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Global Reform vs Regional Emancipation: The Principles on International Investment for Sustainable Development in Africa

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International investment law has been weathering contestation since its inception. It suffices to recall the opposition of capital-importing states to the idea of an international minimum standard expressed in the famous Calvo Doctrine rejecting the standards of compensations for expropriation. Contestation also flared with the rejection of an obligation to provide compensation for the expropriation of foreigners that accompanied the Declaration on the Establishment of the New International Economic Order. In that sense, contestation has always been part of investment law practice and discourses. Nowadays, such continuous defiance is even voiced by various actors in capital-exporting states. After all, one of the most publicized instances of criticism came from Europe on the occasion of the TTIP and CETA negotiations[1] – criticism that arguably resulted in the EU Commission's proposal of an investment court system.

As illustrated by these examples, it seems possible to distil two main modes of contestation. On the one hand, contestation can be directed at a reform of the universal investment protection regime as a whole and the adjustment of its rules. This is what is called here *global reform*. On the other hand, contestation has manifested in attempts of certain countries or regions to emancipate themselves from the universal regime with a view to establishing a distinct regional or national practice. This is what is called here *regional emancipation*. It must be acknowledged that it is not always possible to

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[1] European Commission, 'Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement', 13 January 2015 <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf> accessed 20 January 2017, 14.

distinguish neatly between these two modes of contestation as the challenges of the international investment protection regime may simultaneously borrow from both. Yet, the distinction bears some didactic and cognitive virtues which justify its use in the following paragraphs. In particular, the distinction helps introduce (and delineate the breath of) a remarkable initiative that has been overlooked by the investment law community, namely the adoption by the African Society of International Law (hereafter the 'AfSIL') of the Principles on International Investment for Sustainable Development in Africa (hereafter the 'AfSIL Principles') on 29 October 2016. It is the ambition of this Reflection to discuss and situate the specific mode of contestation of the international investment regime espoused by the AfSIL.

The AfSIL Principles boil down to a series of recommendations on international investment law that call for a recalibration of the ways in which international investment law is applied to the African continent. It is submitted here that the AfSIL Principles constitute an emancipatory form of contestation, whereby the application of the rules of international investment law is tailored to serve political projects valued highly by the ASIL while falling short of the ambition to revamp the universal investment protection regime.

The following observations shed light on the extent of the emancipation from the international investment protection regime contemplated by AfSIL and situate them against the backdrop of some recent contestations of international investment law. After recalling the drafting history of the AfSIL Principles (1) and some concurrent recent contestations (2), the attention turns to the content and possible adjustment to the international investment protection regime vindicated by AfSIL (3). This short essay ends with a few concluding remarks on the choice for an emancipatory mode of contestation rather than a reformist type thereof (4).

A preliminary caveat is necessary regarding the formal status of both the rules being the object of the contestations discussed here and the means through which contestation is articulated. It is important to emphasize that the contestations of the investment protection regime are discussed in the following paragraphs irrespective of the possible customary or conventional nature of the standards being contested or that of the measures through which the contestation is raised. Looking at the contestations of the international investment protection regime from the vantage point of the sources of international law is a project for another day.[2]

[2] It must also be stressed that although it evolved towards a very conventional regime in the second half of the 20th century, international investment law continues to accommodate customary law, thereby making the distinction between conventional investment law and customary investment law very porous. On the place of customary law in international investment law, see J. d'Aspremont, "International Customary Investment Law: Story of a Paradox" in E. de Brabandere and T. Gazzini (eds), *Sources of Transnational Investment Law* (Nijhoff, 2012), 5-47.

1. The adoption of the AfSIL Principles

In 2015 the AfSIL set up a high level task force to reflect on recent investment practices within the African continent and prepare recommendations on investment law in Africa. The task force was composed of five renowned international legal scholars who had been advisors to African governments in investment disputes as well as arbitrators. At the 5th Annual Conference of the AfSIL held in Accra-Ghana in October 2016, the high level task force presented a set of fifteen recommendations to AfSIL's Executive Board. Therefore, on 29 October 2016 at the conclusion of its 5th Annual Conference, the AfSIL General Assembly adopted carefully drafted recommendations enunciating some common ambitions of African countries in their approach to investment on the African continent, i.e. the so-called AfSIL Principles.

