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17 Rethinking the Dualism of Regionalism vs. Universalism in the Light of the Sub-Saharan Experience with the Regulation of Foreign Investments

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17.1 Introduction

The number of the Bilateral Investment Treaties (hereinafter referred to as 'BITs') concluded by African countries has dramatically increased in the last twenty years.[1] As a result of this, BITs have become the essential means for African countries, including Sub-Saharan states, to contribute to the shaping and development of the international law on foreign investment.

However, the bilateral format used for regulating the relationships between states in the economic sector has also raised significant criticism.[2] Of chief importance is the argument that bilateralism in Africa has mostly helped economically powerful countries in the opening of new markets for their services and goods, transferring their capitals and obtaining unfair benefit from cheaper labour and natural resources abroad.[3] Moreover, some bitter criticism to the network of BITs in force in Sub-Saharan Africa specifically was also raised on grounds that it contributed to subordinating the sovereign interests and

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1 On the topic, see among others Roshen Hendrickson, 'The Impact of Changing Global Power Relations on African Governance of Foreign Direct Investment', in Toyin Falola, Jessica Achberger (eds.), *The Political Economy of Development and Underdevelopment in Africa*, (Abingdon: Routledge, 2013), p. 128 ff; Aurelien Poibout, 'Sub-Saharan Africa, a Key Issue for France in the Cold War', in Toyin Falola, Charles Thomas (des.), *Securing Africa: Local Crises and Foreign Interventions* (Abingdon: Routledge, 2013), p. 83 ff.

2 See generally K. Vandevelde, 'The Economics of BITs', 41 *Harv. Int'l. LJ* 469 (2000); Id., 'The Political Economy of a BIT', (1998) American Journal of International Law 621.

3 See E. Layrea, 'Evolution of international investment law and implications for Africa', in F. N. Botchway (ed.), *Natural Resource Investment and Africa's Development* (Cheltenham: Edward Elgar Publishing Ltd, 2011), p. 293 ff; J. Nakagawa and N. Madulo, 'The Importance of the Voice from Africa in the 'Global' International Economic Law,' in N. Madulo (ed.), *Africa and International Economic Law* (Abingdon, Routledge, 2014) (forthcoming).

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prerogatives of the host states to the economic interests of foreign investors and foreign capital.[4]

This criticism cannot be simply dismissed – in particular, the argument that African BITs often do very little to enhance FDI in the African territories that are most relevant for socio-economic development is very much a fact.[5] Nonetheless, Sub-Saharan countries have made regular recourse to BITs both in order to attract foreign capitals in their own territories and to compete for incoming financial resources with neighbouring countries.[6] To do so, however, they have had to accept various international law obligations, such as the commitment not to prescribe *a priori* legal requirements or restrictions to foreign companies and investors unless they were motivated by national interest, public health issues or other specifically declared circumstances, the guarantee of national treatment to foreign companies and the waiver of their sovereign immunity in case of arising controversies by accepting the jurisdiction of international arbitral tribunals.[7]

In this article, we analyse and critically assess the pivotal role that BITs concluded by the US with six sub-Saharan African partners have had in consolidating the current trend of investments in agriculture in Sub-Saharan African countries, which can be deemed to be the outcome of a fast-advancing shift in the usage of the fertile lands and their associated natural resources from small-scale uses for local communities and markets, toward wide-scale, resource-depleting uses such as industrial mono-cultures.[8] Special attention is given to the manner in which these BITs boost capital bargaining power *vis-à-vis* host states, and the difficulty that they create for the effective implementation of true land reforms in Sub-Saharan Africa. It would not be safe though to maintain that BITs are the *raison d'etre* why mis-investments in agriculture in Sub-Saharan Africa are occurring, nor that that there necessarily is a causal link between signing BITs and the increase in FDI.[9] Actually, it is our opinion that BITs are one of the essential factors that ease the establishment of a

4 On this issue, see among others C. Dupasquier, P. N. Osakwe, 'Foreign Direct Investment in Africa: Performance, Challenges and Responsibilities' (ATPC Work in Progress No. 21), http://repository.uneca.org/bitstream/handle/10855/12601/bib.%2053710.pdf?sequence=1 (last accessed on 2 October 2013); E. Asiedu, 'Policy Reform and Foreign Direct Investment in Africa: Absolute Progress but Relative Decline', 22 *Dev. Pol.'Y Rev*. 41 (2004), p. 42.

5 *Amplius* A. R. Johnson, 'Rethinking BITs in Sub-Saharan Africa', (2010) 59 (4) *Emory Law Journal*, p. 923 ff.

6 References are found in J. Morisset, Foreign Direct Investment in Africa: Policies Also Matter (World Bank, Policy Research Working Paper No. 2481, 2000), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=632551).

7 *Amplius* V. Nde Fru, *The International Law on Foreign Investments and Host Economies in Sub Saharan Africa*, (Münster: Verlag, 2013), pp. 63 ff.

8 References can be found in V. Nde Fru, *op. ult.cit.*, pp. 63 ff.

9 *Amplius* A. R. Johnson, *above* n. 5, p. 923 ff. See also R. Andrzejczuk, 'Theoretical Assumptions Concerning the Protection of Foreign Investments in the Light of Bilateral International Agreements', (2006) 29 *Polish Yearbook of International Law*, p. 159.

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common *acquis* of investment rules and principles that strengthen the inequalities between capital and host states.[10]

In general, the proliferation of the BITs not only in Sub-Saharan Africa but worldwide has had a three-fold consequence. On one hand, it grants foreign investors with an additional level of protection of their interests and rights.[11] On the other, it amplifies the asymmetry of power and strength between capital and sovereign states, since investment protection in a host state turns to be fully operational via a single BIT.[12] Evidence can be easily found in that BITs allow exit from the international law protection of investment exclusively if a host State ceases all of its BITs, as investors have always the opportunity to bring their investment under the protection of a different BIT by bringing the claim by means of an intermediary company registered in a state party to a different BIT with the same host state. Moreover, consequences arise on the regulatory contention that exists among recipient countries from the fact that BITs have become the most popular instrument in international law to establish legal provisions on the protection of foreign investments. While more than twenty years ago African countries – including Sub-Saharan states – were entering into BITs since they felt this might have attracted foreign capitals and investments, the current situation is much different. The dramatic increase in the number of BITs led African countries to start competing for foreign investment flows, partially sacrificing their own sovereign powers over the altar of investors' rights.[13] BITs, thus, widen the countries' efforts to establish a pleading environment for foreign companies and investors, greatly extending the volume of international externalities.

It is also worth recalling, in connection with the relationship between BITs and underlying socio-legal factors, that BITs never operate in a vacuum, but assume a compelling role only in relation to the *a priori* assignment of rights to the foreign investor. This, in the case of agriculture land, usually assumes the typology of an acquisition through a merger or a public concession, with the *ex post* intervention of arbitration procedure as a depoliticized means for the settlement of disputes.[14] *Rebus sic stantibus*, we maintain that the relationship between land reform in Sub-Saharan Africa and BITs could not be understood without taking into account the relationship between the content of the

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10 For a fuller discussion of these issues, see Muradu A. Srur, The International Investment Regime: Towards Evolutionary Bilateral & Regional Investment Treaties?, 1 *Manchester J. Int'l Econ. L.* 54 (2004), pp. 64-72.

11 See among others Jeswald W. Salacuse & Nicholas P. Sullivan, 'Do BITs Really Work?: An Evaluation of BITs and Their Grand Bargain', 46 *Harv. Int'l L.J.* 67 (2005), pp. 95-96.

12 See also Tom Ginsburg, International Substitutes for Domestic Institutions: BITs and Governance, 25 *Int'l Rev. L. & Econ.* 107 (2005), pp. 119-122.

13 See also Richard K. Lebero, *The International Law Framework for Foreign Investment Protection: An Analysis of African Treaty Practice* (PhD thesis, University of Glasgow, 2012), esp. Ch. 1.

14 See also Lisa E. Sachs & Karl P. Sauvant, BITs, DTTs, and FDI Flows: An Overview, in Karl P. Sauvant & Lisa E. Sachs (eds.), The Effect of Treaties on Foreign. Direct Investment: Bilateral. Investment Treaties, Double. Taxation Treaties, and Investment. Flows, Oxford Scholarship Online: May 2009, DOI: 10.1093/acprof:oso/9780195388534.001.0001 (last accessed on 18 November 2013).

