropical Beverage Commodities	Peter Robbins
4	November 2005	The Potential Impacts of Nano-Scale Technologies on Commodity Markets: The Implications for Commodity Dependent Developing Countries	ETC Group
5	March 2006	Rethinking Policy Options for Export Earnings	Jayant Parimal
6	April 2006	Considering Gender and the WTO Services Negotiations	Meg Jones
7	July 2006	Reinventing UNCTAD	Boutros Boutros-Ghali
8	August 2006	IP Rights Under Investment Agreements: The TRIPS-plus Implications for Enforcement and Protection of Public Interest	Ermias Tekeste Biadgleng
9	January 2007	A Development Analysis of the Proposed WIPO Treaty on the Protection of Broadcasting and Cablecasting Organizations	Viviana Munoz Tellez and Andrew Chege Waitara
10	November 2006	Market Power, Price Formation and Primary Commodities	Thomas Lines
11	March 2007	Development at Crossroads: The Economic Partnership Agreement Negotiations with Eastern and Southern African Countries on Trade in Services	Clare Akamanzi
12	June 2007	Changes in the Governance of Global Value Chains of Fresh Fruits and Vegetables: Opportunities and Challenges for Producers in Sub-Saharan Africa	Temu A.E and N.W Marwa
13	August 2007	Towards a Digital Agenda for Developing Countries	Dalindyebo Shabalala
14	December 2007	Analysis of the Role of South-South Cooperation to Promote Governance on Intellectual Property Rights and Development	Ermias Tekeste Biadgleng
15	January 2008	The Changing Structure and Governance of Intellectual Property Enforcement	Ermias Tekeste Biadgleng and Viviana Munoz Tellez
16	January 2008	Liberalization of Trade in Health Services: Balancing Mode 4 Interests with Obligations to Provide Universal Access to Basic Services	Joy Kategekwa
17	July 2008	Unity in Diversity: Governance Adaptation in Multilateral Trade	Vicente Paolo B. Yu III

		Institutions Through South-South Coalition-Building	
18	December 2008	Patent Counts as Indicators of the Geography of Innovation Activities: Problems and Perspectives	Xuan Li
19	December 2008	WCO SECURE: Lessons Learnt from the Abortion of the TRIPS-plus-plus IP Enforcement Initiative	Xuan Li
20	May 2009	Industrialisation and Industrial Policy in Africa: Is it a Policy Priority?	Darlan F. Marti and Ivan Ssenkubuge
21	June 2009	IPR Misuse: The Core Issue in Standards and Patents	Xuan Li and Baisheng An
22	July 2009	Policy Space for Domestic Public Interest Measures Under TRIPS	Henning Grosse Ruse – Khan
23	June 2009	Developing Biotechnology Innovations Through Traditional Knowledge	Sufian Jusoh
24	May 2009	Policy Response to the Global Financial Crisis: Key Issues for Developing Countries	Yılmaz Akyüz
25	October 2009	The Gap Between Commitments and Implementation: Assessing the Compliance by Annex I Parties with their Commitments Under the UNFCCC and its Kyoto Protocol	Vicente Paolo Yu III
26	April 2010	Global Economic Prospects: The Recession May Be Over But Where Next?	Yılmaz Akyüz
27	April 2010	Export Dependence and Sustainability of Growth in China and the East Asian Production Network	Yılmaz Akyüz
28	May 2010	The Impact of the Global Economic Crisis on Industrial Development of Least Developed Countries	Report Prepared by the South Centre
29	May 2010	The Climate and Trade Relation: Some Issues	Martin Khor
30	May 2010	Analysis of the Doha Negotiations and the Functioning of the World Trade Organization	Martin Khor
31	July 2010	Legal Analysis of Services and Investment in the CARIFORUM-EC EPA: Lessons for Other Developing Countries	Jane Kelsey
32	November 2010	Why the IMF and the International Monetary System Need More than Cosmetic Reform	Yılmaz Akyüz
33	November 2010	The Equitable Sharing of Atmospheric and Development Space: Some Critical Aspects	Martin Khor
34	November 2010	Addressing Climate Change through Sustainable Development and the Promotion of Human Rights	Margreet Wewerinke and Vicente Paolo Yu III
35	January 2011	The Right to Health and Medicines: The Case of Recent Negotiations on the Global Strategy on Public Health, Innovation and Intellectual Property	Germán Velásquez
36	March 2011	The Nagoya Protocol on Access and Benefit Sharing of Genetic Resources: Analysis and Implementation Options for	Gurdial Singh Nijar

