SOUTH AFRICA, AFRICA, AND INTERNATIONAL INVESTMENT AGREEMENTS

CENTRE FOR CONFLICT RESOLUTION
CAPE TOWN, SOUTH AFRICA

POLICY ADVISORY GROUP SEMINAR REPORT
STELLENBOSCH, SOUTH AFRICA
DATE OF PUBLICATION: JULY 2014

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RAPPORTEURS

SANUSHA NAIDU AND BRENDAN VICKERS

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About the Organiser

The Centre for Conflict Resolution, Cape Town, South Africa, was established in 1968. The organisation has wide-ranging experience in conflict interventions across Africa and is working on a pan-continental basis to strengthen the conflict management capacity of Africa's regional organisations. Its policy research focuses on Peacekeeping and Peacebuilding in Africa; Region-building and Regional Integration on the continent; Africa and the European Union; The Millennium Development Goals (MDGs) and Africa; and South Africa's bilateral and multilateral foreign policy.

The Rapporteurs

Sanusha Naidu is a former Senior Researcher at the Centre for Conflict Resolution, Cape Town, South Africa; and Brendan Vickers is Chief Director, Research and Policy, at the South African Department of Trade and Industry, Tshwane, South Africa.

Executive Summary

The Centre for Conflict Resolution (CCR), Cape Town, South Africa, and the South African Department of Trade and Industry (DTI) hosted a policy advisory group seminar in Stellenbosch, South Africa, from 17 to 18 February 2014, on "South Africa, Africa, and International Investment Agreements".

The meeting brought together about 30 policymakers, scholars, and civil society actors from Africa, Asia, Europe, North America, and South America, to assess and broaden the debate on the implications of international investment agreements (IIAs) – including bilateral investment treaties (BITs) – for development efforts in Africa. The meeting also assessed the principles that underpin these agreements, which were conceived in the immediate post-colonial era during the Cold War, and are increasingly seen by critics as being at odds with emerging economic challenges confronting developing countries.

Particular attention was paid to six key areas: the global context and changing perspectives on international investment agreements; the benefits that can accrue from foreign direct investment (FDI) and the relationship between investment agreements and foreign direct investment flows; the structure and impact of investment treaties; the core provisions of international investment agreements; the international arbitration system that provides for investor claims against states; and the implications of all this for Africa's structural transformation and economic development.

1. Global Change and the International Investment Agreements Landscape

Foreign direct investment is important for economic development, helping host countries to generate inflows of capital and finance; technological innovation; managerial best practices; and access to global markets. However, structural changes to the world economy following the global financial crisis of 2008/2009 have strengthened the view that the benefits of such investment to the development of host countries are not automatic. Proponents of international investment agreements acknowledge that governments sacrifice some measure of regulatory autonomy when they sign these treaties. Nevertheless, they argue that the system of international investment agreements can be reformed – particularly by redrafting legal texts and through reform of arbitration mechanisms – to strike an appropriate balance between state sovereignty and investor rights. Other economists and policymakers take different views. Some advocate termination of international investment agreements and their replacement by a new model, while others oppose subjecting investor claims to international arbitration. All these approaches have aimed, to a greater or lesser extent, at ensuring that the right of sovereign governments to regulate foreign investors is not unduly impeded.

Over the past decade, reviews of investment treaties have been undertaken in Australia, Canada, Brazil, India, Norway, South Africa, the United States (US), and the European Union (EU). Actions taken by countries to address the asymmetrical nature of these agreements include: clarifying the meaning of treaty provisions through authoritative interpretations; revising agreements through amendments; renegotiating older treaties; and terminating and/or consolidating agreements either unilaterally or by mutual consent. By December 2013, more than 1,300 bilateral investment treaties were estimated to have been terminated or renegotiated.

2. Determinants of Foreign Direct Investment and the Role of International Investment Treaties

International and bilateral investment agreements are often promoted as means of attracting foreign direct investment. In pursuit of such investment, some governments are prepared to offer strong protections to foreign investors and to liberalise investment regimes. However, there is little evidence of any direct link between foreign investment inflows and signing investment agreements. Increased foreign investment following the adoption of international and bilateral investment treaties is often more the result of other factors such as the promise of returns on investments and business strategies, as well as national economic reforms and domestic investment and trade regimes. Although international investment agreements have been promoted as instruments that encourage multinational corporations (MNCs) to invest in politically volatile jurisdictions, such firms often make their investment decisions regardless of the existence of such treaties. Investors are instead often guided by profit and ease of access to resources, labour, and regional markets. Foreign investment in mining, oil, and gas in volatile areas in countries such as Angola, Nigeria, and Libya is overwhelmingly driven by the prospect of high returns. Although foreign direct investment can produce economic benefits, it has also sometimes contributed to environmental damage; resulted in economic development in enclaves that has not contributed to broader national economic growth; and negatively affected the balance of payments in some countries.

In order to promote more effective management of international and bilateral investment agreements to foster sustainable development, the Paris-based Organisation for Economic Cooperation and Development (OECD) and the Geneva-based United Nations Conference on Trade and Development (UNCTAD) should work to forge a set of common principles that can guide the future development and practical application of international treaties, while also promoting a shared understanding of their potential impacts on host economies.

3. The Policy Impact of International Investment Agreements in Africa

By December 2013, 793 bilateral investment treaties had been concluded by African countries, representing 27 percent of the total number of such agreements. Most of these treaties employ expansive definitions and standards of protection to address state regulatory activity and standards, and provide for international investor-state dispute settlement (ISDS) mechanisms that generally favour the enforcement of the rights of foreign investors. International investment agreements in Africa consist of bilateral treaties or provisions in preferential trade agreements (PTAs).

These investment treaties have sometimes constrained the capacity of African governments to fulfil their regulatory mandates to advance the public interest, while placing few obligations on the activities and conduct of foreign investors. Foreign firms are rarely required to integrate their operations into domestic value chains or to promote broader national industrialisation efforts. These agreements have also sometimes inhibited the imposition of developmental conditions of entry or operation on foreign investors such as the establishment of joint ventures; the transfer of technology; the purchase of domestic inputs; or undertakings to support research and development.

Most external investments in Africa seek to exploit the continent's oil, gas, and mineral wealth. Conceding economic control over the terms on which foreign investors extract these natural resources can often undermine national and regional beneficiation policies and legislation to promote sustainable socio-economic development. For example, foreign investors may use international investment treaties to challenge tax regimes that seek to

impose levies on mineral exports in support of industrialisation efforts. Investment agreements further impose differential treatment of foreign and domestic investors that often favours the former, and can abrogate beneficial terms of trade enjoyed by a country as a most favoured nation (MFN). Arbitration resulting from international investment agreements can further drain national bureaucratic, legal, and financial resources, leading to unwillingness on the part of African and other governments to contest cases, or to introduce legislation in the public interest for fear of legal repercussions.

4. Analysing Investment Treaty Provisions

The expansive scope and content of international investment agreements exacerbates their capacity to undermine the policy autonomy of governments in developing countries. Investment treaties typically include a preamble stating the goals of the parties; umbrella clauses that place blanket obligations on host states; and broad definitions of "investor" and "investment". They also include substantive provisions that oblige host states to accord foreign investors "fair and equitable treatment"; to compensate them for any direct or indirect expropriation of their property; to allow the transfer of capital in and out of the host country by foreign investors; and to enable claims to be brought against host states through international arbitration.

Key definitions in these treaties have been contested in court, leading to contradictory arbitration awards. For example, the definition of "investment" can cover a wide range of "assets" beyond productive enterprises. Similarly, the definition of "expropriation" can extend to "regulatory takings" which cover any new policy measures that affect potential revenues and profits. "Fair and equitable treatment" has been controversially interpreted as granting foreign investors the right to challenge any government measure that could be interpreted as affecting a "predictable regulatory environment". Most seriously, these investment treaties also contain provisions for an investor-state dispute settlement system which allow foreign investors to sue host governments in an international tribunal – a legal recourse that domestic firms do not enjoy, and one that can undermine the national judicial sovereignty of host countries. International investment arbitration is also beset by inconsistent outcomes, many of which do not meet the standard of legal correctness. This compounds the uncertainty embedded in the agreements themselves.

