

2010

## Rethinking Bilateral Investment Treaties in Sub-Saharan Africa

Alec R. Johnson

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/elj>

---

### Recommended Citation

Alec R. Johnson, *Rethinking Bilateral Investment Treaties in Sub-Saharan Africa*, 59 Emory L. J. 919 (2010).

Available at: <https://scholarlycommons.law.emory.edu/elj/vol59/iss4/3>

This Comment is brought to you for free and open access by the Journals at Emory Law Scholarly Commons. It has been accepted for inclusion in Emory Law Journal by an authorized editor of Emory Law Scholarly Commons. For more information, please contact [law-scholarly-commons@emory.edu](mailto:law-scholarly-commons@emory.edu).

# RETHINKING BILATERAL INVESTMENT TREATIES IN SUB-SAHARAN AFRICA

## INTRODUCTION

More than any other region of the world, Sub-Saharan Africa has struggled with extreme poverty,<sup>1</sup> and the continent's poor are likely to suffer disproportionately from the effects of the recent global financial crisis.<sup>2</sup> To minimize the human costs of poverty, African countries desperately need to increase their standards of living by promoting economic growth and development. Foreign direct investment (FDI) will continue to play an important role in this process by providing the financing that, for many African countries, is otherwise unavailable.<sup>3</sup> And to attract this FDI, developing countries will continue to rely heavily on Bilateral Investment Treaties (BITs)—agreements between two countries, usually a developed “home” country and a developing “host” country, that govern the promotion and protection of foreign investments.<sup>4</sup>

But FDI and BITs appear to have failed in Sub-Saharan Africa. This is for two reasons. First, not all FDI is created equal. FDI will only promote meaningful development if the economic growth it fuels is *sustainable*. Africa has experienced many periods of economic expansion over the past thirty years, but frequent growth collapses have offset much of these gains.<sup>5</sup> Prior to the current financial crisis, for example, annual FDI inflows to Africa's least developed countries (LDCs) increased consistently for almost a decade.<sup>6</sup>

---

<sup>1</sup> WORLD BANK, GLOBAL MONITORING REPORT 2–3 (2008) [hereinafter 2008 GLOBAL MONITORING REPORT] (“At a regional level, Sub-Saharan Africa lags on all MDGs [UN Millennium Development Goals].”).

<sup>2</sup> WORLD BANK, GLOBAL MONITORING REPORT 48–49 (2009) [hereinafter 2009 GLOBAL MONITORING REPORT] (estimating that in 2009, three-fourths of Sub-Saharan African countries could experience a rise in the number of extreme poor).

<sup>3</sup> See Albert H. De Wet & René Van Eyden, *Capital Mobility in Sub-Saharan Africa: A Panel Data Approach*, 73 S. AFR. J. ECON. 22, 22 (2005) (noting that foreign investment and foreign aid are often the only sources of financing in Africa).

<sup>4</sup> Victor Mosoti, *Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between?*, 26 NW. J. INT'L L. & BUS. 95, 103 (2005).

<sup>5</sup> 2009 GLOBAL MONITORING REPORT, *supra* note 2, at 50.

<sup>6</sup> U.N. Conference on Trade & Dev. [UNCTAD], *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development*, 45, U.N. Doc. UNCTAD/WIR/2009 (July 2009) [hereinafter 2009 World Investment Report].

Because this FDI was concentrated in Africa's extractive industries, it was extremely vulnerable to falling commodity prices; as a result, FDI to Africa's LDCs was expected to decrease in 2009.<sup>7</sup> Second, African BITs have failed to convince foreign investors. While Africa's *share* of FDI inflows among developing countries has increased steadily during recent years, the actual *amounts* of FDI African LDCs have received are fairly small.<sup>8</sup> These amounts are even smaller if FDI in the extractive sector is excluded.<sup>9</sup> These failures warrant a general reconsideration of the kinds of BITs that African nations are signing.

The emergence of BITs as the basic foundation for the international investment regime,<sup>10</sup> however, is not the direct source of Africa's difficulties attracting FDI. BITs have the potential to be particularly useful in Africa.<sup>11</sup> The real problem is that African BITs rarely deviate from a standard model that has developed over time.<sup>12</sup>

In order to be effective in Africa, BITs must account for, and be better tailored to, individual countries' circumstances and needs.<sup>13</sup> Both highly underdeveloped and post-conflict nations, for example, cannot tackle extreme poverty without sustained economic growth and external financing. They must attract investment at all costs, and they need BITs that are very protective of

---

<sup>7</sup> *Id.* at 45, 49.

<sup>8</sup> *Id.* at 49; see also Leonce Ndikumana & Sher Verick, *The Linkages Between FDI and Domestic Investment: Unravelling the Developmental Impact of Foreign Investment in Sub-Saharan Africa 2* (Inst. for the Study of Labor (IZA), Discussion Paper No. 3296, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1136458](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1136458) (noting that Africa's share of FDI since the 1990s has been significantly lower than it was during the 1970s).

<sup>9</sup> Natural resources attract investors interested in the extractive sector, so the presence of a BIT is less relevant to FDI in resource-rich countries.

<sup>10</sup> Kenneth J. Vandavelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 COLUM. J. TRANSNAT'L L. 501, 526 (1998) ("In an era when virtually every developing state has concluded at least one BIT and such treaties are being signed at about the rate of one every other day, states may find that it is necessary to conclude a BIT simply to avoid sending investors a negative signal about the stability of their investment climate." (footnote omitted)).

<sup>11</sup> See *infra* text accompanying notes 61–63. Further, because this Comment assumes that BITs will continue to serve as the primary legal mechanism governing FDI for the foreseeable future, a general criticism of BITs is of little practical use.

<sup>12</sup> Mosoti, *supra* note 4, at 115–16.

<sup>13</sup> Cf. UNCTAD, Intergovernmental Group of Twenty-Four on Int'l Monetary Affairs and Dev., *Governance and Anti-Corruption Reforms in Developing Countries: Policies, Evidence and Ways Forward*, 3, U.N. Doc. UNCTAD/GDS/MDPB/G24/2006/4 (Nov. 2006) (prepared by Mushtaq H. Khan) [hereinafter *Governance and Anti-Corruption Reforms*] (arguing that corruption reduction strategies should be specifically tailored or risk diverting attention from more important issues).

FDI. BITs that require complex institutional reforms, on the other hand, set unrealistic goals that divert the parties' attention from more important issues.<sup>14</sup>

For more developed African countries, most BITs do little to actually promote FDI in the areas that are most important for development—such as infrastructure and downstream activities.<sup>15</sup> These BITs tend to overemphasize the protection of foreign investors while doing little to promote or protect home-country interests.<sup>16</sup> Broad compensation requirements for regulatory takings, for example, can have a chilling effect on host-government policy making.<sup>17</sup> And BITs that provide foreign investors with substitutes for weak domestic institutions may lead to a deterioration of local institutions, the rule of law, and overall governance.<sup>18</sup> Given that the prevailing economic conditions and investment policies are usually more influential on the decision to invest than the mere presence of a BIT, these BITs may result in a net loss to the home country.<sup>19</sup>

Modern U.S. and Canadian BITs have adopted innovative provisions that deserve special consideration. These BITs provide home-country investors with more effective protections, while at the same time encouraging stronger institutions and better policies. They also require a heightened commitment to economic liberalism that may encourage more sustainable growth. Although these BITs still need to be better tailored to individual countries, they are promising.

---

<sup>14</sup> Cf. *id.* at 21 (arguing that strategies should aim to transform failing states into developing states rather than set unachievable goals that divert attention from more critical reforms).

<sup>15</sup> 2009 GLOBAL MONITORING REPORT, *supra* note 2, at 71–72, 74 (“An adequate supply of infrastructure has long been viewed as a key ingredient for economic development. . . . Despite progress in recent years, the region with the greatest infrastructure challenge remains Sub-Saharan Africa. . . . The gaps in infrastructure coverage reflect a large unmet need for infrastructure investment in developing countries.”); 2009 *World Investment Report*, *supra* note 6, at 47.

<sup>16</sup> Joseph E. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities*, 23 AM. U. INT’L L. REV. 451, 457, 468, 554 (2007).

<sup>17</sup> *Id.* at 554.

<sup>18</sup> Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INT’L REV. L. & ECON. 107, 119–22 (2005) (arguing that BITs reduce governmental and institutional quality by “depriving key actors from a need to invest in institutional improvement”).

<sup>19</sup> Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT’L L.J. 67, 95–96 (2005) (“No language in a BIT binds a source country to encourage its investors and companies to invest abroad. . . . Thus, the BIT is often a codification, and not a source, of pro-foreign investment policies.”).

This Comment argues that Africa's failure to attract FDI can be solved through the adoption of BITs that account for and adapt to each country's individual and changing circumstances. This Comment proposes a three-group taxonomy<sup>20</sup> of non-resource-rich African nations<sup>21</sup> based on their respective FDI and domestic investment levels.<sup>22</sup> Group One is composed of countries with low FDI and low domestic investment levels; Group Two is composed of countries with high FDI and low domestic investment levels; and Group Three is composed of countries with high FDI and high domestic investment levels. These groups represent progressive stages of development. Thus, a Group One country must increase FDI before it graduates to Group Two, and a Group Two country must increase domestic investment before it graduates to Group Three.

This Comment attempts to refocus the discourse about FDI and BITs onto developing countries by offering examples of BIT provisions that are appropriate for each grouping. Each set of provisions reflects typical realities of countries in that group and aims to facilitate graduation to the next group. While each set of provisions directly addresses foreign investor interests—because these are central to attracting FDI, and attracting FDI is important for all African countries<sup>23</sup>—they attempt to strike a balance between home-country interests and the immediate needs and long-term welfare of host countries.

There is also an aspirational element to this Comment's taxonomy. Each grouping has its own set of priorities and goals that will guide countries toward graduation to the next grouping and eventually toward sustainable economic development. Group One countries must reduce risk to FDI at all costs; Group Two countries need to strengthen the rule of law and encourage equal

---

<sup>20</sup> This taxonomy borrows from Mushtaq Khan's analysis of anti-corruption strategies presented in his discussion paper for the U.N., whereby low-growth "diverging" LDCs must become high-growth "converging" LDCs before becoming "advanced countries." *Governance and Anti-Corruption Reforms*, *supra* note 13, at 5, 10–11. Whereas Khan's groupings are based on GDP growth rates, this Comment's taxonomy is based on investment levels.

<sup>21</sup> Natural resource-exporting nations could represent a fourth group, but they are beyond the scope of this Comment because the realities they face place them outside of the "virtuous cycle" discussed below. See Zachary Elkins, Andrew T. Guzman & Beth Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 2008 U. ILL. L. REV. 265, 294 (finding that "higher extractive production" reduces a host country's "propensity to negotiate a BIT").

<sup>22</sup> In this Comment, "domestic investment" means investment by private domestic investors and is determined by domestic savings and gross fixed capital formation ("GFCF"). The higher a country's domestic savings levels, and the lower the percentage of its GFCF (essentially a proxy for business activity) that FDI represents, the higher its "domestic investment" level. Lower "domestic investment" levels mean a country is more reliant on external finance, and higher levels mean a country has more sophisticated local entrepreneurs and industries.

<sup>23</sup> See *infra* text accompanying notes 56–59.

competition among domestic and foreign investors; and Group Three countries should seek to attract higher-quality FDI and to maximize its positive spillover effects. Like the BIT provisions discussed in this Comment, each set of goals is based on the realities characteristic of African nations at the relevant stage of development and represents a balancing of foreign-investor and home-country interests.

This Comment envisions a “virtuous cycle.” Each grouping’s BIT provisions aim to facilitate the pursuit of the group’s corresponding goals, facilitating graduation to the next grouping and a new set of BIT provisions and goals.<sup>24</sup> The measures taken at each stage will attract the kinds of investments that are appropriate for that particular country at that stage of development—be it general FDI for Group One countries, domestic investment for Group Two countries, or a higher quality FDI for Group Three countries. The steps that a Group One country takes to attract FDI and graduate to Group Two will make it better able to negotiate BIT provisions that are appropriate for a Group Two country and to pursue its new Group Two goals. This, in turn, will prepare it for graduation to Group Three and the pursuit of more liberal reforms. While this Comment focuses on African nations, its ideas and the suggested BIT provisions may be equally applicable to other developing countries.

Part I gives an overview of BITs, explaining why developing countries sign them and why they have not lived up to their maximum potential in Africa. Part II introduces Group One countries and discusses what types of BITs are best for reducing risk to FDI and what provisions are counterproductive to that goal. Part III addresses Group Two countries and examines the types of provisions that can encourage confidence in the rule of law and encourage domestic investment. Part IV suggests that Group Three countries are better prepared to embrace more liberal economic reforms but discusses provisions that are needed to grant host countries freedom to intervene in their economies when necessary. Finally, Part V recommends mechanisms for amending or renegotiating BITs and potential alternatives to international arbitration.

---

<sup>24</sup> This idea is borrowed from Koji Miyamoto, *Human Capital Formation and Foreign Direct Investment in Developing Countries* 9–10 (Org. for Econ. Co-operation and Dev. (OECD) Dev. Ctr., Working Paper No. 211, 2003), available at [www.oecd.org/dataoecd/45/25/5888700.pdf](http://www.oecd.org/dataoecd/45/25/5888700.pdf).

## I. OVERVIEW OF BILATERAL INVESTMENT TREATIES

BITs have spread rapidly since the first such treaty was signed in 1959,<sup>25</sup> and today they are the primary legal mechanism governing FDI.<sup>26</sup> All efforts at a multilateral alternative to the bilateral network of BITs have proved unsuccessful.<sup>27</sup> While many regional investment treaties have been successfully negotiated, many argue—and this Comment assumes—that BITs will form the basis for the international investment regime for the foreseeable future.<sup>28</sup> An examination of FDI in Africa, therefore, necessarily involves a discussion of BITs.

Section A introduces the relationship between BITs and FDI and discusses why developing countries sign BITs despite certain costs. Section B explains why FDI and BITs are important to Africa but argues that BITs have failed to achieve their potential. And section C attributes this failure to the fact that African BITs tend to ignore important domestic considerations.

### A. *The Mechanism Behind BITs*

Most BITs are made between a developed and a developing country and represent a “bargain,” whereby a host country promises to protect home-country FDI in exchange for the prospect of increased foreign capital in the future.<sup>29</sup> Developing countries incur certain “sovereignty costs” in negotiating, ratifying, and complying with a BIT<sup>30</sup>: They are less free to regulate in areas affecting foreign investment or the flow of capital because of the potential for sovereign liability upon breach of a BIT’s provisions governing treatment of FDI.<sup>31</sup> They are also usually forced to delegate judicial authority to international arbitral bodies, which have the authority to adjudicate cases involving foreign investors.<sup>32</sup> Developing countries accept these costs because

---

<sup>25</sup> See, e.g., Salacuse & Sullivan, *supra* note 19, at 67.

<sup>26</sup> Elkins et al., *supra* note 21, at 265.

<sup>27</sup> Muradu A. Srur, *The International Investment Regime: Towards Evolutionary Bilateral & Regional Investment Treaties?*, 1 MANCHESTER J. INT’L ECON. L. 54, 64–72 (2004).

<sup>28</sup> E.g., *id.* at 68; see also Ryan J. Bubb & Susan Rose-Ackerman, *BITs and Bargains: Strategic Aspects of Bilateral and Multilateral Regulation of Foreign Investment*, 27 INT’L REV. L. & ECON. 291, 310 (2007) (noting “the strong protections provided by the current BIT regime to foreign investors, and the resistance to full liberalization of inward investment by some developed states” as reasons that multilateral efforts have failed).

<sup>29</sup> Salacuse & Sullivan, *supra* note 19, at 77.

<sup>30</sup> Elkins et al., *supra* note 21, at 278–79.

<sup>31</sup> *Id.* at 278.