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underlying investment and the BIT, especially the content of investment treaties directly entered with the sovereign State and the role that arbitration assumes as the main legal instrument for defending foreign investments.

Due to the intricacy of the overall picture therefore illustrated, the main purpose of this article is to establish how the current relationships between BITs and investment contracts and concessions in the Sub-Saharan Africa are linked to the competition for natural resources and fertile lands and the parallel difficulty of adopting redistributive land programs and policies in the sub-region. Our central assertion is that the mix of investment agreements and BITs has had a major role in boosting the obtainment of large portions of fertile land by international companies and investors in the whole Sub-Saharan Africa.

To prove the validity of these assertions, and suggest some tentative solutions about feasible alternatives, the work is structured as follows. The next section illustrates the growth of the system of BITs in Sub-Saharan Africa, examining the way in which the content of BITs and investment agreements adversely affect the bargaining power that the Sub-Saharan countries may exercise when dealing with international investors, and investigates on the interactions between the grab of natural resources in Sub-Saharan countries and international investment law and policy. The third section then gives some specific instances in which BITs and investment agreements have been used to deprive the local and indigenous peoples of host state of their land and other natural resources, and raises some examples of cases where redistributive efforts have been hampered by investment arbitration. Finally, we suggest the establishment of a multilateral framework for the promotion and protection of foreign investment in Sub-Saharan Africa in order to address the problem of the subordination of the interests of the local population and the natural environment of Sub-Saharan Africa to the interests of foreign investors and companies.

17.2 The Role of BITs in Sub-Saharan Africa: Preliminary Remarks

More than twenty years after the signature of the first BIT between an African country and the US, investment relations in Sub-Saharan Africa appear to be largely based on bilateralism. Indeed, even though the US BIT program in Africa only counts six ratified BITs with African countries (Cameroon, Democratic Republic of the Congo, Republic of Congo, Mozambique, Rwanda and Senegal),[15] China has negotiated BITs with 33 African

15 References are found in Kenneth J Vandevelde, 'The BIT Program of the United States' (1988) 21 Cornell Int'l L J 201, 204.

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governments.[16] Bilateral negotiations have been the opening through which the rules and principles that engaged criticism against multilateral institutional frameworks, included the ECOWAS, came to be introduced on a wider sub-regional dimension. Unsurprisingly, thus, bilateralism has been functional for the establishment of a normative system in Sub-Saharan Africa that currently encompasses more than 500 BITs.[17]

In the present scenario of bilateral relations, it appears that the six US-Sub-Saharan BITs, including the most recent United States-Rwanda BIT (BIT),[18] are representative of the whole. This is because the strategy behind these investment agreements is to establish a feasible mechanism for defending FDI against possible normative interventions by the host countries or, it in other words, to make easier and defend the transfers of foreign capitals through the allowance of the best possible legal protection of FDI. All that said, it appears that the BITs system in Sub-Saharan Africa is growing quickly mainly as a result of economic concerns. Evidence is found in that the conclusion of a BIT in Sub-Saharan countries is generally identified by investors as a comparative benefit, because they receive the same treatment as internal capital while benefiting at the same time both from the further degree of legal protection arising from general international investment law, and, in case such protection is breached, the chance of commencing investment arbitral proceedings rather than bringing the claim before national courts. *Rebus sic stantibus*, a state that has entered into a BIT with the investor's home country has to be considered, by definition, as the most ideal objective. It then follows that capitals shall flow toward that country rather than to any other one. Nevertheless, economic concerns generally hinder well-thought programs and actions in Sub-Saharan African countries, as it is well demonstrated by the fact that non-signatory States often entered into BITs that are analogous or even more beneficial to international investors and capital exporting States. In other words, the conclusion of a BIT is tactically functional in filling the inequality gaps that a country (presumably?) has in comparison with other countries belonging to the same geographical area. This somewhat explicates the growth in the number of BITs between China and Sub-Saharan countries in the last few years, together with Trade and

16 On the topic, see Won Kidane, *China-Africa Dispute Settlement: The Law, Economics and Culture of Arbitration* (The Hague: Kluwer Law International, 2012), pp. 182 ff; Jing Gu,'China's Private Enterprises in Africa and the Implications for African Development', 21 *European Journal of Development Research* 570 (2009).

17 See also Richard K. Lebero, *above* n. 13, p. 66 who stresses that: 'Comparatively within Africa, the majority of BITs have been concluded between developed states and Sub-Saharan African countries and cumulatively Sub-Saharan African have entered into 507 BITs of all existing African BITs'.

18 Treaty between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment: http://unctad.org/sections/dite/iia/docs/bits/US_Rwanda.pdf (last accessed 20 May 2012).

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Investment Framework Agreements (TIFAs), like for instance the US-Angola TIFA which provide official *fora* for both discussing regional and bilateral investment and trade topics.[19]

Nevertheless, even though it can be maintained that BITs are powerful instruments that have the intrinsic ability both to grant simpler access to foreign states' agriculture land and to allow an effective protection of their interests and rights, they must not be seen as the exclusive reason for the increasing exploitation of fertile land, water and other natural resources located in Sub-Saharan countries, nor of the correlative increase of such land in the hands of few foreign companies and international investors. Even referring solely to the Sub-Saharan experience, one can also easily identify substantial US foreign direct investment in countries which have not concluded any BIT with the US, like Nigeria – a case which clearly evidences the fact that BITs are only one of the reasons why investors target certain States.[20] Nonetheless, as BITs are incredibly powerful instruments for the protection of investors abroad, it can be argued that the aim of BITs between capital exporting countries and capital importing ones cannot be identified with the aspiration of the former to attract incoming financial resources, but rather the quest by the former of guarantees for national companies and investors.[21] If things are such, it can therefore be seen how BITs strengthen as they were a double stance of pre-eminence of the capital exporter and subordination of the capital importer, to a degree changeable depending on the economic power of the parties entangled.

It is possible to safely argue that the existence of a relation between BITs concluded with Sub-Saharan countries and investments in agriculture can be inferred at least from the following two circumstances. Firstly, the correlation between BITs and large-scale land purchases in Sub-Saharan Africa may stem from the fact that BITs with Sub-Saharan countries generally encompass duties such as the obligation to pay 'market value' compensation in case of nationalization or expropriation and the obligations to grant 'full security and protection' and 'fair and equitable treatment'[22] to foreign investors. In other words,

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19 Acordo Quadro Entre o Governo da República de Angola e o Governo dos Estados Unidos da América sobre o Comércio e Investimento, www.ustr.gov/sites/default/files/US-Angola%20TIFA%20Portuguese.pdf (last accessed on 18 November 2013).

20 References are found in U.S. International Trade Commission, U.S. Trade and Investment with Sub-Saharan Africa, 4th Annual Report, (Washington: USITIC Publication, 2003).

21 See also L. Colen, A. Guariso, 'What Type of Foreign Direct Investment is attracted by BITs?', in Olivier De Schutter, Johan Swinnen and Jan Wouters (eds.), Foreign direct investment and human development: the law and economics of international investment agreements, (Abingdon: Routledge, 2013), p. 138 ff; N. Lavranos, 'Member States' BITs (BITs): Lost in Transition?', in (2011) 24 Hague Yearbook of International Law, pp. 281-311.

22 On the fair and equitable treatment standard see a.o. C. Schreuer, 'Fair and Equitable Treatment', *Transnational Dispute Management* 2(5) (2005); P. Muchlinski, '"Caveat Investor"? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard', 55(3) *ICLQ* 527 (2006); I. Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford: OUP, 2008); S. Vascianne, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice', 70(1) *BYIL* 99 (2000).

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instead of being identified as exclusively an inducement for international investors, these BITs must be seen as factors aggravating the economic reliance of the Sub-Saharan states. Moreover, the correlation between large-scale land purchases in Sub-Sahara Africa and BITs concluded with Sub-Saharan countries may arise from the phenomenon of 'treaty shopping', that is the *a priori* and strategic selection of favourable *fora* by the investors who transfer their capital wherever the wider protection granted by a BIT is available.[23] Clearly enough, the situation presents several parallelisms and similarities with the colonial system, that traditionally allowed investors establishment into states under similar (if not identical) conditions of nationals, and benefit afterward from a more far-reaching legal protection than the one which is guaranteed to their internal contenders.

