

STRIKING THE RIGHT BALANCE BETWEEN THE INTERESTS OF THE FOREIGN INVESTORS AND THE HOST STATE – A CASE STUDY OF THE TANZANIA-GERMANY BIT 50 YEARS AFTER ITS CONCLUSION

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I. INTRODUCTION

The Treaty between the Federal Republic of Germany and the United Republic of Tanzania concerning the Encouragement and Reciprocal Protection of Investments signed on 30 January 1965 is one of the oldest bilateral investment treaties (BITs) concluded by African countries that is still in force. Much has happened since then, not only in terms of historical events but also with regard to the trends in international investment law, such as the establishment of international investor–state dispute resolution mechanisms, the mushrooming of BITs in the 1990s, the recent developments in the European Union’s (EU) take on foreign investment policy, as well as the push towards regional integration, in which both countries – Tanzania as a member of the East African Community (EAC) and Germany as a member of the EU – are involved. It is thus worth examining whether the Tanzania-Germany BIT still adequately addresses the interests of investors and the host state in spite of stemming from a different epoch. Such an inquiry also provides for insights into the current discussions on the assets and drawbacks of BITs concluded by African countries; in this regard the Tanzania-Germany BIT can serve as a useful lens.

After presenting the historical context of the conclusion of the Tanzania-Germany BIT and its major characteristics, this article gives account of the criticism put forward by African scholars with regard to BITs and foreign investment in general. Based on this account and taking the provisions of the Tanzania-Germany BIT as a case study, the third part reviews specific and general claims as to the conclusion and the content of BITs. In the fourth part, the Tanzania-Germany BIT is put in a broader perspective of the EU’s policy

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regarding foreign direct investment (FDI) for which the Treaty of Lisbon of 2009 established a new competence title.

II. THE TANZANIA-GERMANY BIT OF 1965

A. Historical Context

The Tanzania-Germany BIT is the first of the very few BITs concluded before the fundamental policy shift initiated by the Arusha declaration of 1967.¹ It is also the only BIT from that period which is still in force.² In those years, the government of Tanzania sought to avoid an exodus of investors from a newly independent country and encourage new investments,³ as they were regarded as an important factor in the country's development, in particular in the development of its private sector.⁴ The German government wanted to create a political counterweight to the emerging relations between Tanzania and the GDR (East Germany).⁵ Although the Tanzanian government was still willing to attract private investors even in the post-Arusha declaration period,⁶ private investment was no longer considered crucial. The government of Tanzania started pursuing policies of socialism and self-reliance which were to be achieved by the state-steered economy. Accordingly, private businesses were nationalised and parastatal enterprises were established. The takeovers continued until the early 1970s and were effectuated against compensations,⁷ the payments of which, though, gave rise to only minor disputes.⁸

It was only in the 1980s, after the collapse of the socialist economic model and due to the pressure from the World Bank, that Tanzania reoriented its policies to the benefit of the private sector. Encouraging foreign investment was again on the political agenda and so were new BITs. The reform programmes tabled by the Tanzanian government at that time were based on the assumption that the inflow of external resources was necessary for economic recovery.⁹ From the Tanzanian perspective, the BITs concluded in the 1990s were also aiming at the restoration

1 The state now known as the United Republic of Tanzania was created in 1964 as a result of the union agreed upon between Tanganyika which became independent in 1961 and Zanzibar.

2 The BIT with the USA was concluded in 1963 by the government of Tanganyika, but it was only of a rudimentary character, as it did not include most of the guarantees which BITs normally include. The other two BITs signed at that time – one with Switzerland in 1965 and the other with the Netherlands in 1970 – were replaced by the BITs signed in 2004 and 2001 respectively. The older BITs are reproduced in Ch. Maina Peter, *Foreign Private Investments in Tanzania. A Study of the Legal Framework* (Hartung-Gorre Verlag, 1989), 191 *et seq.* For the more recent BITs see <http://investmentpolicyhub.unctad.org>.

3 Peter, *supra*, note 2, p. 14.

4 E. Kipole, *The Role of BITs in Africa: The Case Study of Tanzania* (University of Dar es Salaam, 2010), p. 38.

5 *Ibid.*, p. 26.

6 Peter, *supra*, note 2, p. 22.

7 Peter, *supra*, note 2, pp. 20–1; also Ch. Maina Peter, *Foreign Investments in Tanzania: The Mainland and Zanzibar* (Friedrich Ebert Stiftung and Department of International Law of the University of Dar es Salaam, 1994), p. 8.

8 Peter, *supra*, note 2, 22.

9 L. Lwambuka and C. K. Mtaki, *Liberal Principles for Tanzania* (Free Market Development Society, 1996), p. 30.

of investors' confidence seriously damaged by the expropriations which followed the Arusha declaration.¹⁰

B. General Characteristics

Unlike the BITs concluded in the 1990s, the Tanzania-Germany BIT does not contain investors' entitlement to bring a case against the host country to an international arbitral tribunal. An arbitral tribunal may be set up only for an inter-state dispute (Article 11). This feature is particularly noteworthy, since Tanzania has quite recently gone through a costly, difficult, and only partially successful arbitration with an investor in the water sector (Biwater Gauff arbitration).¹¹ This arbitration was based on a BIT with the UK and negatively affected the general take on the BITs in Tanzania. Apart from this, all the components of which a BIT is typically made are also contained in the Tanzania-Germany BIT. Accordingly, the fair and equitable treatment (FET) standard must be accorded to investments on the basis of Article 1; Article 2 provides for a national treatment (NT) standard for investments owned by investors of the other contracting party. This formula implies that the NT standard applies only to investments already established, being thus of a 'post-entry' character. The wording of Article 1, which establishes each party's obligation to admit investments only 'in accordance with its own legislation', supports this interpretation; also Article 1 of the attached Protocol being an integral part of the BIT (further referred to as 'Protocol') specifies

¹⁰ Peter, *supra*, note 7, p. 9.