<sup>32</sup> *Id.* at 280.

they expect them to be outweighed by the benefits of a corresponding increase in FDI.<sup>33</sup>

Several different explanations have been given for the relationship between BITs and increased FDI. Some scholars point to BITs' stabilizing effects, which make a host country more attractive to foreign investors.<sup>34</sup> A BIT's text establishes a clear and independent set of investment laws that its signatories cannot ignore.<sup>35</sup> And signing a BIT dissuades a host country from altering its own investment policies by elevating them to the level of international law.<sup>36</sup> Investors can enforce their rights through arbitration, which offers a neutral and reliable alternative to partial or inefficient local courts.<sup>37</sup> Thus, BITs reduce the expected risks to FDI in two ways: first, they stabilize a host country's existing investment environment;<sup>38</sup> and second, they provide substitutes for weak domestic laws and institutions that are often ill-equipped to protect FDI.<sup>39</sup>

Others point to a signaling effect, whereby a developing country that signs a BIT—especially a BIT with a highly developed country<sup>40</sup>—signals to potential investors that its commitment to protecting FDI is credible.<sup>41</sup> The treaty raises the ex post costs of noncompliance by clarifying a host country's obligations, involving the host government in future disputes and enhancing enforceability through arbitration.<sup>42</sup> This may allow an unstable, or even corrupt, developing country to convince foreign investors that it will uphold and respect both domestic reforms that it has already undertaken and provisions of the BITs it has signed.<sup>43</sup>

---

<sup>33</sup> *Id.* at 279.

<sup>34</sup> Vandeveld, *supra* note 10, at 523.

<sup>35</sup> Salacuse & Sullivan, *supra* note 19, at 95.

<sup>36</sup> *Id.* at 96.

<sup>37</sup> *E.g., id.* at 75, 96.

<sup>38</sup> Vandeveld, *supra* note 10, at 523.

<sup>39</sup> Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 *WORLD DEV.* 1567 (2005).

<sup>40</sup> Kim Sokchea, *Bilateral Investment Treaties, Political Risk and Foreign Direct Investment*, 11 *ASIA PAC. J. ECON. & BUS.* 6, 18–20 (2007) (concluding that BITs with countries from the OECD signify a more credible commitment to a “stable legal investment framework”).

<sup>41</sup> *E.g.,* Ginsburg, *supra* note 18, at 117; Lisa E. Sachs & Karl P. Sauvant, *BITs, DTTs, and FDI Flows: An Overview*, in *THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS*, at liii (Karl P. Sauvant & Lisa E. Sachs eds., 2009).

<sup>42</sup> Elkins et al., *supra* note 21, at 278.

<sup>43</sup> Sachs & Sauvant, *supra* note 41, at lxi.

It is unclear, however, whether the benefits of signing a BIT—namely its positive impact on FDI inflows—outweigh the corresponding sovereignty costs. Many studies have been conducted on the relationship between BITs and FDI, but their conclusions are often contradictory.<sup>44</sup> Investment flows are difficult to analyze because of the number of variables involved and the lack of detailed data on FDI, and wide variations in BIT provisions, combined with the presence of complex regional factors, make BITs hard to quantify.<sup>45</sup> For the purposes of this Comment, this debate is essentially irrelevant; developing countries, at least, seem convinced that BITs are worth signing,<sup>46</sup> and there appears to be no viable alternative mechanism for governing FDI, at least for the foreseeable future.<sup>47</sup>

### B. *The African Context*

There may be important lessons to learn from development strategies that proved successful in other parts of the world, but these same policies cannot be expected to yield the same results in Africa without consideration of its particular circumstances.<sup>48</sup> This has proved true in the context of FDI—while gross FDI inflows to Africa have increased over time, Africa's share of FDI has decreased compared to other developing countries.<sup>49</sup>

---

<sup>44</sup> Compare RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 8 (2008) (arguing that the availability of real-time information on international economic and legal matters suggests that potential investors would be dissuaded from investing in countries that have failed to sign a BIT), Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a Bit . . . and They Could Bite* 22–23 (World Bank, Policy Research Working Paper No. 3121, 2003), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=636541](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=636541) (finding little evidence that BITs have stimulated FDI inflows and suggesting that the costs of signing a BIT outweigh the benefits), and Jennifer Tobin & Susan Rose-Ackerman, *Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties* 23, 30–31 (Yale Law Sch., Ctr. for Law Econ. & Pub. Policy, Research Paper No. 293, 2005), available at <http://ssrn.com/abstract=557121> (finding a very weak relationship between BITs and FDI flows that is only present in countries with stable business environments), with Neumayer & Spess, *supra* note 39, at 27 (finding that developing countries, especially countries with weak institutions, have increased FDI inflows by signing multiple BITs), and Salacuse & Sullivan, *supra* note 19, at 105–06 (finding that signing a BIT, especially with the United States, positively affects FDI).

<sup>45</sup> Sachs & Sauvant, *supra* note 41, at lvi–lviii.

<sup>46</sup> Elkins et al., *supra* note 21, at 299 (recognizing that host countries sign BITs to participate in the global capitalist system and to compete with each other for FDI); Mosoti, *supra* note 4, at 103; Sachs & Sauvant, *supra* note 41, at lx; Sokchea, *supra* note 40, at 9 (arguing that developing countries promote BITs to enhance their investment climates and attract FDI by assuring their governments will protect it).

<sup>47</sup> See *supra* notes 23–26 and accompanying text.

<sup>48</sup> Elizabeth Asiedu, *On the Determinants of Foreign Direct Investment to Developing Countries: Is Africa Different?*, 30 WORLD DEV. 107, 108, 114–16 (2003).

<sup>49</sup> See *supra* text accompanying notes 6–9.

When making policy that affects investment in the continent, certain factors particular to Africa should be considered along with each African country's particular circumstances. First, Africa's failure to attract FDI may be due to a "regional effect," whereby African nations receive less FDI simply by virtue of their geographical location.<sup>50</sup> FDI inflows to Africa are less responsive to increased rates of return on investment, improved infrastructure, and increased openness than to similar changes in other developing regions.<sup>51</sup> Investors either lack knowledge about individual African nations, basing investment decisions on their perceptions of neighboring countries' investment environments, or are aware of investment reforms but see Africa as inherently risky.<sup>52</sup> It takes time for a country to modify its image in the international community, especially when it has a history of policy interventions.<sup>53</sup> Foreigners considering investing in Africa may fear that, given its historically ad hoc treatment of reforms, domestic reforms are likely to be reversed.<sup>54</sup>

Second, African nations are particularly reliant on FDI. Africa has been less successful at reducing extreme poverty than any other region of the world.<sup>55</sup> Income levels and domestic savings are generally low in Africa, so foreign investment and foreign aid are often the only sources of financing.<sup>56</sup> Aid to Africa has increased, but not quickly enough.<sup>57</sup> And thin financial markets mean that foreign indirect investment—such as portfolio investment—is limited.<sup>58</sup> Thus, foreign direct investment has become especially important to Africa, which must look to FDI to fuel its economic development and reverse recent increases in poverty levels.<sup>59</sup>

---

<sup>50</sup> Asiedu, *supra* note 48, at 114.

<sup>51</sup> This suggests that Africa's decreased attractiveness to FDI is not simply because reforms there have been less dramatic than those of other developing countries. *Id.* at 113–14.

<sup>52</sup> *Id.* at 114.

<sup>53</sup> See Jacques Morisset, *Foreign Direct Investment in Africa: Policies Also Matter* (World Bank, Policy Research Working Paper No. 2481, 2000), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=632551](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=632551).

<sup>54</sup> Asiedu, *supra* note 48, at 115.

<sup>55</sup> See *supra* text accompanying note 1.

<sup>56</sup> See De Wet & Van Eyden, *supra* note 3, at 30, 32.

<sup>57</sup> See WORLD BANK, *GLOBAL DEVELOPMENT FINANCE 2008: THE ROLE OF INTERNATIONAL BANKING* 56 (2008) ("Excluding debt relief, [Sub-Saharan Africa] received 37.5 percent of total ODA in 2006, up from 34 percent in 2006 but slightly below its 38 percent share in 2004."); UN Millennium Development Goals, *supra* note 1, at 12 (noting that aid to Africa would need to increase at a much greater rate to achieve its development goals).

<sup>58</sup> Elizabeth Asiedu, *Policy Reform and Foreign Direct Investment in Africa: Absolute Progress but Relative Decline*, 22 DEV. POL'Y REV. 41, 42 (2004).

<sup>59</sup> UNCTAD et al., *World Economic Situation and Prospects 2009*, 26–27 (2009) (noting that "extreme poverty in sub-Saharan Africa may have risen by almost 8 percentage points, implying that the recent food

### C. *Rethinking African BITs*

In theory, BITs have the potential to be particularly effective in Africa for several reasons. First, unlike long-term policy reform, a BIT's signaling and stabilizing effects should take effect immediately.<sup>60</sup> Many African countries are in urgent need of economic growth to combat extreme poverty but have no alternative other than relying on external financing to fuel this development. And while certain African countries have encouraged FDI by improving their general business climates, this usually requires a long-term commitment to reform.<sup>61</sup>

Further, BITs have the potential to address certain distinctive hurdles facing African nations—especially the “regional effect.” A BIT's signaling and stabilizing effects enhance the credibility of a country's reforms and indicate a meaningful commitment to protecting FDI. This should encourage foreigners making investment decisions to focus more on economic determinants and less on Africa's reputation as a risky forum for investment.<sup>62</sup> In addition, because bilateral commitments aim at establishing long-term, mutually beneficial relationships, BITs promote communication between countries that should encourage potential home-country investors to make informed decisions that account for a host country's unique investment opportunities and comparative advantages.<sup>63</sup>

Unfortunately, BITs have failed to achieve their full potential as tools for economic development in Africa. First, modern BITs vary little across individual African countries and rarely deviate from a standard format that has developed over time.<sup>64</sup> They all include five basic provisions: (1) scope of application, (2) conditions for entry of FDI, (3) standards for treatment, (4) protection against expropriation and compensation, and (5) investment dispute settlement.<sup>65</sup> But Africa is a large and diverse continent, and liberalizing BIT

---

price increases have more than offset the poverty reduction achieved between 1990 and 2004” and that “on a per capita basis, Africa will require the greatest investment push” to tackle the current crisis).

<sup>60</sup> A country should be legally bound by a BIT's terms upon signing it, causing a stabilizing effect, and any foreigner thinking about investing in a host country should be aware of something as public as an international treaty.

<sup>61</sup> See Morisset, *supra* note 53, at 10–11 (observing that Mali and Mozambique were able to attract FDI only after prolonged reform efforts).

<sup>62</sup> Cf. Sachs & Sauvart, *supra* note 41, at lii (noting that BITs should “allow the key economic determinants—if present—to prevail”).

<sup>63</sup> DOLZER & SCHREUER, *supra* note 44, at 22–24.

<sup>64</sup> Mosoti, *supra* note 4, at 115–16.

<sup>65</sup> *E.g., id.* at 116; Salacuse & Sullivan, *supra* note 19, at 79–90.

provisions that attract FDI in one African country may be inappropriate or unworkable in another.<sup>66</sup>

Second, because BITs and the whole discourse surrounding them have become so focused on foreign investment, they tend to ignore important domestic considerations to the detriment of home and host countries alike. While there exists a healthy debate over the value of BITs to developing countries, most studies—both by supporters, who argue BITs positively impact FDI, and detractors, who claim that they do not—center on foreign investment alone. This Comment argues that BITs that ignore important domestic issues forgo real opportunities to promote a host country's sustainable economic development. Domestic investment is a good example. Studies indicate a strong positive relationship between foreign and domestic investment in Africa.<sup>67</sup> Increased domestic investment stimulates FDI, much like the signing of a BIT does, by signaling to foreign investors that a host country offers high rates of return.<sup>68</sup> Further, domestic investment has been an important source of finance in many developing countries<sup>69</sup> and is critical to long-term, sustainable growth.<sup>70</sup> Though FDI in Africa has increased steadily over time, both private and public domestic investment levels have been decreasing.<sup>71</sup> This is a serious problem, and an exploration of BITs as a tool for improving Africa's investment climate needs to examine their effects on both foreign and domestic investment levels.<sup>72</sup>

---

<sup>66</sup> Cf. Khan, *supra* note 13, at 1 (“The challenge for developing countries trying to devise institutional reform and anti-corruption strategies is to learn the right lessons from the international experience and create feasible governance reform agendas appropriate and feasible for their own circumstances.”).

<sup>67</sup> This is often referred to as a “crowding in” (as opposed to “crowding out”) effect of FDI on domestic investment. Ndikumana & Verick, *supra* note 8, at 24.

<sup>68</sup> *Id.* at 4.

<sup>69</sup> WORLD BANK, GLOBAL ECONOMIC PERSPECTIVES AND THE DEVELOPING COUNTRIES xiv (2003) (noting that in 2003, FDI flows to developing countries totaled about \$160 billion, while domestic investment totaled about \$1 trillion).

<sup>70</sup> See, e.g., Sumei Tang et al., *Foreign Direct Investment, Domestic Investment and Economic Growth in China: A Time Series Analysis*, 31 WORLD ECON. 1292, 1304 (2008) (noting that China's domestic investment contributes much more to growth than FDI and encouraging promotion of domestic investment over FDI); Mina Balamoune-Lutz & Léonce Ndikumana, *Corruption and Growth: Exploring the Investment Channel* 12–13 (Univ. of Mass. Amherst Dep't of Econ., Working Paper No. 2008-08, 2008) (arguing that growth from investment in infrastructure is unsustainable without private investment for its maintenance); Ndikumana & Verick, *supra* note 8, at 3 (“While FDI can stimulate growth, these growth effects are sustainable only if FDI stimulates the utilization of domestic factors of production, especially by increasing employment and stimulating private investment.”).

<sup>71</sup> Ndikumana & Verick, *supra* note 8, at 6.

<sup>72</sup> See Prakash Loungani & Assaf Razin, *How Beneficial Is Foreign Direct Investment for Developing Countries?*, FIN. & DEV., June 2001, at 6, 9 (noting some negative effects of FDI, and arguing that policies must seek to attract both foreign and domestic investment).

This Comment divides developing African nations into three groupings based on a country's FDI and domestic investment levels. Group One is composed of countries with low FDI and low domestic investment levels. Group Two countries have higher FDI levels, but their domestic investment levels remain low. Group Three comprises countries that have successfully encouraged both FDI and domestic investment. These groupings represent progressive stages of development. A country must meet certain benchmarks to graduate to the next grouping: a Group One country must increase FDI before graduating to Group Two, and a Group Two country must increase domestic investment before Graduating to Group Three.

This Comment also recommends group-specific BIT provisions that will help countries from each group achieve a corresponding set of goals. BIT provisions that reduce risk to FDI will help Group One countries attract FDI. BITs that strengthen democratic institutions and the rule of law and grant Group Two countries a degree of freedom to promote equal competition among foreign and local firms will encourage domestic investment. Liberal BIT provisions will attract higher-quality FDI in Group Three countries.

The measures that a country takes to graduate to the next stage of development place it in a better position to negotiate new BIT provisions and to pursue its new set of goals. This functions as a "virtuous cycle" that will guide countries toward economic development.<sup>73</sup> Although this mechanism was devised for, and probably best applies to, African nations, it may serve other countries in their development efforts.

## II. GROUP ONE COUNTRIES

Group One is composed of low-income, low-growth least developed countries (LDCs) with poor infrastructure, weak institutions, and low levels of both FDI and domestic investment.<sup>74</sup> Many Group One countries are emerging from recent conflicts and desperately need to improve their infrastructure and the prevailing quality of life.<sup>75</sup> The lack of domestic investment to fuel this recovery, however, means that Group One countries must look to external

---

<sup>73</sup> See *supra* note 24 and accompanying text.

<sup>74</sup> See Loungani & Razin, *supra* note 72, at 8 (noting that FDI represents a greater share of capital inflows in countries with weak domestic policies and institutions).

