The SADC Model Bilateral Investment Treaty Template: Towards a new standard of investor protection in southern Africa

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tralac Trade Brief
No. D14TB03/2014
December 2014
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This publication should be cited as: Woolfrey, S. 2014. The SADC Model Bilateral Investment Treaty Template: Towards a new standard of investor protection in southern Africa.

Stellenbosch: tralac.

tralac gratefully acknowledges the financial support of the Danish International Development Assistance (Danida) for the publication of this Working Paper.

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Introduction

Trade and investment are the two fundamental pillars of international economic relations. Almost all international trade flows are governed either by bilateral or regional trade agreements or by the multilateral trade rules established under the various World Trade Organization (WTO) agreements. Efforts to establish a multilateral governance framework for cross-border investment, however, have thus far failed to bear fruit. In the absence of multilateral rules on foreign investment, states have resorted to using bilateral investment agreements to establish legally binding rules on the treatment of foreign investment. While some of these agreements take the form of dedicated investment chapters in comprehensive trade agreements, the vast majority are in the form of bilateral investment treaties (BITs). As of 2014, almost 2 800 BITs had been concluded, of which approximately 2 100 were in force.\(^1\) Given the sheer number of BITs in force and their similarity in terms of structure, coverage and provisions, the existing network of in-force BITs is the most important framework for international investment governance today.

BITs are binding international agreements between two states that establish the terms and conditions for private investment by nationals and firms of either state in the territory of the other. In particular, BITs grant investments made by an investor of one contracting state party (contracting party) in the territory of the other, a number of guarantees which typically include fair and equitable treatment, full protection and security, protection from discriminatory treatment, protection from expropriation and free transfer of funds. Notably, BITs also provide for international investor-state dispute settlement, whereby investors whose rights under the BIT have been violated have recourse to international arbitration under the rules of the International Centre for Settlement of Investment Disputes (ICSID) and/or the arbitration rules of institutions such as the United Nations Commission on International Trade Law (UNCITRAL) and the International Chamber of Commerce (ICC).

\(^1\) See [http://investmentpolicyhub.unctad.org/IIA](http://investmentpolicyhub.unctad.org/IIA)
Southern African countries are no strangers to the use of BITs. According to the United Nations Conference on Trade and Development (UNCTAD), every one of the 15 member states of the Southern African Development Community (SADC) is party to at least one BIT, and together they have signed over 250 BITs to date, of which over 100 are currently in force. The BITs concluded by SADC member states largely follow the form, structure and content of traditional BITs. In particular, they provide for fair and equitable treatment, nondiscrimination and full protection and security of investments. They also prohibit expropriation, except where this is carried out in a nondiscriminatory manner, for a public purpose, under due process of law and against the payment of prompt, adequate and effective (full market value) compensation, and provide foreign investors with the right to refer disputes to international arbitration under, *inter alia*, ICSID or UNCITRAL rules.

Recent developments, such as growing numbers of investor-state disputes and the initiation of disputes concerning sensitive policy issues such as public health legislation, have stimulated significant global debate around the impact of BITs and the international investment arbitration regime on domestic policy space and sustainable development, and a number of states have reviewed their approach to the use of BITs. It has also become clear that certain SADC member states are dissatisfied with the impact of BITs on domestic policy space and are seeking new approaches to investment governance which place more emphasis on the sustainability dimension of investment and the preservation of appropriate regulatory space for host states. The South African Government, for instance, has terminated a number of its BITs with European partners and has indicated that it seeking to replace its BITs with a single piece of legislation covering all investment in the country.

The publication in 2012 of the SADC Model Bilateral Investment Treaty Template (Model BIT) provides a clear example of a shifting approach to investment governance in southern Africa. This brief shows how the Model BIT encapsulates new thinking about investment governance by recommending an approach to investment governance that deviates quite sharply from the status quo provided by the BITs currently in force in southern Africa. In particular, the brief examines the specific suggestions and recommendations the Model BIT makes with regard to individual BIT provisions and demonstrates how these differ from the typical form such provisions take in the BITs previously concluded by SADC member states.