¹¹ *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania* (2008), ICSID Case No. ARB/05/22. Biwater Gauff was a company established to take part in a bid process initiated by the Tanzanian government to remedy the precarious water supply situation in Dar es Salaam. The company leased run-down water supply facilities which were by then owned by a state enterprise; Biwater Gauff was required to operate and upgrade them. However, due to an underestimation of this task, the company's performance was poor. After the attempts to re-negotiate the contract had failed, the government announced the termination of the contract on a press conference without giving a formal notice to the company representatives and held public rallies to mobilise support for this move. The media spectacle thus triggered coincided with the electoral campaign in which the minister in charge of water supply was running for the position of the prime minister. In addition, the Biwater Gauff's VAT relief certificate was revoked. After Biwater Gauff obtained an injunction from an English court barring the owner of the water facilities from terminating the contract, the company management was detained, kept in custody for the whole day and ultimately deported. The company assets and the water supply services were taken over by a newly created state enterprise DAWASCO. The tribunal examined the case under a BIT concluded between Tanzania and the UK. It concluded that the actions taken by the Tanzanian on a cumulative basis constituted an expropriation (para. 519) and the public announcement of terminating the contract also constituted a violation of the FET standard (para. 628). One point not adequately addressed by Tribunal's analysis is whether the expropriation could be justifiable in view of public policy concerns, such as ensuring a reliable water supply. As Allen rightly points out, the threshold established by the Tribunal – the risk of 'sabotage' (para. 514) to the water supply system – is too high. See. D. Allen, "This Business Will Never Hold Water": International Investment Arbitration on Public-Private Water Service Provision – A Comment on *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, p. 25, available at SSRN: <http://ssrn.com/abstract=1540256>. On balance, the Tribunal stated that, the violations notwithstanding, no compensation was due, as the claimant suffered no economic losses (para. 806). However, the costs of the arbitration of which the Tribunal ordered to be shared between the parties (para. 814) constituted a considerable burden to the Tanzanian budget.

that the treaty should apply only to enterprises which have an approved status in conformity with the Tanzanian legislation. In this regard the parties follow a traditional European investment control model,¹² in which the NT standard is not applicable in the pre-entry stage, that is, to the establishment of an investment. A different approach traditionally followed by North American countries was adopted, for example, in the Canada-Tanzania BIT: Article 4 of this treaty expressly provides that the NT standard is to be observed also with respect to the ‘establishment of investment’.

The protection against expropriation is guaranteed in Article 3 of the Tanzania-Germany BIT; there is an obligation to accord ‘full protection and security’ to the investments of either party; the expropriation is allowed only for public benefit and against compensation. The expropriation is defined in Article 3 of the Protocol; it is a rather broad definition including also indirect expropriations to which the Protocol refers as restrictions of property rights tantamount to expropriation. As for the compensation, although different terms are used, one may safely conclude that the standard of the Hull-formula is kept,¹³ as the compensation must also be ‘transferable’; its amount as well as the expropriation itself must be subject to review by ‘due process of law’ (Article 3 section 2). However, according to the Protocol either party may order on the ground of national reconstruction ‘or any other valid reason’ that the compensation payments must be reinvested. Article 3, section 4 provides for a most-favoured-nation treatment (MFN) standard with regard to the matters dealt with in the previous sections of this provision and referred to above; these matters are related to the protection of investments already established. It thus becomes clear that the MFN standard also does not apply at the pre-entry stage.

The BIT further provides for a free transfer of capital and returns (Article 4). It also contains a so-called ‘umbrella clause’¹⁴ for the obligations entered into by one party with investors of another party with regard to investments (Article 7 section 2). The investments protected under the Tanzania-Germany BIT are not limited to direct investments (FDI), but encompass ‘any kind of asset’, also, for example, shares in companies (Article 8 section 1).

The Tanzania-Germany BIT does not ban any performance requirements from foreign investors;¹⁵ accordingly, performance requirements regarding the training of local staff, technology transfer, the purchase of products on the local market (‘local content requirement’) and so on can be incorporated into investment

12 See J. Chaisse, ‘Promises and Pitfalls of the European Union Policy on Foreign Investment – How Will the New EU Competence on FDI Affect the Emerging Global Regime?’ 15 (1) *Journal of International Economic Law* (2012): 51–84, at p. 55.

13 On the Hull-formula see M. Herdogen, *Principles of International Economic Law* (Oxford University Press, 2013), p. 366.

14 On umbrella clauses, see generally R. Dolzer and Ch. Schreuers, *Principles of International Investment Law* (Oxford University Press, 2012), p. 166.

15 This is important to take note of as bans on performance requirements in BITs have been criticised. See A. A. Sinda, *Foreign Direct Investment in Tanzania: Implications of Bilateral Investment Treaties in Promoting Sustainable Development in Tanzania* (University of Pretoria, 2010), p. 77.

agreements. On the other hand, the BIT itself does not establish any duties for investors. In his accompanying letter to the German Ambassador, the Tanzanian Minister of State in the Office of the President expressed his expectation that the German government would 'use its best efforts' to encourage investors to train Tanzanian citizens in the conduct of enterprises.

III. QUESTIONING THE RELEVANCE OF THE BITs – THE TANZANIAN DEBATE ON FOREIGN INVESTMENT

Usually, the sole objective and purpose of a BIT is to promote the flow of foreign investments.¹⁶ From the perspective of a developing country, the conclusion of a BIT rests therefore on an unwritten assumption that once a BIT is in place, investors from the capital-exporting countries will come. The second and even more basic unwritten assumption is the conviction that the inflow of foreign investment has a positive impact on an economy. The following section will address these two assumptions.

On the other hand, the capital-exporting states entering a BIT seek to protect their investors abroad; this simple idea was at the root of the first modern-era BIT concluded between Germany and Pakistan in 1959, six years before Tanzania-Germany BIT.¹⁷

A. Increasing the Inflow of Foreign Investments?

This assumption sounds plausible at first glance, in particular with regard to Africa: small, scattered markets and a weak rule of law record¹⁸ resulting in high risks for investments.¹⁹ The investors strive for some level of security, which is – at least to some extent – offered by BITs. Moreover, the Tanzania-Germany BIT was concluded at a time when the Tanzanian constitution did not provide for the protection of fundamental rights; as Peter points out, it was thus difficult to attract foreign investment without a constitutional guarantee of property rights.²⁰ Yet, as plausible as the link between the BITs and the FDI inflow may appear, it has not been proven to be a matter of empirical evidence. As for Tanzania, there is even some empirical work pointing to the contrary. Accordingly, as observed by Sinda,²¹ the number of projects running with investors from countries not linked to Tanzania by a BIT is no lower than the number investments coming from countries with which a BIT was concluded; it was further observed that although the overall volume of private investment had tripled between 1998 and 2010, the inflow of

16 See Dolzer and Schreuers, *supra*, note 14, p. 26.

17 *Ibid.*, p. 6.