17.3 BITs and Land Grabbing in Sub-Saharan Africa

The aim of the following sub-sections is to critically assess and evaluate the relationship between the BITs concluded by sub-Saharan countries (excluding South Africa), access to agriculture land and the variety of policies and rules. In doing so, we highlight four adverse serious consequences arising from the post-colonial system of foreign investment in Sub-Saharan Africa, namely, (a) the reinforcement of inequalities as a result of the prioritisation of the economic interests and rights of foreign investors over the needs of indigenous and local people; (b) the consolidation of a property system largely based on public dispossession and private stock; (c) the bargaining power of foreign companies and investors and (d) the on-going agriculture land and other natural resources grabbing.

17.3.1 BITs and the Doctrine of Permanent Sovereignty over Natural Resources

Generally speaking, BITs are treaties that States sign in order to commit to other States 'with respect to the treatment they will accord to investors and investments from those other [S]tates'.[24] More practically, however, it can be argued that capital exporting States sign BITs with the aim of ensuring protection for their nationals investing abroad, while capital importing States enter into BITs with the goal of enhancing their economic development through the promotion of investment and attracting foreign capital within their own territories. After World War II, post-colonial developing countries found themselves in the situation of newly independent States subject to a system of customary international law that placed great emphasis on the protection of foreign investment, and saw this

23 *Amplius* Karel Daele, 'Investment Disputes across Africa: Lessons to Be Learned From' (2012) 6, www.africanlaw.org/images/papers/daelepaper.pdf (last accessed 12 November 2013).
24 J. Salacuse, *The Law of Investment Treaties* (Oxford: Oxford University Press, 2010), p. 1.

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Western countries-oriented system as one of the reasons for their economic underdevelopment, as it 'prioritized economic and commercial freedom of foreigners over the right of the [S]tate to regulate economic activities in its own territory.'[25]

The development of the doctrine of permanent sovereignty over natural resources dates therefore back to the end of colonial empires.[26] Most of these nations aimed expressly at exploiting their own natural resources in order to enhance their economic development, regaining control over such resources from foreign companies.[27] It was in this climate that the focus on State sovereignty over natural resources became a much-debated topic in *fora* such as the United Nations General Assembly, where developing countries tried to force a reshaping of international law towards more attention to their developing goals. Chief among the results of these efforts is the UN General Assembly Resolution 1803 (XVII),[28] which eventually led to the Charter of Economic Rights and Duties of States ('CERDS').[29]

According to the doctrine of permanent sovereignty over natural resources, '[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.'[30] Moreover, any activity related to such resources – including 'the import of the foreign capital required for these purposes' – should be conducted in a manner consistent with 'the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.'[31] Under Article 3 of the GA Resolution in question, the foreign capital invested and the returns of such capital shall be regulated by the domestic law of the host State and international law, and the returns shall be shared by the investor and the host State. However, according to the same article, due care must be taken

> to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources.' In addition to this, the GA Resolution states that 'the free and beneficial exercise of the sovereignty of peoples and

25 Ibid., p. 68, citing T. Waelde, 'Requiem for the "New International Economic Order"', in G. Hafner, G. Loibl, A. Rest, L. Sucharipa-Behrmann, K. Zemanek (eds.), *Liber Amicorum Professor Ignaz Seidl-Hohenveldern: In Honour of His 80th Birthday* (Leiden: Brill, 1998), p. 761.

26 A. Akinsanya, 'Permanent Sovereignty Over Natural Resources and the Future of Foreign Investment', 7 *Journal of International Studies* 124 (1978), p. 126; Rudolf Dolzer, 'Permanent sovereignty over natural resources and economic decolonization', 7 *Human rights law journa* 217 (1986), p. 221.

27 S. Asante, 'Restructuring Transnational Mineral Agreements', 73 *American Journal of International Law* 335 (1979), p. 340.

28 United Nations General Assembly Res. 1803 (XVII) of 14 December 1962, 'Permanent Sovereignty over Natural Resources', www.un.org/ga/search/view_doc.asp?symbol=A/RES/1803%28XVII%29 (last visited 22 May 2014).

29 United Nations General Assembly Res. 3281 (XXIX) of 12 December 1974, 'Charter of Economic Rights and Duties of States', www.un-documents.net/a29r3281.htm (last visited 22 May 2014).

30 UN GA Res. 1803 (XVII), Art. 1.

31 Ibid., Art. 2.

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> nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality.[32]

As previously stated, the Resolution on permanent sovereignty over natural resources is the foundation upon which the CERDS was drafted, and it is interesting to see how its principles have been transposed into the Charter. The preamble of the CERDS states clearly the development goals behind the Charter,[33] and it is under this lens that the provisions of the CERDS have to be assessed.

Article 2(1) of the Charter states that '[e]very State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.' Moreover, each State has the right to regulate and exercise authority over foreign investment in their territory according to their laws and regulations and 'in conformity with its national objectives and priorities', with no obligation to grant foreign investment any preferential treatment.[34] Foreign investors shall not intervene in the internal affairs of a host State, which retains the right to regulate the activity of transnational corporation within their own jurisdiction.[35] Moreover, host State retain the right '[t]o nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent.'[36] Indeed, in the light of the Preamble to the CERDS, these rights must be exercised with the purpose of enhancing the economic development of the host State.[37]

32 Ibid., Art. 5.

33 According to its Preamble, the CERDS is aimed at 'contributing to the criterion of conditions for: a) The attainment of wider prosperity among all countries and of higher standards of living for all peoples, b) The promotion by the entire international community of the economic and social progress of all countries, especially developing countries, c) The encouragement of co-operation, on the basis of mutual advantage and equitable benefits for all peace-loving States which are willing to carry out the provisions of the present Charter, in the economic, trade, scientific and technical fields, regardless of political, economic or social systems, d) The overcoming of main obstacles in the way of economic development of the developing countries, e) The acceleration of the economic growth of developing countries with a view to bridging the economic gap between developing and developed countries, f) The protection, preservation and enhancement of the environment, […] Mindful of the need to establish and maintain a just and equitable economic and social order through: a) The achievement of more rational and equitable international economic relations and the encouragement of structural changes in the world economy, b) The creation of conditions which permit the further expansion of trade and intensification of economic co-operation among all nations, c) The strengthening of the economic independence of developing countries, d) The establishment and promotion of international economic relations, taking into account the agreed differences in development of the developing countries and their specific needs.'

34 CERDS, Art. 2(2)(a).

35 Ibid., Art. 2(2)(b).

36 Ibid., Art. 2(2)(c).

37 See N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge: Cambridge University Press, 2007), p. 319.

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17.3.2 *Sub-Saharan BITs under the Lens of the Doctrine of Permanent Sovereignty over Natural Resources*

Viewing the Sub-Saharan BITs from the perspective of the GA Resolution on permanent sovereignty over natural resources and the CERDS, two contradictory aspects appear the same picture. On the one hand, it is arguable that the very principles at the basis of these two UN instruments are incorporated in the Sub-Saharan BITs, which feature the goal of economic development, the right for the host State to regulate the entry and activities of foreign investors within their own territories and the obligation to pay adequate compensation in case of expropriation. On the other hand, the competition among Sub-Saharan States to attract foreign capital has led such States to an unfavourable position when negotiating BITs with capital exporting countries, especially the main investors in the area (China and the US).[38] Consequence of this competition is the fact that the Sub-Saharan BITs have been mostly drafted according to models provided by capital exporting States, providing valuable benefit to foreign investors but resulting in severely deficient instrument from the point of view of control over natural resources within the territories of the host State, as it will be explained in the following section.