Between 2007 and 2010, South Africa reviewed its 19 bilateral accords. Tshwane (Pretoria) concluded that the link between these treaties and increased foreign direct investment was uncertain, and that the ambiguity inherent in many of the standard provisions of these agreements created uncertainty for both investors and governments. As a result, South Africa decided to terminate its existing investment treaties, and only to enter into new ones if there were compelling economic or political reasons to do so. All partners were informed in advance about the decision to terminate these agreements. Tshwane has further introduced national legislation clarifying typical treaty provisions which can be adjudicated by domestic courts.

Meanwhile, the US and Canada have revised their model investment treaties, redrafting key provisions to clarify the rights of investors and to limit the scope of interpretation for arbitration panels. The EU has proposed new approaches to enhance the transparency of the process for negotiating these accords; the independence of arbitrators; and the predictability of the agreements, including through the possibility of binding interpretation by the parties involved. Brussels has also suggested the establishment of an appellate mechanism to ensure greater consistency in arbitration processes.

5. Assessing the Investor-State Dispute Settlement System

The investor-state dispute settlement system included in most international investment agreements enables foreign investors to sue host governments at an international tribunal – usually the Washington-based International Centre for the Settlement of Investment Disputes (ICSID) or the Vienna-based United Nations Commission on International Trade Law (UNCITRAL). If such a claim succeeds, the tribunal could award the investor financial compensation, which may be enforced through seizing government assets. Since its creation in 1966, the International Centre for the Settlement of Investment Disputes has concluded 282 cases, with 188 disputes still pending. In Africa, 25 percent of reported arbitrations involve mining, oil, and gas investments. Most international investment agreements also provide for State-to-State Dispute Settlement (SSDS), which allows cases to be brought between countries in relation to the application of investment treaties.

The investor-state dispute settlement system has become a multi-billion-dollar industry dominated by a small group of 20 law firms from Western countries. On average, each investor-state dispute costs $8 million in legal and arbitration fees, with some cases costing more than $30 million. Despite the large sums at stake, the system remains fragmented: a range of venues, each with its own history, culture, and rules of procedure, offer arbitration by panellists chosen in a relatively *ad hoc* manner. The same small group of lawyers rotates between representing claimants and respondents, and sitting on arbitration panels, raising serious concerns over conflicts of interest.

The system lacks an institutional framework that enshrines the principles of judicial accountability and independence. Arbitrators can award damages without having to apply the limitations on state liability that have evolved in domestic legal systems. Furthermore, in the absence of an appellate process, the system is prone to diverging interpretations in cases addressing the same provisions and similar facts, which has exacerbated uncertainty about the meaning of key obligations under these treaties. Concerns have also been raised over the secrecy of many aspects of these arbitration hearings. Unless and until this dispute system is reformed, consideration should be given to a moratorium on using it. State-to-state dispute settlement may provide a useful alternative avenue.

6. Regional Regulation of Investments in Africa

Africa's governments, its regional economic communities (RECs), and the African Union (AU) have increasingly sought to address how international investment agreements can be managed at the sub-regional and continental levels. They have also examined the role of these treaties in Africa's efforts to promote industrialisation and sustainable economic development. Fourteen of the 15 countries in the Southern African Development Community (SADC) have ratified a 2006 Finance and Investment Protocol (FIP), which came into force in 2010. However, regional norms on investment frameworks are often out of step with national policies, and are further undermined by competition for investment among African states. The African Union Commission has identified a need to align the investment protocols adopted by Africa's sub-regional organisations such as SADC, the Economic Community of West African States (ECOWAS), the Common Market for Eastern and Southern Africa (COMESA), and the East African Community (EAC) with frameworks being proposed by the continental body. The AU Commission is seeking to harness investment flows to strategic economic objectives for Africa which include: enhancing the continent's share of global markets; boosting intra-African trade; fast-tracking the establishment of a continental free trade area; accelerating Africa's industrial development; and implementing the Africa Mining Vision and Action Plan,

which was adopted by the AU in February 2009. The forging of such policies may entail a comprehensive review of all African international investment agreements, particularly if these treaties threaten national socio-economic plans and Africa's wider development and integration objectives.

Policy Recommendations

The following ten policy recommendations emerged from the Stellenbosch policy advisory group seminar:

1. African governments should include properly researched and tested policies on international investment in their development strategies in order to support national economic diversification and industrialisation priorities;

2. African governments must draft investment laws that mobilise and harness domestic savings and funds, thereby decreasing dependence on foreign direct investment. Governments should also encourage international investors to look beyond international investment agreements for other means of creating an enabling environment to attract foreign direct investment;

3. African governments must review their international investment agreements to determine whether these treaties contribute to inclusive and socially equitable economic development. They should seek to amend or renegotiate these treaties, as necessary, in order to create a fair balance between the rights of investors and those of governments and their citizens;

4. African governments must retain their right to regulate investments in the public interest and minimise their exposure to damaging litigation in all negotiations related to aid, trade, and international investment agreements;

5. African civil society and private sector bodies; governments; and sub-regional and continental organisations should coordinate their efforts in order to harmonise protocols and legal frameworks regulating foreign investment. African governments must also ensure that commitments agreed under investment treaties do not undermine the continent's integration efforts;

6. The oversight role of African parliaments over international investment agreements should be strengthened through greater coordination between national legislatures and the sub-regional and continental committees responsible for promoting investment legislation in support of Africa's economic development;

7. The existing institutional architecture for investor-state dispute settlement must be reviewed to ensure fairer and more equitable outcomes; measures to ensure the transparency of the system, particularly in respect of investor-state disputes, should be integrated into investment treaties; the processes for nominating and selecting arbitrators in investment disputes must also be revised to enlarge the pool and ensure representation of a broader spectrum of interests. Consideration should be given to employing tenured judges as arbitrators. A code of conduct for arbitrators must also be introduced, and an effective appeals process should be established;

8. African governments must explore alternative models for the investor-state dispute settlement process, such as promulgating national legislation that prioritises the domestic adjudication of disputes; establishes independent trade courts; and promotes African dispute settlement systems. State-to-state dispute settlement should be promoted as an effective alternative to investor-state dispute settlement;

9. The African Union Commission must facilitate a dialogue among African trade ministers and sub-regional bodies on the impact of international investment agreements on the continent's development agenda, at which lessons learned in international investment agreement negotiations should be shared and implemented; and

10. Africa's regional organisations must coordinate with the continent's think-tanks to develop common benchmarks for evaluating the quantitative and qualitative impact of investment policies – including those that promote international investment agreements – on sustainable development in Africa.

Introduction

The Centre for Conflict Resolution (CCR), Cape Town, South Africa, in close collaboration with the South African Department of Trade and Industry (DTI), hosted a policy advisory group seminar in Stellenbosch, South Africa, from 17 to 18 February 2014, on "South Africa, Africa, and International Investment Agreements".

The meeting brought together about 30 policymakers, scholars, and civil society actors from Africa, Asia, Europe, North America, and South America, to assess and broaden the debate on the implications of international investment agreements (IIAs) – including bilateral investment treaties (BITs) – for development efforts in Africa. The Centre has developed extensive knowledge on trade issues and foreign policy, and has convened three key policy seminars since 2012: "The African, Caribbean, and Pacific (ACP) Group and the European Union (EU)" held in Cape Town in October 2012; "South Africa in Southern Africa" held in Cape Town in November 2012; and "Post-Apartheid South Africa's Foreign Policy After Two Decades" held in Cape Town in July 2013.[1] The Stellenbosch seminar in February 2014 also leveraged the expertise and vast experience and networks of the South African Department of Trade and Industry in relation to the challenges and impact of international investment agreements. The meeting focused on the principles that underpin these treaties, which were conceived in the immediate post-colonial era during the Cold War, and are increasingly seen by critics as being at odds with emerging economic challenges confronting developing countries.[2]

Foreign direct investment (FDI) is widely considered to be important for economic development, playing a significant role in assisting host countries to generate inflows of capital and finance; technological innovation; skills development; managerial best practices; and access to global markets. While industrial economies have historically been the primary source of foreign direct investment, the "global South" has increasingly offered such investment. Since the world financial crisis of 2008/2009, leading economies in the "global South" such as China, India, Indonesia, Brazil, and Mexico have led the world's economic recovery, and continue to record higher rates of growth than those in Western industrial economies. These global shifts have been accompanied by significant improvement in Africa's economic prospects. The continent is the world's fastest-growing region, offering the highest returns on investment. Six of the ten most dynamic economies between 2001 and 2010 were in Africa.[3]

Structural changes to the world economy following the global financial crisis of 2008/2009 have strengthened the view that the benefits of foreign direct investment to the development of host countries are not automatic. Furthermore, the role of international investment agreements in promoting foreign investment is now highly contested. In this context, governments have sought an appropriate balance between the protections demanded

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1 See the Centre for Conflict Resolution (CCR) reports, *The African, Caribbean, and Pacific (ACP) Group and the European Union (EU)*, Cape Town, South Africa, October 2012; *South Africa in Southern Africa*, Cape Town, November 2012; and *Post-Apartheid South Africa's Foreign Policy after Two Decades*, Cape Town, July 2013 (all available at www.ccr.org.za).