<sup>75</sup> Malawi, Liberia, and Sierra Leone are typical Group One countries. Liberia and Sierra Leone were involved in recent conflicts. In 2006, all three had negative domestic savings rates—and thus were relying on foreign financing for domestic investment—and all received under \$50 million in FDI. UNCTAD, *The Least Developed Countries Report 2008*, 9, 35, U.N. Doc. UNCTAD/LDC/2008 (2008).

sources—namely FDI—for financing. Section A argues that a Group One country's dire need to spur economic growth means that reducing the perceived risks to FDI should be its primary goal. Section B suggests BIT provisions on standards of treatment of FDI that accomplish this goal by maximizing foreign investor rights and limiting a host government's freedom to regulate. Section C argues that a Group One BIT must allow foreign investors to promptly refer a dispute to arbitration. Finally, Section D explains that BIT provisions that demand institutional reforms at the expense of more important goals may be counterproductive for a Group One country.

### A. *Risk Reduction*

Group One countries are typically either facing some kind of emergency, such as famine or AIDS, or emerging from a period of crisis or conflict. They offer foreign investors unparalleled opportunities to benefit from first-mover advantages and the potential to obtain very high rates of return on investment.<sup>76</sup> However, their instability deters FDI.<sup>77</sup> The primary goal of a Group One country must be to reduce the perception among foreigners that their investments will be lost. By minimizing the extent to which this essentially unquantifiable risk impacts the decision whether to invest, a Group One country can increase the expected rates of return on FDI.<sup>78</sup> FDI is especially important to a Group One country because neither its government nor its citizens have sufficient capital to fuel meaningful economic growth through domestic investment, and a Group One country's lack of natural resources means it cannot simply open its extractive sector and expect to

---

<sup>76</sup> See John Bray, *The Role of Private Sector Development in Post-Conflict Economic Recovery*, 9 CONFLICT, SECURITY & DEV. 1, 5 (2009) (“[T]here are also opportunities arising first from the reconstruction process itself and, more broadly, from the possibility that investors who are willing to take the risks of being among the “first movers” can establish themselves before their more nervous competitors.”); Harry G. Broadman, ‘First Mover’ Investment Advantages in Sub-Saharan Africa: Why Northern Multinationals Should React (Quickly) to Their Southern Counterparts, CESIFO FORUM, Winter 2009, at 52, 53 (“Even if the investment risks in Africa are high so too are the returns. Indeed, unlike virtually any other region of the world, Sub-Saharan Africa is the one location where true investment ‘first-mover advantages’ can still be found . . .”).

<sup>77</sup> Ernest Harsch, *Investors Start to Eye Africa*, AFR. RENEWAL, Jan. 2005, at 20, available at <http://www.un.org/ecosocdev/geninfo/afrec/vol118no4/184invest.htm> (quoting UN Under-Secretary-General and Special Adviser on Africa Ibrahim Gambari as saying that “[t]he rates of return on investment in Africa are possibly the highest in the world,” but noting the many factors that deter FDI to Africa).

<sup>78</sup> Risk reduction is important for all LDCs, but especially for African Group One countries given the “regional effect.” Asiedu, *supra* note 48, at 114.

attract FDI.<sup>79</sup> A Group One country that opens its economy to FDI while also indicating that it is more committed than other LDCs to protecting FDI should be able to attract foreign investors.

The goal of risk reduction, therefore, should guide a Group One country's investment policy and determine the kinds of BITs it signs. Group One countries should seek to enter into BITs with highly developed countries.<sup>80</sup> And these developed countries should recognize that pushing for drastic economic, political, and judicial changes sets unrealistic goals and diverts attention from more important reforms.<sup>81</sup> While more comprehensive reforms may be necessary for sustainable development,<sup>82</sup> Group One countries must focus on achievable goals that will attract FDI and spur economic growth in the short term.

Attracting an initial tranche of FDI brings a Group One country into a "virtuous cycle" toward economic development. Each infusion of foreign capital will increase a Group One country's per capita income, GDP, and the size of its market, thus boosting the expected rates of return on investments.<sup>83</sup> And a Group One country's success at attracting FDI—especially FDI that improves the quality of infrastructure—will invite even more FDI in the future by demonstrating that investment there can be viable and that the country is accommodating to foreign investors.<sup>84</sup>

### *B. Standards of Protection of FDI*

BITs are often criticized for being unbalanced and asymmetrical, favoring foreign-investor over host-country interests.<sup>85</sup> While most BITs do emphasize

---

<sup>79</sup> See Elkins et al., *supra* note 21, at 281 ("[W]hile the number of countries in which bauxite mining is profitable is quite limited, almost any jurisdiction can host a Nike plant.").

<sup>80</sup> Cf. Sokchea, *supra* note 40, at 22 (noting that signing a BIT with a non-OECD country signals a credible commitment to providing a stable legal environment only if a BIT has also been signed with an OECD country).

<sup>81</sup> Cf. *Governance and Anti-Corruption Reforms*, *supra* note 13, at 21 (arguing that corruption reduction strategies should aim to transform failing states into developmental states rather than set unachievable targets that divert attention from more critical reforms).

<sup>82</sup> Cf. Baliaoune-Lutz & Ndikumana, *supra* note 70, at 14 (arguing that to achieve sustainable growth, both the quantity and quality of investment must be addressed).

<sup>83</sup> See Sachs & Sauvant, *supra* note 41, at li.

<sup>84</sup> See Ndikumana & Verick, *supra* note 8, at 11, 27 (noting that investors are attracted to "established market[s]" that "already cater to foreign investors").

<sup>85</sup> Stiglitz, *supra* note 16, at 547; see also AARON COSBEY, INT'L DEV. RESEARCH CTR., INTERNATIONAL INVESTMENT AGREEMENTS AND SUSTAINABLE DEVELOPMENT: ACHIEVING THE MILLENNIUM DEVELOPMENT GOALS 3 (2005) (noting that most BITs distribute rights and obligations in an "unbalanced" manner, with the

FDI protection, which can be detrimental to developing countries under certain circumstances, there is no question that a BIT with stronger standards for FDI protection “creates a less risky investment climate” than one with weaker standards.<sup>86</sup> If Group One countries are to overcome their reputations for instability and succeed in attracting FDI, it is critical that their BITs prioritize investor interests.<sup>87</sup> Therefore, Group One BITs should maximize FDI protection by granting foreign investors as many substantive rights<sup>88</sup> as possible and limiting a host country’s discretion to implement policies that affect FDI.

Group One countries should make efforts to negotiate BITs with the United States. Signing a U.S. BIT appears to cause significant increases in FDI and may even achieve the important host-country goal of investment promotion—the “attraction of investment projects that the host country determines are in *its* best interests” rather than the creation of an investment climate that accommodates investments that foreigners “judge to be in *their* interests.”<sup>89</sup> U.S. BITs are especially protective of FDI.<sup>90</sup> The BIT between the United States and Rwanda, for example, grants foreign investors expansive substantive rights, such as the right to prompt compensation for direct or indirect “measures equivalent to expropriation or nationalization.”<sup>91</sup> It also sets high standards for treatment of FDI, promising that investments will be granted “fair and equitable treatment and full protection and security,” “non-discriminatory treatment,”<sup>92</sup> “national treatment,”<sup>93</sup> and “most favored nation”

---

“benefits tilted squarely toward the investors and away from their host states”); Ibronke T. Odumosu, *The Antinomies of the (Continued) Relevance of ICSID to the Third World*, 8 SAN DIEGO INT’L L.J. 345, 361 (2007) (arguing that the focus of arbitration has been more on protecting FDI than on balancing the interests of host states and foreign investors).

<sup>86</sup> Salacuse & Sullivan, *supra* note 19, at 106–07.

<sup>87</sup> This is especially true as the global financial crisis makes investors increasingly risk-averse. See Org. for Econ. Cooperation & Dev., *OECD FDI Outflows and Inflows Reach Record Highs in 2007 but Look Set to Fall in 2009*, INVESTMENT NEWS (OECD, Paris, Fr.), June 2008, at 1, 3 (predicting that the financial crisis will result in a 40% decline in FDI to LDCs).

<sup>88</sup> Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 337, 342 (2007) (explaining that BITs “articulate specific substantive standards for investment rights” that protect FDI from “inappropriate risks”).

<sup>89</sup> Salacuse & Sullivan, *supra* note 19, at 78–79.

<sup>90</sup> *Id.* at 106.

<sup>91</sup> Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.–Rwanda, art. 6, Feb. 19, 2008, S. TREATY DOC. NO. 110–23 (2008) [hereinafter U.S.–Rwanda BIT].

<sup>92</sup> *Id.* art. 5.

<sup>93</sup> *Id.* art. 3 (requiring “treatment no less favorable than that it accords, in like circumstances, to its own investors”).

(MFN) treatment.<sup>94</sup> These provisions reduce risk by extending protection of FDI to cover discriminatory policies, legislation, or financial and regulatory measures that affect an investment's value.<sup>95</sup>

The widespread use of MFN clauses means that a Group One country signing a U.S. BIT should also become more attractive to FDI from other countries.<sup>96</sup> Typical MFN provisions require that a host country "accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-Party."<sup>97</sup> Thus, foreign investors from countries that have signed less protective BITs with the host country will benefit from a U.S. BIT's heightened standards through MFN clauses.<sup>98</sup> To maximize FDI inflows, therefore, a Group One country that has signed a U.S. (or another especially protective) BIT should continue to conclude BITs with other OECD countries, being sure to include MFN clauses.<sup>99</sup>

Group One BITs should also limit a host government's policy-making room. This will create a more stable investment environment by dissuading future governments from reversing investment policies or enacting new regulations that adversely affect FDI.<sup>100</sup> For Group One countries, broad compensation requirements for indirect expropriation (regulatory takings) may be desirable precisely because the resulting chilling effect reduces the perceived risks to FDI. Where BITs allow signatories to specify "non-conforming" measures, sectors, subsectors, and activities to which MFN and national treatments do not apply,<sup>101</sup> Group One countries should be selective

---

<sup>94</sup> *Id.* art. 4 (requiring "treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party").

<sup>95</sup> Franck, *supra* note 88, at 344–45.

<sup>96</sup> Salacuse & Sullivan, *supra* note 19, at 107.

<sup>97</sup> Canadian Foreign Investment Protection Agreement Model, art. 4 (2004) [hereinafter Canada Model BIT], available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/2004-FIPA-model-en.pdf>. This model "serves as a template for Canada in discussions with investment partners on bilateral investment rules." Canada's Foreign Investment Promotion and Protection Agreements (FIPAs) Negotiating Programme, [http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/what\\_fipa.aspx?lang=en&menu\\_id=45&menu=R#structure](http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/what_fipa.aspx?lang=en&menu_id=45&menu=R#structure) (last visited Mar. 21, 2010).

<sup>98</sup> Salacuse & Sullivan, *supra* note 19, at 107.

<sup>99</sup> The OECD is a group of highly developed countries dedicated to democracy and the market economy. OECD country BITs are the most desirable because they have been found to have a more positive effect on FDI than non-OECD BITs. Sokchea, *supra* note 40, at 16.

<sup>100</sup> See *supra* text accompanying notes 40–43.

<sup>101</sup> U.S. Model Bilateral Investment Treaty, art. 14 (2004) [hereinafter U.S. Model BIT], available at <http://www.state.gov/documents/organization/117601.pdf>. The United States negotiates its BITs based on this model. Bilateral Investment Treaties and Related Agreements, <http://www.state.gov/e/eeb/ifa/bit/> (last visited Mar. 21, 2010). There are also provisions allowing regulations aimed at protecting public welfare that typically do not constitute indirect expropriations. See *infra* text accompanying notes 191–96.

and careful not to leave themselves too much room to maneuver. Group One BITs should also prohibit performance requirements and other obligations that impose extra costs on FDI. Reducing a host country's ability to disrupt the operations of foreign firms will encourage multinational corporations (MNCs) to make investment decisions based on purely economic projections and considerations.

### C. *International Arbitration*

Group One BIT provisions aimed at reducing risk to FDI are useless as long as investors are forced to rely on domestic courts to enforce their rights. Foreigners view local courts as inefficient and fear discriminatory treatment.<sup>102</sup> Thus, while it may seem contrary to traditional conceptions of sovereign immunity to allow private investors to “unilaterally” bring a sovereign to trial,<sup>103</sup> a Group One BIT *must* grant investors the right to enforce its provisions through international arbitration.

It is critical that the act itself of signing a BIT constitute a Group One country's consent to referral of investment disputes to arbitration.<sup>104</sup> A Group One BIT should also minimize preconditions to this referral. The U.S.–Rwanda BIT, for example, provides that “the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation” and requires that “six months have elapsed since the events giving rise to the claim” before its referral to arbitration.<sup>105</sup> Most BITs require both consultation and a six-month waiting period.<sup>106</sup> While these preconditions seem reasonable, a Group One country might consider decreasing the waiting period to demonstrate its commitment to protecting FDI.

Even BITs that allow for prompt referral of disputes to arbitration may not go far enough to convince foreigners to invest in a Group One country. Despite the rapid increase in BIT signings, there have been relatively few

---

<sup>102</sup> Salacuse & Sullivan, *supra* note 19, at 75, 96.

<sup>103</sup> Odumosu, *supra* note 85, at 361–62.

<sup>104</sup> Compare U.S.–Rwanda BIT, *supra* note 91, art. 25 (“Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Treaty.”), with Agreement for the Promotion and Reciprocal Protection of Investments, Egypt–Bots., art. 9, July 3, 2003 [hereinafter Egypt–Bots. BIT], available at [http://www.unctad.org/sections/dite/ia/docs/bits/egypt\\_botswana.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/egypt_botswana.pdf) (declaring that after six months, disputes are submitted “to a competent court of the Contracting Party . . . or by mutual consent between the parties to international arbitration”).

<sup>105</sup> U.S.–Rwanda BIT, *supra* note 91, arts. 23–24.

<sup>106</sup> UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking*, ¶ 105, U.N. Doc. UNCTAD/ITE/IIT/2006/5 (2007) [hereinafter *Bilateral Investment Treaties*].

arbitrations—especially in Africa.<sup>107</sup> There are several possible explanations for this. First, most BITs only provide recourse for acts committed by the state and offer little protection against private interferences.<sup>108</sup> Second, arbitration decisions are difficult to predict because they apply a body of law that is constantly developing, and they are typically unavailable to the public.<sup>109</sup> Third, arbitration is a costly and risky process—damages have been awarded less than half the time,<sup>110</sup> and awards can be difficult to enforce.<sup>111</sup>

A Group One country should consider negotiating BIT provisions that are drafted to address these weaknesses. First, the “protection and security” standard, which typically requires that a host government provide only physical security, should be qualified by the word “full.”<sup>112</sup> Arbitration bodies have interpreted this language to extend to legal protection as well as physical security.<sup>113</sup> Thus, for example, an investor might be able to bring a claim against a host government for failure to foster a legal environment that protects FDI from private infringement. A limited number of BITs address private infringement directly by allowing investors to bring claims against private parties.<sup>114</sup> The BIT between Australia and Egypt, for example, provides: “Each Party shall . . . permit its investors to select means of their choice to settle disputes relating to investments with the *investors* of the other Party, including arbitration conducted in a third country.”<sup>115</sup>

Second, BIT provisions that take into account developments in BIT interpretation may increase predictability. Unlike most BITs, which are drafted in very general terms, the United States and Canada have used their experiences with arbitration to develop detailed provisions on issues such as

---

<sup>107</sup> See Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 33 (2007) (noting that there have been only two arbitrations involving African LDCs).

<sup>108</sup> See Kenneth J. Vandeveld, *The Political Economy of a Bilateral Investment Treaty*, 92 AM. J. INT'L L. 621, 632 (1998) (“BITs, for example, do little to protect intellectual property rights against private infringement or to provide for effective resolution of disputes between the investor and other private parties.”).

<sup>109</sup> DOLZER & SCHREUER, *supra* note 44, at 153 (explaining that it is difficult to develop consistent case law because BITs are usually interpreted by ad hoc tribunals); Franck, *supra* note 107, at 49.