Indeed, the six BITs between the US and Sub-Saharan countries show a number of common features. Chief among these features is the fact that the six BITs under scrutiny here have been drafted according to Western models. The BITs between the US and Cameroon, Congo DR, Congo, Senegal and Mozambique reflect the standard BIT model that was used prior to 2004 – that is, before the US released their Model BIT.[39] Such BITs are almost unilaterally aimed at protecting the investor in the territory of the host State, by means of comprehensive provisions on the activities falling within the notion of investment, applicable standards of protection, rules for the payment of compensation in cases of expropriation, provisions on transfer of funds, and dispute settlement clauses pointing to ICSID or ad hoc arbitration. The documents accompanying the BITs, such as letters of submittal or transmittal, clearly refer to the model treaties submitted by the US during the negotiations – models that have been substantially translated into the final texts of the treaties, with little – if any – adjustments to take into consideration, at treaty level, the issue of sovereignty over natural resources.[40]

38 See *above*, Section 17.2.

39 United States 2004 Model BIT, www.state.gov/documents/organization/117601.pdf (last visited 14 May 2014).

40 See for instance the Letter of Submittal accompaining the US-Congo DR BIT, signed on 3 August 1984, www.state.gov/documents/organization/43544.pdf (last visited 14 May 2014); the Letter of Transmittal accompaining the US-Congo BIT, signed on 12 February 1990, www.state.gov/documents/organization/43545.pdf (last visited 14 May 2014); the Letter of Transmittal accompaining the US-Senegal BIT, signed on 6 December 1986, www.state.gov/documents/organization/43585.pdf (last visited 14 May 2014); the Letter of Transmittal accompaining the US-Cameroon BIT, signed on 26 February 1986, www.state.gov/documents/organization/43543.pdf (last visited 14 May 2014).

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The BIT between the US and Rwanda was signed on 19 February 2008.[41] For the purposes of our investigation, this BIT is quite significant for two main reasons. First, it was the first treaty signed by the US with an African State in nearly a decade – an indication of how investment policies of capital exporting States target certain countries depending on their appeal for nationals of such States.[42] Second, it is the first – and only so far – case of implementation of the 2004 US Model BIT.[43] The US-Rwanda BIT is designed to provide investors with legal protections that represent a significant step further with respect to the pre-2004 BITs in terms of detail in the provisions. In particular, the BIT in question provides for extensive norms on non-discriminatory treatment of investors and investments,[44] the right to freely transfer investment-related funds,[45] prompt, adequate, and effective compensation in the event of direct or indirect expropriation,[46] freedom from a number of performance requirements,[47] provisions to ensure transparency,[48] and the right to bring investment disputes to international arbitration.[49] Although some provisions in the treaty refer to the issue of natural resources, the focus is most certainly not on sovereignty, but rather on the respect of environmental concerns. Indeed, the treaty acknowledges the need that investments are conducted in respect of domestic environmental laws, giving the parties the power to adopt, maintain or enforce any measure consistent with the treaty 'that it considers appropriate to ensure that investment activity in its territory is conducted in a manner sensitive to environmental concerns.'[50]

Reading the six BITs listed above shows that the concerns that led to the GA Resolution on permanent sovereignty over natural resources and the CERDS were only translated in the BITs between the US and Sub-Saharan countries by means of a few lines in the

41 Treaty between the Government of the United States of America and the Government of the Republic of Rwanda concerning the Encouragement and Reciprocal Protection of Investment, www.ustr.gov/sites/default/files/uploads/agreements/bit/asset_upload_file743_14523.pdf (last visited 14 May 2014). The Letter of Transmittal accompaining the US-Rwanda BIT is available at http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/pdf-agreements/RwandaBIT.pdf (last visited 15 May 2014).

42 See *above*, Section 17.2.

43 The literature on the 2004 US Model BIT is quite scarce; however, we can refer the reader for further analysis to S. Schwebel, 'The United States 2004 Model BIT: an Exercise in the Regressive Development of International Law', in G. Aksen, R. Briner (eds.), *Global reflections on international law, commerce and dispute resolution: liber amicorum in honour of Robert Briner* (Paris: ICC, 2005), p. 815; L. Henry, 'Investment Agreement Claims Under the 2004 Model U.S. BIT: a Challenge for State Police Powers?', 31(3) *University of Pennsylvania journal of international law* 935 (2010); J. Coe, 'An Examination of the Draft Award Circulation Provision of the US Model BIT of 2004', in C. Rogers, R. Alford (eds.), *The future of investment arbitration* (Oxford: Oxford University Press, 2009), p. 107.

44 US-Rwanda BIT, Arts. 3-5.

45 US-Rwanda BIT, Art. 7.

46 US-Rwanda BIT, Art. 6, Ann. A and B.

47 US-Rwanda BIT, Art. 8.

48 US-Rwanda BIT, Arts. 10, 11, 19, 20 and 21.

49 US-Rwanda BIT, Arts. 23-27.

50 US-Rwanda BIT, Art. 12.

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Preambles that refer to the desire to promote economic cooperation and encourage the flow of investment in order to enhance the economic development of the parties. Indeed, none of the provisions in the six treaties hereby under examination seem to address the need to ensure that host States retain control over their natural resources when such resources are the object of concession contracts or other investment relationships. The only exception to this is the fact that host States retain the right to expropriate foreign property, under the condition that compensation is paid promptly, fully and adequately. This aspect of these treaties is hardly surprising. As mentioned beforehand, the BITs in question were all drafted according to models provided by the US – a capital-exporting State the primary concern of which is to protect their own nationals abroad, rather than keeping control over their natural resources against foreign investors. Five of these six treaties were negotiated and signed over a period of six years, and the preliminary documents show how each State negotiated with the US separately; in other words, there was no joint effort in the region to reach a common framework that would have forced the capital-exporting State to accept a more sensible balance between the rights of investors and the powers of the host State. The BIT with Rwanda, if possible, is even more unbalanced towards the protection of foreign investors – once again, an example of how the need to attract foreign capital in the territory of the State gives the capital-exporting State the necessary strength to impose treaty rules aimed at ensuring the maximum level of protection for their nationals abroad. The main consequence of this is the fact that concerns of sovereignty over natural resources have been more often than not sacrificed in order to achieve the position of being a target State of foreign investors. The following section uses the example of the phenomenon of land-grabbing to assess the price that Sub-Saharan countries have paid in their pursuit of foreign investment.

17.3.3 The Shortcomings of BITs in Sub-Saharan Africa: The Case of Land-Grabbing

From the above analysis it seem to be arguable that, at least in Sub-Saharan Africa, BITs are not sufficient *per se* to prevent and defend against the exploitation of vast portions of fertile land in the host state by international investors.[51] However, there are at least three additional allegations that are worth being made in relation to the connection between the grab of natural resources in Sub-Saharan African countries and BITs. First, the influence of a BIT will largely rest upon the particular geographical setting of the 'grabbed' and the 'grabber'. Moreover, BITs strengthen a process of commercialization of state sovereignty

51 References can be found in L. Cotula, *The Great African Land Grab? Agricultural Investments and the Global Food System* (London: Zed Books, 2013; P. M. Lehloenya, 'Africa Must Walk Before She Runs: The Case for Agricultural Stability in Sub-Saharan Africa in Advance of a Global Trade', (2013) 10 *MJIEL*, pp. 19-37.

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in Sub-Saharan Africa. Lastly, BITs with Sub-Saharan countries boost private access to natural resources in particular land and water of the host country to the detriment country of traditional property rights. Indeed, it seems that foreign investors generally choose to address their investments to countries that have concluded a BIT with the target state in order to get additional protection.[52] In the case of investments in agriculture, it can be claimed that a preponderance of such investments are directed toward countries that have previously concluded a BIT with the source state.[53] This is supported by several fonts such as trade and investment frame agreements (TIFAs), the Online Public Database on Land Deals (Land Matrix)[54] as well as by blogs like 'Mother Jones',[55] that show how the top land-grabbing states are generally directing their investments in agriculture to states that are bound by international conventional rules to protect the investors' interests and rights. Investors from the US – a top 'land-grabber' worldwide – target mostly countries that are party to BITs.[56] Similar conclusions also apply to China, another top 'land-grabbing' country that has signed an impressive number of BITs both with target and source countries.[57] Furthermore, if we take into account that Chinese specialists are progressively exerting strains to establish a free trade area with Southern African countries;[58] that US has recently entered into a BIT with Rwanda, namely one of the country with the lowest GDP average growth in Sub-Saharan Africa;[59] it is safe to state that investors are particularly eager to get the benefits arising from the starting of foreign economic activities, but also to supply their investors with the further legal protection arising from the mixture of international conventional rules and investment arbitration proceedings.[60]

52 For a thorough discussion of this issue, see among others Kenneth J Vandevelde, BITs: History, Policy and Interpretation (OUP 2010) 55 ff; Mary Hallward-Driemeier, 'Do BITs Attract FDI? Only a bit…and they could bite', http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-3121 (last accessed on 13 November 2013).