2. The AfSIL Principles and concurrent contestations of the investment protection regime

Needless to say that the AfSIL Principles have not been adopted in a vacuum and must be examined against the backdrop of a complex and overlapping web of bilateral, regional and global investment instruments. Looking at the sheer number of instruments designed to influence investment policy in Africa, it becomes clear that the continent is increasingly active in formulating its own preferences regarding investment policy and protection.[3] This is why, before turning the attention to the contents of the AfSIL Principles, the attention should turn to a few concurrent contestations of the international investment protection regime with a view to situating the AfSIL Principles and highlighting the specificities of the emancipation they envisage.

UNCTAD's Investment Policy Framework for Sustainable Development

Before examining domestic and African efforts to reform the international investment protection regime, the global reform envisaged under UNCTAD's Investment Policy Framework for Sustainable Development (hereafter the 'UNCTAD Framework') should be mentioned. This is particularly warranted since the UNCTAD Framework served as an inspiration for the AfSIL Principles, which its preamble demonstrates.

The UNCTAD Framework was launched in 2012, and updated in 2015, to address the challenge of implementing sustainable development objectives through investment policy at the national and international levels.[4] Placing emphasis on but not confined to

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[3] M Mbengue, 'The quest for a Pan-African Investment Code to promote sustainable development', International Centre for Trade and Sustainable Development, 21 June 2016 <www.ictsd.org/bridges-news/bridges-africa/news/the-quest-for-a-pan-african-investment-code-to-promote-sustainable> last accessed 20 January 2017; F Seatzu and P Vargiu, 'Africanizing Bilateral Investment Treaties ('BITs'): Some case studies and future prospects of a Pro-active African Approach to International Investment' (2015) 30 Connecticut Journal of International Law 143.

[4] UNCTAD, *World Investment Report (WIR) 2012* <http://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf> accessed 7 February 2017, 97; UNCTAD WIR 2016 <http://unctad.org/en/PublicationChapters/wir2016ch2_en.pdf>, accessed 20 January 2017, 108.

developing countries' needs, it represents a comprehensive expert guidance detailing different policy options for policymakers and negotiators.[5] The expressed aim of the Framework at the international level is to encourage "sustainable-development-friendly [International Investment Agreements]".[6] This broad objective is broken down into ten core principles, one example being "balanced rights and obligations" for states and investors.[7] Subsequently, corresponding policy options are deduced. Regarding investor obligations, for example, these range from the non-inclusion of any obligations to clauses that deny investors treaty protection under certain circumstances.[8] It is noteworthy, for the sake of argument made here, that the UNCTAD Framework enables both global reform and regional emancipation. Indeed, it aims at ensuring that investment policy worldwide fosters sustainable development on the one hand. It simultaneously allows states to cherry-pick among a wide variety of options and tailor investment policy to their individual needs on the other hand. In this sense, the UNCTAD Framework can be construed as a tool allowing both global reform and regional emancipation.

South Africa's National Investment Policy

South Africa is traditionally among the top recipient countries of foreign investment in Africa.[9] In a move unexpected by many commentators, it chose to shift investment protection from the international to the national sphere by passing the Investment Protection Act (IPA), enacted in December 2015.[10] According to the IPA, foreign investors do not enjoy any access to international arbitration. Instead their protection is, apart from inter-state arbitration, "nationalized": investors can either refer a dispute to a single mediator or to the domestic courts. Substantively, the Act contains several typical investor and investment protections but aligns them with South Africa's laws and its constitution which translates to a narrower protection, most notably with regard to expropriation. The Act applies to foreign and domestic investors alike.

The enactment of the IPA was the culmination of a policy review process initiated in 2008. One of the central reasons for South Africa's policy shift was the clash of substantial investor protection as enshrined in BITs with its Black Economic Empowerment programme. The conflict between domestic law and international obligations had until then largely gone unnoticed. One of the reasons was that many BITs, especially those with European countries, were signed from 1994 onwards, even before the South African constitution came into force in 1997.

[5] UNCTAD, *Investment Policy Framework for Sustainable Development* <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1437> accessed 7 February 2017, 25.
[6] Ibid 77.
[7] Ibid 30.
[8] Ibid 109f.
[9] UNCTAD WIR 2015 <http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf> accessed 20 January 2017, 32; but significant decrease of foreign direct investment inflows to South Africa in 2016, UNCTAD WIR 2016, 40, 41.
[10] Act No. 22 of 2015: Protection of Investment Act, 2015 <https://www.thedti.gov.za/gazzettes/39514.pdf> accessed 20 January 2017.