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2 Figures calculated from information on http://investmentpolicyhub.unctad.org/IIA
3 Some governments, such as those of the United States and Canada, have recently revised their model BITs (United States Department of State, 2012; Titi, 2007), while others, such as those of Bolivia and Venezuela, have terminated existing BITs (Luque Macias, 2013).
The SADC Model BIT Template

The Model BIT was developed in line with the overall goal of the SADC Protocol on Finance and Investment to promote the harmonisation of SADC member states’ investment policies and laws (SADC, 2012). It was prepared by a drafting committee consisting of representatives from Malawi, Mauritius, Namibia, South Africa and Zimbabwe, with technical input provided by the International Institute for Sustainable Development (IISD). The Model BIT is not a legally binding document, but a template for SADC member states to use in the development of their own model BITs or as a guide for future BIT negotiations (Ibid.).

The Model BIT is structured in the form of a standard BIT, but provides a menu of differing clauses for fleshing out the provisions usually found in BITs, as well as commentary on the rationale for and suitability of the different options presented. Particularly noteworthy are the Model BIT’s recommendations pertaining to the substantive provisions typical of BITs, including those dealing with nondiscrimination, fair and equitable treatment, expropriation and dispute settlement, and its suggestions regarding the use of preambles, the inclusion of investor obligations and general exceptions and the preservation of a host state’s right to regulate. The Model BIT’s recommendations on these issues are presented below.

Preamble

The preamble of a BIT provides an introduction to the thinking of the drafters of the treaty and serves to outline the treaty’s main objectives (OECD, 2006: 145). The objectives emphasised in BIT preambles have typically been limited to the strengthening of economic cooperation between the contracting parties, the creation of favourable conditions for investors and investments of both parties and the benefits that are expected to derive from the reciprocal promotion and protection of these investments (Ibid.). For example, the preamble to the Austria-South Africa BIT reads:

The Government of the Republic of South Africa and the Government of the Republic of Austria (hereinafter referred to as the “Contracting Parties”),

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4 Representatives from Angola, Botswana, Mozambique and the Seychelles also participated in the final drafting committee meeting (SADC, 2012).
Desiring to create favourable conditions for greater economic co-operation between the Contracting Parties, and

Recognizing that the promotion and reciprocal protection of investments may strengthen the readiness for investments by investors of one Contracting Party in the territory of the other Contracting Party and thereby make an important contribution to the strengthening of economic relations between the Contracting Parties...

By outlining the objectives of the treaty, a BIT’s preamble provides context for the interpretation of individual clauses in the treaty, especially by arbitration tribunals to investment disputes (Ibid.). The Model BIT’s commentary notes that there have been numerous occasions where arbitral tribunals have examined a BIT’s preamble and have found only references to the promotion of investment and the provision of investor rights under the treaty (SADC, 2012: 5). In such cases, arbitrators have held that the preamble establishes ‘a presumption in favour of broader over narrower rights for the investor, fewer and more limited rights for government regulatory activity in relation to an investment, and an overall presumption of investor-friendly interpretations’ (Ibid.).

In order to ensure an appropriate balance between investor interests and the development objectives of host states, the Model BIT recommends that the preambles of SADC member states’ BITs be used to prevent ‘unintended expansive interpretation of substantive provisions in favour of investors’ (Ibid.: 6). According to the Model BIT, preambles should recognise the contribution investment can make to sustainable development and should highlight the desire of the contracting parties to strengthen cooperation and promote and encourage investments, but, in addition, should reflect the development goals of state parties, ‘reaffirm the right of State Parties to regulate’ in order to meet national policy objectives and emphasise that the treaty in question seeks to establish a balance between the rights and obligation of the contracting parties and investors (Ibid.: 5).