18 Lwambuka and Mtaki writing in 1996 claimed that Tanzania's rule of law record were 'extremely poor' and deplored the prevalence of 'political expediency' over the courts' rulings. See Lwambuka and Mtaki, *supra*, note, 9, p. 55.

19 This is also recognised by a Tanzanian study by Kipole, *supra*, note 4, 28.

20 Peter, *supra*, note 7, p. 4.

21 Sinda, *supra*, note 15, p. 45

FDI remained the same;²² as Kipole claims the inflow of FDI periodically even decreased, while the number of BITs entered into by Tanzania kept increasing.²³ Interviews conducted by the same author with stakeholders of foreign companies resident in Tanzania revealed that roughly one-fifth of the interview partners were not even aware of the existence of a BIT linking Tanzania to their home countries.²⁴ Ninety percent of those who were aware denied the relevance of a BIT for their decision on investment,²⁵ without, however, disavowing the usefulness of the BIT 'as a road map for investors'.²⁶ Quite tellingly, two-thirds of the interviewed Tanzanian government officials claimed that BITs are not effective in terms of attracting foreign investment.²⁷ Those findings largely coincide with the outcomes of studies conducted globally. Having examined no less than 26 studies focusing on the link between the signing of a BIT and the actual increase of investment flows, Bonnitcha came to the conclusion that there is no empirical evidence for the existence of such a link.²⁸

B. Positive Impact of Foreign Investment in the Economy of the Host State?

Various positive impacts of the inflow of investment on the economy of the host state have been acknowledged in scholarly writing as well as in Tanzania, apart from net economic benefits such as bringing into the private sector companies capable of low-cost production. After the post-Arusha declaration era of ineffective parastatals,²⁹ foreign investments are considered to have produced positive externalities or so called 'spill-over benefits'.³⁰ These include higher wages, faster productivity growth, and greater diffusion of knowledge (transfer of skills and technology).³¹ It should be remembered that the aspect of local staff training, which is an important element of knowledge dissemination, was addressed in the exchange of letters between the Tanzanian Minister of State in the Office of the President and the German Ambassador, further to the signature of the Tanzania-Germany BIT.

Meanwhile in Tanzania, quite a number of studies have viewed foreign investments critically. The criticism is twofold: on the one hand, it has been pointed out that the expected positive externalities failed to materialise; on the

22 I. M. Michael, *Determinants of Private Investment in Tanzania* (University of Dar es Salaam, 2012), pp. 22–3 with references to the relevant World Bank studies.

23 Kipole, *supra*, note 4, p. 5.

24 *Ibid.*, p. 60, for a similar observation see Sinda, *supra*, note 15, p. 28.

25 Kipole, *supra*, note 4, p. 61. However, one must add that the author of the study interviewed company stakeholders who were resident in Tanzania whereas, especially in case of bigger enterprises, it is quite likely that decisions on investments were made by the higher ranks resident in the home countries.

26 Kipole, *supra*, note 4, p. 65.

27 *Ibid.*, p. 63

28 J. Bonnitcha, *Substantive Protection under Investment Treaties. A Legal and Economic Analysis* (Cambridge University Press, 2014), p. 109.

29 See *ibid.*, p. 64; Lwambuka and Mtaki, *supra*, note 9, p. 43.

30 Bonnitcha, *supra*, note 28, p. 103.

31 See *ibid.*, p. 103; Michael, *supra*, note 22, p. 46; also Sinda, *supra*, note 15, p. 21.

other hand much writing is devoted to negative externalities which actually occurred in connection with the foreign investments in Tanzania. As for the first category, it is claimed that the training of local staff is in reality hardly taking place.³² Imitation of foreign business practices and technological solutions – ‘learning by doing’ – by the Tanzanian private sector is, as Michael claims, ‘difficult to observe’.³³ The rise in wages is seen to be damped by disparities in the remuneration between the local and the expatriate staff.³⁴ Even the net economic benefits of FDI are not regarded as overwhelming; although the positive impact on growth is not denied, better results can be achieved through emphasis on credit provision to domestic investors, as one econometrical study observes.³⁵

Regarding the negative externalities of foreign investments from the economic point of view, the local commentators deplore the ‘killing of local firms’ due to the competition from foreigners,³⁶ loss of jobs in the privatised parastatals,³⁷ and infringements of local communities’ rights.³⁸ However, the prevailing narrative focuses on the abusive acts of investors, which can be subdivided into two groups: first the abuse of human rights and most notably of workers’ rights,³⁹ and, second, the degradation of the environment.⁴⁰

C. Overprotection of Foreign Investors?

Given that the two basic assumptions underlying the signing of BITs are under fierce challenge, it is not surprising that many authors go a step further and decry what they regard as the ‘overprotection’ of foreign investors in Tanzania or even a ‘red carpet treatment’ of investors.⁴¹ Although there are in fact some claims regarding the content of BITs – those claims will be discussed below – it is quite striking that most of the standards for the treatment of investors, which are allegedly either overprotective or not demanding enough, are attributable not to the BITs, but to the provisions of Tanzanian domestic laws. Accordingly, while outlining the negative impact of FDI in Tanzania, the study of Baregu of 2004

32 K. Baregu, *Foreign Direct Investment in Tanzania: The Role Played by Foreign Investors in the Protection of Human Rights* (University of Dar es Salaam, 2004), p. 186.

33 Michael, *supra*, note 22, p. 46.

34 Baregu, *supra*, note 32, p. 172.

35 Michael, *supra*, note 22, pp. 77–9, 81. Access to finance still remains one of the major challenges; on the recent studies see ‘Rwanda and Kenya most competitive economies in EA’, *East African*, 2 October 2015.

36 S. S. Njamasi, *The Role of the Law in the Conduct of Foreign Direct Investment in a Developing Country: A Critical Study of the Role of the Law in the Conduct of Foreign Direct Investments in Tanzania* (University of Dar es Salaam, 2011), p. 100.

37 Baregu, *supra*, note 32, p. 172

38 For example, for the rights of Zanzibari fishermen in favour of the tourism industry see *ibid.*, p. 52.

39 *Ibid.*, pp. 187 *et seq.*; Sinda, *supra*, note 15, p. 79; Njamasi, *supra*, note 36, p. 106; see also Bonnitcha, *supra*, note 28, pp. 35–7.