<sup>110</sup> Franck, *supra* note 107, at 58.

<sup>111</sup> For example, claimants that have attempted to seize assets have had difficulty showing that those assets were commercial rather than governmental, and, thus, sovereign immunity did not apply to the execution of the assets. David R. Sedlak, Comment, *ICSID's Resurgence in International Investment Arbitration: Can the Momentum Hold?*, 23 PENN ST. INT'L L. REV. 147, 167–68 (2004).

<sup>112</sup> E.g., U.S.–Rwanda BIT, *supra* note 91, art. 5.

<sup>113</sup> DOLZER & SCHREUER, *supra* note 44, at 153.

<sup>114</sup> *Bilateral Investment Treaties*, *supra* note 106, at 99.

<sup>115</sup> Agreement for the Promotion and Reciprocal Protection of Investments, Austl.–Egypt, art. 14, May 3, 2001, 2002 Austl. T.S. No. 19 [hereinafter Austl.–Egypt BIT] (emphasis added).

expropriation and standards of treatment.<sup>116</sup> The Canadian Model BIT defines “investment” very precisely using a descriptive and exhaustive list of what is covered.<sup>117</sup> Third, BITs providing for arbitration in Africa would reduce costs and encourage home-country participation. This should increase arbitration’s local legitimacy, thereby facilitating the enforcement of awards.<sup>118</sup>

#### *D. Institutional Reform*

In general, Group One countries’ BITs should focus on promoting stability and encouraging FDI inflows in the short term.<sup>119</sup> Institutional reform and the rule of law become important only after a country has graduated from Group One. It is true that granting foreign investors access to arbitration may reduce their vested interests in improving local institutions—and this may, in turn, inhibit the growth of a strong judiciary by reducing courts’ incentives to improve.<sup>120</sup> But in order to attract foreign investors, Group One countries must do everything in their power to minimize extra costs to FDI—such as the expending of time and energy for judicial reform. Otherwise, they present no advantage over Group Two and Group Three countries that are more stable and have stronger institutions.

Group One countries should avoid BIT provisions that require active institutional reform and must be aware that such provisions are not always obvious. Certain transparency requirements, for example, do not explicitly address the rule of law, yet compliance will require most Group One countries to devise and implement mechanisms to improve due process.<sup>121</sup> This risks diverting a Group One country’s limited government resources away from measures that aim to reduce risks to FDI and encourage growth in the short-term.<sup>122</sup>

BITs that encourage the separation of powers and an autonomous judiciary pose additional risks to Group One countries. A country’s political stability

---

<sup>116</sup> *Bilateral Investment Treaties*, *supra* note 106, at 142–43.

<sup>117</sup> Canada Model BIT, *supra* note 97, art. 1.

<sup>118</sup> See *infra* text accompanying notes 317–20 (explaining that, at present, Africans tend to be suspicious of arbitration because it is prohibitively expensive and takes place abroad).

<sup>119</sup> Cf. *Governance and Anti-Corruption Reforms*, *supra* note 13, at 19 (stressing that LDCs must direct their attention to the “more critical set of governance reforms”).

<sup>120</sup> Ginsburg, *supra* note 18, at 119; see also Tobin & Rose-Ackerman, *supra* note 44, at 11.

<sup>121</sup> See *infra* text accompanying notes 152–55.

<sup>122</sup> See *supra* note 81 and accompanying text.

weighs heavily in a foreigner's decision to invest.<sup>123</sup> Yet maintaining this stability can be difficult for Group One countries with meager tax revenues that leave little to redistribute to citizens, who may feel they are being cheated.<sup>124</sup> In this context, it may be easier for government officials with wide discretion to distribute a country's resources strategically—through patron-client networks, for example—to appease powerful and influential constituencies and preserve social and political stability that would otherwise be elusive.<sup>125</sup> Officials with a high degree of discretion have more freedom to manage critical interventions—such as providing infrastructure for productive sectors or teaching local firms to use new technologies—that benefit the country as a whole, but that place certain constituencies above others.<sup>126</sup> To the extent that greater transparency or a more watchful judiciary limits officials' discretion, these measures may prove counterproductive for a Group One country.<sup>127</sup>

While corruption in Africa is often a byproduct of discretion in public spending,<sup>128</sup> Group One officials that possess broad decision-making authority may be the only ones that can effectively maintain stability and intervene in the economy in ways that attract FDI and encourage growth.<sup>129</sup> Of course, this Comment does not condone wholesale corruption. It simply argues that it may be better for Group One countries to focus their limited resources elsewhere. In many Group One countries tackling deficient infrastructure, for example, may be more effective at attracting FDI than efforts to reduce corruption, crime, red tape, and financial market constraints combined.<sup>130</sup> Further, certain types of "corruption"—in the sense that unofficial patron-client network

---

<sup>123</sup> Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 117 (2003).

<sup>124</sup> See *Governance and Anti-Corruption Reforms*, *supra* note 13, at 15 ("One of the fundamental problems faced by states in developing countries is to maintain political stability in a context of severely limited fiscal resources.")

<sup>125</sup> *Id.* at 15–16 (acknowledging that these patron-client transfers involve political corruption).

<sup>126</sup> *Id.* at 14–15.

<sup>127</sup> See *id.* at 19–20 (arguing that vulnerable states should focus on "strengthen[ing] the state's capacity to behave in a cohesive and effective way" rather than transparency and anti-corruption).

<sup>128</sup> Léonce Ndikumana, *Corruption and Pro-Poor Growth Outcomes: Evidence and Lessons for African Countries 7* (Political Econ. Research Inst., Univ. of Mass. Amherst, Working Paper No. 120, 2006).

<sup>129</sup> Cf. *Governance and Anti-Corruption Reforms*, *supra* note 13, at 17 (arguing that politicians known to be corrupt sometimes beat honest ones in elections because they are "the only ones who can deliver").

<sup>130</sup> Cf. 2009 GLOBAL MONITORING REPORT, *supra* note 2, at 74 ("In African countries the infrastructure constraint on doing business is found to be associated with 40 percent lower firm productivity. For most countries the negative impact of deficient infrastructure is at least as large as that associated with crime, red tape, corruption, and financial market constraints." (footnote omitted)); Ndikumana & Verick, *supra* note 8, at 27 ("[I]nfrastructure is critical for attracting FDI . . .").

transactions are technically “corrupt”—can be important to a Group One country’s stability. Regardless, a comprehensive long-term corruption reduction strategy requires transparency, an independent judiciary, and checks on executive power.<sup>131</sup> For many Group One countries, these are unachievable goals.<sup>132</sup> Group One countries that opt for BITs emphasizing risk reduction and maximizing foreign investor rights will use their limited resources most effectively and should be more successful at attracting FDI.

### III. GROUP TWO COUNTRIES

A Group Two country has increased FDI, but its domestic investment levels remain low. Its successful graduation from Group One has gained it credibility among foreign investors, increased GDP per capita, and improved infrastructure—making it more attractive to both foreign and domestic investors.<sup>133</sup> Yet domestic investment levels remain low for two reasons. First, Group Two countries have inherited weak and often corrupt judiciaries that inspire little confidence among local entrepreneurs that their investments will be protected.<sup>134</sup> Second, a Group Two country’s preferential treatment of *foreign* investment prior to graduation from Group One has placed *domestic* investors at a competitive disadvantage.

Group Two countries, therefore, must take action to stimulate domestic investment and local entrepreneurship. A strong private sector will create jobs, increase productivity, and encourage the use of domestic factors of production—all of which are critical to sustainable economic growth.<sup>135</sup> Further, domestic investment has a particularly strong signaling effect that will lead to an increase in FDI.<sup>136</sup> Fortunately, because a Group Two country is more attractive to FDI, it is in a better position to negotiate BITs that (1)

---

<sup>131</sup> Ndikumana, *supra* note 128, at 32.

<sup>132</sup> See *Governance and Anti-Corruption Reforms*, *supra* note 13, at 17 (“[T]he fight against political corruption should be structured in such a way that it is not doomed to fail . . .”).

<sup>133</sup> 2009 GLOBAL MONITORING REPORT, *supra* note 2, at 71 (“Infrastructure is an important part of the investment climate enabling the emergence and success of private entrepreneurs.”). Ethiopia, Uganda, and Tanzania are Group Two countries that are making strides toward graduation to Group Three. In 2006, they each received between \$300 and \$400 million in FDI but had relatively low domestic savings rates despite sustained growth performance. *Least Developed Countries Report 2008*, *supra* note 75, at 9, 35. Burundi represents a country that has very recently graduated to Group Two. It had a negative domestic savings rate in 2006—and thus was relying on foreign financing for domestic investment—and its FDI jumped from nothing in 2004 to \$290 million in 2006. *Id.*

<sup>134</sup> See Ginsburg, *supra* note 18, at 121 (noting that courts may be “captured” by corrupt groups).

<sup>135</sup> 2009 GLOBAL MONITORING REPORT, *supra* note 2, at 71; Ndikumana & Verick, *supra* note 8, at 3.

<sup>136</sup> Ndikumana & Verick, *supra* note 8, at 4.

strengthen the rule of law and (2) grant policy makers room to level the playing field so that foreign and domestic investors can compete as equals. It is important to note, however, that Group Two countries must always be careful to avoid actions that risk deterring FDI. Group Two BITs must balance investor rights and host country interests and should not grant policy makers so much room to maneuver that foreigners fear they will implement policies that threaten FDI.

#### A. *Strengthening the Rule of Law*

In order to increase domestic investment levels and graduate to Group Three, a Group Two country must encourage confidence in local courts. Domestic investors are motivated by the same goals as foreigners—maximizing returns and minimizing risk.<sup>137</sup> Inefficient or corrupt local courts deter domestic investment just as they deter FDI.<sup>138</sup> Group Two countries that encourage confidence in local courts should therefore increase domestic investment in the same way that BIT arbitration provisions attract FDI in Group One countries—by reducing the perceived likelihood that domestic investments will be treated unfairly.

Group Two countries must prioritize efforts to reduce corruption because it has a significant deterrent effect on domestic investment.<sup>139</sup> BITs that expressly forbid acts of corruption discourage foreigners from bribing local officials and preclude claims to enforce contracts negotiated through corruption.<sup>140</sup> Transparency provisions requiring proper accounting of FDI incentives discourage corruption by decreasing discretion in public spending.<sup>141</sup> But corruption is self-perpetuating and resilient—simply exposing it is not enough.<sup>142</sup> An effective corruption reduction strategy also requires a clear separation of powers.<sup>143</sup>

---

<sup>137</sup> Ivar Kolstad & Espen Villanger, *How Does Social Development Affect FDI and Domestic Investment?*, 2 CHR. MICHELSEN INST. REP. 1 (2004).

<sup>138</sup> See *supra* note 102 and accompanying text.

<sup>139</sup> Kolstad & Villanger, *supra* note 137, at 24; see also Balamoune-Lutz & Ndikumana, *supra* note 70, at 14.

<sup>140</sup> Victor R. Salgado, Comment, *The Case Against Adopting BIT Law in the FTAA Framework*, 2006 WIS. L. REV. 1025, 1065; e.g., International Institute for Sustainable Development Model Investment Agreement, pt. 3, art. 13, available at [http://www.iisd.org/pdf/2005/investment\\_model\\_int\\_agreement.pdf](http://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf) [hereinafter IISD Model BIT].

<sup>141</sup> Andrew Charlton, *Incentive Bidding for Mobile Investment: Economic Consequences and Potential Responses* 28 (OECD Dev. Ctr., Working Paper No. 203, 2003).

<sup>142</sup> Ndikumana, *supra* note 128, at 3.

<sup>143</sup> *Id.* at 26.

Group Two BITs must encourage autonomous judiciaries that are capable of checking powerful government officials who may be prone to corruption. It is unsettling, therefore, that some studies show BIT adoption may actually lead to a decline in the rule of law.<sup>144</sup> Fortunately, comprehensive transparency requirements, which demand far more than mere exchanges of information, are becoming more common among certain developed countries.<sup>145</sup> This trend is promising for Group Two countries because these provisions should strengthen the rule of law and promote good investment policies. This will encourage both foreign and domestic investments in four ways.

First, comprehensive transparency provisions should encourage FDI by creating a more predictable business climate. The U.S. Model BIT, for example, requires that signatories “promptly publish[.]” or make “publicly available” all “laws, regulations, procedures, and administrative rulings . . . and adjudicatory decisions respecting any matter covered by [the] Treaty.”<sup>146</sup> Signatories must “promptly provide information and respond to questions pertaining to any actual or proposed measure that . . . might materially affect the operation of [the] Treaty or otherwise substantially affect [a party’s] interests.”<sup>147</sup> Contact points are established to “facilitate communications.”<sup>148</sup> By requiring full disclosure of matters affecting FDI and facilitating investor inquiries, these provisions will reassure investors that they are making informed investment decisions that accurately reflect all potential risks to FDI.

Second, these provisions invite widespread participation in the lawmaking process that will encourage policies that are beneficial to all investors. The U.S. Model BIT provides: “to the extent possible, each Party shall: (a) publish in advance any measure [discussed above] that it proposes to adopt; and (b) provide *interested persons* and the other Party a reasonable opportunity to comment.”<sup>149</sup> Disclosure of proposed measures makes the process of domestic rulemaking more transparent. And extending the right to comment to all *interested persons* encourages input not only from U.S. investors but also from

---

<sup>144</sup> Ginsburg, *supra* note 18, at 121.

<sup>145</sup> *E.g.*, U.S. Model BIT, *supra* note 101, arts. 11–12; *see also* Canada Model BIT, *supra* note 97, art. 19; Agreement for the Liberalization, Promotion and Protection of Investment, Japan-Viet., art. 7, Nov. 14, 2003 [hereinafter Japan–Viet. BIT], *available at* [http://www.unctad.org/sections/dite/ia/docs/bits/japan\\_vietnam.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/japan_vietnam.pdf).

<sup>146</sup> U.S. Model BIT, *supra* note 101, art. 10.

<sup>147</sup> *Id.* art. 11.3(a).

<sup>148</sup> *Id.* art. 11.1(a).

<sup>149</sup> *Id.* art. 11.2 (emphasis added).

other foreign investors and a host country's own citizens.<sup>150</sup> Foreigners will lobby for policies that benefit and attract additional FDI. Locals, who now have a means to influence policy, will push for policies that encourage domestic investment and create a more level playing field.

Third, comprehensive transparency provisions will strengthen both due process and democratic institutions.<sup>151</sup> The U.S. Model BIT requires that all administrative proceedings affecting FDI accord with domestic law and that affected investors be given "reasonable notice" and an "opportunity to present facts and arguments."<sup>152</sup> Signatories are required to "establish or maintain judicial, quasi-judicial, or administrative tribunals or procedures" that are "impartial and independent of the office or authority entrusted with administrative enforcement" and which must provide for "prompt review" and appeal.<sup>153</sup> To comply with these provisions, Group Two countries will be forced to develop reporting mechanisms and establish autonomous adjudicatory bodies, which in turn will bolster due process.<sup>154</sup> These reforms will benefit foreign and domestic investors alike.<sup>155</sup>

Fourth, transparency requirements have the potential to spur broader legal reforms that extend beyond due process. Studies show that foreign investors have significant influence over a host country's political decisions.<sup>156</sup> However, BITs that allow them to sidestep local courts may reduce their incentives to push for reforms that are not viewed as critical but would benefit all investors.<sup>157</sup> Property rights reform and enforcement, for example, are vital to domestic investors.<sup>158</sup> While they also stand to serve FDI, these factors are less important to foreigners due to the presence of BITs.<sup>159</sup> Transparency provisions that facilitate investor input in the legislative process, however, reduce the anticipated costs of lobbying for reform, and this may be enough to convince foreigners to push for a stronger domestic judiciary. After all, foreign investors stand to benefit from efficiency in local courts for three

---

<sup>150</sup> *Bilateral Investment Treaties*, *supra* note 106, at 78.