**Nondiscrimination**

BITs provide for a number of post-establishment rights. These are the rights accorded to covered investors once their investments have been admitted to the territory of one of the contracting parties. The principle of nondiscrimination is a central feature of BITs, which typically provide for most-favoured-nation (MFN) treatment and national treatment. The former ensures that foreign investors covered by the BIT are not discriminated against relative to other foreign investors, while the latter

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6 Pre-establishment rights, such as a right of admission, are generally treated separately in BITs, or not at all.
ensures that they are not discriminated against relative to domestic investors. For example, Article 3.2 of the Malawi-Netherlands BIT\(^7\) states that:

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

Many BITs qualify these rights by allowing for the contracting parties to provide privileges to certain investors if these privileges arise from \textit{inter alia} economic integration or taxation agreements. For instance, Article 3.3 of the Malawi-Netherlands BIT states that:

If a Contracting Party has accorded special advantages to nationals of any third State by virtue of agreements establishing customs unions, economic unions, monetary unions or similar institutions, or on the basis of interim agreements leading to such unions or institutions, that Contracting Party shall not be obliged to accord such advantages to nationals of the other Contracting Party.

The Model BIT, however, recommends against the inclusion of an obligation to provide MFN treatment, arguing that, as bilateral agreements, BITs should not be used to establish ‘unintended multilateralization’ (SADC, 2012: 22). The Model BIT Drafting Committee notes that MFN provisions pose ‘unnecessary risks’ for developing countries due to the fact that they have been broadly and unpredictably interpreted by arbitral tribunals (Ibid.).

On national treatment, the Model BIT recommends the inclusion of a provision ensuring that each contracting party ‘shall accord to Investors and their Investments treatment no less favourable than the treatment it accords, in like circumstances, to its own investors and their investments with respect to the management, operation and disposition of Investments in its territory’. The Model BIT also recommends, however, that SADC member states qualify this provision by scheduling a list of present and future non-conforming measures, sectors and activities which will be permanently excluded from the scope of the national treatment provision. This approach is similar to the approach adopted by the recent Canada-Tanzania BIT, which provides for derogation from national treatment obligations for

\(^{7}\) Agreement on encouragement and reciprocal protection of investments between the Government of the Republic of Malawi and the Government of the Kingdom of the Netherlands (signed 11/12/03, in force 01/11/07).
certain existing non-conforming measures and for certain sectors, subsectors and activities specified in the annexes to the treaty.⁸

**Fair and equitable treatment**

Almost all BITs contain an obligation to accord fair and equitable treatment (FET) to covered investments. The FET principle, which provides a standard against which to determine whether the behaviour of the contracting parties towards covered investments is satisfactory, has become increasingly prominent and controversial in recent years as it has been ‘regularly invoked by claimants in investor-State dispute settlement (ISDS) proceedings, with a considerable rate of success’ (UNCTAD, 2012: xiii). The vague wording of FET provisions has provided a source of significant ‘protective value’ for covered investors, as many tribunals have interpreted these provisions very broadly to include obligations on the contracting parties to act ‘consistently, transparently, reasonably, without ambiguity, arbitrariness or discrimination’, to ensure ‘due process’ and to respect the ‘legitimate expectations’ of investors (Ibid.). These broad interpretations create significant risks and uncertainties, especially for developing countries that are likely to find such obligations particularly difficult to meet.

The increased prominence of FET provisions has also stimulated debate over what constitutes FET-inconsistent conduct, and whether the obligation to provide FET differs at all from the obligation to treat foreign investors in accordance with the customary international law minimum standard of treatment of aliens⁹ (UNCTAD, 2007: 28.). The lack of certainty prompting these debates is compounded by differences in the wording of FET provisions across individual BITs. Many BITs grant covered investments FET without making any reference to international law or other criteria to determine the content of the standard (Ibid: 30). Article 3.2 of the Mozambique-India BIT,¹⁰ for example, requires only that:

Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party.

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⁸ Article 16, Agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments (signed 17/05/13, in force 09/12/13).
⁹ It is argued that under customary international law a violation of the minimum standard requires actions by a state amounting to gross misconduct, manifest injustice, an outrage, bad faith or wilful neglect of duty. As a result, a breach of this standard is likely to be harder to prove than if FET is associated with higher standards (UNCTAD, 2007: 29).
Some treaties go further by specifying that the contracting parties must provide covered investments with ‘full protection and security’ and must refrain from impairing these investments through unjustifiable or discriminatory measures. For example, Article 3 of Mauritius’ BIT with the Belgian-Luxembourg Economic Union\(^\text{11}\) states that:

1. All investments made by investors of one Contracting Party shall enjoy a fair and equitable treatment in the territory of the other Contracting Party.