2 Howard Mann, "Reconceptualising International Investment Law: Its Role in Sustainable Development", *Lewis and Clark Law Review*, Vol. 17, 2013, pp. 521-544.

3 *The Economist*, "Daily Chart: Africa's Impressive Growth", 6 January 2011 (accessed on 22 April 2014 at www.economist.com/blogs/dailychart/2011/01/daily_chart). The six countries listed are, in order of strength of growth: Angola, Nigeria, Ethiopia, Chad, Mozambique, and Rwanda. The article also cites an International Monetary Fund (IMF) forecast which predicts that seven African countries will be among the fastest-growing between 2011 and 2015 – in order of strength of growth: Ethiopia, Mozambique, Tanzania, the Democratic Republic of the Congo (DRC), Ghana, Zambia, and Nigeria.

by foreign investors for their investments and the right of national parliaments to regulate in the public interest and in support of domestic economic goals. Proponents of these investment treaties acknowledge that governments sacrifice some measure of regulatory autonomy when they sign these agreements. Nevertheless, they argue that the system of international investment agreements can be readjusted – particularly by redrafting treaties and through reform of the system's arbitration mechanisms – in order to redress the balance between state sovereignty and investor rights. Other economists and policymakers take different views. Some advocate termination of international investment agreements and their replacement by a new model, while others oppose subjecting investor claims to international arbitration. All these approaches have aimed, to a greater or lesser extent, at ensuring that the right of sovereign governments to regulate foreign investment is not unduly impeded.

As the "second-generation" of investment treaties negotiated in the 1990s have expired, they have been critically reviewed by governments. Investors have challenged an ever-broader range of government measures at international arbitration, exacerbating concerns about the structure and content of these treaties, particularly those concluded in the 1990s. As a result, many countries have reviewed their investment protection regimes, including the role and impact of international investment agreements. Since 2003, reviews of these treaties have been undertaken in Australia, Brazil, Canada, India, Norway, South Africa, the United States (US), and the European Union. Most of these reviews have found that there is little evidence of any direct link between foreign investment inflows and signing investment agreements.

National policies on such agreements have been significantly changed to mitigate their inherent shortcomings and risks, as well as the drawbacks of the investor-state dispute settlement system. Actions that countries are pursuing to address the challenges posed by international investor agreements include: clarifying the meaning of treaty provisions through authoritative interpretations; revising agreements through amendments; renegotiating older treaties; and terminating and/or consolidating agreements either unilaterally or by mutual consent.[4]

The management of foreign direct investment through these accords is a crucial aspect of Africa's economic plans, particularly as the continent's rapid economic growth rates – averaging over five percent between 2000 and 2010 – continue to attract investors by offering potentially high return on investments. However, the terms and conditions historically imposed on African governments by these accords threaten to constrain continental economic programmes from effecting the structural transformations required to achieve sustainable development. African governments and leaders will therefore require a range of new policies and regulations to harness the benefits of foreign direct investment. The development of such policies may entail a comprehensive review of all international investment agreements in Africa. African leaders could also seek to promote a continent-wide investment protection framework that provides a more appropriate balance between investor protection and the right of national governments to regulate in the public interest.

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4 United Nations Conference on Trade and Development (UNCTAD), "International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal", International Investor Agreements – Issues Note No 4, Geneva, Switzerland, June 2013.

The four key goals of the Stellenbosch seminar in February 2014 were to:

1. Contribute to a body of knowledge that can inform policymaking in response to international investment agreements by examining a range of political and legislative approaches that have been, and may be, taken towards negotiating them;
2. Strengthen the capacity of key decision-makers in Africa to address these challenges and maximise the benefits of these treaties to the continent;
3. Draw lessons from the debates on the impact of international investment agreements and bilateral investment treaties in order to support economic strategies for Africa that facilitate structural transformation and sustainable development; and
4. Develop concrete policy recommendations for addressing the coherent implementation of international investment agreements in Africa.

From left, Dr Adekeye Adebajo, Executive Director, Centre for Conflict Resolution (CCR), Cape Town, South Africa; Ms Felleng Sekha, Board Member, Centre for Conflict Resolution, Cape Town; and Mr Xavier Carim, Deputy Director-General, South African Department of Trade and Industry (DTI), Tshwane

1. Global Change and the International Investment Agreements Landscape[5]

There are three main forms of international investment agreements: bilateral investment treaties; free trade agreements (FTAs) with investment provisions such as the North American Free Trade Area (NAFTA); and regional investment agreements such as the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area, and the Southern African Development Community (SADC) Protocol on Finance and Investment. By December 2013, 793 bilateral investment treaties had been concluded by African countries, representing 27 percent of the total number worldwide.[6]

Many African countries are seen as investment treaty "takers" and not "makers", due to their relatively weak bargaining positions during negotiations towards these agreements. African governments have often been unable to impose market-entry or performance conditions on foreign investors through these treaties to ensure that their operations contribute towards domestic growth and development. Moreover, the investment policies of African countries sometimes fail to take account of broader national development strategies and priorities. Many African governments have also been criticised for being unaware of the risks and challenges that these investment agreements pose to their policy autonomy and sovereignty; sometimes signing them for political, rather than economic, reasons.[7]

The number of new international investment treaties being signed each year has declined from its peak in 1996 when more than 200 were agreed. In 2012, fewer than 40 such agreements were signed.[8] However, the number of disputes between investors and states arising from these agreements had risen from 49 in December 1987 to 514 in December 2012,[9] with Egypt being the most frequent African respondent in such cases.

The scope, content, and nature of international investment agreements have changed since the global financial crisis of 2008/2009. Governments have been accorded a greater role in the management of the world's economic architecture since then; and the previous prevailing economy orthodoxy of the "Washington Consensus" which promoted the benefits of foreign direct investment has been increasingly challenged. The climate for negotiating international investment agreements has also been changed by the prospect of several "mega-regional" free trade agreements such as the proposed European Union-United States Transatlantic Trade and Investment Partnership (TTIP) and the proposed Tripartite Free Trade Agreement between SADC, COMESA, and the East African Community (EAC). These inter-regional agreements could potentially create a

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5 This section is partly based on presentations made by Kathryn Gordon and Hamed El-Kady, at the CCR policy advisory group seminar, "South Africa, Africa, and International Investment Agreements", Stellenbosch, South Africa, 17-18 February 2014.

6 United Nations Conference on Trade and Development Database on International Investment Agreements, website (accessed on 23 April 2014 at http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20%28IIA%29/IIA-Tools.aspx).

7 Oxfam International, "Signing Away the Future: How Trade and Investment Agreements Between Rich and Poor Countries Undermine Development", Oxfam Briefing Paper, Oxford, England, March 2007 (accessed on 29 May 2014 at http://www.oxfam.org/sites/www.oxfam.org/files/Signing%20Away%20the%20Future.pdf).

8 United Nations Conference on Trade and Development, *2013 World Investment Report: Global Value Chains – Investment And Trade For Development* (Geneva: United Nations Conference on Trade and Development, 2013), p. 102.

9 United Nations Conference on Trade and Development, *2013 World Investment Report: Global Value Chains – Investment And Trade For Development*, p. 138.

multilateral environment that will enable countries to build consensus on the core elements of investment protection and sustainable development that should be included in their investment treaties. Conversely, the rules emerging from inter-regional arrangements could polarise positions and complicate the search for multilateral consensus on these agreements.

Economic policymaking has shifted from prioritising the protection of foreign investors to emphasising national sustainable development objectives. Accordingly, governments in the "global south" are seeking to strengthen the development dimensions of international investment agreements; to preserve their regulatory space; and to balance the rights and obligations of states and investors more equitably.