<sup>151</sup> UNCTAD, *Investor-State Dispute Settlement and Impact on Investment Rulemaking*, ¶ 78, U.N. Doc. UNCTAD/ITE/IIA/2007/3 (2007) [hereinafter *Investor-State Dispute Settlement*].

<sup>152</sup> U.S. Model BIT, *supra* note 101, art. 11.4(b).

<sup>153</sup> *Id.* art. 11.5(a).

<sup>154</sup> *Investor-State Dispute Settlement*, *supra* note 151, at 79.

<sup>155</sup> *Id.*

<sup>156</sup> Tobin & Rose-Ackerman, *supra* note 44, at 11.

<sup>157</sup> *See supra* notes 18 & 120 and accompanying text.

<sup>158</sup> Tobin & Rose-Ackerman, *supra* note 44, at 11.

<sup>159</sup> *Id.*

reasons: (1) local courts may provide a faster, cheaper, or easier alternative to arbitration;<sup>160</sup> (2) local courts are often important for enforcing arbitral awards;<sup>161</sup> and (3) investors must rely on local courts for national-law claims and claims against private parties.<sup>162</sup>

Group Two BITs can further encourage investor participation in policy formation and legal reform through their arbitration provisions. Investors should be given the express right to choose domestic courts over arbitration. And a waiting period should be required between the time a dispute is filed and its referral to arbitration.<sup>163</sup> It is important, however, that this waiting period be short enough to render the host country only nominally less attractive to FDI but long enough to ensure that foreign investors have a vested interest in good policies and legal reform.<sup>164</sup>

To the extent that they promote a strong and autonomous judiciary, transparency and arbitration provisions can encourage a more level playing field between foreign and domestic investors. When locals can rely on efficient and honest courts, arbitration no longer provides FDI with protections that are unavailable to domestic competitors. But there are other competitive disadvantages facing local firms that Group Two countries must address.

### *B. Leveling the Playing Field*

Group Two countries must also equalize foreign and local investor rights. Having graduated from Group One, a Group Two country no longer needs to maximize investor rights—FDI is less vital and foreign investors should be drawn to the country for other reasons. Unbalanced BITs stifle domestic

---

<sup>160</sup> Franck, *supra* note 88, at 368 n.150 (noting a practitioner’s comments that he would advise a client to pursue treaty claims in local courts if they were impartial to such claims). *But see* DOLZER & SCHREUER, *supra* note 44, at 215–16 (“[A]rbitration is usually less costly and more efficient than litigation through regular courts.”).

<sup>161</sup> Franck, *supra* note 88, at 369.

<sup>162</sup> *Id.* at 370.

<sup>163</sup> DOLZER & SCHREUER, *supra* note 44, at 215–16.

<sup>164</sup> Most BITs require a six-month waiting period. *See supra* notes 105–06 and accompanying text. Other countries require a longer waiting period. *See, e.g.*, Colombia Model Bilateral Investment Treaty, art. 2, 2002 (requiring a one-year waiting period); Norway Proposed Model Bilateral Investment Treaty, art. 15 (requiring thirty-six months from a dispute’s submission to a local court). The Norwegian model BIT was abandoned following criticism from businesses, which argued that the draft provided investors with insufficient protections. Damon Vis-Dunbar, *Norway Shelves Its Draft Model Bilateral Investment Treaty*, INVESTMENT TREATY NEWS, June 2009, at 7. Nongovernmental organizations also criticized the draft for not providing host countries enough freedom to regulate. *Id.*

competition by making local firms less competitive.<sup>165</sup> Broad expropriation provisions, for example, mean that foreign investors are more likely to receive compensation than their domestic competitors for the same legislation.<sup>166</sup> And most BITs restrict performance requirements on FDI but allow host countries to grant performance incentives to FDI.<sup>167</sup> This is problematic, and Group Two BITs must allow host countries to increase domestic investment and in order to graduate to Group Three.

### *1. Standards of Treatment Regarding FDI & Compensation*

Group Two countries need pre-establishment rights that allow them to channel FDI in ways that promote domestic competition. “Admission clause” BITs—which permit host countries to screen entry of FDI<sup>168</sup>—strike a balance between foreign investor interests and a Group Two country’s need to regulate FDI inflows. The China–Botswana BIT is typical of this approach. On the one hand, a party must admit investments “in accordance with its laws and regulations”,<sup>169</sup> thus, all screening under the BIT must be pursuant to existing laws and regulations so a host country cannot arbitrarily refuse entry to FDI or adopt new laws that make screening easier.<sup>170</sup> On the other hand, the China–Botswana BIT covers only assets invested “in accordance with the laws and regulations” of Botswana, as the host country.<sup>171</sup> This arrangement implies that admission standards do not even apply to FDI that is inconsistent with a country’s development policy as reflected in domestic legislation.<sup>172</sup> Group Two countries that broadly and formally articulate development policies aimed

---

<sup>165</sup> See Salgado, *supra* note 140, at 1047 (arguing that such provisions have an “anticompetitive effect” by “increas[ing] a foreign investor’s expected return vis-à-vis that of a potential domestic competitor’s . . . thus distorting the relative cost of entry of domestic competitors”).

<sup>166</sup> *Id.* at 1046–47.

<sup>167</sup> Ginsburg, *supra* note 18, at 122 (including tax breaks or expedited regulatory procedures).

<sup>168</sup> *Bilateral Investment Treaties*, *supra* note 106, at 21–22. These are common in European BITs. *Id.* at xiii.

<sup>169</sup> *E.g.*, Agreement for the Promotion and Reciprocal Protection of Investments, China–Bots., art. 2, June 12, 2000 [hereinafter China–Bots. BIT], available at [http://www.unctad.org/sections/dite/ia/docs/bits/china\\_botswana.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/china_botswana.pdf).

<sup>170</sup> Other BITs grant host countries more freedom to screen FDI by allowing a host country to change its policies after signing or by limiting the scope of investments covered by the treaty. Compare Austl.–Egypt BIT, *supra* note 115, art. 3 (requiring that parties admit FDI in accordance with “laws and investment policies applicable from time to time” (emphasis added)), with Agreement for the Promotion and Reciprocal Protection of Investments, Ghana–Malay., art. 1, 2002, available at [http://www.unctad.org/sections/dite/ia/docs/bits/ghana\\_malaysia.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/ghana_malaysia.pdf) (“The term ‘investments’ . . . shall only refer to all investments that are made in accordance with the laws, regulations and national policies of Contracting Parties.” (emphasis added)).

<sup>171</sup> China–Bots BIT, *supra* note 169, art. 1.

<sup>172</sup> *Bilateral Investment Treaties*, *supra* note 106, at 9.

at promoting domestic investment, therefore, may be able to deny entry to FDI that would thwart efforts to promote equal competition among foreign and local firms.<sup>173</sup>

“Right of establishment” BITs, which prohibit the screening of FDI, have become common among certain developed countries.<sup>174</sup> These are different from traditional BITs, which grant host countries a degree of freedom to turn investors away by extending substantive rights to FDI only after its entry.<sup>175</sup> “Right of establishment” BITs require that host countries apply national and MFN treatment “with respect to the establishment” of investment.<sup>176</sup> These BITs usually define “investment” broadly so as to maximize their coverage.<sup>177</sup> “Right of establishment” BITs do permit some screening of FDI.<sup>178</sup> For example, host countries can usually designate specific industries in which discriminatory treatment is allowed in a BIT’s annexes.<sup>179</sup> However, this approach is dangerous for Group Two countries because they run the risk of signing a BIT and only later realizing that certain important sectors have been left out of the annexes.<sup>180</sup>

Most BITs institute stricter standards of treatment once an investment is established.<sup>181</sup> These standards do not expressly prohibit government actions, but they make legislating, regulating, and policy making more costly by exposing a host country to potential liability.<sup>182</sup> Under most BITs, investors

---

<sup>173</sup> Cf. *id.* at 22 (noting that “admission clause” BITs do not require a host government to eliminate discriminatory legislation that reserves certain economic activities for national investors or for investors of another nationality).

<sup>174</sup> *Id.* at 22–23 (noting that while these are rare, they are the norm for the United States, Canada, and Japan).

<sup>175</sup> E.g., China–Bots BIT, *supra* note 169, art. 3 (extending MFN and national treatment to “investments and activities associated with such investments”).

<sup>176</sup> E.g., U.S. Model BIT, *supra* note 101, arts. 3, 4.

<sup>177</sup> E.g., *id.* art. 1 (defining “investment” as an asset controlled by an investor “that has the characteristics of an investment”).

<sup>178</sup> *Bilateral Investment Treaties*, *supra* note 106, at 23.

<sup>179</sup> E.g., U.S. Model BIT, *supra* note 101, art. 14.2 (“National Treatment” and MFN treatment “do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II.”).

<sup>180</sup> See *infra* notes 209–10 and accompanying text (explaining that developing countries often lack the capacity to anticipate future development).

<sup>181</sup> E.g., *supra* text accompanying notes 90–95.

<sup>182</sup> For example, an International Centre for Settlement of Investment Disputes (ICSID) tribunal held the government of Burundi’s revocation of a foreign investor’s free-zone status deprived the investor of expected benefits, and had an effect similar to expropriation, resulting in the reimbursement of some \$3 million and creating a new free zone. *Antoine Goetz v. Republic of Burundi*, 15 ICSID (W. Bank) 457 (1998).

can sue to recover for losses in an investment's value caused by any measures that are found to violate a BIT's standards of treatment.<sup>183</sup>

Broad compensation and expropriation clauses threaten greater liability and have an even stronger chilling effect on efficient or potentially beneficial regulations.<sup>184</sup> The U.S. Model BIT, for example, requires compensation for "measures equivalent to expropriation,"<sup>185</sup> and the Federal Republic of Germany–Ethiopia BIT requires compensation for "[any] measure[,] the effects of which would be tantamount to expropriation."<sup>186</sup> The purpose of this language, which is very common in BITs, is to extend protection of FDI beyond traditional international law.<sup>187</sup> Such language, however, opens the door for regulatory-takings claims to the detriment of both host and home countries.<sup>188</sup> Group Two countries should negotiate BITs that minimize the likelihood that laws or regulations will constitute "indirect expropriation." The France–Uganda BIT arguably achieves this by prohibiting only expropriation, nationalization, and "measures having the effect of dispossession."<sup>189</sup>

## 2. Policy-making Room: Exceptions & Annexes

BITs increasingly recognize that investment protection must not overshadow legitimate host-country concerns.<sup>190</sup> General exception provisions increase a host country's policy-making room and represent a balancing of investor and host-country interests.<sup>191</sup> The U.S.–Rwanda BIT, for example, contains general treaty exceptions that recognize a host country's right to protect the environment<sup>192</sup> and national security,<sup>193</sup> regulate labor standards,<sup>194</sup>

<sup>183</sup> E.g., U.S.–Rwanda BIT, *supra* note 91, art. 24.

<sup>184</sup> Stiglitz, *supra* note 16, at 554.

<sup>184</sup> Cf. Been & Beauvais, *supra* note 123, at 134.

<sup>185</sup> U.S. Model BIT, *supra* note 101, art. 6.

<sup>186</sup> Agreement for the Encouragement and Reciprocal Protection of Investments, F.R.G.–Eth., art. 4, Jan. 19, 2004 [hereinafter F.R.G.–Eth. BIT], available at [http://www.unctad.org/sections/dite/ia/docs/bits/germany\\_ethiopia.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/germany_ethiopia.pdf).

<sup>187</sup> Been & Beauvais, *supra* note 123, at 141–42.

<sup>188</sup> *Id.* at 126, 128.

<sup>189</sup> Agreement for the Promotion and Reciprocal Protection of Investments, Fr.–Uganda, art. 5, Jan 3, 2003, available at [http://www.unctad.org/sections/dite/ia/docs/bits/france\\_uganda.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/france_uganda.pdf).

<sup>190</sup> *Bilateral Investment Treaties*, *supra* note 106, at 142.

<sup>191</sup> *Id.* at 80, 142.

<sup>192</sup> U.S.–Rwanda BIT, *supra* note 91, art. 12.1 ("The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws.")

<sup>193</sup> *Id.* art. 18 ("Nothing in this Treaty shall be construed . . . to preclude a Party from applying measures that it considers necessary for . . . the protection of its own essential security interests.")

and adopt prudent financial measures.<sup>195</sup> Many BITs go even further: the Federal Republic of Germany–Ethiopia BIT, for example, allows favorable taxation of residents and favorable treatment of third-party countries for purposes of regional integration.<sup>196</sup>

Unfortunately, most OECD BITs do not recognize the promotion of domestic competition as a legitimate host-country concern worthy of a general exception provision.<sup>197</sup> Thus, those BITs that attract the most FDI are also the least conducive to a Group Two country's goal of promoting domestic investment.<sup>198</sup> And while attracting FDI is not as vital to a Group Two country as it is to a Group One country, it is nevertheless important to fueling economic growth. Group Two countries would benefit greatly if OECD countries would acknowledge that economic interventions are important and legitimate elements of a host country's development strategy.<sup>199</sup>

BITs between developing countries tend to provide more flexibility to pursue development strategies than OECD BITs.<sup>200</sup> The preamble of the Nigeria–Egypt BIT, for example, recognizes “the right of each Contracting Party to define the conditions under which foreign investment can be received and the investor's duty to respect the host country's sovereignty and laws.”<sup>201</sup>

---

<sup>194</sup> *Id.* art. 13.1 (“The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws.”).

<sup>195</sup> *Id.* art. 20 (“[A] Party shall not be prevented from adopting or maintaining measures relating to financial services for prudential reasons . . .”).

<sup>196</sup> F.R.G.–Eth. BIT, *supra* note 186, art. 3 (providing that national and MFN treatment do not apply to privileges granted to investors of a third state on account of membership in “a customs or economic union, a common market or a free trade area or by virtue . . . of agreements regarding matters of taxation” and allowing for tax privileges, exemptions, and reductions for resident investors).

<sup>197</sup> Finland is an exception. *See infra* notes 200–06 and accompanying text.

<sup>198</sup> *See* Sokchea, *supra* note 40, at 16 (noting that OECD BITs have a more positive effect on FDI than non-OECD BITs).

<sup>199</sup> *See* S. CTR., COMMENTS ON NORWAY'S DRAFT MODEL BILATERAL INVESTMENT TREATY (BIT): POTENTIALLY DIMINISHING THE DEVELOPMENT POLICY SPACE OF DEVELOPING COUNTRY PARTNERS 6, 10–11 (2008), available at [http://www.southcentre.org/index.php?option=com\\_content&task=view&id=942&Itemid=248](http://www.southcentre.org/index.php?option=com_content&task=view&id=942&Itemid=248) (arguing that “promot[ing] the global competitiveness of domestic industries,” “infrastructure development, supply-side capacity enhancement, promotion of full employment,” and “the promotion of . . . development objectives” are “legitimate” policies); Salgado, *supra* note 140, at 1038–39 (arguing that developing countries have legitimate policy reasons to treat foreign and local investors differently, such as to encourage infant industries and SMEs).

<sup>200</sup> UNCTAD, *South–South Cooperation in International Investment Arrangements*, 37, U.N. Doc. UNCTAD/ITE/IIT/2005/3 (Nov. 2005) (published as part of the UNCTAD Series on International Investment Policies for Development); Bilaterals.org, South–South BITs, [http://www.bilaterals.org/rubrique.php3?id\\_rubrique=58](http://www.bilaterals.org/rubrique.php3?id_rubrique=58) (last visited Feb. 23, 2009).

<sup>201</sup> Agreement for the Reciprocal Promotion and Protection of Investments, Egypt–Nig., Preamble, June 20, 2000, available at [http://www.unctad.org/sections/dite/ia/docs/bits/Egypt\\_Nigeria.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/Egypt_Nigeria.pdf).