2. Except for measures required to maintain public order, such investments shall enjoy continuous protection and security, i.e. excluding any unjustified or discriminatory measure which could hinder, either in law or in practice, the management, maintenance, use, possession or liquidation thereof.

Other BITs, meanwhile, explicitly link the concept of fair and equitable treatment to principles of international law, such as the international minimum standard. For instance, under Article 6 of the Canada-Tanzania BIT\(^\text{12}\):

1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.

2. The concepts of “fair and equitable treatment” and “full protection and security” in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

Due to the increasingly controversial nature of FET and, in particular, the ‘very broad interpretations’ of FET standards in arbitral decisions, the Model BIT Drafting Committee recommends against the inclusion of an FET provision. Instead, it recommends the inclusion of a provision on ‘fair administrative treatment’ (SADC, 2012: 22). This standard was developed and proposed by the South African Government and aims to avoid the most controversial aspects of FET, while still addressing state actions towards an investor that should create a liability (Ibid: 24). The standard is narrower in scope than FET and sets a relatively high threshold for what can be considered ‘arbitrary’ conduct by a government or conduct that amounts to a denial of procedural justice or due process. In addition, the

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\(^{11}\) Agreement between the Belgian-Luxembourg Economic Union and the Republic of Mauritius on the Reciprocal Promotion and Protection of Investments (signed 30/11/05, in force 16/01/2010).

\(^{12}\) Agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments (signed 17/05/13, in force 09/12/13).
fair and administrative treatment provision proposed in the Model BIT uses the language of governance standards rather than investor rights in order to alter the interpretational approach of arbitral tribunals (Ibid.: 24). The Drafting Committee notes that it believes that such an approach would ‘still provide useful protection for investors, while limiting the risks of expansive rulings associated with the FET standard’ (Ibid.: 24).

For SADC member states wishing to include an FET provision in their BITs, the Model BIT recommends that such a provision does not simply refer to customary international law, but in addition, uses specific and precise language with regard to the standard to be applied so as to avoid ‘expansive interpretations by arbitrators’ (Ibid.: 23).

**Expropriation**

Historically, one of the main rationales for BITs has been the protection of foreign investors from uncompensated expropriation of their investments (UNCTAD, 2007: 44). Almost all BITs contain provisions dealing with expropriation and nationalisation, although they generally do not define these terms or clarify the distinction between the two. In addition, BITs provisions on expropriation usually cover measures which may have an effect equivalent to expropriation or nationalisation. These are sometimes referred to as ‘indirect expropriation’ (Ibid.: 44). Indirect expropriation is widely understood to involve measures which do not result in transfer of title or physical seizure of property, but which nevertheless permanently destroy the economic value of an investment or deprive the owner of its ability to manage, use or control its property in a meaningful way. However, BITs tend not to define indirect expropriation or explicitly specify the criteria by which to identify such measures (Ibid.: 44). For instance, Article 7.1 of the BIT between Mauritius and the Belgian-Luxembourg Economic Union states that:

> Each Contracting Party undertakes not to adopt any measure of expropriation or nationalisation or any other measure having the effect of directly or indirectly dispossessing the investors of the other Contracting Party of their investments in its territory.

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**Footnotes:**

13 In recent years, there has been significant discussion concerning the appropriate criteria for (a) determining whether indirect expropriation has taken place and (b) distinguishing indirect expropriation from regulation in the public interest which is non-compensable regardless of any economic impact on particular investments (UNCTAD, 2012: xii). The ‘nature and characteristics’ of a particular measure have emerged as important criteria for distinguishing indirect expropriation from non-compensable regulatory measures, and there is an emerging consensus that regulatory acts which pursue legitimate public policy objectives and comply with the requirement of due process, nondiscrimination and proportionality do not constitute a form of expropriation, whatever their economic impact (UNCTAD, 2012: xiii).