Policies on the future role of international investment agreements are generally shaped by either reformist or transformative positions. Reformists argue that these agreements attract crucial foreign capital by granting the robust legal protections sought by external investors. They note that the commitments contained in these agreements provide a solid basis for public governance. However, some reformists concede that investment treaties, and the investor-state dispute settlement (ISDS) system that enables foreign investors to sue host governments for alleged breaches of these agreements, have often favoured investors and are in need of reform. In recognition of the binding restrictions that investment treaties often impose on African and other governments, the Paris-based Organisation for Economic Cooperation and Development (OECD) has sought to promote alternative channels to reform the system such as inter-governmental statements on treaty interpretation, as well as comprehensive treaty-mapping. In addition, the US and Canada have revised their model investment treaties, making modest efforts to redraft certain key provisions and to clarify others; and granting greater authority to governments to interpret the meaning of the obligations that they enter into.

The transformative school of thought on investment treaties acknowledges that foreign direct investment can contribute to sustainable development, but argues that such benefits are not automatic and that regulation is required to balance the economic protections sought by investors against the real contributions that incoming investment could potentially provide. Since international investment agreements proscribe the rights of governments to enact such regulation, some economists such as American Nobel economics laureate, Joseph Stiglitz, have argued that they should be replaced by a new model under which states retain their policy sovereignty and political authority over the legal rights of foreign investors.[10]

Treaty expiration provides a window of opportunity for improving the international investment agreement regime. In December 2013, more than 1,300 bilateral investment treaties were estimated to have been terminated or renegotiated.[11] By 2018, a further 350 bilateral agreements will have reached the end of their initial terms. African and other governments can address the challenges and deficiencies in international investment agreements by amending, renegotiating, or terminating them. The changes sought in the next generation of treaties vary between capital-exporting and capital-importing countries, and also according to whether there is confidence that a government's right to regulate can be assured through appropriate reform of the dispute system. Inconsistencies and overlaps in the regime of international investment agreements have also been increasingly addressed.

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10 See Joseph Stiglitz, "Investment Treaties Are About Corporate Stealth Not Rights", *Business Day*, 7 November 2013 (accessed on 8 April 2014 at http://www.bdlive.co.za/opinion/2013/11/07/investment-treaties-are-about-corporate-stealth-not-rights).

11 United Nations Conference on Trade and Development, *2013 World Investment Report: Global Value Chains – Investment And Trade For Development*, p. 108.

African countries should analyse the costs and benefits of terminating treaties and the impact of such actions on their overall national investment climates. After a three-year review of its treaties, South Africa decided, in 2010, to revise its national legislation protecting investors, and to terminate existing agreements. African governments must manage the risks posed by international investment agreements, and retain the right to regulate investments in the public interest. As African states seek to transform their economies and to industrialise, they should assess how foreign direct investment can contribute to inclusive and socially equitable economic development, as well as the role that international investment agreements can play in such development. Moreover, African governments should focus on strengthening their domestic legal frameworks in order to offer the protections sought by foreign investors. In Latin America, Brazil is considering new types of treaties to promote foreign investment. African governments may be able to draw lessons from such innovations.

From left, Mr Hamed El-Kady, International Investment Policy Officer, Division on Investment and Enterprises, United Nations Conference on Trade and Development (UNCTAD), Geneva, Switzerland; Mr Xavier Carim, Deputy Director-General, South African Department of Trade and Industry, Tshwane; and Dr Kathryn Gordon, Senior Economist, Investment Division, Directorate for Financial and Enterprise Affairs, Organisation for Economic Cooperation and Development (OECD), Paris, France

2. Determinants of Foreign Direct Investment and the Role of International Investment Treaties[12]

International investment agreements and bilateral investment treaties are often promoted as a means of attracting foreign direct investment. Governments that emphasise the benefits of such investment for enhancing domestic growth and development often provide strong protections to foreign investors; liberalise investment regimes; and reduce or limit the regulations and conditions on investors.

However, the precise nature of any foreign direct investment benefits that may accrue from signing such deals is highly contested. For example, although foreign direct investment can result in economic benefits, it has also sometimes contributed to environmental damage and resulted in economic development in enclaves that has not contributed to broader national economic growth. Increased foreign investment following the adoption of such agreements may also result from other factors such as national economic reforms and revised domestic investment and trade regimes.

International mergers and acquisitions in specific sectors may also have a great effect on foreign direct investment figures. For example, the Industrial and Commercial Bank of China's (ICBC) purchase of 20 percent of South Africa's Standard Bank for $5.6 billion in 2007 contributed more than half of South Africa's foreign direct investment of $10 billion that year, and has been the biggest single investment in the country since democratic rule was achieved in 1994.

The direct contribution made by international investment agreements and bilateral investment treaties to "greenfield development" – the construction of new factories and facilities and the accompanying creation of long-term jobs – is also open to question. For example, between 2011 and 2013, 29 percent of the 414 investment projects identified in South Africa either constituted reinvestment or expansion by firms that were already in the country.[13] Data on levels of inward investment must, therefore, always be placed in context in order to reach an accurate assessment of the importance of international and bilateral investment agreements in increasing foreign direct investment. An analysis by the Geneva-based United Nations Conference on Trade and Development (UNCTAD) of data collected from 133 countries between 1993 and 1995, found that the impact of bilateral investment agreements on foreign direct investment was non-existent or marginal, and was secondary to the effects of other factors such as the size of the domestic market.[14] In 2009, UNCTAD concluded that these treaties "impact FDI inflows into developing countries only indirectly".[15]

International investment agreements have been promoted as instruments that increase the confidence of multinational corporations (MNCs) to invest in politically volatile jurisdictions. However, international firms often make their investment decisions regardless of the existence of such treaties. In 2010, almost 40 percent of multinational corporations based in the United States noted that they were either unfamiliar with bilateral

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12 This section is partly based on presentations made by Stephen Gelb and Lauge Poulsen, at the CCR policy advisory group seminar, "South Africa, Africa, and International Investment Agreements", Stellenbosch, South Africa, 17-18 February 2014.

13 Data collated by Stephen Gelb from public sources.

14 United Nations Conference on Trade and Development, *Bilateral Investment Treaties in the Mid-1990s* (Geneva: United Nations Conference on Trade and Development, 1998).

15 United Nations Conference on Trade and Development, *The Role of Investment Agreements in Attracting FDI [Foreign Direct Investment]* (Geneva: United Nations Conference on Trade and Development, 2009).

investments treaties or considered them to be unimportant.[16] American political risk insurers similarly noted the irrelevance of such treaties to their investment decisions.[17] The relationship between international investment agreements and increased foreign direct investment flows is ambiguous at best. In this regard, these treaties have been criticised for serving the interests of foreign countries and investors rather than those of their counterparts in the developing world.

African countries should analyse the precise importance of foreign direct investment within their domestic economies; the nature and scale of external investment flows that they require; and the legal controls over foreign direct investment. African governments should also survey domestic investors and undertake cost-benefit analyses in order to ascertain the risks and opportunities that increased foreign investment can bring to their domestic economies. Once a clear understanding of the costs and benefits of proposed international investment agreements has been reached, governments can negotiate with international investors from a stronger bargaining position. Other African countries can learn from South Africa's review of its own international investment agreements between 2007 and 2010.

After the advent of democracy in South Africa in 1994, and before its current constitution was adopted in 1996, Tshwane (Pretoria) concluded a raft of bilateral investment treaties without any detailed research. The proliferation of these deals signalled the re-entry of South Africa into the global economic community following international sanctions against the apartheid regime during the mid- to late-1980s. These agreements were signed in order to attract foreign capital and to reassure international multinational corporations that their investments were secure under the new democratic government of president Nelson Mandela. However, it became increasingly apparent that these new treaties posed a threat to Tshwane's efforts to use domestic policy to redress some of the social and economic inequities of the past. In 2006, a group of Italian-Belgian quarry investors, comprising R.E.D. Graniti Quarries and Blocks and, its Luxembourg-based holding company, Finstone, lodged a claim that South Africa's Black Economic Empowerment (BEE) policy – enacted in 2004 and providing for the increased participation of historically disadvantaged South Africans in the country's economy[18] – had unfairly prejudiced their economic opportunities without adequate compensation, and had damaged their future profits.