40 Baregu, *supra*, note 32, p. 88 *et seq.*; Sinda, *supra*, note 15, p. 79; Njamasi, *supra*, note 36, p. 106; see also Bonnitcha, *supra*, note 28, pp. 37–9.

41 Peter, *supra*, note 2, p. 1.

proposed remedies that, on the whole, aim at eradication of shortcomings in the legislation on investment and at the strengthening of national institutions; it is their efficiency, Baregu argues, which is decisive for reducing the environmental risks of investments and the prevention of human rights violations by the investors.

Also Peter's critical account published as early as 1989 ends up in recommendations to the national legislator.⁴² Taking the 'killing of local firms' due to the competition by foreign investors as an example: if the foreign investment were not 'hijacked by big players',⁴³ the local Tanzanian business would find it easier to stand up to the competition. However, the Tanzanian government has not done enough to attract middle-and small-sized enterprises, even though such companies would be 'easier' competitors for the local business; they could also offer more chances to spread know-how than the multinational companies do. But the Tanzanian government follows a different attitude: the incentive packages and preferential treatment for foreign investors provided for under Tanzanian law are reserved for big-scale investments.⁴⁴ Consequently, the small-scale investors are subjected to regular administrative procedures, and those procedures are cumbersome and far from a red carpet treatment, to say the least. Baregu claims that 'investors are known for their way of getting around through bribes and corrupt practices'.⁴⁵ This statement could be quoted as another example of foreign investments' negative externalities (corrupting the rule of law) but it obviously applies only to those investors who can afford the corruption.

IV. WHAT TO DO WITH THE BITS? THE CONSEQUENCES OF THE DEBATE

Many claims have been raised regarding the conclusion and content of the BITS with African countries; these claims will be addressed in the following section as well as their relevance for the Tanzania-Germany BIT and against the background of the concerns to which foreign private investment in developing countries generally gives rise.

A. Specific Claims

A major point of discontent is the investors' right to direct recourse to international arbitration in case of disputes arising out of the BIT concerned.⁴⁶ Unlike a

⁴² *Ibid.*, 189.

⁴³ Lwambuka and Mtaki, *supra*, note, 9, p. 44.

⁴⁴ The Tanzania Investment Act of 1997 which provides for incentive packages is applicable only to investments of a certain monetary value. In case of foreign investment this value must be 300,000 USD at the minimum (see Article 2 of the Act). The Tanzania Investment Act applies to Tanzania Mainland. In Zanzibar, the minimum value is to be determined by the Zanzibar Investment Promotion Authority (see Articles 5 and 12 of the Zanzibar Investment Promotion and Protection Act 2004). According to the information available on the homepage of the Authority, the minimum value for general undertakings is 500,000 USD, while it is 4,000,000 USD for hotels; see <http://www.zanzibarinvest.org/eligibility.htm>.

⁴⁵ Baregu, *supra*, note 32, p. 102.

⁴⁶ Sinda, *supra*, note 15, p. 52; Njamasi, *supra*, note 36, p. 64; also in connection with the Biwater Gauff arbitration Allen, *supra*, note 11, p. 29.

number of BITs concluded by Tanzania,⁴⁷ the Tanzania-Germany BIT does not confer such a right upon investors. This is, however, due to the fact that it predates the development of this type of dispute resolution. As Tanzania follows a dualistic tradition with regard to the international law, the BIT does not constitute a directly applicable law which can be invoked in the Tanzanian courts. Claiming their rights under the BIT, the German investors must accordingly rely on the national legislation relating to investments, most notably on the Tanzania Investment Act (TIA) of 1997 for Tanzania mainland and the Zanzibar Investment Promotion and Protection Act (ZIPA) of 2004 for Zanzibar. This legislation is framed *inter alia* also to incorporate the standards set by the BITs, such as the transferability of revenues and the guarantees against expropriation (see Part III of TIA). Moreover, Article 23 TIA domesticates the rights of investors contained in the BITs regarding the recourse to arbitration, including international arbitration (Article 23 section 2(c)). As an inter-state arbitration is the only enforcement mechanism provided for in the Tanzania-Germany BIT (Article 11 of the BIT), this provision of TIA does not apply to German investors. According to Article 23 section 2 (a) and (b), they may have recourse to arbitration proceedings under Tanzanian law or under ICSID which is, however, conditional on the mutual agreement of the parties, that is the investor on the one hand and the Tanzanian government or the Tanzanian Investment Centre on the other.

Criticism has also been raised with regard to the regulation of compensation for expropriated property. It is claimed that protection standards are unequal: the investors' property enjoys a higher standard of protection than property owned by Tanzanians.⁴⁸ In fact, according to the Tanzanian constitution, such compensation should be 'fair and adequate',⁴⁹ while the Tanzania-Germany BIT, as said earlier, follows the traditional approach, stipulating that the compensation shall represent an 'equivalent of the investment expropriated'.⁵⁰ Clearly, according to the constitution, the compensation does not have to be full as required by the BIT.

Given the fact that investors operate in a legal, cultural and institutional environment with which they are not necessarily familiar, as may be the case with German investors in Tanzania, and given the fact that compensation is provided for by the legal rules, which are not even directly applicable domestically, as is the case of the BIT-norms, the lack of a guarantee of full compensation does not mean that investors' property enjoys a higher standard of protection. Looking at the full picture, a clear requirement of full compensation may be regarded as offsetting

47 See, for example, Articles 19 *et seq.*, Tanzania-Canada BIT of 2013; Article 9 Tanzania-The Netherlands BIT of 2001 (quite tellingly such an arbitration clause was not included in the original BIT between the two countries concluded in 1970); and Article 8 Tanzania-UK BIT of 1994.

48 Sinda, *supra*, note 15, pp. 64–5.

49 Article 24 Section 2 of the Tanzanian Constitution.

50 Article 3 Section 2 of the Tanzania-Germany BIT.

German investors' lower level of know-how in dealing with Tanzanian law and authorities, as compared to the Tanzanian investors.