It then makes the national treatment standard contingent on a host country's development policy, leaving the host country free to grant "special incentives" to its local citizens and firms "in order to stimulate the creation of local industries."<sup>202</sup> The Egypt–Zambia BIT goes even further and omits any mention of national treatment of FDI.<sup>203</sup> These approaches allow a Group Two country to enact laws that favor domestic over foreign investors even after a foreign investment is established.<sup>204</sup> This is a great deal of freedom, however, and risks deterring FDI to a Group Two country's detriment.

Some BITs allow a host country to promote domestic competition under limited circumstances. The Botswana–Egypt BIT allows "special policies or measures" that grant favorable treatment, incentives, preferences, and privileges to nationals, but "only for the purpose of promoting small and medium-sized enterprises and infant industries."<sup>205</sup> The Finland–Tanzania BIT limits such interventions to "limited incentives" that "protect small and medium sized businesses" and "stimulate the creation of local industries;" it also provides that Tanzania "shall eliminate progressively such incentives."<sup>206</sup> Further, under both BITs, these benefits cannot "significantly affect the investments and activities" of home-country investors.<sup>207</sup> This approach allows Group Two countries to promote local investment while limiting the risk of serious injury to large-scale foreign investors.

BITs that do not recognize a right to promote domestic competition often allow host countries to exempt specific sectors or laws from standards-of-treatment provisions.<sup>208</sup> While this does provide Group Two countries with a

---

<sup>202</sup> *Id.* art. 2 ("Notwithstanding the provisions of paragraphs (2) and (3) of this Article, either Contracting Party may grant within the framework of its development policy to its own nationals and companies special incentives in order to stimulate the creation of local industries, provided that they do not significantly affect the investment and activities of nationals and companies of the other Contracting Party.")

<sup>203</sup> See Agreement for the Promotion and Protection of Investments, Egypt–Zambia, Apr. 28, 2000, available at [http://www.unctad.org/sections/dite/ia/docs/bits/egypt\\_zambia.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/egypt_zambia.pdf).

<sup>204</sup> Cf. *Bilateral Investment Treaties*, *supra* note 106, at 34 (referring to the Agreement for the Reciprocal Promotion and Protection of Investments, India–Indon., art. 4, Feb. 8, 1999, available at [http://www.unctad.org/sections/dite/ia/docs/bits/indonesia\\_india.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/indonesia_india.pdf) ("Each Contracting Party shall, *subject to its laws and regulations*, accord to investment of investors of the other Contracting Party treatment no less favorable than that which is accorded to investments of its investors." (emphasis added)).

<sup>205</sup> Egypt–Bots. BIT, *supra* note 104, art. 4.

<sup>206</sup> Agreement for the Promotion and Protection of Investments, Fin.–Tanz., art. 3, Sept. 27, 2002, [hereinafter Fin.–Tanz. BIT], available at [http://www.unctad.org/sections/dite/ia/docs/bits/finland\\_tanzania.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/finland_tanzania.pdf).

<sup>207</sup> Egypt–Bots. BIT, *supra* note 104, art. 4; Fin.–Tanz. BIT, *supra* note 206, art. 3.

<sup>208</sup> E.g., U.S. Model BIT, *supra* note 101, art. 14 (referencing annexes I, II, and III); Canada Model BIT, *supra* note 97, art. 9, annexes I, II, III.

degree of freedom to make policy, it is a risky approach because developing countries often lack both the capacity to anticipate future developments and the resources to negotiate these exemptions effectively.<sup>209</sup> Group Two countries may find that after the treaty takes effect important sectors are missing from the BIT annexes.<sup>210</sup> Several alternative approaches might solve this problem. First, if BITs allowed for the future designation of businesses or sectors as exempt from national treatment requirements, then Group Two countries would have the capacity to promote those industries that later prove to be important.<sup>211</sup> However, in order for this right to be palatable to developed home-country signatories, host countries would probably need to limit its use.<sup>212</sup> Second, a “positive list approach,” under which a country would affirmatively designate those sectors that are open to FDI, might be more appropriate for Group Two countries because it would allow them to conduct investigations and make informed decisions after signing a BIT.<sup>213</sup> Finally, a broad general exception for industrial policy in a BIT’s annex would give a Group Two country room to act pursuant to a dynamic development strategy.<sup>214</sup>

### 3. Performance Requirements

Performance requirements—which impose obligations or commitments on foreign firms or projects—also provide a means for Group Two countries to promote a more level playing field among investors. By ensuring that FDI will have positive spillover effects in the host country, these requirements can encourage sustainable economic growth. They can be used to introduce new technologies, create jobs, transfer skills, increase productivity, improve

---

<sup>209</sup> UNCTAD, *Development Implications of International Investment Agreements*, 8, U.N. Doc. UNCTAD/WEB/ITE/IIA/2007/2 (2007); see also Stiglitz, *supra* note 16, at 512 (“[T]he very fact that such countries are not developed means that there may not be any interest groups to demand the requisite exception.”).

<sup>210</sup> Stiglitz, *supra* note 16, at 512 (“As a result, whole ideas and sectors may be foreclosed from domestic development, and the limited set of instruments at the disposal of poor countries for advancing their development is further circumscribed.”).

<sup>211</sup> *E.g.*, Agreement for the Promotion and Reciprocal Protection of Investments, Spain-Namibia, art. 4, Feb. 2003, available at [http://www.unctad.org/sections/dite/ia/docs/bits/spain\\_namibia.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/spain_namibia.pdf) (“Neither Contracting Party shall be precluded from designating, in accordance with its laws and regulations, a business or category of business as reserved for its own investors . . .”).

<sup>212</sup> *E.g.*, *id.* (providing that “such designation (a) [be] made for the purpose of promoting small and medium-sized businesses only; and (b) shall not negatively affect the rights which at the time of the designation have already accrued to an investment or an investor of the other Contracting Party”).

<sup>213</sup> Stiglitz, *supra* note 16, at 512.

<sup>214</sup> S. CTR., *supra* note 199, at 11.

infrastructure, and encourage domestic industry—all of which are legitimate goals and common to development strategies.<sup>215</sup> However, performance requirements impose extra costs on MNCs, and Group Two countries considering these requirements must carefully weigh their potential benefits against the risk that they will deter FDI.<sup>216</sup>

Most BITs prohibit mandatory performance requirements. The Canada–Peru BIT is typical: it prohibits MNCs from being obligated “to export a given level or percentage of goods,” “to achieve a given level or percentage of domestic content,” “to purchase, use or accord a preference to goods produced or services provided in its territory,” or “to transfer technology” or other proprietary knowledge.<sup>217</sup> While this provides potential investors with a high degree of certainty that their operations will not be disrupted, it makes it very difficult for a Group Two country to utilize FDI to achieve its other goals. A blanket rejection of performance requirements therefore seems more appropriate for a Group One country.

Fortunately for Group Two countries, there has been a trend among certain OECD BITs toward allowing performance requirements linked to FDI incentives—such as special taxation, government grants for jobs created, and other preferential fiscal and financial treatment.<sup>218</sup> The U.S.–Rwanda BIT allows parties to condition “the receipt or continued receipt of an advantage . . . on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development.”<sup>219</sup> Here, foreign investors have an option: they may choose to receive certain benefits in return for operating in a way that promotes positive spillover effects in the host economy, or they may reject the idea altogether. The U.S.–Rwanda BIT also allows an “importing party” to impose domestic content requirements and require foreign investors to grant preferential treatment to domestic producers if tied to “preferential tariffs or preferential quotas.”<sup>220</sup> Typically, this provision would apply if the

---

<sup>215</sup> See *id.* at 8–9.

<sup>216</sup> UNCTAD, *Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries*, 34, U.N. Doc. UNCTAD/ITE/IIA/2003/7 (Jan. 26, 2004) [hereinafter *Foreign Direct Investment and Performance Requirements*].

<sup>217</sup> Agreement for the Promotion and Reciprocal Protection of Investments, Can.–Peru, art. 7, Nov. 14, 2006, available at [http://www.unctad.org/sections/dite/iiia/docs/bits/canada\\_peru.pdf](http://www.unctad.org/sections/dite/iiia/docs/bits/canada_peru.pdf).

<sup>218</sup> *Foreign Direct Investment and Performance Requirements*, *supra* note 216, at 14.

<sup>219</sup> U.S.–Rwanda BIT, *supra* note 91, art. 8.

<sup>220</sup> *Id.* The United States allows a host country to exempt certain sectors in the BIT annexes. *Id.* art. 14, annexes I, II, III.

host country were importing goods for use by MNCs. And the performance requirements that it permits—which target the promotion of domestic industries and local products—still allow an MNC to import foreign goods if it so desires. This approach should make a Group Two country’s ability to impose performance requirements more palatable to MNCs, which are only required to comply if they stand to gain from them.

It is important to note that OECD BITs that allow requirements linked to FDI incentives also prohibit the requirements from being used as conditions for “establishment, acquisition, expansion, management, conduct, operation or sale” of a covered investment.<sup>221</sup> Performance requirements can only be linked to the “receipt or continued receipt” of incentives that are already established and that apply universally.<sup>222</sup> This means that a Group Two country could not use special incentives to attract individual MNCs and projects or specific kinds of FDI that it believes would help achieve its development goals. This approach is typical to an emerging group of “liberalizing” BITs, which defer heavily to market factors and seek to limit government interventions.<sup>223</sup> While these BITs offer great promise to certain developing countries, they are most appropriate only after a country graduates to Group Three.

A limited number of BITs—typically only the most development-friendly—grant host countries great freedom to impose a variety of performance requirements. The Finland–Tanzania BIT, for example, prohibits only mandatory measures “concerning purchase of materials, means of production, operation, transport, marketing of its products or similar orders having *unreasonable or discriminatory effects*.”<sup>224</sup> Under this approach, a host country may impose whatever requirements it desires before an investment is established and may impose reasonable and non-discriminatory requirements at any time before or after establishment of FDI.<sup>225</sup> This, however, probably grants too much freedom to policy makers.

Group Two BITs must reflect the reality that these countries are still relatively new to FDI. Having graduated from Group One, these countries must begin to address important domestic considerations. But a Group Two country’s reputation among investors is still relatively weak, and MNCs are

---

<sup>221</sup> U.S.–Rwanda BIT, *supra* note 91, art. 8.

<sup>222</sup> *Id.*

<sup>223</sup> See *infra* notes 243–54 and accompanying text (detailing this new trend in BITs).

<sup>224</sup> Fin.–Tanz. BIT, *supra* note 206, art. 3 (emphasis added).

<sup>225</sup> *Bilateral Investment Treaties*, *supra* note 106, at 66.

unlikely to trust its short track record for investment policy. A Group Two country cannot afford to deter the foreign capital that is still needed to fuel economic growth. BIT provisions should only allow performance requirements in pursuit of legitimate goals—such as the promotion or protection of domestic industries—pursuant to an articulated development policy. And these policies must not be allowed if they have unreasonably negative effects on the investment environment.

#### IV. GROUP THREE COUNTRIES

Group Three is composed of African countries that have increased levels of both foreign and domestic investment.<sup>226</sup> After graduating from Group Two, a Group Three country will have a larger and more robust economy, stronger institutions, better investment policies, an improved reputation among foreign investors, and more competitive domestic firms. Local investors in a Group Three country are also better protected than those in a Group Two country because a more efficient and autonomous judiciary is capable of enforcing contract rights and combating corruption. While the outlook may be better for a Group Three country compared to a Group Two or Group One country, this does not change the “underlying factors” that have made investment in Africa unproductive in the past.<sup>227</sup> To guarantee that a Group Three country is on the path toward *sustainable* growth, policy makers must encourage positive spillovers from FDI and implement domestic reforms that will attract higher-quality investment in the future.

Once a country achieves Group Three status and addresses the most glaring disadvantages that its investors face vis-à-vis foreigners, it should be prepared to relinquish a degree of control to market forces through liberal reforms. Section A introduces liberal economic theory and discusses why developing countries should embrace it. Section B examines a new trend of liberalizing BITs, which should be especially appropriate for African countries that graduate to Group Three. Section C proposes BIT provisions that will grant Group Three countries room to encourage FDI spillover, which is addressed in

---

<sup>226</sup> Although there may not be a perfect correlation, most Group Three countries are no longer LDCs as defined by the U.N. Committee for Development Policy.

<sup>227</sup> See Shantayanan Devarajan, William R. Easterly & Howard Pack, *Low Investment Is Not the Constraint on African Development*, 51 *ECON. DEV. & CULTURAL CHANGE* 547, 568 (2003); see also Ndikumana & Verick, *supra* note 8, at 26–27 (discussing the relationship between FDI and domestic-factor markets and arguing that investment alone does not guarantee economic growth).

section D. And section E argues that it is important for Group Three countries to develop their own bodies of commercial law.

### A. *Liberal Economic Theory*

Economic liberalism has come to dominate development theory.<sup>228</sup> It holds that the Third World lacks the necessary capital, technology, and skills to achieve economic development without foreign investment.<sup>229</sup> Market forces encourage specialization by those producers that have a comparative advantage; and this specialization—rather than the redistribution of existing wealth—fuels development through the creation of new wealth.<sup>230</sup> Economic liberalism presents a theory under which all African countries can simultaneously benefit from signing BITs to attract an ever-increasing pool of FDI.<sup>231</sup> Yet some scholars criticize BITs as “instruments of only partial liberalization.”<sup>232</sup>

Liberalism holds that free markets should determine economic decisions.<sup>233</sup> Laws and regulations interfere with the market’s efficient allocation of resources and reduce overall productivity.<sup>234</sup> Thus, BITs that allow for FDI screening, performance requirements, and investment incentives violate the principle of investment neutrality—a tenet of liberalism that prohibits discrimination among investments on the basis of nationality of ownership.<sup>235</sup> Commentators have argued that developing countries will not benefit from the economic growth associated with liberalization unless they “go well beyond” what typical BITs require.<sup>236</sup> Viewed in this sense, BITs are not *sources* of liberal investment policies, but rather *codifications* of those policies that exist within a home country at signing.<sup>237</sup> While a BIT does stabilize a country’s

<sup>228</sup> Vandevelde, *supra* note 10, at 502 (noting a “broad consensus that economic development is best achieved through liberalization of the economy”). *But see* Stiglitz, *supra* note 16, at 463 (“The last quarter century has seen a re-examination and a rejection of the economic foundations on which that theory rests, and the creation of a new paradigm, based on imperfect information and incomplete markets.”).

<sup>229</sup> Srur, *supra* note 27, at 60–63; *see also* DOLZER & SCHREUER, *supra* note 44, at 10.

<sup>230</sup> Vandevelde, *supra* note 108, at 624.

<sup>231</sup> *See* Sachs & Sauvart, *supra* note 41, at xlii n.36 (noting that steadily increasing FDI levels suggest that LDCs are not involved in a prisoner’s dilemma, which rests on the assumption that they are competing for a fixed pool of FDI).

<sup>232</sup> Vandevelde, *supra* note 10, at 517.

<sup>233</sup> Salacuse & Sullivan, *supra* note 19, at 90; Vandevelde, *supra* note 10, at 504.

<sup>234</sup> Vandevelde, *supra* note 10, at 519. Even policies carried out in the name of economic development are often flawed due to political pressure and corruption. Vandevelde, *supra* note 108, at 635.

<sup>235</sup> Vandevelde, *supra* note 108, at 629.

<sup>236</sup> *See, e.g.*, Vandevelde, *supra* note 10, at 515.