BIT provisions on expropriation typically describe the conditions under which expropriations may be made and the standard for compensation of the expropriated property. Generally, BITs allow the contracting parties to expropriate covered investments provided that the expropriation is undertaken for a purpose which is in the public interest, in a nondiscriminatory manner, under due process of law and against the payment of compensation (UNCTAD, 2012: xii). For example, Article 6.1 of the Malawi-Netherlands BIT\(^{15}\) states that the contracting parties must refrain from taking any measures depriving covered investors of their investments unless:

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 which takes such measures may have given;

c) the measures are taken against just compensation…

With regard to compensation, most BITs incorporate the standard of prompt, adequate and effective compensation, and provide that compensation must reflect the genuine or fair market value of the property expropriated (UNCTAD, 2007: 48). For instance, Article 5.2 of the Austria-South Africa BIT\(^{16}\) requires that compensation

… shall be at least equal to the fair market value of the investment expropriated, as determined in accordance with recognized principles of valuation such as, the capital invested, replacement value, appreciation, current returns, goodwill and other relevant factors, immediately before or at the time when the decision to expropriate was announced or when the impending expropriation became publicly known, whichever is the earlier.

The approach recommended by the Model BIT largely follows the standard approach to expropriation outlined above. It specifies that the contracting parties must refrain from directly or indirectly expropriating or nationalising covered investments in their territory except where this is done in the public interest, under due process of law and against the payment of compensation within a reasonable period of time (SADC, 2012: 24). However, the provision on expropriation in the Model BIT deviates from traditional BIT approaches to expropriation in three notable ways.

\(^{15}\) Agreement on encouragement and reciprocal protection of investments between the Government of the Republic of Malawi and the Government of the Kingdom of the Netherlands (signed 11/12/03, in force 01/11/07).

First, it omits the requirement that a lawful expropriation be nondiscriminatory, noting that expropriations are often specific and targeted, and thus ‘in a strict legal sense could be defined as being discriminatory by their very nature’ (Ibid.: 25). Second, it advocates the use of a ‘fair and adequate’ standard of compensation and suggests that such a standard need not necessarily be determined on the basis of fair market value, but could instead be determined on the basis of an ‘equitable balance between the public interest and interest of those affected’ (Ibid.: 24-26). In so doing it leaves it to the SADC member states themselves to decide whether or not fair and adequate compensation must always and only equal fair market value (Ibid.: 25).

Finally, the Model BIT includes a clause stating that a measure ‘designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment’, does not constitute an indirect expropriation (Ibid: 25). The Model BIT notes that such clauses are becoming increasingly common, and that a failure to include such a clause would create the risk that a tribunal might hold that by not explicitly excluding regulatory measures the Contracting Parties meant to include them within the scope of measures constituting expropriation (Ibid: 26).

**Investor obligations**

Investor obligations are not typically found in BITs. The Model BIT, however, proposes that SADC member states include in their BITs a number of specific obligations on investors, including obligations relating to corruption, compliance with domestic law, the provision of information, environmental and social impact assessments, environmental management, minimum standards for human rights and labour, corporate governance and transparency (SADC, 2012: 32-38). In order to address the enforcement of these obligations, the Model BIT recommends the inclusion of language that makes it clear that breaches of these obligations ‘can and should be taken into account in any dispute settlement proceedings initiated under the agreement’, and a specific provision allowing for counterclaims by the contracting parties (Ibid.: 39).

The Model BIT also recommends the inclusion of a provision stating that a host state ‘may initiate a civil action in domestic courts’ against an investor for damages arising from an alleged breach of an investor obligation contained in the agreement (Ibid.: 39). It is silent, however, on how exactly investor obligations can actually be created though a BIT given that investors themselves are not party to such agreements. It is difficult therefore to see how investors could be held liable for breaches of such ‘obligations’.
Host state’s right to regulate and right to pursue developmental goals

The Model BIT proposes the inclusion of a provision confirming that the treaty ‘does not alter the Host State’s basic right to regulate’ (SADC, 2012: 40). In particular, it recommends the inclusion of a clause stating that ‘the Host State has [the] right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives’ (Ibid.: 39). This clause is meant to be read with other provisions in the treaty, including those providing for performance requirements to be imposed and those on nondiscrimination and expropriation (Ibid.: 40).