But the criticism does not seem to be justified, even adopting a purely positivistic perspective. The standard of protection provided for in the BIT reflects the position of customary international law. On the other hand, the regulation of the Tanzanian constitution – adopted in 1977 – represents a concept advanced by the developing countries in the 1960s and 1970s in a bid to facilitate expropriation by challenging the 'full compensation' standard. It was the Charter of Economic Rights and Duties of States passed in 1974 as a resolution of the UN General Assembly which provided only for an 'appropriate compensation' in case of expropriation. However, although the resolution was adopted by a large majority, the industrial states voted against it or abstained altogether.⁵¹ Also in the years which followed the standard of 'appropriate compensation' could not win recognition as a principle of customary international law; as regards now, there is not much debate that, in cases of expropriation, under public international law full compensation must be paid.⁵²

Obviously, Tanzania may adopt compensation standards for nationalised private property which are lower than those enshrined in international customary law with regard to the protection of aliens. Although the constitutional standard applies to all investors in Tanzania, it will be the local Tanzanian investors who are put in a less advantageous position, as only they do not enjoy additional protection provided for in the public international law. In this case, it is rather incumbent upon the Tanzanian government to explain to the local investors why the Tanzanian constitution provides for less protection in cases of expropriation than international law does for aliens. Looking at the law alone, the Tanzanian investors investing abroad enjoy stronger guarantees against expropriation than those investing at home.

In addition, the Tanzanian legislator could put end to the 'discrimination' of Tanzanian private investors by providing for a full compensation in the ordinary legislation, as it did in the defunct National Investment (Promotion and Protection) Act of 1990.⁵³ According to Article 28 para. 2 of this Act, 'full and fair compensation' had to be paid when an enterprise was compulsorily acquired. In the TIA of 1997,⁵⁴ the principle of full compensation was not retained, as only 'adequate and prompt' compensation is guaranteed. A quite confusing approach is adopted by the Zanzibari legislature. The Zanzibari constitution provides for a 'fair and adequate' compensation only (Article 17), while Article 22 of the Zanzibar Investment and Protection Act (ZIPA) allows for an expropriation only when full payment of compensation contained in Article 17 is paid. What is

51 See Herdegen, *supra*, note 13, p. 366.

52 Dolzer and Schreuers, *supra*, note 14, p. 100; Herdegen, *supra*, note 13, p. 367.

53 According to Article 3 of the National Investment (Promotion and Protection) Act of 1990, the Act was applicable to both foreign and local investments.

54 This Act applies also to foreign and local investments which, however, in order to benefit from the Act's guarantees, must have a certain minimum value, being originally 300,000 TSH for foreign investments and 100,000 TSH for local investments (see *supra*, note 45). See <http://www.zanzibarinvest.org/eligibility.htm>.

here envisaged is thus a full payment of a compensation which has to be 'fair and adequate', but does not necessarily reflect the full value of the acquired business. There is a difference between the 'full payment of compensation' and the 'payment of full compensation', the cited Zanzibari legislation providing only for the former.

Further concerns have been raised regarding the NT standard, which is also enshrined in the Tanzania-Germany BIT. It has been criticised that the NT standard excludes affirmative actions aimed at boosting private businesses owned by Tanzanians and increasing Tanzanian ownership in the economy,⁵⁵ whereas regulations aiming at the empowerment of Tanzanians are indeed included in various pieces of legislation.⁵⁶

However, a look at those regulations and, first and foremost, at the National Economic Empowerment Policy⁵⁷ does not reveal major discriminatory patterns towards foreign investors; the Tanzanian policy-makers do not seem to regard such discrimination as a panacea to predicaments of local businesses. The cited policy paper focuses on problems affecting both national and foreign investors. For example, as far as licensing is concerned, the policy paper points to 'multiplicity, bureaucracy and disregard of licensing regulations'.⁵⁸ Other issues addressed in the Strategy, such as limited availability of credit, lack of adequate skills⁵⁹ and shortcomings in the economic infrastructure,⁶⁰ being very relevant to investments established by foreigners, hit the development of local businesses even more severely. Another important element of the strategy seems to be an extension of incentives for foreign investors to local entrepreneurs.⁶¹ Similarly, also the National Economic Empowerment Act of 2004 does not aim at ousting foreign competitors, but rather at training in entrepreneurship (Article 5) and providing funds for setting up companies and other business entities designed to economically empower Tanzanians (Article 19).

Even if there are still regulations in place aimed at promoting businesses owned by Tanzanians at the expense of businesses run by foreign investors, those regulations do not fall under the scope of application of the BIT here analysed. In so far as they apply to the setting up of businesses and licensing (pre-entry stage), the Tanzania-Germany BIT, contrary to, for example, the Canada-Tanzania BIT, does not refer to the admission of investments, but, as stated, only to investments already established. Such regulations include, for example, requirements to enter into partnership with Tanzanian nationals.⁶²

55 Sinda, *supra*, note 15, pp. 67 *et seq.*

56 For an overview of those measures, see *ibid.*, pp. 66–70.

57 The National Economic Empowerment Policy is a policy paper issued by the Prime Minister's Office in 2004, available at <http://www.uwezeshaji.go.tz>.

58 *Ibid.*, item 4.2.3.1, p. 9.

59 *Ibid.*, item 4.5.2., p. 14.

60 *Ibid.*, item 4.5.3., p. 16.

61 This is the case with tax incentives; see *ibid.*, item 4.2.1.3.(i), p. 8.

62 Such requirements apply, for example, in the mining and tourism sectors; see Sinda, *supra*, note 15, p. 68 with references to the relevant legislation. Under the newly enacted Petroleum Act of 2015 petroleum operation rights can be granted to the National Oil Company, of which the state

Some of the remaining preferential treatment regulations at the post-entry stage, for example procurement laws reserving tenders under a certain value for local contractors, can still be legally justified, even if they deny national treatment to foreign investors. One must bear in mind that the NT standard is not an absolute one; it is widely accepted that different treatment is permissible if rational grounds are shown.⁶³ Accordingly, procurement schemes reserving low-value contracts to Tanzanian owned contractors may pass the rationality test, as they aim at the empowerment of locally owned small and medium-sized enterprises in the context of a country listed by the UN as one of the least developed (LDC).⁶⁴ On the other hand, it is perfectly legitimate to dismiss those denials of national treatment to German investors which do not pass the reasonability test.