In *Foresti v South Africa*, one of two notable arbitration cases against South Africa, this clash was exemplified. The dispute was filed under the Belgium-Luxemburg – South Africa BIT in 2006 following the enactment of a new mining and drilling law in 2002, which was designed to, inter alia, "substantially and meaningfully expand opportunities for historically disadvantaged persons…to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources".[11] The investor company claimed it was expropriated by the law which converted private ownership of mineral resources into state ownership accompanied by a licensing system through which the previous owners could apply for so-called "new order rights".[12] The law also required that at least 26 per cent of the ownership stake in the applying enterprise must be held by black South Africans. The case was eventually settled at the expense of South Africa as the company was not required to fully meet the ownership stake requirements (5% instead of 26%).[13]

The *Foresti* case constituted one of the main drivers for the ensuing investment policy review process. Indeed, the South African government decided not to renew or renegotiate but to terminate numerous elapsing BITs.[14] The government also decided to refrain from entering into future BITs and instead to develop a domestic framework for investment protection with the enactment of the Investment Protection Act. By doing away with international standards of foreign investment protection both procedurally and substantively, South Africa sends out a signal that the best way to ensure a balance between foreign investment protection and the host state's policy interests is to prioritize national (constitutional) law. Until now, no other (African) country seems to have chosen a similar path. This reform, albeit solely focused on the national sphere, represents a specific attempt of emancipation from the global investment protection regime that falls short of any amendment of the latter.

Regional and continent-wide investment peculiarities: SADC Model BIT 2012 and the Draft Pan-African Investment Code

Germane examples for a less radical emancipatory approach are found in the 2012 South African Development Community (SADC) Model BIT as well as in the 2015 Draft Pan-African Investment Code (PAIC).[15] SADC is one of the 14 regional economic communities that coexist in Africa. In this elaborate web, the vast majority of African

[11] Art 2 (d) Mineral and Petroleum Resources Development Act No 28 of 2002.
[12] *Piero Foresti, Laura de Carli and others v Republic of South Africa*, ICSID Case No ARB(AF)/07/1 (4 August 2010) para 59.
[13] EC Schlemmer, 'An Overview of South Africa's Bilateral Investment Treaties and Investment Policy' (2016) 31 ICSID Review 167, 186.
[14] Cf UNCTAD Investment Policy Hub, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/195> and Schlemmer EC, 'An Overview of South Africa's Bilateral Investment Treaties and Investment Policy' (2016) 31 ICSID Review 167, 189.
[15] SADC Model Bilateral Investment Treaty Template with Commentary, <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf> accessed 20 January 2017; Draft Pan-African Investment Code, <http://repository.uneca.org/handle/1 0855/23009> accessed 20 January 2017.

countries retain at least dual membership[16] while most of these regional economic communities have issued instruments regarding the regulation of foreign investment.

The SADC Model BIT of 2012 is one of the most prominent regional economic instruments. Drafted by representatives from nine of SADC's 15 member states with technical support from the International Institute for Sustainable Development (IISD),[17] the SADC template is not a legally binding document. It is intended to serve as a tool that provides a coherent option to SADC Member states in future investment treaty negotiations. For this reason, the Model BIT does not opt for specific policy decisions but presents different choices for each element of an investment treaty. Among the options presented, however, the treaty template indicates clear preferences.

Drafted by independent African experts and reviewed by African Union (hereafter the 'AU') experts, the legal status of the PAIC is still unclear. It is formulated as a binding treaty and as such would need to be signed and ratified by the AU member states in order to enter into force. Moreover, it would complicate its relationship to existing investment treaties, although the PAIC addresses this issue in Article 2. It might, not unlike the SADC Model BIT, remain a draft and, therefore, serve as a treaty template.