Although provisions concerning a host state’s right to regulate are not typically found in BITs, the drafters of the Model BIT believe that in the light of current debates on the impact of BITs on domestic policy space, such instruments should explicitly reaffirm the right of host states to ‘regulate investments in the public interest’ (Ibid.: 40). The re-affirmation of this right is meant to emphasise the broader objective of SADC member states’ future BITs to embody a balance between the rights and obligations of investors and host states. This, it is hoped, will prevent arbitrators from viewing these instruments as only providing for investor protection (Ibid.: 40).

In another departure from typical BIT practice, the Model BIT recommends the inclusion of a provision recognising a host state’s right to pursue development goals. Specifically, it proposes a provision that allows the contracting parties to (a) provide, in accordance with their domestic legislation, preferential treatment to an enterprise in order to achieve ‘national or subnational regional development goals’, (b) support the development of domestic entrepreneurs and promote production, employment, research and development, human capital upskilling and technology transfer through the use of performance requirements on investors, and (c) introduce measures to address ‘historically based economic disparities suffered by identifiable ethnic or cultural groups’ due to past ‘discriminatory or oppressive measures against such groups’ (Ibid.: 40).

This provision would allow exclusions from the obligations found elsewhere in the treaty for measures taken to promote economic and social development within the host state, and in particular, would allow the contracting parties to make use of performance requirements on foreign investors and affirmative action-type measures, without fear that these would be subject to claims that such measures constitute a breach of the treaty.
General exceptions

In recent years BITs have increasingly started to include general exception clauses concerning issues such as taxation, security, public health, environmental protection, labour policies, cultural diversity and prudential measures (UNCTAD, 2007: 99). This trend reflects growing concern around these issues and a desire to ensure that investment promotion and protection are not pursued at the expense of other key public policy objectives (ibid.). General exception provisions in BITs often draw on the language of such clauses in the WTO General Agreement on Tariffs and Trade (GATT), and General Agreement on Trade in Services (GATS). For example, Article 17 of the Canada-Tanzania BIT17 states that:

1. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, this Agreement shall not be construed to prevent a Party from adopting or enforcing measures necessary:

   (a) to protect human, animal or plant life or health;
   (b) to ensure compliance with laws and regulations that are not inconsistent with this Agreement; or
   (c) for the conservation of living or non-living exhaustible natural resources.

2. This Agreement shall not be construed to prevent a Party from adopting or maintaining reasonable measures for prudential reasons, such as:

   (a) the protection of investors, depositors, financial market participants, policy-holders, policy-claimants, or persons to whom a fiduciary duty is owed by a financial institution;
   (b) the maintenance of the safety, soundness, integrity or financial responsibility of financial institutions; and
   (c) ensuring the integrity and stability of a Party’s financial system.

3. This Agreement shall not apply to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit or exchange rate policies. This paragraph shall not affect a Party’s obligations under Article 9 (Performance Requirements) or Article 11 (Transfers).

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17 Agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments (signed 17/05/13, in force 09/12/13).
The Model BIT follows this trend by including a list of general exceptions for SADC member states to specify in their BITs. These relate to *inter alia* measures relating to public morals and safety; protection of human, animal or plant life or health; conservation of natural resources; environmental protection; prudential matters; taxation measures; nondiscriminatory measures of general application taken in pursuit of monetary, credit or exchange rate policies; and protection of national security (SADC, 2012: 46-47).