Finally, it has been argued that the FET standard should take into account the sustainable development and interests of the citizens of the host country. Admittedly, the open-ended character of the FET formula does grant attention to these concerns. The arbitral tribunals have adopted four different approaches to the FET standard, of which only two allow for the revisiting of substantive policy choices of the host state, as well as those which impose obligations on foreign investors in the public interest.⁶⁵ Without going into detail, one may assume that the FET clause might give reason to different interpretations and some of those interpretations may excessively limit the host state's regulatory powers.⁶⁶ Accordingly, there could be some argument that broadening the objectives of the BIT, for example by adding sustainable development goals, may influence the interpretation of the FET standard, limiting its applicability to the approaches which do not look into substantive policy choices. This is quite a controversial aspect of an equally controversial broader case examined further below: making the BITs more balanced. It has been rightly observed⁶⁷ that even including the sustainable development in the preamble of a BIT would have a decisive effect on its teleological interpretation as provided for in Article 31 Section 1 of the Vienna Convention on the law of treaties.

must hold 51 per cent of the shares at the minimum; the investors in this sector must partner with the National Oil Company (see Articles 8, 45, and 46 of the Petroleum Act). The fact that neither the NT nor MFN standard is applicable at the pre-entry stage could be problematic from the German perspective, as due to this MFN regulation, the German investors can be subjected to a less favourable treatment than, for example, Canadian investors, while the Canadian investors would automatically benefit from any preferential treatment accorded to the German investors.

63 See Dolzer and Schreuers, *supra*, note 14, p. 202 with references to the relevant case law of arbitral tribunals.

64 See *The Least Developed Countries Report 2014*, UNCTAD/LDC/2014.

65 For a thorough analysis of those approaches, see Bonnitcha, *supra*, note 28, p. 143 *et seq.*

66 However, the violation of the FET standard by Tanzania established by the Tribunal in the Biwater Gauff case did not involve any revisiting of substantive policy choices but a condemnation of the way in which the contract with the water supply company was terminated (press conference and rallies). See *supra*, note 11.

67 See references in the note 68.

B. General Claims

There are generally two propositions of a general nature which have been put forward, partially on the basis of the more specific observations examined above; there is accordingly the above-mentioned postulate that the BITs should not favour the interests of investors, but should be more balanced. It is further claimed that the BITs impose excessive constraints upon the regulatory powers of the host state.

The idea of making the BITs more balanced coincides with the expectations regarding the FET standard. In the context of a developing country such as Tanzania, the achievement of a more balanced structure has been proposed, perhaps by the inclusion of sustainable development as a treaty objective.⁶⁸ Norway even tabled a BIT model draft to this effect in 2007. This draft was, however shelved in 2009, after facing criticism from two ends: one group of critics felt that the protection of investors' rights wouldn't be sufficient, while others still feared excessive encroachments on the host states' powers to regulate in the public interest.⁶⁹ It goes without saying that the Tanzania-Germany BIT predating the Brundtland Report⁷⁰ by three decades does not contain a sustainable development clause. It is rather the investment as such which is regarded as a development vehicle.

A commitment to sustainable development is, for example, enshrined in the preamble to the Tanzania-Canada BIT of 2013. However, in the case of this BIT, this commitment along with a lengthy list of reservations regarding various protective measures seems justified. Since the Tanzania-Canada BIT provides, for example, for an NT-standard also at the pre-entry stage,⁷¹ a ban on performance requirements⁷² and investors' direct recourse to international arbitration, it offers much more far-reaching standards of protection for foreign investors. Similarly, the Economic Partnership Agreement between the EU and the Caribbean States of CARIFORUM (CEPA)⁷³ not only invokes 'sustainable development by respecting basic labour rights in line with the commitments they have undertaken within the International Labour Organisation and by protecting the environment in line with

68 See Sinda, *supra*, note 15, p. 45 with further references; Bonnitca, *supra*, note 28, p. 47 with further references; also S.W. Schill, 'Investitionsschutzrecht als Entwicklungsvölkerrecht', 72 (2) *Heidelberg Journal of International Law* (2012): 261–308, at p. 291 *et seq.* More sceptically see H. G. Ruse-Khan, 'A Real Partnership for Development? Sustainable Development as Treaty Objective in European Economic Partnership Agreements and Beyond', 13 (1) *Journal of International Economic Law* (2010), at p. 179, admitting, however, that in the context of international economic law in general 'integration and balancing economic with social and environmental concerns must then primarily be performed in the process of treaty interpretation'.

69 Ruse-Khan, *supra*, note 68, p. 179.

70 *The Report of the World Commission on Environment and Development: Our Common Future*, which was submitted to the UN General Assembly (UN Doc. A/42/427) and published in 1987, also known as the Brundtland Report after the name of the Commission's chairperson, is considered to be the headstone of the 'sustainable development' concept.

71 See Article 4 section 1 Tanzania-Canada BIT.

72 See in particular Article 9 section 1(b) and section 3 a (domestic content) and Article 9 section 1(f) (technology transfer) of the Tanzania-Canada BIT.

73 Economic Partnership Agreement of 2008 between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part.

the 2002 Johannesburg Declaration’ in the preamble and reaffirms it in Article 3 as a governing principle of the partnership,⁷⁴ it also provides for the obligation to take necessary measures *inter alia* through domestic legislation to ensure the compliance of investors with the core labour standards of the International Labour Organisation and the standards of environmental protection.⁷⁵ In addition, the parties are obliged to ensure that investment shall not be encouraged by the lowering of these standards.⁷⁶ CEPA also provides for NT with respect to market access.⁷⁷

A challenge to the legal certainty is not deniable: the application of one fuzzy term – the FET-standard – is being limited with another fuzzy term, namely sustainable development. This can indeed obscure the content of a treaty. But as said, a respective clause in the preamble of the Canada-Tanzania BIT is backed by a quite detailed list of public policy measures which are permissible as exceptions to investors’ treatment standards. And as Bonniticha points out, the term sustainable development is in practice used as an umbrella term for a variety of different standards related to environmental protection, economic growth, human rights, and distributive justice.⁷⁸ Seen in this context (portmanteau of standards) the notion of sustainable development indeed addresses the concerns raised by Tanzanian authors with regard to foreign investments.