A central innovative feature of both instruments is the strong emphasis on the linkage between investment and sustainable development. For instance, Article 1 of the SADC Model BIT provides:

> *The Main objective of this Agreement is to encourage and increase investments ... that support the sustainable development of each Party, and in particular the Host State where an investment is to be located.*

Article 1 of the PAIC provides for a similar objective. In both instruments, the focus on sustainable development serves as a benchmark for streamlining all other draft provisions. Differences between the two may be found in nuances: Regarding investor-state dispute settlement (ISDS), for example, the drafters of the SADC Model BIT advise treaty negotiators to not include any ISDS provisions in future investment treaties.[18] This recommendation, however, is followed by an acknowledgement that states might decide otherwise and draft ISDS provisions are presented which, inter alia, include the obligation to exhaust local remedies. In the PAIC, ISDS is included without any particular reservation but it codifies the exhaustion of local remedies and places an emphasis on an African seat of arbitration.[19] Both instruments include numerous

[16] M Mbengue, The quest for a Pan-African Investment Code to promote sustainable development, 21 June 2016, < http://www.ictsd.org/bridges-news/bridges-africa/news/the-quest-for-a-pan-african-investment-code-to-promote-sustainable>.
[17] SADC, 'SADC Model Bilateral Investment Treaty Template with Commentary', July 2012 <http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf> accessed 20 January 2017, 3.
[18] Art 29 'Special Note' SADC Model BIT.
[19] Art 42 PAIC.

provisions regarding investor obligations enforceable via counterclaims and stress the host state's right to regulate.[20]

The PAIC and the SADC Model BIT both reject the traditional approach of BITs popular in the 1990s and in the 2000s. At the same time, they represent an earlier emancipatory attempt by African countries to tailor investment protection to the overall objective of sustainable development. The primary addressees of the two instruments are in SADC's case a regional sub-group of African states and in the PAIC's case the AU member states. Consequently, they can be seen as "an attempt by African countries to shape an international investment treaty according to their own priorities".[21]

3. The AfSIL Principles as a mild regional emancipation from the investment protection regime

As mentioned above, reformist projects can be of two kinds. Such projects aim to reform the universal regime as a whole or seek to provide for some regional adjustment. The AfSIL Principles dispels some ambiguity in this respect. The Principles claim from the outset that their ambition is to soften the universal regime as it is applied to the African continent but not to reform it universally.

It is worth noting that the emancipatory contestation of the AfSIL Principles is not carried out through formal channels. First, the Principles are not legally binding. They are not drafted in treaty language but rather in the form of a declaration. As such, they are meant to complement the previously presented instruments by formulating the underlying rationales in a more abstract and general way.

Given their non-binding nature, the value of these principles must be found elsewhere. They do not as such derogate from any existing rule of investment law but seek to contribute to a specific interpretation thereof that is more attuned to what is perceived as the needs, priorities and agendas of the African continent. In that sense, they constitute an intervention by the AfSIL to steer the making and the interpretation of the rules of the international investment regime in a way that is deemed more favourable to the dominant agenda of Africa.

The principles are not only meant to inform authoritative interpretation of the current investment regime. They also seek to guide African states in the ongoing negotiations of bilateral and multilateral investment treaties. As noted by H.E. Marietta Brew Appiah-Oppong, the Attorney General and Minister of Justice of Ghana, at the 5th annual conference of AfSIL, the adoption of the Principles marks an important milestone and "will undoubtedly serve as a useful guide for investment negotiations in the continent".

Although many of the AfSIL Principles are not norm-creating, the ways in which the AfSIL Principles substantially depart from the common investment protection regime can be summarized as follows. Even the title "2016 AFSIL Principles on International

[20] Arts 10-19 SADC Model BIT; Arts 19-24, 43 PAIC.
[21] Mbengue.

Investment for Sustainable Development in Africa" indicates that sustainable development goals and the interests of the host states should play a central role – this focus fits squarely within the goals of the SADC Model BIT and the Draft Pan-African Investment Code. Principle 1, according to which "Foreign investment must contribute to the sustainable development of African states", as well as Principles 2 and 3 – linking the right to regulate to the UN's Sustainable Development Goals and calling for the promotion of only such investment that fosters sustainable development – reinforce this commitment.

The overall orientation and concept of the AfSIL is a balanced emancipatory reform effort. This is expressly acknowledged in Principle 5, which reads that "Investment agreements and laws should seek an overall balance of the rights and obligations between states and investors", thereby presuming that no such balance currently exists. In that sense, the AfSIL Principles are more reminiscent of the SADC Model BIT and the PAIC and differ from the South African contestation which prioritizes the host state's interests in a much more radical way. Nonetheless, the AfSIL Principles place a great emphasis on the state's sovereign right to regulate (Principle 2). Interestingly, such expressed reference to this "right"– apart from both previously mentioned instruments – is similarly found in recent investment-related treaties, such as CETA or the EU-Vietnam free trade agreement. Considerable weight is given to investor obligations, with four of the fifteen principles dedicated to this question (Principles 6-10) – again, one of the innovative features of newer-generation investment treaties mirrored in the AfSIL Principles.[22] Remarkably, the Principles mention ISDS only in passing, with Principle 11 calling for dispute settlement mechanisms that are "fair, open and transparent, with appropriate safeguards to prevent abuse". No particular stance is taken on the desirability of ISDS or restrictions to it, which differs to the SADC template or the PAIC.[23]