53 *Amplius* see Ward Anseeuw, Liz Alden Wily, Lorenzo Cotula, and Michael Taylor, 'Land Rights and the Rush for Land – Findings of the Global Commercial Pressures on Land Research Project', www.landcoalition.org/sites/default/files/publication/1205/ILC%20GSR%20report_ENG.pdf (last accessed on 25 June 2014).

54 The Land Matrix Database is available at: www.landmatrix.org/en/ (last accessed on 26 June 2014).

55 For the 'Mother Jones's' official website see: www.motherjones.com/blog (last accessed on 26 June 2014).

56 References are found in the 'Mother Jones's official website *above* n. 55.

57 See David Shinn, 'China's Investments in Africa', www.chinausfocus.com/finance-economy/chinas-investments-in-africa/ (last accessed on 16 November 2013) who also stresses that: 'The bulk of China's FDI has been concentrated in a relatively few countries. Between 2003 and 2007, five countries – Nigeria, South Africa, Sudan, Algeria and Zambia – accounted for more than 70 percent of China's FDI. While these countries remain important recipients, others such as Guinea, Ghana, Democratic Republic of the Congo and Ethiopia have joined the list in recent years').

58 *Amplius* Denis M. Tull, 'China's engagement in Africa: scope, significance and consequences', J. of Modern African Studies, 44, 3 (2006), pp. 463-65.

59 See *above*, Section 17.3.

60 On the issue, see also Frank L. Bartelsa, Sadiq N. Alladinab, Suman Ledererc, 'Foreign Direct Investment in Sub-Saharan Africa: Motivating Factors and Policy Issues', (2009) 10 (2) *Journal of African Business*, pp. 141-62.

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17.3.4 *The BITs' Unbalanced Obligations and Their Failure to Protect the Interests of Local Communities in Sub-Saharan African Countries*

The considerations above suggest that the US BITs, but also the Chinese and Western European BITs concluded with Sub-Saharan countries, offer foreign investors sound protection against possible uses of the notion of State sovereignty as a tool for cutting out their advantages or, more generally, hampering their property interests or rights. The same conclusion is also suggested by other evidence, namely that only few and recent BITs with Sub-Saharan countries encompass non-discrimination as a condition for lawful expropriation.[61] Looking at the most recent history of investor-country relationships in Sub-Saharan Africa, it is clear that BITs have often been used by international investors in order to hinder legal reforms that could have counter-balanced or reduced the host State's reliance on foreign capital. Indeed, far from being the only tool available to investors against public expropriations,[62] the significance of BITs as means to protect foreign investors' interests has been clear in a number of problematic cases. As a consequence, the pledge of sovereign issues is left to a number of privately designated arbitrators.[63]

This instrumental recourse to investment arbitration to bypass the political authority of states is evident in the case of the arbitration commenced by a group of Dutch nationals following the expropriation of their land in Zimbabwe. The expropriation was challenged before an ICSID tribunal as a breach of the Netherlands-Zimbabwe BIT. The case is significant since it offers evidence that arbitration causes redistribution to be more expensive.[64] The history of investment arbitration offers examples of cases in which a BIT was used to hinder land redistribution and reforms, ensuring that they were categorized as expropriation. In essence, although sovereign states have the power act in the public interest, such power is often challenged by investors.[65] Moreover, *mutatis mutandis*, a similar line of

61 See Richard K. Lebero, *above* n. 13, p. 166 ff.

62 For a good resume of the instruments at the disposal of foreign investors against expropriations see Kyla Tienhaara, *The Expropriation of Environmental Governance – Protecting Foreign Investors at the Expense of Public Policy* (Cambridge University Press, Cambridge 2009); Andrew T. Guzman & Jan H. Dalshuisen, 'Expropriatory and Non-Expropriatory Takings Under International Investment Law', (2012), http://works.bepress.com/andrew_guzman/61 (last visited Apr. 9, 2013) and P. Vargiu, 'Environmental Expropriation in International Investment Law', in T. Treves, F. Seatzu, S. Trevisanut (eds.), *Foreign Investment, International Law and Common Concerns*, (Abingdon: Routledge, 2013), pp. 213 ff; R. Dolzer, C. Schreuer, *Principles of International Investment Law* (Oxford: OUP, 2012), pp. 98 ff. An account of the traditional concept of expropriation in international law may be found in B. Wortley, 'Problèmes Soulevés en Droit International Privé par la Législation sur l'Expropriation', (1939) 67 *Recueil des Cours*, p. 341.

63 On the use of investment arbitration proceedings in Sub-Saharan countries see Oladiran Ajayi, and Patricia Rosario, 'Investments In Sub Saharan Africa: The Role of International Arbitration in Dispute Settlement', http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1426823 (last accessed on 15 November 2013).

64 References are in L.E. Peterson's article 'Land Reform and Investment Arbitration in Southern Africa', http://kluwerarbitrationblog.com/blog/2010/06/23/2097/ (last accessed on 18 November 2013), who also stresses that the parties are still struggling to collect on the 2009 arbitral award.

65 See *Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24).

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reasoning is found in *Biwater v. Tanzania* where, after having recalled that expropriation always requires a certain degree of severity and the severity does not have to be economic in character, the tribunal concludes by observing that 'there can be a substantial interference with an investor's rights even if that interference does not necessary amount to a quantifiable economic loss.'[66]

17.4 A Possible Solution: A Multilateral Investment Agreement for Sub-Saharan Countries

The analysis above suggests that there are several reasons for claiming that the BITs so far concluded by Sub-Saharan countries with capital-exporting states contributed to the establishment of a network that facilitated (and defended) the deprivation of large extensions of fertile land against the rights and interests of the local and indigenous communities. Notwithstanding the fact that the signature of BITs was not the *raison d'être* of the large-scale investments in agriculture in Sub-Sahara Africa, evidence from NGOs prove that the top land-grabbing states such as the US, UK and China often rely on this type of agreements and on the protection of international investment law.[67]

Moreover, although the BITs concluded so far with Sub-Saharan countries cannot be always considered responsible for the lease of fertile land and the exploitation of other natural resources by foreign investors, it is certainly true that the network of BITs in the Sub-Saharan region has greatly enhanced inter-country competition, in the sense that they have become the tools through which comparative benefits are achieved by foreign investors. Additionally, the legal protection granted by most of the Sub-Saharan BITs is such that whatever deprivation is realized through BITs indirectly and investment contracts directly is asserted as a *status quo* which may not be unilaterally altered by the home country. Indeed, this is the reason why no sound plan against natural resources grabbing in Sub-Saharan countries can be effectively advanced without a multilateral investment agreement that operates at the sub-regional level.

Indeed, the voices of experience would challenge this idea in light of the failure of many attempts at multilateralism in the field of international investment law in the past.[68] However, the very African tradition of multilateral and regional treaties in the neighbouring

66 *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, (ICSID Case ARB/05/22), Paras. 464-465.

67 See *above*, Section 17.3.3.

68 See generally E Sussman, 'A Multilateral Energy Sector Investment Treaty: Is It Time for a Call for Adoption by All Nations', 44(3) *The International Lawyer* 939 (2010), p. 941; A. Kutty, S. Chakravarty, 'A Multilateral Investment Agreement: Poison or Antidote?', 22(1) *Sri Lanka Journal of International Law* 89 (2010), p. 93; S. Schill, 'The Multilateralization of International Investment Law: Emergence of a Multilateral System of Investment Protection on Bilateral Grounds', 2(1) *Trade, Law and Development* 59 (2010), p. 64; E. Chalamish, 'The Future of BITs: A De Facto Multilateral Agreement?', 34(2) *Brooklyn Journal of International Law* 303 (2009).