The case was one of the factors that led the South African government to institute a three-year multi-stakeholder review of 19 bilateral investment treaties, which was concluded in 2010. This review found that the link between bilateral investment treaties and increased foreign direct investment was uncertain, and that the ambiguity inherent in many of the standard provisions of these agreements created uncertainty for both investors and governments. As a result, Tshwane decided to terminate its existing investment treaties; and only to enter into new ones if there were compelling economic or political reasons to do so, and if the new deals clearly reduced the risks inherent in the earlier agreements. South Africa adopted the position that its 1996 Constitution provided strong protections for foreign investors, which would be clarified in the adoption of a new Promotion and Protection of Investment Bill, issued for public comment in November 2013.[19]

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16 See Jason Webb Yackee, "Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence", *Virginia Journal of International Law*, Vol. 51, No. 2, 2010, pp. 397-442.

17 See Lauge Poulsen, "The Importance of BITs [Bilateral Investment Treaties] for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence", in Karl Sauvant (ed.), *Yearbook on International Investment Law and Policy 2009/2010* (Oxford: Oxford University Press, 2009), pp.539-574.

18 See Roger Southall, "The ANC [African National Congress] and Black Capitalism in South Africa", *Review of African Political Economy*, Vol. 31, No. 100, June 2004, pp. 313-328; and Kehla Shubane, "Black Economic Empowerment: Myths and Realities", in Adekeye Adebajo, Adebayo Adedeji, and Chris Landsberg (eds.), *South Africa in Africa: The Post-Apartheid Era* (Scottsville: University of KwaZulu-Natal Press, 2007), pp. 63-77.

19 See Carol Paton, "Investment Bill Marks Shift in SA's [South Africa's] Trade Policy", *Business Day*, 4 November 2013 (accessed on 7 April 2014 at http://www.bdlive.co.za/business/trade/2013/11/04/investment-bill-marks-shift-in-sas-trade-policy).

Most of the investment capital being ploughed into Africa is directed at the continent's mining and energy sectors. Conceding economic control over the terms on which foreign investors extract these natural resources has serious implications for national development and beneficiation policies. For example, foreign investors may seek to block tax regimes that impose levies on mineral exports in support of national industrialisation efforts. The promotion and protection of foreign investment by international investment agreements can also significantly damage the national balance of payments of some developing countries. For example, the inflow of relatively large amounts of foreign capital can lead to currency appreciation; inflation; and over-valued assets, which can destabilise a domestic economy. Conversely, capital flight can lead to currency depreciation and leave an economy without the financial reserves to service its debts. Furthermore, international investment agreements enable foreign investors to challenge any measure by African and other governments that they see as impinging on their expectations of appropriate returns on their investments.

It is important for international organisations like the Paris-based Organisation for Economic Cooperation and Development, and the Geneva-based United Nations Conference on Trade and Development to develop a common approach to the practical application of international treaties and foster a shared understanding of their potential impacts on host economies. In this regard, the right to arbitration under international investment agreements, which is currently only enjoyed by international investors, should be extended to domestic parties. Substantial political damage can also be caused by arbitration to enforce these agreements, which often targets sensitive regulatory areas and can prevent African and other governments from legislating and acting in the public interest on economic policy; labour standards; environmental protection; and public health. International investment agreements are not designed to address environmental and developmental issues *per se*. In addition, the negotiation, ratification, implementation, and arbitration of investment treaties can entail significant opportunity costs for public administrations, particularly for developing countries with limited bureaucratic and legal resources. Furthermore, a country's reputation as a destination for foreign investment can be damaged by its mere engagement in an investment arbitration case, regardless of whether it wins or loses.

From left, Dr Stephen Gelb, Director, International Investment Initiative, World Trade Institute, University of Bern, Switzerland; Ms Nathalie Bernasconi-Osterwalder, Programme Leader, Investment and Sustainable Development, International Institute for Sustainable Development (IISD), Geneva, Switzerland; and Dr Lauge Poulsen, Research Fellow in Politics, University of Oxford, England

3. The Policy Impact of International Investment Agreements in Africa[20]

African and other developing countries generally accede to international investment agreements on the understanding that these treaties and the legal protections that they afford to external investors will promote greater inflows of foreign direct investment.

However, some leading economic powers receive substantial foreign direct investment although they have signed few or no bilateral treaties. Japan – the second largest source of foreign direct investment in the world – has signed only four such agreements. The United States does not have a bilateral investment treaty with Beijing, although China is the largest destination for American foreign direct investment in the developing world. There is a growing belief that investment flows are not affected if countries refuse to sign bilateral investment treaties or allow such investment agreements to lapse.[21] Therefore, signing such agreements alone will not attract substantial foreign investment. For example, countries with weak domestic institutions have often failed to obtain significant benefits from these investment treaties.[22]

By December 2013, 793 bilateral investment treaties had been concluded by African countries, representing 27 percent of the total number of such agreements.[23] Most of these accords employ expansive definitions and standards of protection to address state regulatory activity which grant leeway to broad interpretation by international investment agreement tribunals such as the Washington-based International Centre for the Settlement of Investment Disputes (ICSID), and the Vienna-based United Nations Commission on International Trade Law (UNCITRAL). The investor-state dispute settlement mechanisms and arbitration provided by these treaties generally favour the enforcement of the rights of foreign investors. Only foreign investors – often big international corporations – can initiate legal cases in the event of disputes, while governments have no such recourse to challenge errant behaviour by these investors.

International investment agreements in Africa consist of bilateral investment treaties, or investment provisions in preferential trade agreements (PTAs) like the United States' African Growth and Opportunity Act (AGOA) of

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20 This section is partly based on presentations made by Yao Graham and Malan Lindeque at the CCR policy advisory group seminar, "South Africa, Africa, and International Investment Agreements", Stellenbosch, South Africa, 17-18 February 2014.

21 Yackee, "Do Bilateral Investment Treaties Promote Foreign Direct Investment?".

22 See Eric Neumayer and Laura Spess, "Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?" *World Development*, Vol. 33, No. 10, 2005, pp. 1567-85.

23 See United Nations Conference on Trade and Development, "Country-Specific Lists of Bilateral Investment Treaties", United Nations Conference on Trade and Development website (accessed on 7 April 2014 at http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20%28IIA%29/Country-specific-Lists-of-BITs.aspx).

2000,[24] and the European Union's Economic Partnership Agreements (EPAs), initiated in 2002.[25] Bilateral investment treaties focus on the terms and conditions for permitting and protecting investments by enterprises or individuals of one country in the territory of its treaty partner. Preferential trade agreements generally cover a broader range of trade and economic issues and may be concluded at bilateral, sub-regional, or regional levels. Most external investments in Africa seek to exploit the continent's oil, gas, and mineral wealth. The terms of this exploitation can be shaped by the regulatory framework provided by investment agreements, as well as by domestic mechanisms for aligning external investment with national development priorities.

Many African governments have sought to forge policies to mobilise foreign direct investment for sustainable development. However, national, sub-regional, and regional bodies on the continent including the Common Market for Eastern and Southern Africa, the East African Community, the Economic Community of West African States (ECOWAS), the Southern African Development Community, and the African Union (AU) often fail to coordinate their negotiation of investment treaties due to a lack of bureaucratic capacity, as well as competition among these bodies. This lack of coordination often facilitates the adoption of differentiated approaches by external investors to their African partners, and weakens the bargaining positions of African governments and sub-regional and regional bodies.

International investment agreements in Africa often constrain the capacity of national governments to make policies and legislate in support of domestic investors, and restrict the ability of legislatures to fulfil their regulatory mandate to advance the public interest. In addition, large, relatively uncontrolled inward and outward capital flows, which are sometimes promoted by investment agreements, can damage already fragile African economies. Furthermore, the protections afforded by these accords are often not required by external investors who have shown themselves to be undeterred by political risks when seeking to engage in the extraction of mineral resources. Foreign investment in mining, oil, and gas in volatile areas in countries such as Angola, Nigeria, and Libya is overwhelmingly driven by the prospect of high returns.