Another emancipatory feature can be found in the AfSIL Principles' distinction between "states" in general and "African states" when formulating duties and obligations towards them. Such differentiation does not appear either in the SADC template or in the PAIC. In the Principles, some provisions, such as the call for a reliable and transparent regulatory framework for investment and a warning against the lowering of standards to attract investment, are directed at states in general (Principles 4 and 6).[24] Other provisions are expressly directed at African states (Principles 12-15), including, inter alia, the call for cooperation and coordination of investment policies and for strengthening domestic judicial systems. Moreover, these provisions add an African *academic* perspective to the project of investment policy reform: Principles 12 and 13 call for the participation of African lawyers and experts in the drafting of investment agreements and for the inclusion of investment law and policy expertise in academic curricula, respectively.

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[22] Arts 10-19 SADC Model BIT; Arts 19-24, 43 PAIC.
[23] 'Special Note' Art 29 SADC Model BIT; Art 42 PAIC.
[24] These provisions mirror similar ones in the SADC Model BIT and the PAIC: Art 22.2 SADC Model BIT; Art 37 PAIC.

It is expected the AfSIL Principles, irrespective of the absence of formal bindingness and their unpredictable interpretive effects on existing conventional instruments, will prove germane in the continuation of current debates on the investment protection regime, especially in relation to Africa. This is so, even if African states do not have the same weight in the global investment landscape.[25] Indeed, while one of the goals of AfSIL Principles is to promote harmonization of investment policies and legislation within the continent, they simultaneously capture and formalize the aspiration of many African countries to regionally shape the investment regime, according to their needs and priorities, and constitute another step towards a greater assertiveness of African states in negotiations and drafting of future investment treaties.

4. Concluding remarks: regional emancipation rather than global reform

Contestation of the international investment protection regime seems ubiquitous nowadays. As noted earlier, contestation is also heard in capital-exporting states. It even seems to have become a defining practice in international investment law as a whole. It must be acknowledged that contestations, while being located in both the Global North and the Global South, seem more genuine and earnest when they emanate from the latter.[26] This is confirmed by the African contestation that has been discussed here. Indeed, however moderate the emancipation envisaged by AfSIL's may be, it appears much more resolute and considerate than the fashionable dissent also heard in the Global North.

It has been submitted here that contemporary contestations of the investment protection regime can manifest in attempts to reform the global regime as a whole or quests for more regional autonomy, some contestations borrowing from both modes without making a neat distinction. It has been argued that the mode of contestation chosen by the AfSIL, as discussed above, has favoured regional emancipation over global reform. This specific mode of contestation obviously has its merits. At least it seems to reinforce an African identity of some sort while not alienating the major capital-exporting states. This choice simultaneously vindicates the hope of an investment protection regime that is tailored to regional sensibilities and specificities. It remains that the choice for regional emancipation, instead of a global reform, inevitably comes down to a choice by some leading international lawyers of the African Continent about how capital flows, how interventions into global inequalities should be designed, and how environmental degradation of the planet should be prevented. Whether this is the best choice for prosperity, distributive justice and environmental protection does not need to be discussed here. The architects of the AfSIL Principles know too well that both global

[25] UNCTAD WIR 2016, 39ff.

[26] Cf the renunciation of the ICSID Convention and numerous BITs by Bolivia, Venezuela and Ecuador and the attempts to create regional institutions, KF Gomez, 'Latin America and ICSID: David versus Goliath?', 12 November 2010, SSRN Paper https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1708325 accessed 20 January 2017; KF Gomez and C Titi, 'UNASUR Centre for the Settlement of Investment Disputes: Comments on the Draft Constitutive Agreement' (2016) 7 (3) Investment Treaty News Quarterly. Cf also the South African investment reform presented above.

reform and regional emancipation have their distinct costs. They should be credited for standing up for what they believe to be good for Africa and the environment. The debate will go on. And so will the contestation of the international investment protection regime.