**Investor-state dispute settlement**

Finally, most BITs include a provision on investor-state dispute settlement. This provision usually allows an investor to take a host state to international arbitration should a dispute between the two arise. Generally, investor-state dispute settlement provisions in BITs specify the different arbitration venues available, as well as the procedures for appointing arbitrators and the contracting parties’ obligation to consider the arbitration award as final and binding and to provide for its enforcement (UNCTAD, 2007: 100). ICSID and the ICSID Additional Facility Rules are the fora most commonly referred to in BITs, but many BITs mention other fora such as the Court of Arbitration of the International Chamber of Commerce (ICC) in Paris or the Arbitration Institute of the Chamber of Commerce of Stockholm (Ibid.: 110). BITs generally also provide for the submission of disputes to ad hoc arbitration under the Arbitration Rules of UNCITRAL. Article 9 of the Austria-South Africa BIT, for example, states that:

(1) Any legal dispute between a Contracting Party and an investor of the other Contracting Party arising from an investment shall, as far as possible, be settled amicably between the parties to the dispute.

(2) If a dispute referred to in paragraph (1) cannot be settled within three months of a written notification of sufficiently detailed claims, the dispute shall upon the request of the Contracting Party or of the investor of the other Contracting Party be subject to the following procedures:

(a) to conciliation or arbitration by the International Centre for Settlement of Investment Disputes, established by the Convention on the Settlement of Investment Disputes between states and Nationals of other States, opened for signature in Washington on March 18th, 1965, when each Contracting Party has become a party to said Convention.

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18 Usually these provisions require the parties to the dispute to have made prior attempts to settle the dispute.

As long as this requirement is not met, each Contracting Party agrees that the dispute may be settled under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of ICSID…; or

(b) to arbitration by three arbitrators in accordance with the UNCITRAL arbitration rules, as amended by the last amendment accepted by both Contracting Parties at the time of the request for initiation of the arbitration procedure…

The Model BIT, however, recommends that SADC member states should not include a provision granting investors the right to bring disputes directly against host states (Ibid.: 55). Instead, it recommends the inclusion of a state-state dispute settlement provision that allows the contracting parties to claim damages on behalf of an investor for an alleged breach of the treaty, but only if the investor has first exhausted local remedies or if a contracting party can demonstrate that no appropriate domestic remedies are available (Ibid.: 52-54).

**Conclusion**

Historically, the focus of BITs, including those entered into by SADC member states, has tended to be on protecting investment. Provisions on nondiscrimination and FET and guarantees of full market value compensation in the event of expropriation have been central to this emphasis on investor rights. The recommendations contained in the Model BIT, however, suggest a shift in focus away from the traditional BIT approach to investor protection. In particular, the Model BIT recommends excluding or watering down substantive investor rights relating to national treatment, FET, fair market value compensation in the event of expropriation and investor-state dispute settlement. In addition, the Model BIT recommends including provisions on investor obligations and on the host state’s right to regulate in the public interest – elements not typically found in BITs. Together these recommendations add up to an approach that differs quite markedly from that found in the BITs currently in force between SADC member states and other countries.

The approach to BITs advocated by the Model BIT also clearly seeks to ensure greater balance between the rights of investors and the interest of host states in regulating in the public interest, and as such is a noteworthy contribution to ongoing global debates about how to balance these sometimes conflicting objectives. The recommendations are not entirely unproblematic, however. The idea of including investor obligations appears somewhat confusing given that investors are not themselves
party to such treaties. Furthermore it is unclear how prospective investors are likely to view BITs which provide no guarantee of access to investor-state dispute settlement procedures.

Ultimately it remains to be seen whether or not SADC member states adopt the recommendations contained in the Model BIT and to what degree they do so. The South African Government has already indicated that its own Model BIT, which is currently in development, is likely to follow the Model BIT quite closely, which is unsurprising given the country’s own overhaul of its investment protection regime.\textsuperscript{20} If there is significant uptake of the Model BIT’s recommendations, the investment protection regime in southern Africa is likely to look quite different in the future.

\textsuperscript{20} ‘Remarks by Dr Rob Davies at the Centre for Conflict Studies Public Dialogue on “South Africa, Africa and International Investment Agreements”’ Cape Town, 17 February 2014.
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