Bilateral and international investment treaties in Africa place few obligations on overseas investors in relation to their activities and conduct. In particular, such investors are rarely required to integrate their operations into domestic value chains to support local small- and medium-sized enterprises (SMEs) or to promote industrialisation. Prioritising short-term, profit-seeking foreign direct investment through international investment agreements can often undermine national and regional policies and legislation to promote sustainable socio-economic development. These treaties also impose differential treatment of foreign and domestic investors that often favours the former, and can abrogate beneficial terms of trade enjoyed by a country as a most favoured nation (MFN). These agreements further oblige national governments to compensate foreign investors in cases of direct or indirect public expropriation of relevant assets. Additionally, they can

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24 Nomfundo Xenia Ngwenya, "The United States", in Chris Saunders, Gwinyayi A. Dzinesa, and Dawn Nagar (eds.), *Region-Building in Southern Africa: Progress, Problems and Prospects* (London and New York: Zed Books, 2012), pp. 264-280.

25 See Mareike Meyn, "An Anatomy of the Economic Partnership Agreements", in Adekeye Adebajo and Kaye Whiteman (eds.), *The EU and Africa: From Eurafrique to Afro-Europa* (London: Hurst and Co; New York: Columbia University Press; and Johannesburg: Wits University Press, 2012), pp. 197-216; and Gilbert M. Khadiagala, "Africa and Europe: Ending a Dialogue of the Deaf", in Adebajo and Whiteman (eds.), *The EU and Africa*, pp. 217-235.

inhibit the imposition of beneficial conditions of entry or operation on foreign investors such as the establishment of joint ventures; the transfer of technologies; the purchase of domestic inputs; or undertakings to support research and development. Finally, these agreements grant external investors the right to bring arbitration claims against host countries before international tribunals.

International investment agreements generally oblige host states to grant domestic and foreign investors identical benefits, privileges, and advantages under national rules and laws, thereby enabling international investors to compete on an equal footing with, and enjoy the same level of treatment as, their national peers.[26] However, the imposition of this national treatment standard can effectively undermine the sovereignty of governments if the protections enjoyed by foreign investors exceed those extended to their domestic counterparts. Not only are international investors, unlike their national peers, provided with extra protections against expropriation, they also enjoy additional guarantees regarding the free transfer of capital. In addition, the "legitimate expectations" of foreign investors, as framed under the international investment agreements, are broad in scope, and entail rights to compensation that may exceed those offered to their domestic counterparts.

Meanwhile, arbitration resulting from international investment agreements can drain national bureaucratic, legal, and financial resources – leading to unwillingness on the part of African and other governments to contest cases, or to introduce legislation in the public interest for fear of legal repercussions. Furthermore, the extra-territorial dispute settlement mechanisms provided by bilateral investment treaties can challenge the sovereignty of domestic law, subjecting it to the judgements of international tribunals. In this regard, international investment treaties grant foreign entities – often owned by distant portfolio investors, asset managers, or pension funds – the right to challenge and potentially overturn clauses in national constitutions.

Given these high stakes, African and other governments have adopted increasingly cautious approaches towards such agreements, including exploring the possibility of terminating them. South Africa has sought to level the playing field between foreign and domestic investors and to create a balance between the public interest and investment protection by introducing specific national legislation in this area which can be adjudicated by domestic courts. In Latin America, some countries such as Argentina, Bolivia, Ecuador, and Venezuela are seeking to establish a regional alternative for dispute settlement under the Union of South American Nations – *Unión de Naciones Suramericanas* (UNASUR). Similarly, African governments should seek to adopt legal frameworks in response to international investment agreements in line with protocols developed by the African Union in order to harness foreign direct investment to national development priorities.

A more coherent approach to the coordination of foreign direct investment on the continent would enable African governments to channel incoming funds more effectively to creating jobs; developing skills; and transferring relevant technologies from abroad to meet Africa's development needs. African governments should also engage with civil society and national, sub-regional, and regional think-tanks to explore the viability of specific international investment agreements and the impact of foreign direct investment on development priorities, particularly given the capacity of large-scale capital flows to distort vulnerable domestic economies. In addition, African policymakers should place greater emphasis on plans to boost and harness domestic savings and investment for sustainable development.

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26 David Collins, "National Treatment in Emerging Market Investment Treaties", in Anselm Kamperman Sanders (ed.), *The Principle of National Treatment in International Economic Law* (Cheltenham, England: Edward Elgar, September 2014).

Lessons may also be learned from the obligations imposed by Asian governments such as China and Malaysia on foreign investors in support of that region's industrialisation efforts. These include requirements for foreign investors: to transfer technologies; to provide research and development support; to establish joint ventures and supply chains to strengthen local companies; and to channel capital flows to domestic priorities in line with national development and industrial plans.

From left, Dr Yao Graham, Coordinator, Third World Network-Africa (TWN-Af), Accra, Ghana; Ms Joanmariae Fubbs, Chair, Portfolio Committee on Trade and Industry, Parliament of South Africa, Cape Town; and Dr Malan Lindeque, Permanent Secretary, Namibian Ministry of Trade and Industry, Windhoek

4. Analysing Investment Treaty Provisions[27]

The state in many post-independence developing countries has a major role to play in redressing the legacies of colonialism. In this regard, the struggle for control over economic policy and ownership of national assets remains a crucial issue.

For example, in 1971, Malaysia adopted a new economic policy to promote "affirmative action" between Malays and Chinese, and to redress historic inequalities in its relations with external economic actors. The policy imposed performance requirements on foreign investors in support of the country's socio-economic development. Kuala Lumpur thus regained national control of its economic policymaking, while attracting the most foreign direct investment per capita in the world. However, many of the policies and regulations introduced by Malaysia are now proscribed by international investment agreements. States that currently seek to regulate foreign investment in the public interest face the risk of litigation. In 2006, foreign investors in the mining sector challenged policies such as Black Economic Empowerment, which had been introduced by South Africa two years earlier to redress apartheid's inequities, on the grounds that these measures threatened their commercial interests.[28]

The expansive scope and content of international investment agreements exacerbates their capacity to undermine the policy autonomy of governments in developing countries. Investment treaties typically include a preamble stating the goals of the parties; umbrella clauses that place blanket obligations on host states; and broad definitions of "investor" and "investment". They also include substantive provisions that oblige host states to suspend any discrimination against foreign investors that may be permitted under national treatment and most favoured nation provisions; to compensate them for any direct or indirect expropriation of their property; to accord foreign investors "fair and equitable treatment"; to allow the transfer of capital in and out of the host country by foreign investors; and to enable claims to be brought against host states through international arbitration.

The deficiencies of these international investment agreements, particularly the early-generation treaties concluded by many African countries, have been widely recognised. Their substantive provisions are imprecise and open to widely varying interpretations, reflecting a pro-investor bias and jeopardising national sovereignty, particularly if domestic legislation is introduced that is seen to damage the value of an

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27 This section is partly based on presentations made by Martin Khor and Kekeletso Mashigo at the CCR policy advisory group seminar, "South Africa, Africa, and International Investment Agreements", Stellenbosch, South Africa, 17-18 February 2014.

28 See Adam Habib, *South Africa's Suspended Revolution* (Johannesburg: Wits University Press, 2012); and Daron Acemoglu, Stephen Gelb, and James A. Robinson, "Black Economic Empowerment and Economic Performance in South Africa", South African National Policy Commission, August 2007 (accessed on 22 April 2014 at http://www.npconline.co.za/MediaLib/Downloads/Home/Tabs/Diagnostic/Economy2/Black%20Economic%20Empowerment%20and%20economic%20performance%20in%20South%20Africa.pdf).

investment. For example, American tobacco giant, Philip Morris, initiated cases under separate international investment agreements against the Australian government in 2011 and the government of Uruguay in 2012 for enacting anti-smoking legislation. Key definitions in the treaties have been contested in court, leading to contradictory arbitration awards. For example, the definition of "investment" can cover a wide range of "assets" beyond productive enterprises. Similarly, the definition of "expropriation" can extend to "regulatory takings" which cover any new policy measures that affect potential revenues and profits. "Fair and equitable treatment" has been controversially interpreted as granting foreign investors the right to a "predictable regulatory environment", which has enabled them to challenge the introduction of new tax rules, sometimes undermining the sovereignty of national governments.

These investment treaties also contain provisions for an investor-state dispute settlement system which allow foreign investors to sue host governments in an international tribunal. Such provisions accord foreign investors a legal recourse that domestic firms do not enjoy. International investment agreements can further constrain the ability of governments to implement or pursue legislation on sensitive public policy issues. If foreign investors lose a case in a national court, they can take up the same case in an international tribunal, where the chances of success and compensation on offer may be higher – thus undermining the national judicial sovereignty of host countries. Notwithstanding the extensive rights and guarantees provided to foreign investors, international investment agreements generally place no obligations on them to contribute to, or support, socially equitable economic development.