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field of international trade law[69] suggest that a multilateral, regional framework for the regulation of foreign investment in Sub Saharan Africa may be the way forward to establish a more balanced investment environment in the region. First, a multilateral agreement on foreign investment would eliminate – or at least significantly reduce – the competition for FDI in the area, giving African States more bargaining power when negotiating investment protection regimes with the likes of US, China and other capital-exporting countries.[70] Second, a common framework for foreign investment and the subsequent strength that host States would have in negotiation could be used to tackle the phenomenon of land grabbing and, more in general, the exploitation of natural resources by foreign investors.[71] Third, it would allow African States to finally have a say in the shaping of international investment law, a field in which they stepped in once they became independent but that they found very much shaped – and not in a way that maximized their best interest.[72]

Another possible objection to the idea of multilateralism as a means to overcome the shortcomings of the BITs regime is the difference in levels of development among Sub Saharan States (besides the intense differences among their legal and political regimes and religious and cultural values), which would keep a one-size-fits-all solution off the table. However, this has proven not to be an insurmountable obstacle in the past – and it could actually be turned into strength. A valuable lesson, as stated beforehand, can be learned from the experience of African regional trade agreements (hereinafter referred to as 'RTAs'). African RTAs have traditionally been designed as 'establishing flexible regimes of cooperation as opposed to containing rules requiring scrupulous and rigorous adherence.'[73] Moreover, African RTAs are based on the concept of 'variable geometry', which adopt 'steps for meeting timetabled and other commitments.'[74] While the concept of 'variable geometry' is not a exclusive feature of African RTAs – the whole expansion of the European Union is very much based on the same concept[75] – its application in Africa has been quite unique.

69 See e.g. the Common Market for Eastern and Southern Africa (COMESA), the Southern African Development Community (SADC), the Economic Community of West African States (ECOWAS), the East African Community (EAC), the Economic Community of Central African States (ECCAS) and the African Free Trade Zone between COMESA, EAC and SADC (AFTZ).

70 See above, Sections 17.2 and 17.3.

71 See above, Section 17.3.

72 See above, Sections 17.2 and 17.3.

73 J. Gathii, *African Regional Trade Agreements as Legal Regimes* (Cambridge: CUP, 2011), p. 4.

74 Ibid.

75 See generally K. Featherstone, C. Radaelli (eds.), *The Politics of Europeanization* (Oxford: Oxford University Press, 2003); R. Harmsen, 'A European Union of Variable Geometry: Problems and Perspectives', 45 *Northern Ireland Legal Quarterly* 109 (1994); C. Van Grasstek, P. Sauvé, 'The Consistency of WTO Rules: can the Single Undertaking be Squared with Variable Geometry?', 9(4) *Journal of International Economic Law* 837 (2004); M. Jachtenfuchs, *Democracy and Governance in the European Union* (Heidelberg: Springer, 1998).

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The underlying rationale behind African RTAs is the even-handed spreading of trade benefits to the detriment of principles of non-discrimination and trade liberalisation. The flexibility of African RTAs is also showed by the presence of multiple and in some cases overlapping memberships.[76] The consequence of such flexibility is the rather informal structure of such treaties and their bodies if compared to similar instances such as the EU or the ASEAN Free Trade Area. Such informality, however, does not clash with the need of binding commitments – indeed, what is less stringent than in European, North American or Asian trade agreements is the enforceability of such commitments, which is adjusted by means of a range of outlets, rather than their binding force. A good example of this can be found in the Southern African Customs Union (SACU), under which new industries are protected from competing goods from both member and non-member States 'provided that such duties are levied equally on goods grown, produced or manufactured in other parts of the Common Customs Area and like products imported from outside that area, irrespective of whether the latter goods are imported directly or from the area of another Member State and subject to payment of the customs duties applicable to such goods on importation into the Common Customs Area.'[77] In a nutshell, it can be affirmed that cooperation in African RTAs, at least in theory, is more aimed at implementing concrete and specific programmes to the mutual advantage of all member States rather than the greater level of economic integration targeted by institutions such as the EU or the ASEAN. The small size of most African economies makes indeed more realistic – and perhaps feasible – to aim for harmonisation and the development of common resources.[78] Examples

76 Ibid.

77 2002 Southern African Customs Union (SACU) Agreement, Section 26, www.sacu.int/main.php?include=docs/legislation/2002-agreement/part5.html (last accessed on 2 June 2014).

78 Gathii, *above* n. 73 at 19.

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of this goal can be found in the Economic Community Of West African States (ECOWAS) Treaty at Article 3[79] or Article 6(b) of the COMESA Treaty.[80]

The afore-mentioned principle of variable geometry permeates most of African RTAs. The principle entails a certain flexibility in the quest for harmonization and timetabled commitments by allowing different paces depending on the economic development of the member States, policies for the minimization of imbalances in economic development – by means, for instance, of a more relaxed approach to the most favoured nation treatment standard, favouring the distribution of credit and resources from regional banks to treaty

79 '[…] 2. In order to achieve the aims set out in the paragraph above, and in accordance with the relevant provisions of this Treaty, the Community shall, by stages, ensure;

a. the harmonisation and co-ordination of national policies and the promotion of integration programmes, projects and activities, particularly in food, agriculture and natural resources, industry, transport and communications, energy, trade, money and finance, taxation, economic reform policies, human resources, education, information, culture, science, technology, services, health, tourism, legal matters;
b. the harmonisation and co-ordination of policies for the protection of the environment;
c. the promotion of the establishment of joint production enterprises;
d. the establishment of a common market through: i) the liberalisation of trade by the abolition, among Member States, of customs duties levied on imports and exports, and the abolition among Member States, of non-tariff barriers in order to establish a free trade area at the Community level; ii) the adoption of a common external tariff anda common trade policy vis-a-vis third countries; iii) the removal, between Member States, of obstacles to the free movement of persons, goods, service and capital, and to the right of residence and establishment;
e. the establishment of an economic union through the adoption of common policies in the economic, financial social and cultural sectors, and the creation of a monetary union.
f. the promotion of joint ventures by private sectors enterprises and other economic operators, in particular through the adoption of a regional agreement on cross-border investments;
g. the adoption of measures for the integration of the private sectors, particularly the creation of an enabling environment to promote small and medium scale enterprises;
h. the establishment of an enabling legal environment;
i. the harmonisation of national investment codes leading to the adoption of a single Community investment code;
j. the harmonisation of standards and measures;
k. the promotion of balanced development of the region, paying attention to the special problems of each Member State particularly those of landlocked and small island Member States;
l. the encouragement and strengthening of relations and the promotion of the flow of information particularly among rural populations, women and youth organisations and socio-professional organisations such as associations of the media, business men and women, workers, and trade unions;
m. the adoption of a Community population policy which takes into account the need for a balance between demographic factors and socioeconomic development;
n. the establishment of a fund for co-operation, compensation and development; and
o. any other activity that Member States may decide to undertake jointly with a view to attaining Community objectives.'

80 'The Member States […] agree to adhere to the following principles: (a) equality and inter-dependence of the Member States; (b) solidarity and collective self-reliance among the Member States; (c) inter-State co-operation, harmonisation of policies and integration of programmes among the Member States;[…] (f) accountability, economic justice and popular participation in development; (g) the recognition and observance of the rule of law; […]'.

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members, instituting quotas on interregional trade, increasing sales from poorer countries within the region and sharing the gains of cooperation.[81]

Is the principle of variable geometry compatible with the goal of investment liberalisation? The answer to this question tends to be more or less to negative depending on which angle one tries to answer it from; however, our argument is that investment liberalisation is not necessarily the key to the economic development of the Sub Saharan region – in fact, seeking an increase in foreign investment by means of liberalisation has led to dramatic consequences in terms of land grabbing and other shifts in control of natural resources towards investors from developed countries.[82] Our suggestion is indeed not one that is based on investment liberalisation, but rather one that advocates for regional regulation of foreign investment and a common position for Sub Saharan States to negotiate the level and substance of investment protection with capital-exporting States. The instrument we suggest to reach this long-term aim is a regional treaty on investment protection which states the aims and conditions to be put on the table when negotiating bilateral or multilateral agreements on the promotion and protection of investments, based on the principle of variable geometry internally and the doctrine of permanent sovereignty on natural resources externally.

17.5 Salient Aspects of a Multilateral Agreement on Investment for Sub-Saharan Countries

As stated beforehand,[83] the BITs signed by Sub Saharan countries – while designed to promote and protect investment bilaterally – tend to accommodate mainly the needs of the capital-exporting State party to the BIT, putting the interest of the host State in the back burner. What we suggest is therefore a regional effort in the Sub Saharan area to regulate foreign investment from a common standpoint, and to affect the balance of powers when Sub Saharan States negotiate – whether singularly or jointly – investment treaties with capital exporting States.