		Developing Countries	
37	March 2011	Capital Flows to Developing Countries in a Historical Perspective: Will the Current Boom End with a Bust?	Yılmaz Akyüz
38	May 2011	The MDGs Beyond 2015	Deepak Nayyar
39	May 2011	Operationalizing the UNFCCC Finance Mechanism	Matthew Stilwell
40	July 2011	Risks and Uses of the Green Economy Concept in the Context of Sustainable Development, Poverty and Equity	Martin Khor
41	September 2011	Pharmaceutical Innovation, Incremental Patenting and Compulsory Licensing	Carlos M. Correa
42	December 2011	Rethinking Global Health: A Binding Convention for R&D for Pharmaceutical Products	Germán Velásquez and Xavier Seuba
43	March 2012	Mechanisms for International Cooperation in Research and Development: Lessons for the Context of Climate Change	Carlos M. Correa
44	March 2012	The Staggering Rise of the South?	Yılmaz Akyüz
45	April 2012	Climate Change, Technology and Intellectual Property Rights: Context and Recent Negotiations	Martin Khor
46	July 2012	Asian Initiatives at Monetary and Financial Integration: A Critical Review	Mah-Hui (Michael) Lim and Joseph Anthony Y. Lim
47	May 2013	Access to Medicines and Intellectual Property: The Contribution of the World Health Organization	Germán Velásquez
48	June 2013	Waving or Drowning: Developing Countries After the Financial Crisis	Yılmaz Akyüz
49	January 2014	Public-Private Partnerships in Global Heatlh: Putting Business Before Health?	Germán Velásquez
50	February 2014	Crisis Mismanagement in the United States and Europe: Impact on Developing Countries and Longer-term Consequences	Yılmaz Akyüz
51	July 2014	Obstacles to Development in the Global Economic System	Manuel F. Montes
52	August 2014	Tackling the Proliferation of Patents: How to Avoid Undue Limitations to Competition and the Public Domain	Carlos M. Correa
53	September 2014	Regional Pooled Procurement of Medicines in the East African Community	Nirmalya Syam
54	September 2014	Innovative Financing Mechanisms: Potential Sources of Financing the WHO Tobacco Convention	Deborah Ko Sy, Nirmalya Syam and Germán Velásquez
55	October 2014	Patent Protection for Plants: Legal Options for Developing Countries	Carlos M. Correa
56	November 2014	The African Regional Intellectual Property Organization (ARIPO) Protocol on Patents: Implications for Access to Medicines	Sangeeta Shashikant
57	November 2014	Globalization, Export-Led Growth and Inequality: The East Asian Story	Mah-Hui Lim
58	November 2014	Patent Examination and Legal Fictions: How Rights Are Created on Feet of Clay	Carlos M. Correa
59	December 2014	Transition Period for TRIPS	Nirmalya Syam

		Implementation for LDCs: Implications for Local Production of Medicines in the East African Community	
60	January 2015	Internationalization of Finance and Changing Vulnerabilities in Emerging and Developing Economies	Yılmaz Akyüz
61	March 2015	Guidelines on Patentability and Access to Medicines	Germán Velásquez
62	September 2015	Intellectual Property in the Trans-Pacific Partnership: Increasing the Barriers for the Access to Affordable Medicines	Carlos M. Correa
63	October 2015	Foreign Direct Investment, Investment Agreements and Economic Development: Myths and Realities	Yılmaz Akyüz
64	February 2016	Implementing Pro-Competitive Criteria for the Examination of Pharmaceutical Patents	Carlos M. Correa

SOUTH
CENTRE

Chemin du Champ d'Anier 17
PO Box 228, 1211 Geneva 19
Switzerland

Telephone: (41 22) 791 8050
Fax: (41 22) 798 8531
Email: south@southcentre.int

Website :
http://www.southcentre.int

ISSN 1819-6926