African governments need to adopt a range of measures to address the deficiencies in international investment agreements. They should aim to develop investment laws that support their specific public policy objectives, and strengthen the oversight role of African parliaments over international investment agreements. African governments should further seek to amend or renegotiate investment treaties in order to balance the rights of investors and states more fairly. In particular, such agreements should advocate that investment protection is a tool for promoting sustainable economic development; health and environmental protections; labour rights; and corporate social responsibility. Government measures to protect legitimate public welfare objectives should also be exempted from provisions offering foreign investors compensation for the "expropriation" of assets. These agreements should use explicit language that clearly limits the definitions of "investor" and "investment". In addition, clauses on "fair and equitable treatment" must be excluded or linked to minimum standards of treatment in customary international law. Specific rather than blanket exemptions should be offered to foreign investors to ensure that they are not discriminated against by most favoured nation provisions. Host countries must further be allowed to restrict transfers of capital in cases of bankruptcy; if they need to respond to balance of payments pressures; and to protect the stability of domestic currencies. Provisions regarding dispute settlement should include an explicit requirement that investors exhaust all available domestic remedies before seeking investor-state or state-to-state arbitration. Finally, African governments need to coordinate more effectively to ensure that commitments entered into under international investment agreements do not undermine the continent's long-terms strategies for achieving regional integration.

The European Union is also rethinking its traditional approach to investment agreements, as the competence for negotiating these accords has moved from its member states to its Commission under the 2009 Lisbon Treaty. Brussels has proposed new approaches to enhance the transparency of the process for negotiating these accords; the independence of arbitrators; and the predictability of the agreements themselves, including through the possibility of binding interpretation by the parties involved. The EU has also proposed the establishment of an appellate mechanism to ensure greater consistency in arbitration processes.

From left, Ms Kekeletso Mashigo, Director: Multilateral Organisations, South African Department of Trade and Industry, Tshwane; Dr Malan Lindeque, Permanent Secretary, Namibian Ministry of Trade and Industry, Windhoek; and Mr Martin Khor, Executive Director, South Centre, Geneva, Switzerland

5. Assessing the Investor-State Dispute Settlement System[29]

The investor-state dispute settlement system is a mechanism included in most investment treaties to enable foreign investors to sue host governments at an international tribunal.

Most of these treaties grant investors the right to choose between a few named tribunals – usually established under the auspices of the Washington-based International Centre for the Settlement of Investment Disputes or the Vienna-based United Nations Commission on International Trade Law – each with its own procedural rules. The dispute settlement system permits any foreign investor from a country that has signed an investment agreement to bring a case against a host government on the grounds that the state has not met its obligations under the treaty. If such a claim succeeds, the tribunal could award the investor financial compensation, which may be enforced through seizing government assets.

Since its creation in 1966, the International Centre for the Settlement of Investment Disputes has concluded 282 cases, with 188 disputes still pending.[30] In Africa, 25 percent of reported arbitrations involve mining, oil, and gas investments – all critical sectors for the continent's development. In 2009, 113 of the 318 investment arbitrations that had been filed were against Latin American states.[31] As a result, between 2007 and 2012, Bolivia, Ecuador, and Venezuela withdrew from the Washington Convention of 1965[32] which established the International Centre for the Settlement of Investment Disputes – joining the remaining Bolivarian state, Cuba, which had previously refused to ratify the convention. Meanwhile, Brazil's Congress has also withheld ratification of all the 15 bilateral investment treaties signed by the executive with foreign investors on the grounds that these are incompatible with the national Constitution. Although Brazil is not a signatory to the Washington Convention, and therefore falls outside the jurisdiction of the International Centre for the Settlement of Investment Disputes, it nevertheless remains one of the world's main recipients of foreign direct investment. This would again suggest that investors do not necessarily need investment treaties to attract foreign investment.

Most international investment agreements also provide for State-to-State Dispute Settlement (SSDS), which allows cases to be brought between countries in relation to the interpretation and application of investment treaties. Such cases can only be brought if local remedies have already been exhausted, and arbitration by the International Centre for the Settlement of Investment Disputes is not applicable.

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29 This section is partly based on presentations made by Nathalie Bernasconi-Osterwalder and Aluisio de Lima-Campos at the CCR policy advisory group seminar, "South Africa, Africa, and International Investment Agreements", Stellenbosch, South Africa, 17-18 February 2014.

30 International Centre for the Settlement of Investment Disputes (ICSID), "List of ICSID Cases", International Centre for the Settlement of Investment Disputes website page (accessed on 22 April 2014 at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListCases).

31 See Omar E. Garcia-Bolivar, "The Surge of Investment Disputes: Latin America Testing the International Law of Foreign Investments", paper presented at the Second Biennial General Conference of the Asian Society of International Law, Tokyo, 1-2 August 2009 (accessed on 22 April 2014 at http://asiansil-jp.org/wp/wp-content/uploads/2012/07/garcia-bolivar.pdf).

32 The Washington Convention on the Settlement of Investment Disputes, which was formulated by the World Bank in 1965 and came into force in 1966, established the International Centre for the Settlement of Investment Disputes and sought to remove major impediments to the free international flows of private investment posed by non-commercial risks and the absence of specialised international methods for investment dispute settlement. A total of 159 countries had signed the Convention, and 150 had ratified it by July 2014.

The investor-state dispute settlement system under which investors can bring cases against governments is fragmented. A range of venues offer arbitration, each with its own history, culture, and rules of procedure. In the absence of an appellate process, the system is prone to diverging interpretations in cases addressing the same provisions and similar facts, which has exacerbated uncertainty about the meaning of key obligations under existing and proposed treaties.[33] The shortcomings of the investor-state dispute settlement system are acknowledged by many states; the European Union; inter-governmental organisations such as UNCTAD; and civil society organisations such as the South Centre in Geneva. This framework has been mainly criticised for its lack of accountability and secrecy. The details of disputes involving important public policy issues and large sums of money are often hidden from the public. Access to information on hearings; arguments and facts presented by the parties; interim decisions; and awards, is very limited. Most treaties lack rules on submissions by impartial special advisers to courts – *amicus curiae*. Concerns have also been raised over the impartiality and independence of arbitrators, especially in relation to how they are nominated, and the effectiveness of the process for appealing their awards.

The mostly Western arbitrators and law firms that specialise in investment disputes have a vested interest in maintaining and controlling the investor-state dispute settlement system, which has become a multi-billion dollar industry. The number of cases and the sums of money involved have surged since 1990, as litigation in this area has become part of the business model for international investors and lawyers. On average, each investor-state dispute costs $8 million in legal and arbitration fees, with some cases costing more than $30 million. In 2009/2010, 151 investment arbitration cases involved corporations claiming up to $100 million in total from national governments. In addition, the success rate for claims is growing. In 2012, 75 percent of all decisions were in favour of investors, with the largest – against Ecuador – awarding an investor $2.4 billion. The industry is dominated by a small group of 20 investment arbitration law firms from Western countries, with very few lawyers from African, Asian or Latin American legal firms being nominated to serve on these tribunals. In 2012, only 15 arbitrators – mainly from Europe, the US, and Canada – had decided 55 percent of the 450 investor-state disputes brought before the tribunals. The same small group of lawyers rotates between representing claimants and respondents, and sitting on arbitration panels, raising serious concerns over conflicts of interest.[34] The predictability and correctness in law of the awards has also been questioned, since there is limited scope to review or annul these decisions under the International Centre for the Settlement of Investment Disputes, and the New York Convention of 1958 which established the legal basis for international arbitration.[35]

Although the deficiencies in the investor-state dispute settlement system are widely recognised, reform of the system will have to overcome vested interests seeking to maintain the status quo. Meanwhile, provisions to promote a more transparent dispute system should be integrated into treaties, and the rules of the International Centre for the Settlement of Investment Disputes and the UN Commission on International Trade Law must be amended to improve transparency in investor-state arbitration. An expanded roster of arbitrators, including tenured judges from both rich and developing economies, should be drafted based on

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33 United Nations Conference on Trade and Development, "Recent Developments in Investor-State Dispute Settlement: International Investor Agreements – Issues Note No. 1", Geneva, March 2013.