<sup>237</sup> Salacuse & Sullivan, *supra* note 19, at 96.

investment environment, existing policies and institutions are more important to the decision to invest than the mere existence of a BIT.<sup>238</sup>

Africa's failure to attract FDI,<sup>239</sup> therefore, may be due to the fact that BITs do not go far enough to promote economic liberalism. FDI involves a long-term commitment, especially the kind of FDI that promotes inter-firm linkages and other spillover effects that lead to meaningful and sustainable economic development.<sup>240</sup> Yet Africa has a history of short-term and sporadic attempts at liberalization.<sup>241</sup> Group Three BITs, therefore, must do more to convince foreigners that host countries are truly committed to economic liberalism and its "deference to a self-correcting market."<sup>242</sup>

### B. Liberalizing BITs

The emergence of BITs that go beyond mere investment protection and actually commit a host country to liberalization is promising for Group Three countries.<sup>243</sup> These liberalizing BITs represent a sharp break from the past<sup>244</sup> and have the potential to benefit host countries in ways that traditional protection-oriented BITs cannot.<sup>245</sup> BITs with liberalizing provisions have been found to increase FDI to developing countries significantly more than traditional BITs.<sup>246</sup> This suggests that liberalizing BITs fulfill their end of the "bargain"<sup>247</sup> by actually promoting FDI, rather than simply codifying existing investment policies.<sup>248</sup>

---

<sup>238</sup> *Id.*; see also Tobin & Rose-Ackerman, *supra* note 44, at 31 ("[A] country must have some minimum level of political stability before BITs have a positive effect on their ability to attract FDI.").

<sup>239</sup> See *supra* note 49 and accompanying text.

<sup>240</sup> Vandevelde, *supra* note 10, at 527; see also OECD, OECD BENCHMARK DEFINITION OF FOREIGN DIRECT INVESTMENT 7 (3d ed. 1996) ("Foreign direct investment reflects the objective of obtaining a lasting interest by a resident entity in one economy . . . . The lasting interest implies the existence of a long-term relationship . . . .").

<sup>241</sup> Vandevelde, *supra* note 10, at 527.

<sup>242</sup> *Id.* at 527.

<sup>243</sup> *Bilateral Investment Treaties*, *supra* note 106, at 144; see also Sachs & Sauvant, *supra* note 41, at xxxvii (noting that this approach is primarily limited to the U.S., Canada, and Japan).

<sup>244</sup> See *Bilateral Investment Treaties*, *supra* note 106, at 144 (noting that while many BITs may appear different on paper, the real divide is between those that include liberalizing commitments and those that do not).

<sup>245</sup> Sachs & Sauvant, *supra* note 41, at lvi ("[I]t would not be surprising for 'liberalizing' BITs to lead to more FDI.").

<sup>246</sup> Salacuse & Sullivan, *supra* note 19, at 106–07.

<sup>247</sup> See *supra* notes 29–33 and accompanying text.

<sup>248</sup> See Salacuse & Sullivan, *supra* note 19, at 77, 106.

Liberalizing BITs contain provisions that “give greater scope for market factors to determine investment decisions and proportionately less scope for governmental decisions.”<sup>249</sup> The U.S. Model BIT’s “right to establishment” approach, for example, opens sectors of a host country’s economy that were previously closed to FDI by prohibiting screening of FDI.<sup>250</sup> The Canadian Model BIT prohibits host governments from imposing performance requirements on third-party-country foreign investors as well as Canadians.<sup>251</sup> This reflects an intent to move beyond simple FDI protection and to create a level playing field for *all* foreign investors.<sup>252</sup>

Such deference to the market would undoubtedly be counterproductive for LDCs with weaker economies and institutions. But after a Group Three country has graduated from Group One and Group Two, its economy is stronger, and it is in a position to minimize state interventions. Signing BITs with liberalizing provisions, therefore, may be a workable means for Group Three countries to go beyond what traditional BITs have required in order to benefit from the growth associated with liberalism.<sup>253</sup> Such BITs also offer Group Three countries a more immediate alternative to the kinds of long-term reforms that African countries have implemented in the past to successfully indicate meaningful commitments to liberalism.<sup>254</sup>

### C. Policy-making Room for Market Interventions

Group Three is composed of countries with varying degrees of economic sophistication. While Group Three countries as a whole are prepared for liberal reform, the degree of liberalization and deference to the market demanded by each Group Three BIT should vary according to the economic realities of each country. Even the strongest proponents of economic liberalism maintain a degree of control over foreign investment.<sup>255</sup> It would be unreasonable to expect African countries that are less politically and

---

<sup>249</sup> *Id.* at 94.

<sup>250</sup> Sachs & Sauviant, *supra* note 41, at lvi.

<sup>251</sup> Canada Model BIT, *supra* note 97, art. 7 (“Neither Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or a non-Party in its territory.”).

<sup>252</sup> *Bilateral Investment Treaties*, *supra* note 106, at 68.

<sup>253</sup> See *supra* note 227 and accompanying text.

<sup>254</sup> See *supra* note 53 and accompanying text.

<sup>255</sup> DOLZER & SCHREUER, *supra* note 44, at 79; Srur, *supra* note 27, at 72; *c.f.* Stiglitz, *supra* note 16, at 481 (criticizing the “hypocrisy” of Western governments that are willing to protect their own economies but not those of LDCs by noting the U.S.’s protectionist actions against China and Dubai Ports).

economically prepared for the effects of rapid liberalization, therefore, to cede all such control.<sup>256</sup>

While policy-making room is less important for countries after graduation to Group Three, full-on liberalization may be detrimental to their long-term development.<sup>257</sup> Legitimate concerns remain that weak domestic industries will be “crowded out” by foreign investors and that rapid changes in the economy will have destabilizing social effects.<sup>258</sup> Liberal theory itself acknowledges that interventions in the economy are necessary to correct market failures.<sup>259</sup> Treaty drafters must recognize that Group Three economies are still vulnerable and susceptible to market imperfections,<sup>260</sup> and Group Three BITs must grant governments room to oversee the economy and intervene when necessary.<sup>261</sup>

Most modern BITs prohibit capital controls aimed at maintaining foreign exchange reserves.<sup>262</sup> Yet Group Three countries have legitimate reasons to fear for their young economies. Measures aimed at avoiding currency and price volatility when reserves are low are often central to their development strategies.<sup>263</sup> The Japan–Vietnam BIT offers a potential compromise between a Group Three country’s financial concerns and the importance of liberal BIT provisions; it allows a host country to adopt measures that adversely affect FDI in “exceptional financial, economic or industrial circumstances,” provided that the home country receive prior notice and be allowed to question, comment, and consult on the measures.<sup>264</sup>

Further, many BITs contain ambiguous terms that are difficult to apply and that may have a chilling effect on domestic regulation. This hurts emerging democracies, which need to adapt to changing circumstances and preferences

---

<sup>256</sup> Cf. Srur, *supra* note 27, at 73.

<sup>257</sup> DOLZER & SCHREUER, *supra* note 44, at 79 (noting that it is becoming clearer that factors not considered under economic liberalism need to be considered in formulating policy).

<sup>258</sup> *Id.* at 80.

<sup>259</sup> Vandeveld, *supra* note 10, at 505.

<sup>260</sup> Salgado, *supra* note 140, at 1036–37; *see also* Odumosu, *supra* note 85, at 357–58 (arguing that the “neoliberal economic paradigm” is inappropriate for Third World states whose economies and populations are vulnerable to the negative effects of foreign investment).

<sup>261</sup> *See* Stiglitz, *supra* note 16, at 463–64 (“[M]arkets by themselves are not, in general, efficient, and government intervention . . . can lead to welfare improvements.”).

<sup>262</sup> COSBEY, *supra* note 85, at 13.

<sup>263</sup> *Id.* at 14; Mosoti, *supra* note 4, at 128; *see also* Salacuse & Sullivan, *supra* note 19, at 85–86 (noting that provisions on monetary transfers are often the most difficult to conclude because of LDCs’ “chronic balance-of-payments difficulties” and “need to conserve foreign exchange”).

<sup>264</sup> Japan–Viet. BIT, *supra* note 145, art. 6.

and must be able to regulate in response to new societal problems or to restore social justice.<sup>265</sup> Out of fear of being held liable for expropriation, host countries may be dissuaded from undertaking reforms that benefit foreign and domestic investors alike.<sup>266</sup> Traditional standards-of-treatment clauses that require national or MFN treatment of investments *in like situations* provide good examples of this ambiguity. It may be difficult for a host country to predict how an arbitral body would compare two investment projects, given that the projects are not fungible goods and may exist under very different circumstances.<sup>267</sup> To decrease the chilling effect, a Group Three BIT should qualify that “in like situations” must account for domestic circumstances and general host-country needs.<sup>268</sup>

#### D. FDI Spillover

Foreign direct investment is not an end in itself for Group Three countries, like it is for Group One countries. It is of little help unless it has a positive spillover effect in local economies.<sup>269</sup> There is a “virtuous cycle” through which developing countries may attract FDI: (1) sound policies and an attractive investment climates encourage FDI; (2) human resource development by MNCs and inter-firm linkages encourage spillover effects and technology transfers; and (3) host countries take advantage of the upgraded skill level of their workers and spillovers to attract more FDI from higher value-added MNCs.<sup>270</sup> This means that a Group Three country must focus on education and vocational training to raise its human capital to a level at which it can provide services for—and learn from—foreign firms.<sup>271</sup> The cycle also suggests that it is necessary for Group Three BITs to provide for spillover.

Many countries have successfully used performance requirements to maximize the positive effects of FDI on development goals.<sup>272</sup> These

---

<sup>265</sup> Stiglitz, *supra* note 16, at 515–16.

<sup>266</sup> Salgado, *supra* note 140, at 1052.

<sup>267</sup> Salacuse & Sullivan, *supra* note 19, at 93.

<sup>268</sup> IISD Model BIT, *supra* note 140, art. 5 (noting that “in like circumstances” involves a case-by-case examination of effects on communities, “the sector the investor is in,” “the aim of a measure of concern,” and other factors (internal quotation marks omitted)).

<sup>269</sup> See Devarajan, *supra* note 227, at 568 (“Unless some or all of the underlying factors that made investment unproductive in the past are addressed, the results may be disappointing.”).

<sup>270</sup> Miyamoto, *supra* note 24, at 9–10.

<sup>271</sup> Cf. *Foreign Direct Investment and Performance Requirements*, *supra* note 216, at 1 (“[W]eak domestic capabilities in a country hamper its ability to reap the benefits of inward FDI and limit knowledge spillovers.”).

<sup>272</sup> *Id.* at 32.

requirements can promote inter-firm linkages that encourage the development of sophisticated local businesses by transferring technology and improving management, organizational, and marketing skills.<sup>273</sup> BITs that prohibit performance requirements entirely may prevent host countries from promoting legitimate development strategies.<sup>274</sup>

Even after graduating from Group Two, Group Three governments must be granted a degree of control over the entry of foreign investment. Channeling FDI to underdeveloped segments of the economy, for example, has important “crowding in” effects that can improve human capital and technology, strengthen institutions, encourage domestic entrepreneurship, and promote faster and more sustainable development.<sup>275</sup> And host governments must be allowed to prevent FDI from “crowding out” domestic firms in sectors that are already saturated.<sup>276</sup> The “right of establishment” approach, which prohibits all screening of FDI, is not appropriate for Group Three countries. A BIT that applies MFN treatment, rather than national treatment, to a host country’s admission of FDI would represent a compromise between promoting liberalism and respecting a Group Three country’s needs. This would allow a Group Three country to screen FDI in order to encourage the development of local industries while assuring home countries that their investors would not be at a disadvantage.<sup>277</sup>

#### *E. Strengthening the Rule of Law and Promoting Legal Spillover*

Group Three countries have made great strides to encourage the rule of law and due process. Yet it is difficult to imagine how a Group Three country—during efforts to graduate from groups One and Two—would have developed the capacity to resolve complex commercial disputes as efficiently as international arbitral tribunals. To the extent that a Group Three country’s domestic investors must rely on adjudication by less efficient local courts, this

---

<sup>273</sup> Nicholas Apergis et al., *Dynamic Linkages Between FDI Inflows and Domestic Investment: A Panel Cointegration Approach*, 34 ATLANTIC ECON. J., 385, 393 (2006).

<sup>274</sup> See *Foreign Direct Investment and Performance Requirements*, *supra* note 216, at 41 (“Further discussions on the future treatment of performance requirements in IIAs need to recognize the right of developing countries to regulate and allow sufficient policy space to allow them to pursue their development policies.”).

<sup>275</sup> See Apergis et al., *supra* note 273 (discussing “crowding in” and “crowding out” effects of FDI); Tang et al., *supra* note 70, at 1293 (encouraging host countries to channel FDI toward high-risk areas or into industries where domestic investment is limited).

<sup>276</sup> See generally Apergis et al., *supra* note 273 (discussing the factors that determine whether FDI will have a “crowding in” or a “crowding out” effect on domestic investment).

<sup>277</sup> See Salacuse & Sullivan, *supra* note 19, at 93.

violates the liberal principle of investment neutrality. Thus, a truly liberal Group Three BIT that is committed to promoting market efficiency should provide for both the establishment of a body of local commercial law and a judiciary capable of enforcing it.

BITs can promote legal spillover by encouraging a more “symbiotic relationship” between BIT arbitration and local court litigation.<sup>278</sup> Expansive transparency provisions that facilitate foreign investor involvement in the lawmaking process create pressure on host governments to enact laws and institute legal reforms aimed at creating and strengthening its commercial law.<sup>279</sup> BITs that require investors to seek local relief provide local courts with opportunities to articulate and develop principles of domestic commercial law.<sup>280</sup> A Group Three country with a particularly strong judiciary may even be in a position to negotiate a BIT that requires investors to resolve disputes in domestic courts, to exhaust all local remedies before referral to arbitration, or to limit the role of arbitration in reviewing these decisions.<sup>281</sup> BITs that require more transparent international arbitrations—currently a very secretive process<sup>282</sup>—allow host country judiciaries to observe, learn from, and “internalize the benefits” of the adjudicatory process.<sup>283</sup> Local courts capable of efficiently adjudicating complex investment claims will be able to compete with international arbitral bodies for the “business of resolving commercial disputes”<sup>284</sup> by offering a less expensive and more predictable alternative to arbitration.<sup>285</sup>

While a new breed of liberalizing BITs offer host countries the possibility to attract FDI more quickly, there have been recent signs of a backlash against FDI.<sup>286</sup> This suggests that although liberalization may be appropriate for

---

<sup>278</sup> Franck, *supra* note 88, at 367.

<sup>279</sup> See *supra* text accompanying note 150.

<sup>280</sup> See Franck, *supra* note 88, at 366 n.144 (noting that to require that investors litigate domestically, rather than take claims directly to international arbitration, might build the capacity of local courts).

<sup>281</sup> E.g., China–Bots. BIT, *supra* note 169, art. 9 (stating that “the Contracting Party . . . may require the investor concerned to exhaust the domestic administrative review procedure specified by the laws and regulations of that Contracting Party before submission of the dispute” to arbitration).

<sup>282</sup> Stiglitz, *supra* note 16, at 541.

<sup>283</sup> Ginsburg, *supra* note 18, at 119.

<sup>284</sup> *Id.*

<sup>285</sup> See UNCTAD, *supra* note 210, at 8 (noting that arbitration can be costly, time consuming, and damaging to the investor–country relations).

<sup>286</sup> Cf. Sachs & Sauvart, *supra* note 41, at xlix. (“[W]hile the share of regulatory changes that are favorable to FDI remains high, the number of favorable changes has decreased significantly since 2004 . . . perhaps signaling an increased skepticism in some countries of the benefits of FDI and a new tendency toward FDI protectionism.”).

African countries that have progressed to Group Three, this liberalization should proceed gradually.<sup>287</sup> Home countries should not force overly-liberalizing BIT provisions on developing host countries, and host countries should seek ways to attract FDI without reducing their policy-making space to promote development.<sup>288</sup>

## V. IMPLEMENTATION AND RECOMMENDATIONS

### A. *Mechanisms to Amend BITs*

This Comment suggests BIT provisions that are specially tailored to the particular realities facing different African countries. These provisions will promote sustainable economic growth by pushing countries to enact reforms where necessary but granting them policy-making room when appropriate in the interest of development. A new BIT can easily be drafted to include provisions based on the level of development of the home-country signatory. But it is important that there be some form of renegotiation mechanism to insure that the BIT continues to accurately reflect a country's needs as it progresses from Group One to Group Three.