Many of these standards already constitute international legal norms and should be taken into account as an element of contextual interpretation.⁷⁹ To this extent, an encroachment on the certainty of BIT guarantees is justifiable, since these standards, already being binding international norms, limit the investors’ legitimate expectations.⁸⁰ Those standards that are not reflected in legal principles, but are ‘merely’ a part of public interest concerns, are, however, problematic. With regard to those political objectives, the disturbance of certainty could be compensated, at least to some extent. This could be the case, if the BIT refers not to the term sustainable development as such, but to more specific documents or to specific standards included therein, as, for example, the CEPA does. One may, for instance, consider the newly passed UN 2030 agenda for sustainable development,⁸¹ which puts forward an elaborate action plan for the achievement of sustainable development goals, even if those goals are partly articulated in quite

74 See also the analysis by Ruse-Khan, *supra*, note 68, p. 169f.

75 See Article 72 CEPA.

76 Article 73 CEPA.

77 See Article 76 *et seq.* CEPA.

78 Bonniticha, *supra*, note 28, p. 38.

79 M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, A/CN.4/L.682, 13 April 2006, paras 140 *et seq.* and 410 *et seq.*; in the context of investment treaties see also Herdegen, *supra*, note 13, p. 422. Accordingly, the interpretation of treaties should take into account the need for a systemic integration of public international law. This approach is normatively based on Article 31 Section 3(c) of the Vienna Convention on the Law of Treaties. See T. Milej, *Entwicklung des Völkerrechts. Der Beitrag internationaler Gerichte und Sachverständigengremien* (de Gruyter, 2014), p. 341.

80 See Herdegen, *supra*, note 13, p. 423.

81 *Transforming Our World: The 2030 Agenda for Sustainable Development*, UN Doc. A/70/L.1.

general terms. A reference to the UN sustainable development agenda or some selected development goals included in the preamble of a BIT as a treaty objective would not establish any specific obligations for the investors. The discussion is after all only about offering guidance on how to interpret open-ended treaty norms, most notably the FET standard.

Nevertheless, allowing for a more ample consideration of public policy concerns within the ambit of the teleological interpretation of BIT norms may reduce the scope of investors' protection. And in the case of the Tanzania-Germany BIT the above considerations are of limited persuasiveness as the protection of German investors is already restricted to the post-entry stage.

Before assessing the second claim whereby the BITs impose excessive limitations on regulatory powers of the state, it should be recalled that the recommendations on how to reduce the negative externalities connected with the foreign investment touched upon the national legislation and the capacities of national institutions rather than upon the content of BITs. The national legislature is indeed in a better position to tackle the investors' abusive practices, since national legislation, unlike the BITs, applies also to domestic investors, and it has not been convincingly demonstrated that the domestic investors show a better record in terms of observing human rights and environmental standards compared to foreign investors. It can even therefore be assumed, that there is some mismatch between the reasons for the criticism of investors and the expectations with regard to the content of the BITs examined above. However, by the same token, if the legislative power of the host state is unduly restrained, such legislative measures cannot be taken. Is this the case in the Tanzania-Germany BIT? The present analysis of the BIT's substantive guarantees for German investors does not suggest so. The Tanzanian legislature's scope of action can be limited only by certain interpretations of the FET standard and unjustifiable discriminatory measures which would occur after the investment has been established.

However, it may have an indirect effect on the Tanzanian government's decisions. Accordingly, Bonnitcha conceptualises the BIT guarantees as 'liability rules' and speaks of a 'regulatory chill',⁸² whereby the ability of a state to enact (and enforce) appropriate legislation on environmental and human rights protection may be threatened by the fear of compensation claims.⁸³ The high costs of potential arbitral proceedings increase the chilling effect of the BITs even further. The fact that the costs of international arbitration pose a serious burden for developing countries was also advanced as an argument for revisiting current policies regarding the conclusion of BITs by Tanzania.⁸⁴

The uncertainty of the BIT clauses is the second factor. The government would be more willing to act if it could foresee what types of action do not involve liability under the BIT rules, and do not trigger compensation claims. Accordingly, the more obscure those rules are, the more reluctantly the government of the host

82 Bonnitcha, *supra*, note 28, pp.113 *et seq.*

83 See *ibid.*, p. 37.

84 Sinda, *supra*, note 15, p. 57; Njamasi, *supra*, note 36, p. 64.

state would act.⁸⁵ It is thus the lack of certainty combined with the likelihood of compensation claims that may have impact on the ability and willingness of the government to take steps promoting environmental protection and human rights. Looked at from this perspective, it is rather unlikely that one single BIT would trigger the fear of compensation claims alone, unless the treaty partner concerned is involved in numerous substantial investment projects. One single BIT would merely add to the general chilling effect of all BITs concluded by a given country.

And here again, the case of Tanzania-Germany BIT is a different one. As the BIT does not confer upon the investor the right to refer a dispute to an arbitral tribunal, potential violations of an investor's rights would not necessarily entail a payment of compensation. Similarly, there will be no chilling effect generated by the potentially high costs of arbitration proceedings. Therefore, it is not convincing to conceptualise the provisions of the Tanzania-Germany BIT as liability rules only. Even though potential violations of those rules would involve international responsibility vis-à-vis Germany and entitle Germany to take countermeasures against Tanzania, it would remain highly probable that such conflict would be resolved politically by negotiations, as most international disputes are.⁸⁶ Accordingly, if there is indeed some regulatory chill in terms of imposing obligations on investors, with regard to legislative measures, German investors will only profit from the chill triggered by all the BITs concluded by Tanzania with other states, to which the Tanzania-Germany BIT does not make any addition. But also most BITs, for example the Tanzania-Canada BIT, do not seem to generate as much of a chilling effect. As observed earlier, those treaties started to be more specific with respect to public policy measures which they justify as derogations from the general protection standards which they offer to investors.