It has to be underscored, by way of preface, that African multilateral instruments in investment-related matters have been drafted in the past; moreover, some of these instruments even featured that level of flexibility that we advocate in this article. However, none of these instruments has had great success so far.[84] Such failures are beyond the scope of

81 Gathii, *above* n. 73 at 40-47.
82 See *above*, Section 17.3.
83 See *above*, Sections 17.3 and 17.4.
84 Within the context of COMESA, a multilateral investment Agreement for the COMESA Common Investment Area (hereinafter referred to as 'CCIA') was adopted in 2007, but never entered into force. See for further reference Investment Agreement for the COMESA Common Investment Area, http://programmes.comesa.int/index.php?option=com_content&view=article&id=111&Itemid=149 (last visited

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this article, as they are mainly of political rather than legal nature. We believe that, from a legal perspective, the regional agreement model is valid and feasible for the purposes of the regulation of foreign investment, as proven by successful examples in different regions such as the NAFTA,[85] CAFTA-DR,[86] ASEAN,[87] MERCOSUR[88] and others. The question

12 June 2014) and www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/Investment_agreement_for_the_CCIA.pdf (last visited 12 June 2014). On the features of the CCIA may we refer the reader to F. Seatzu, P. Vargiu, 'Africanizing BITs ('BITS'): Some Case Studies and Future Prospects of a Pro-Active African Approach to International Investment', 2 *State Practice and International Law Journal* (forthcoming 2014); P. Muchlinski, 'The COMESA Common Investment Area: Substantive Standards and Procedural Problems in Dispute Settlement', SOAS School of Law Research Paper No. 11/2010, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1698209 (last visited 9 June 2014). Another example is represented by the SADC Tribunal, which was established in 1992 by Art. 9 of the SADC Treaty as one of the institutions of the Southern African Development Community ('SADC') with the mandate to adjudicate upon disputes arising out of the interpretation and the application of the SADC Treaty and 'give advisory opinions on such matters as the SADC Summit or the SADC Council may refer to it', in the aim of consolidating regional integration within the SADC area. At the moment, the SADC Tribunal has been put on hiatus until a new Protocol is adopted. However, the decision on the new Protocol has been postponed indefinitely. See for further reference the SADC Tribunal website at www.sadc-tribunal.org/ (last visited 9 June 2014); K. Daele, M. de Reya, 'The unfinished work of foreign investment protection in Africa', http://kluwerarbitrationblog.com/blog/2013/02/22/the-unfinished-work-of-foreign-investment-protection-in-africa/ (last visited 9 June 2014); O. Ruppel, F. Bangamwabo, 'The SADC Tribunal: a legal analysis of its mandate and role in regional integration', 8 Monitoring Regional Integration in Southern Africa Yearbook 179 (2008); L. Nathan, 'Solidarity triumphs over democracy – the dissolution of the SADC Tribunal', *Development Dialogue*, December 2011, http://repository.up.ac.za/bitstream/handle/2263/19451/Nathan_Solidarity%282011%29.pdf?sequence=1 (last visited 9 June 2014).

85 North American Free Trade Agreement, https://www.nafta-sec-alena.org/ (last visited 10 June 2014). See for further reference D. Price, 'Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement', 27 *Int'l L.* 727 (1993); G. Sandrino, 'The Nafta Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective', 27 *Vand. J. Transnat'l L.* 259 (1994).

86 Dominican Republic-Central America-United States Free Trade Agreement, www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta (last visited 10 June 2014). See for further reference R. Edsall, 'Indirect Expropriation under NAFTA and DR-CAFTA: Potential Inconsistencies in the Treatment of State Public Welfare Regulations', 86 *B.U. L. Rev.* 931 (2006); M. Muse-Fisher, 'CAFTA-DR and the Iterative Process of BIT Making: Towards a United States Takings Framework for Analyzing International Expropriation Claims', 19 *Pac. McGeorge Global Bus. & Dev. L.J.* 495 (2006); J. Cook, 'The Evolution of Investment-State Dispute Resolution in NAFTA and CAFTA: Wild West to World Order', 34 *Pepp. L. Rev.* 1085 (2006-2007); V. Wang, 'Investor Protection or Environmental Protection – Green Development under CAFTA', 32 *Colum. J. Envtl. L.* 251 (2007).

87 ASEAN Comprehensive Investment Agreement, www.asean.org/images/2013/economic/aia/ACIA_Final_Text_26%20Feb%202009.pdf (last visited 10 June 2014). See for further reeference N. Freeman, 'ASEAN investment area: progress and challenges', in M. Than (ed.), *ASEAN beyond the regional crisis: challenges and initiatives* (Singapore: ISEAS, 2001), p. 80.

88 Protocol of Colonia for the Promotion and Reciprocal Protection of Investments in MERCOSUR, www.mercosur.int/msweb/Normas/normas_web/Decisiones/PT/CMC_1993_DEC_011_PT_Protocolo-Col%C3%B4niaInvestimentosMCS.PDF (last visited 10 June 2014). For further reference see M. Footer, 'Bits and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment', 18 *Mich. St. J. Int'l L.* 33 (2009-2010); G. Gari, 'Free Circulation of Services in MERCOSUR: A Pending Task', 10 *Law & Bus. Rev. Am.* 545 (2004); R. Bouzas, 'Compensating Asymmetries in Regional Integration Agreements: Lessons from Mercosur', in P. Giordano, F. Lanzafame, J. Meyer-Stamer (eds.), *Asymmetries in regional integration and local development* (Inter-American Development Bank, 2005), p. 86.

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is now what should be the main features of a sub-regional agreement for the promotion and protection of foreign investment among Sub-Saharan countries.

In the previous sections of this article we have identified four main aspects that should constitute the objectives of such an agreement, namely *i)* the re-establishment of sovereignty over the natural resources of the host State, *ii)* the avoidance of competition among member States to attract foreign investment, *iii)* a system of sharing the benefits of the inflow of foreign capital in the region and *iv)* either the possibility to negotiate investment agreements collectively with third countries or the establishment of a common standpoint from which to negotiate BITs with other States. The issue of sovereignty over natural resources is, besides one shared by many developing countries in different areas of the world, possibly the one that would present the biggest challenges. As previously mentioned, the current system of bilateral treaties between Sub-Saharan countries and capital-exporting States has led to a dramatic increase in the size of land 'grabbed' by foreign investors. This not only contradicts the objective of permanent sovereignty over natural resources that many developing countries expressed in the 1970s in the UN forum: it actually shows that such objective has been sacrificed on the altar of the quest for foreign capital. Sub-Saharan States need therefore a new investment treaty policy which tackles the progressive erosion of their sovereignty over their own natural resources. The objectives at points *ii)*, *iii)* and *iv)* above are very much interconnected. There is simply no hope to avoid competition for foreign investment and to share the benefits of investment in the region without a collective system of treaty negotiation and drafting or at least the arrangement of a common framework according to which such States shall negotiate BITs with capital exporting countries.

A regional investment treaty to involve Sub-Saharan countries should therefore depart from many of the features that are ultimately integrate in the current doctrine of international investment protection, to the point that one may say that they actually constitute the core of modern international investment law. What we advocate is a regional agreement which addresses the issue of investment promotion and protection both internally and externally. As per the effect of this regional treaty on the relationships between its member States and third countries (especially capital-exporting countries), the discussion needs to take into account both the afore-mentioned failures of bilateralism with regard to the economic development of the host States, as well as the interest of capital-exporting States to keep negotiating BITs rather than multilateral investment treaties with all the States of a region.[89] However, preferences in negotiating BITs or multilateral treaties are more often than not based on political rather than legal reasons, and it is quite hard to predict whether the suggestions we make in this paper could potentially form the basis for a bilateral or a

89 J. Tobin, M. Busch, 'A BIT is Better than a Lot: BITs and Preferential Trade Agreements', 62(1) *World Politics* 1 (2010) at p. 4.

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multilateral instrument. Therefore, the considerations that follow are aimed at underscoring the objectives that a sub-regional instrument for the promotion and protection of investment in Sub Saharan Africa should try and reach, rather than the type of instrument (or instruments) that should be used to pursue such objectives.

Within the signatory States, the main goals of the treaty would be the avoidance of the competition among State in the same region for foreign capital inflow and reaching a situation in which the benefits of such inflow are shared among the member States by means of promoting the attractiveness of Sub Saharan Africa as an investment area and reinforcing the economic activities in the area, rather than merely enjoyed by the state hosting the investment to the exclusion of others.