The most obvious solution would be a BIT that provides for periodic reevaluations of a host country's circumstances and permits corresponding amendments of its terms. Norway's proposed model BIT, for example, establishes a joint committee with authority to "discuss issues related to corporate social responsibility, . . . the goal of sustainable development, anticorruption, employment and human rights, and . . . consider any other matter that may affect the operation of this Agreement."<sup>289</sup> Either party may call a meeting of the committee, which can "decide to amend the Agreement."<sup>290</sup>

Alternatively, a joint committee with powers similar to the one described in the Norway proposed model, but with less discretion, might be more palatable to host country investors. This committee's powers to amend would be limited to a BIT's annexes. Thus, host countries could introduce new sectors or laws

---

<sup>287</sup> Cf. UNCTAD, *International Investment Arrangements: Trends and Emerging Issues*, 70, U.N. Doc. UNCTAD/ITE/IIA/2005/11 (2006).

<sup>288</sup> *Id.*

<sup>289</sup> See Norway Proposed Model BIT, *supra* note 164, art. 23.

<sup>290</sup> *Id.*

that would be exempt from national and MFN treatment requirements, but the committee would not be permitted to alter the body of the BIT itself.

To provide foreign investors with additional comfort, the bodies of these BITs should limit the scope of government interventions. A host country should only be allowed to amend a BIT annex, or to make policy and implement performance requirements under a general exception, when the purpose is to encourage domestic competition. Further, these interventions should only be permissible to the extent that they do not unreasonably affect FDI. Finally, it may be important for some countries—especially those least developed—to maintain BITs that exempt existing investments from the effects of future regulations. This last investor protection would allow a host country to negotiate amendments through the committee process, or to make policy under general exceptions, but these interventions would only apply to future FDI. Existing investments would not be subject to performance requirements or new laws, such as those that encourage domestic competition.

BITs could also include sunset provisions that are tied to levels of investment in the host country. The provisions would be triggered when a Group One country attracts a certain quantity of FDI or when a Group Two country's domestic investment achieves a certain percentage of total investment. These provisions would require that signatories renegotiate the BIT and would suggest particular provisions based on the development benchmarks. To the extent that these mechanisms effectively encourage tailored BITs, and thus more sustainable growth, they would be in the best interests of developed, as well as developing, countries.

Developing countries have demonstrated interest in avoiding overly-restrictive BIT provisions. The number of BITs renegotiated due to changed circumstances has recently increased.<sup>291</sup> More and more, countries are questioning whether traditional BITs—with broad investor protection provisions that reduce host countries' freedom to regulate in the public interest—are appropriate.<sup>292</sup> In 2007, twenty-three percent of all new BITs were the product of renegotiations, bringing the total number of renegotiated BITs to 121.<sup>293</sup> While this represents a small portion of the total number of

---

<sup>291</sup> See Sachs & Sauvant, *supra* note 41, at xxxiii; UNCTAD, *Recent Developments in International Investment Agreements (2008–June 2009)*, 5, U.N. Doc. UNCTAD/WEB/DIAE/IA/2001/1 (2009).

<sup>292</sup> MAHNAZ MALIK, INT'L INST. FOR SUSTAINABLE DEV., S. CTR. & MOROCCAN DEP'T OF INV., *RECENT DEVELOPMENTS IN REGIONAL AND BILATERAL INVESTMENT TREATIES 10–12* (2008), available at [http://www.iisd.org/pdf/2008/dci\\_recent\\_dev\\_bits.pdf](http://www.iisd.org/pdf/2008/dci_recent_dev_bits.pdf).

<sup>293</sup> *Id.* at 10 (noting that ten of the forty-four new BITs replaced earlier treaties).

then-existing BITs, renegotiations are expected to increase as countries revise their model BITs to reflect growing international recognition that BITs must consider legitimate host-country interests.<sup>294</sup>

Developing countries have been reluctant, however, to grant host countries policy-making room to promote domestic competition, which is critical to sustainable economic development.<sup>295</sup> The BIT provisions that this Comment offers represent a balancing of foreign-investor and home-country interests that will benefit developing countries for three reasons.

First, granting developing countries policy-making room to intervene in their economies when necessary will allow them to continually improve their investment environments. This will increase the number and quality of foreign investment opportunities available to firms in developed countries. By investing abroad, these companies will strengthen a home country's connections to the world economy, thereby stimulating its imports and exports. Foreign investments may also benefit home-country operations and shareholders by discovering new ways of conducting business that improve productivity, or by generating extraordinary profits through the application of "firm-specific know-how to new foreign markets."<sup>296</sup>

Second, developed countries benefit from promoting a serious commitment to liberalism by supporting Group One and Two countries in their efforts to graduate to Group Three. Developed countries should therefore support the renegotiation of BITs that grant home-country investors unfair advantages over local firms. While a BIT that focuses on investment protection may be beneficial to FDI in the short-term, some scholars warn that "the time will come . . . when developing states will not feel the same compulsion to attract foreign investment and may be tempted to renege on their promise of investment security."<sup>297</sup>

Third, emerging democracies need room to regulate.<sup>298</sup> Allowing host countries to enact policies that favor domestic investors promotes more open governments and more autonomous judiciaries capable of combating

---

<sup>294</sup> *Id.*

<sup>295</sup> See *supra* text accompanying note 197.

<sup>296</sup> Matthew Adler & Gary Clyde Hufbauer, *Policy Liberalization and FDI Growth, 1982 to 2006*, at 20 (Peterson Inst. for Int'l Econ., Working Paper No. WP 08-7, 2008).

<sup>297</sup> Vandeveld, *supra* note 108, at 636.

<sup>298</sup> Stiglitz, *supra* note 16, at 515–16.

corruption and upholding the rule of law.<sup>299</sup> While this does not directly improve a home-country's finances, it serves important OECD foreign policies by encouraging democracy and reducing poverty.<sup>300</sup>

Certain recent developments suggest that a new approach to BITs may be achievable. First, in the wake of the global financial crisis, there appears to be a growing recognition—even among the most strident advocates of economic liberalism—that host countries should be granted a degree of control over the kinds of FDI that enter their borders. For example, a recent International Monetary Fund (IMF) report reversed the IMF's long-held position that developing countries should always avoid capital controls.<sup>301</sup> Countries with concentrations of certain kinds of FDI—especially financial sector FDI that tends to make host-country economies more vulnerable to asset bubbles and other crises—fared worse during the financial crisis than countries with non-financial FDI. This is especially true for greenfield FDI (FDI aimed at new construction).<sup>302</sup> The report noted that “there may be circumstances in which capital controls are a legitimate component of the policy response to surges in capital inflows,” but warned against a one-size-fits-all approach among developing countries.<sup>303</sup> The report added that there needs to be “regular reassessment” in order to maintain the effectiveness of capital controls and ensure that they represent an appropriate host-country intervention.<sup>304</sup>

Second, the United States is currently reviewing its Model BIT in order to “ensure that it is consistent with the public interest and the overall U.S. economic agenda.”<sup>305</sup> The advisory committee charged with evaluating the document has submitted its report. The report appears to represent both sides of the debate equally; it addresses concerns that the Model BIT needs to be more protective of U.S. investors as well as concerns about undermining host-

---

<sup>299</sup> See Ndikumana & Verick, *supra* note 8, at 12 (“[P]rivate investment is higher in strongly democratic countries . . .”).

<sup>300</sup> E.g., Bilaterals.org, U.S. BITs, <http://bilaterals.org/spip.php?rubrique53> (last visited Feb. 23, 2009) (“US BITs, like their FTAs, are tightly entwined with US foreign policy both in terms of objectives and enforcement.”).

<sup>301</sup> Jonathan D. Ostry et al., Int'l Monetary Fund, *Capital Inflows: The Role of Controls*, 4, Staff Position Note No. SPN/10/04 (Feb. 19, 2010).

<sup>302</sup> *Id.* at 13.

<sup>303</sup> *Id.* at 15 (“While controls can be helpful to individual countries under certain conditions, their widespread use could have deleterious effects on the efficient allocation of investment across countries, and harm prospects for global recovery and growth.”).

<sup>304</sup> *Id.*

<sup>305</sup> Press Release, U.S. Dept. of State, Public Meeting Regarding the U.S. Model Bilateral Investment Treaty Review, July 22, 2009.

country interests.<sup>306</sup> While the Obama Administration has yet to indicate what changes it will implement, President Obama's campaign promise to "ensure that foreign investor rights are strictly limited and will fully exempt any law or regulation written to protect public safety or promote the public interest" suggests that U.S. policy toward FDI will be more sensitive to host-country interests.<sup>307</sup>

Finally, evidence suggests that BIT renegotiations will become more common.<sup>308</sup> If the IMF is willing to recognize the legitimacy of host-country interventions surrounding FDI, the United States under President Obama will likely follow suit. And given the economic clout of the United States and its influence over the international community, such a shift in U.S. investment policy may encourage countries to renegotiate BITs so that the treaties balance home- and host-country interests more equitably.

### *B. Alternatives to International Arbitration*

Virtually all modern BITs allow foreign investors to resolve disputes through international arbitration. The predominant institution for the settlement of such disputes is the International Centre for Settlement of Investment Disputes (ICSID), which functions under the aegis of the World Bank.<sup>309</sup> Developing countries that have avoided arbitration provisions share certain characteristics, none of which are present in Group One, Two, or Three countries.<sup>310</sup> Thus, even if critics of arbitration are correct that it is

---

<sup>306</sup> ADVISORY COMM. ON INT'L ECON. POLICY, REPORT OF THE ADVISORY COMMITTEE ON INTERNATIONAL ECONOMIC POLICY REGARDING THE MODEL BILATERAL INVESTMENT TREATY PRESENTED TO: THE DEPARTMENT OF STATE 16 (2009) (noting, for example, that some "Subcommittee members believe that, without investor-state provisions, U.S. investors would be left at a competitive disadvantage," while others "strongly believe that the international dispute resolution mechanism provided in the Model BIT poses significant risks to the public interest" and worry that arbitration decisions "risk undermining the domestic laws and values").

<sup>307</sup> Bilaterals.org, United States Reviews Its Model Bilateral Investment Treaty, [http://www.bilaterals.org/article.php?id\\_article=15332](http://www.bilaterals.org/article.php?id_article=15332) (last visited Apr. 14, 2010).

<sup>308</sup> 2009 *World Investment Report*, *supra* note 6, at 32.

<sup>309</sup> International Centre for Settlement of Investment Disputes: About ICSID, [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID\\_Home](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home) (last visited Apr. 10, 2010).

<sup>310</sup> See Franck, *supra* note 88, at 357-64 (describing three types of BITs that do not provide for arbitration: (1) the "place holding" model, where investors are especially keen to gain a foothold in a strategic emerging market, such as China; (2) the "political and economic reality" model, where strong relations among signatories already exist (for example the U.S.-Australia BIT); and (3) the "market liberalization" model, where a country already has strong institutions or has already made significant efforts to liberalize).

asymmetric,<sup>311</sup> lacking in due process,<sup>312</sup> or even that it risks losing its relevance and legitimacy,<sup>313</sup> African countries are not likely to attract FDI if they do not grant foreign investors the right to resort to some form of independent adjudication. There may, however, be alternatives to ICSID that serve the same purposes.<sup>314</sup>

An international commercial court might be a viable alternative to “privatization of the judiciary” through international arbitration.<sup>315</sup> Full-time expert judges would be less subject to conflicts of interest than arbitrators. Higher standards of due process could be required and could include greater transparency and more comprehensive appellate procedures. Finally, greater deference could be paid to a host country’s laws and public interest.<sup>316</sup>

A less dramatic alternative would be for international arbitral bodies to encourage the localization of arbitration. Africa is rarely a venue for arbitrations, and there are relatively few African arbitrators.<sup>317</sup> This has resulted in a general ignorance and suspicion of arbitration among Africans, which is exacerbated by the opaqueness of the arbitration process.<sup>318</sup> Creating regional training centers and making efforts to hold arbitrations locally would serve several goals.

First, it would encourage legal spillovers. Host-country judiciaries would be better able to observe and learn from the adjudication process; these local courts, capable of efficiently adjudicating complex investment claims, could compete with arbitral bodies by offering cheaper and more predictable alternatives to arbitration.<sup>319</sup> Second, regional arbitral bodies would increase international arbitration’s local legitimacy by making it more receptive to local concerns and decreasing costs to host governments, which would then be more

---

<sup>311</sup> See Stiglitz, *supra* note 16, at 464–65.

<sup>312</sup> See GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 152* (2007) (criticizing arbitration as lacking accountability, openness, and unity of jurisprudence; for its limited appeal and review process; and arguing that arbitrators are not truly independent).

<sup>313</sup> See Odumosu, *supra* note 85.

<sup>314</sup> *But see* Sedlak, *supra* note 111, at 171 (“The increased use of [ICSID] in BITs and private contracts shows that investors and States alike have confidence in [it] . . . the ICSID Convention appears to be the correct balance of flexibility and predictability needed to encourage confidence in international investments.”).

<sup>315</sup> VAN HARTEN, *supra* note 312, at 179.

<sup>316</sup> Stiglitz, *supra* note 16, at 546.

<sup>317</sup> AMAZU A. ASOZU, *INTERNATIONAL COMMERCIAL ARBITRATION AND AFRICAN STATES: PRACTICE, PARTICIPATION AND INSTITUTIONAL DEVELOPMENT 425–26* (2001).

<sup>318</sup> *Id.* at 421–23.

<sup>319</sup> See *supra* text accompanying notes 160–62.

capable of obtaining fair representation. Third, regional arbitral bodies would render arbitration more accessible to small- and medium-sized regional enterprises for which arbitration is currently too expensive—thus stimulating regional South–South investment.<sup>320</sup>

### CONCLUSION

Bilateral Investment Treaties have great potential in Sub-Saharan Africa. For many countries, BITs represent the most efficient means to attract the foreign investment that is desperately needed to fuel economic development. But BITs have failed to achieve their potential in Africa.

Most BITs are instruments of the theoretical ideal of economic liberalism. This may explain why the treaties vary little across countries at different stages of development—in theory, liberal reforms should spur development wherever applied. While this Comment embraces economic liberalism and the power of the market, it argues that BITs have failed in Africa precisely because of their strict adherence to a theoretical model. As a result, BITs do not account for important domestic considerations among developing countries. Instead of encouraging reforms and attracting the kinds of FDI that move each developing country toward sustainable development based on its particular capacities and needs, BITs end up imposing policies that are insufficient for some countries and impracticable for others.

At the same time, strict compensation provisions—for example, for regulatory takings—make it difficult for host governments to intervene and correct market inefficiencies. Provisions that reflect economic liberalism's belief that free markets—not governments—should determine economic decisions have a chilling effect on domestic policy making that stymies legitimate development strategies. While there have been promising innovations in certain BIT provisions, these provisions are not appropriate for all African countries.

This Comment's three-group taxonomy aims to refocus the discourse about FDI and BITs on developing countries. BIT provisions that reduce risk to FDI will help Group One countries attract FDI. BITs that strengthen democratic institutions and the rule of law, giving Group Two countries a degree of freedom to promote equal competition among foreign and local firms, will encourage domestic investment. And liberal BIT provisions will attract

---

<sup>320</sup> *Investor–State Dispute Settlement*, *supra* note 151, at 93.

higher-quality FDI in Group Three countries. The measures that a country takes to graduate to the next stage of development place it in a better position to negotiate new BIT provisions and to pursue a new set of goals.

Designing BIT provisions based on a host country's FDI and domestic investment levels, and reevaluating BITs as a country advances toward and beyond Group Three status, will encourage sustainable development to the benefit of home and host countries alike. And although this mechanism was devised for, and probably best applies to, African countries, it may serve other countries in their efforts toward development.

ALEC R. JOHNSON\*

---

\* J.D., With Honors, Emory University School of Law, Atlanta, Georgia (2010); B.A., Georgetown University (2003).