V. THE FATE OF THE TANZANIA-GERMANY BIT – THE NEW EU APPROACH

The question of the EU's approach to policy on foreign investments only came up with the Treaty of Lisbon of 2009. Until its entry into force foreign investments were within the sphere of competences of the EU Member States. Only the 2009 Treaty of Lisbon supplemented the catalogue of the EU's exclusive competence regarding the Common Commercial Policy with the aspect of FDI.⁸⁷ Competence over foreign investments not falling under the category of FDI remained with the Member States. The scope of the EU's new competence title is thus narrower than the scope of the Tanzania-Germany BIT. According to the 2012 EU regulation on the transitional regime for the BITs in force,⁸⁸ the BITs concluded by the EU Member States on their own account may be maintained in force if notified to the

85 Bonnitca, *supra*, note 28, p. 137

86 J. G. Merrills, *International Dispute Settlement* (Cambridge University Press, 2005), p. 27.

87 See Article 207 TFEU as compared to the former Article 133 EC Treaty.

88 Regulation 1219/2012 of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries.

European Commission; however, there is a plan to gradually replace them with investment treaties concluded by the Union.⁸⁹

In pursuance of the newly extended Common Commercial Policy, as outlined in the communication of the European Commission of 2010 on investment policy,⁹⁰ the EU was planning to negotiate broad policy agreements encompassing both trade and investment elements;⁹¹ this should have applied most notably to the preferential trade agreements (PTAs).⁹² As a matter of policy objective,⁹³ the investment treaties are intended to provide for the protection of investors already at the pre-entry stage, in particular with regard to the NT and MFN standard.⁹⁴ On the other hand, the Union's investment protection treaties should also incorporate the general objectives of the EU's foreign policy, such as promotion of the rule of law, human rights, and sustainable development. To sum up, the post-Lisbon approach to investment protection seems to be antithetical to the concept underlying the Tanzania-Germany BIT, which applies only in the post-entry stage and does not incorporate any broader policy aims. However, in view of the concerns analysed here, it remains an open question which approach would be more beneficial for developing countries. The Tanzania-Germany BIT also does not fit into the post-Lisbon Common Commercial Policy on account of the dispute settlement mechanism. The 2010 communication of the European Commission points out that an investor-to-state dispute settlement is an important element of ensuring the effectiveness of investment agreements which the EU will seek to include in such agreements.⁹⁵ And the Tanzania-Germany BIT does not provide for the recourse of investors to international arbitration.

The already mentioned CEPA, concluded as a mixed treaty by the EC and its Member States in 2008, that is after signing but before entry into force of the Treaty of Lisbon, constitutes a PTA incorporating both trade and investment issues. In the investment chapter, it includes all standards typical for a BIT, with the notable exception, however, of FET. As said, the treaty is governed by the concern for sustainable development.

Quite surprisingly, a PTA concluded between the Member States of the East African Community (EAC) including Tanzania and the EU – the Economic Partnership Agreement (EPA) initialled on 14 October 2014 – does not follow the

89 See Article 2 of the 1219/2012 Regulation.

90 Communication of the European Commission 'Towards a comprehensive European international investment policy' form 2010 (further on: 2010 Communication), available at <http://ec.europa.eu/trade/policy/accessing-markets/investment/>.

91 See 2010 Communication, p. 5: 'A comprehensive common international investment policy needs to better address investor needs from the planning to the profit stage or from the pre- to the post-admission stage. Thus, our trade policy will seek to integrate investment liberalisation and investment protection. Research confirms that substantive investment provisions in broad trade agreements impact trade and FDI flows more profoundly, or that the combination of substantive investment rules and provisions liberalising other parts of the economy jointly impact trade and investment more significantly.'

92 See Chaisse, *supra*, note 12, p. 53 with further references.

93 For a thorough analysis of those objectives with respective references see *ibid.*, p. 62 *et seq.*

94 2010 Communication, p. 5.

95 2010 Communication, pp. 9–10.

way paved by the CEPA.⁹⁶ Although the EAC EPA declares *inter alia* ‘establishing and implementing an effective, predictable and transparent regional regulatory framework for trade *and investment* in the EAC Partner States, thus supporting the conditions for increasing investment, and private sector initiative’,⁹⁷ it does not include any tangible guarantees for investors. The references to foreign investment throughout the EAC EPA text are made rather in the context of capacity building; they are about creating a conducive environment in the EAC to attract foreign investments, not even necessarily from the EU.⁹⁸ It should be also noted that EAC EPA is governed by the principle of asymmetry setting out special safeguard conditions to protect the economy of the EAC. Are then the EU’s initial policy objectives thus overrun by the structural differences between trade and investment which make them difficult to be governed by one and the same treaty regime?⁹⁹ In any event, the BIT of 1965 will for some time still remain the relevant public international law document providing for the protection of German investments in Tanzania.¹⁰⁰

VI. CONCLUSION

The Tanzania-Germany BIT of 1965 should not be considered as imbalanced to the detriment of Tanzania, even against the background of critical comments put forward by Tanzanian authors towards the BITs concluded by this country in general. This is mainly due to the fact that it applies at the post-entry stage only and does not provide for investors’ direct remedy to an investor-state international arbitration. By doing so, it leaves the Tanzanian government ample space to pursue legitimate objectives of public policy. The missing references to environmental protection, human and especially labour rights, and to sustainable development in general must be seen in this light. Thus, compared to the more contemporary investment treaty framework, the Tanzania-Germany 1965 BIT constitutes a rather slim regime focused on economic gains from foreign investment while relying on traditional enforcement mechanisms of public international law. It tacitly assumes that the responsibility to ward off the negative externalities of foreign investment is vested with the domestic legal order. This allocation

96 A comparison between CARIFORUM and EPA should not lead to hasty conclusions, since CARIFORUM constitutes a rather small market comprising some 25 million inhabitants which is less than the population of Uganda alone. On the other hand, despite the small size, the EU exports to CARIFORUM states amount to 5 billion euros, while the same number for the EAC is less than 4 billion euros. For statistical data see <http://ec.europa.eu/trade/policy/countries-and-regions>.

97 Article 2(f) EAC EPA, emphasis by the author.

98 See, for example, Articles 59, 63, 64, 102, and 103 EAC EPA.

99 According to Dolzer and Schreuers the trade law ‘long-term commitment of resources by the foreign investor under the territorial sovereignty of the host state’; see Dolzer and Schreuers, *supra*, note 14, pp. 19–20.

100 It is expected that the Union would conclude its own BITs only with big strategic players. See Ch. Tietje, ‘EU-Investitionsschutz und Förderung zwischen Übergangsregelungen und umfassender Europäischer Auslandsinvestitionspolitik’, 21 *Europäische Zeitschrift für Wirtschaftsrecht* (EuZW) (2010): 647–52, at p. 649.

of responsibilities is justifiable, given the limited scope of application of the 1965 BIT and a non-invasive dispute settlement mechanism. The lowering of international protection for investors would amount to a collective punishment for all investors, including the small and medium-sized enterprises, for the undisputable abusive acts of some of them, mostly the big companies.