To do so, the doctrine of variable geometry seems to be a viable instrument to achieve these goals in the Sub Saharan investment environment. As stated beforehand,[90] the principle of variable geometry is aimed at ensuring the implementation of treaties among States at different levels of economic development and characterised by different forms of administrative, legislative and judicial systems. In the case of Sub Saharan countries, the principle of variable geometry should particularly inform the fair and equitable treatment, the national treatment and the most favourable nation treatment standards.

The fair and equitable treatment, consistent with customary international law, should be accorded to investors from member States and their investments. However, the treaty should also recognise the fact that, due to the differences among the member States, not every state would be able to reach the same standard immediately. The national treatment and the most favoured nation treatment standard would also be applied to investors from member States with respect, as per the usual formulas, to the establishment, acquisition, expansion, management, operation and disposition of the investment.[91] However, member States should be able to temporarily exclude certain industries from the application of the standards in order to make such industries competitive in the area, or to adopt the necessary measures to ensure to gain benefit from competition between national and foreign companies in the same industries. In time, this flexible regime should create a favourable environment for the economic development of the member States, as there would be a shared benefit system from which gains would go to both investors and host States. Investors, on

90 See *above*, Section 17.4.

91 See a.o. D. Wallace, D. Bailey, 'The Inevitability of National Treatment of Foreign Direct Investment with Increasingly Few and Narrow Exceptions', 31 *Cornell Int'l L. J.* 615 (1998); R. Dolzer, C. Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2012), pp. 198 ff. and 206 ff; T. Gazzini, A. Tanzi, 'Handle with Care: Umbrella Clauses and MFN Treatment in Investment Arbitration', 14(6) *Journal of World Investment and Trade* 978 (2013); M. Paparinskis, 'MFN Clauses and International Dispute Settlement: moving beyond Maffezini and Plama?', 26(2) *ICSID Review – FILJ* 14 (2011); Z. Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation off the Rails', 2(1) *Journal of International Dispute Settlement* 97 (2011); A. Ziegler, 'The Nascent International Law on Most-Favoured-Nation (MFN) Clauses in BITs (BITs)', 1 *European Yearbook of International Economic Law* 77 (2010).

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one hand, would be protected by the treaty when investing in other member States, much alike to what happens under the umbrella of a BIT. Host States, on the other hand, would benefit from capitals from neighbouring States, would be able to offer protection to their own nationals when investing in such member States and would not see their own economy exploited by foreign investors as the protection awarded to aliens would be subject to exceptions and delays while their development level reaches that of the other member States.

With respect to the interactions with third countries, the departure from some common aspects of international investment law would be even more radical that what we advocated with regard to the intra-treaty relationships. First of all, it is doubtful that the application of the national treatment and most favoured nation treatment standards without any exception to protect the economies of the Sub Saharan States would be any beneficial, especially in light of the effect that these standards as incorporated in BITs have had on the host States' control over their natural resources under the BITs regime.[92] Therefore, such standards should also see exceptions with regard to certain industries (in particular the agricultural one to tackle the phenomenon of land-grabbing) and flexible deadlines and time-frames to allow protection for the nationals of the host State *vis-à-vis* competitors from capital-exporting countries.

Second, the provisions on expropriation should eliminate any reference to non-discrimination. While non-discrimination is traditionally seen as a condition for the legality of an expropriation, nothing in international law prevents parties from excluding such requirement from a treaty provision on expropriation – indeed, that is exactly what has been done with the SADC Model BIT Template.[93] As stated in the Commentary to the SADC Model BIT, 'in many instances, expropriations are specific and targeted, and thus in a strict legal sense could be defined as being discriminatory by their very nature.'[94] Expropriation is and remains not only legal, but a very common occurrence in investment relationships.[95] Nonetheless, it has to be pointed out that there is no requirement under international law that a State treats all aliens equally among themselves or as favourably as their own nationals.[96] Therefore, the problem posed by the omission of the requirement of non-discrimination (and, to a lesser extent, by the relaxation of the national treatment

92 See *above*, Section 17.3.

93 Southern African Development Community (SADC) Model BIT Template with Commentary, Art. 6, www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf (last visited 14 June 2014); see for further reference F. Seatzu, P. Vargiu, 'Africanizing BITs ('BITS'): Some Case Studies and Future Prospects of a Pro-Active African Approach to International Investment', 2 *State Practice and International Law Journal.*

94 SADC Model BIT Template with Commentary, *above* n. 93 at p. 25.

95 See above, Section 17.3.

96 *Alex Genin, Eastern Credit Limited, INC. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, Para. 368. See *amplius* P. Vargiu, 'Environmental Expropriation in International Investment Law', *above* n. 62 at p. 215.

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and MFN standards) would not necessarily be a legal one – in fact, it would be mostly a matter of political relevance in the negotiation of new investment agreements.

Another issue on which some degree of flexibility should be demanded and obtain by Sub Saharan countries in order to make foreign investment a viable instrument for their economic development is that of transfer of funds. Our suggestion is that the host State shall accord investors the right to freely repatriate the capital invested and the investment returns, the funds for repayment of loans, any compensation from expropriation and the necessary funds to maintain or develop the investment. However, the host State should also retain the right to take temporary measures to block or delay such transfers when the investor's capital movements significantly affect the State's finances or monetary and exchange policy.

Finally, the issue of transparency needs to be addressed. New recent Model BITs address the question of transparency in relation to domestic law, provision of information, corporate governance, contracts and payments. Therefore, recommending to insert provisions aimed at protecting the investor in this perspective might seem *prima facie* as simply suggesting Sub Saharan States to draft new instruments which are state-of-the-art from the point of view of transparency and accessibility of information. However, we intend to stress how these provisions would be even more significantly needed in an instrument that is drafted along the lines we suggested here above. Indeed, departing from the common features of international investment law to basically reduce the safeguards for investors, sacrificing them on the altar of State sovereignty and regaining a form of control over the territory that has never been the focus of investment treaties makes unquestionably crucial to offer investors the absolute clarity and transparency on whatever measure will be taken that may affect their activity in the host State. What we advocate, in situations in which the common standards of treatment may be adopted in a 'softer' version, expropriations may be discriminatory and transfers may be delayed in the sole interest of the host State is a conversely very high level of transparency, in order to give investors as much predictability as possible with regard to their investment.

17.6 Concluding Remarks

The issues addressed in this article with regard to the consequence of the BIT policy of Sub-Saharan countries can hardly be considered as solely legal ones. It could indeed be argued that BITs have only been the most efficient instrument for investors from capital exporting countries to take advantage of the weak politics and even weaker economies of former colonies around the world, with the most dramatic effects in terms of external control over States' territories in Africa. Considerations of social, cultural, economical and political nature necessarily inform, together with the legal aspects, any discussion on issues

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of sovereignty over natural resources. In this scenario, law is – as it is its fundamental nature – nothing more than a technique; a technique used, one may say, to re-introduce features of the colonial period into a post-colonial scenario.

Nevertheless, while the law (more specifically, in our case, BITs) is part of the problem, it is also part of the solution. As we advocated in this article, international law can and should be used as an instrument for Sub Saharan countries to regain a certain degree of control over their natural resources and ensure that inflows of foreign capital in the form of investment become truly instrumental to their own economic development rather than merely a mechanism for alien companies to make profit, which will almost solely benefit the economies of their States of nationality. As stated beforehand, bilateral treaties may or may not be the most viable tools for Sub Saharan States to regain control over their natural resources and establish an equality-based relationship with foreign investors. The type of instrument used for this goal, however, is hardly the issue. The point of our article is rather to suggest a shift in culture in Sub Saharan States in particular and, possibly, developing countries in general. The main scope of such a shift would be moving from the passive acceptance of international investment law as designed by Western capital-exporting States to a proactive approach able to shape investment law, or at least the law on investment protection applicable to them, according to their developmental needs.

This issue, as it has been shown in this article, is one that Sub-Saharan States should be very concerned about. Adhering to a system, such as the investment law one, which has largely been designed by capital-exporting States, has led to the perpetuation – and possibly worsening, at least from an economic standpoint – of the same economic constraints proper of the colonial period, with Western companies taking the place of the former colonial powers. This is not really likely to change unless African States take charge and become active subjects of international investment law, starting with trying to shape the law in order to reach their own objectives, acting together towards these objectives, and accepting the risk of losing some investors for the greater good of keeping control and sovereignty over their own natural resources – as it was already the goal forty years ago.