34 Pia Eberhardt and Cecilia Olivet, "Profiting from Injustice", Corporate Europe Observatory and the Transnational Institute, Amsterdam, November 2012.

35 The New York Convention, also known as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, was adopted by the United Nations in June 1958 and entered into force in June 1959. The convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against. It further obliges parties to ensure that such awards are recognised and generally capable of enforcement in their jurisdiction in the same way as domestic awards. A total of 150 out of 193 United Nations member states had adopted and ratified the New York Convention by July 2014.

clear criteria for appointments. The processes for nominating and challenging arbitrators must also be improved. A code of conduct for arbitrators should be drafted and adopted. The rules and procedures governing the conduct of cases need urgently to be clarified in order to promote more predictable judgements. The appeals process must also be strengthened.

Unless and until this dispute system is reformed, consideration should be given to a moratorium on using it. State-to-state dispute settlement may provide a useful alternative avenue. African countries should also explore other domestic and regional models for resolving investment disputes. For example, Brazil, which has a strong pro-investor domestic law, has shown that an alternative approach can work: the government authorises state and private companies to sign nationally-enforceable investment contracts with arbitration provisions. While Brazil has been identified as a model to follow, critics have pointed out that the country is also a strategic overseas investor, especially in African markets; and that it should therefore be ascertained whether the South American country offers its investment partners similar sovereign protections.

From left, Ms Nathalie Bernasconi-Osterwalder, Programme Leader, Investment and Sustainable Development, International Institute for Sustainable Development, Geneva, Switzerland; Dr Yao Graham, Coordinator, Third World Network-Africa, Accra, Ghana; and Professor Aluisio de Lima-Campos, Chair, Brazilian International Trade Scholars Institute; and Adjunct Professor, Washington College of Law, American University, Washington D.C., United States

6. Regional Regulation of Investments in Africa[36]

Africa's governments, its regional economic communities (RECs), and the African Union have increasingly sought to address how international investment agreements can be managed at the sub-regional and continental levels. They have also examined the role of these treaties in African efforts to promote industrialisation and sustainable economic development.

For example, 14 of the 15 countries in the Southern African Development Community– excluding Seychelles – have ratified a 2006 Finance and Investment Protocol (FIP), which came into force in 2010. The agreement seeks to improve the climate for investment in each member state; to promote the harmonisation of national investment policies; to expand foreign and intra-regional investment flows; and to guide governments on future investment negotiations. It establishes a sub-regional framework of standards and benchmarks for SADC countries to adopt when negotiating bilateral investment treaties, and also covers issues relating to: macroeconomic convergence; taxation; cooperation among central banks; coordination of exchange controls and settlement; collaboration among stock exchanges; and money laundering. However, the protocol's provisions are not binding on member states, which have often resisted conceding sovereignty to the sub-regional body and its structures. The SADC Tribunal, which was established in August 2005 in Gaborone, Botswana, is a case in point. Following several politically sensitive rulings against the Zimbabwean government by the country's white commercial farmers, Southern Africa's leaders resolved in August 2012 to reduce the powers of the tribunal, limiting its mandate to disputes among member states and no longer allowing individuals to appear before the tribunal. In theory, the court can still adjudicate investment disputes among the bloc's countries. However, there is no guarantee that member states will either respect or enforce the rulings of the tribunal on such matters, since national sovereignty often continues to take precedence over regional authority in Southern Africa. The scope and jurisdiction of SADC's investment protocol and other sub-regional and regional instruments have consequently remained limited, and subject to widely varying interpretations by member states at the national level.

Sub-regional and continental norms on investment frameworks are often out of step with national policies, and are further undermined by competition for investment among African states, as well as the inability of sub-regional bodies to harmonise their investment policies effectively. African governments are often motivated to sign investment treaties by their vested or national interests in attracting foreign direct investment, which can lead to a zero-sum approach to adopting these instruments.

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36 This section is partly based on presentations made by Mustaqeem de Gama and Treasure Maphanga at the CCR policy advisory group seminar, "South Africa, Africa, and International Investment Agreements", Stellenbosch, South Africa, 17-18 February 2014.

The Trade and Industry Division of the African Union Commission has identified a need to align the investment protocols adopted by Africa's sub-regional organisations such as SADC, ECOWAS, COMESA, and the EAC, with frameworks being proposed by the continental body. Policymakers in Addis Ababa are seeking to harness investment flows to strategic economic objectives for Africa which include: enhancing the continent's share of global markets; boosting intra-African trade; fast-tracking the establishment of a continental free trade area; accelerating Africa's industrial development; and implementing the Africa Mining Vision and Action Plan, which was adopted by the African Union in February 2009.

In October 2013, African trade ministers expressed concern that multiple and overlapping bilateral and multilateral trade and investment treaties across the continent had restricted the powers of national governments to legislate and make economic policy. The ministers asked the African Union Commission and the United Nations Economic Commission for Africa (UNECA) to conduct an in-depth study on international investment issues as a matter of urgency in order to resolve this issue. The trade ministers emphasised the importance of policy flexibility in any agreed continental investment agreement regime in order to ensure that such a system would promote regional integration, industrialisation, and socio-economic development. They also noted that such a regime should take account of national economic interests; issues of administrative capacity; and political pressures, while seeking to ensure the implementation of continental decisions on trade and investment by national governments. African governments – through the African Union – should consider pursuing a comprehensive review of international investment agreements in order to inform consultation among sub-regional, continental, and global fora on these instruments. This review should focus on assessing the risks posed by these accords to policies that seek the structural transformation of the continent's economies. African governments could also consider a moratorium on signing new treaties until this assessment has been completed, bearing in mind that there is no direct or clear link between signing international investment agreements and inflows of foreign direct investment. Consideration should also be given to creating an Africa-wide investment protection framework that mitigates the risks created by earlier treaties, and provides a more appropriate balance between investor protection and the right of African governments to regulate in the public interest. Such a framework could include the establishment of an investment arbitration centre located in Africa.

The African Union has to consider whether it should adopt an expansive or narrower approach to formulating policy on investment management, especially considering that the treatment of investments varies widely among Africa's sub-regional bodies. Furthermore, the AU must decide whether the terms for an African Economic Community (AEC) to be implemented by 2028 should necessarily include investment provisions, and, if so, suggest the policies that should be adopted towards foreign investment. A continental protocol on

international investment agreements should also define the rights and protections enjoyed by African firms in free trade areas on the continent and in relation to foreign investors. African states further need to become more proactive in protecting the continent's investment environment by promoting greater regional integration, industrialisation, beneficiation, and peacebuilding efforts. Member states in sub-regional blocs should support the harmonisation of investment protocols among Africa's regional economic communities, and work towards the development of a continental framework on investment treaties. Moreover, the adoption and implementation of the African Mining Vision of 2009 promoted by the African Union and the UN Economic Commission for Africa must be aligned to the proposed establishment of an African Economic Community to ensure policy coordination and coherence at national, sub-regional, and continental levels. Finally, African governments should coordinate their efforts in order to promote the continent's economic interests and development agenda more effectively at international fora in which international investment regimes are being assessed.

From left, Dr Mustaqeem de Gama, Director, South African Department of Trade and Industry, Tshwane; Dr Said Adejumobi, Director, Sub-Regional Office for Southern Africa, United Nations Economic Commission for Africa (UNECA), Lusaka, Zambia; and Ms Treasure Maphanga, Director, Department of Trade and Industry, African Union Commission, Addis Ababa, Ethiopia

Conclusion

Although foreign direct investment can bring benefits to host economies, these do not accrue automatically. Governments need to formulate policies and legislate proactively to ensure that such investment supports national development priorities.

International investment agreements can not guarantee increased foreign direct investment, and have been criticised for creating an unbalanced regime that places obligations primarily on governments while reserving extensive rights for foreign investors. These treaties can constrain governments from legislating and regulating in the public interest. Moreover, the provisions contained in these agreements are prone to expansive interpretations by arbitration panels that often favour the interests of investors. The investor-state settlement system is established on an *ad hoc* and fragmented basis; generates inconsistent and unpredictable outcomes; and has compounded uncertainty about the meaning of treaty provisions. International arbitration in this area has become a profitable industry encouraging a rapid increase in the number of cases being brought before arbitration panels. Accordingly, many African and other governments are reconsidering their approaches to international investment agreements. Some are refusing to enter into new treaties; others are revising their international investment agreements and proposing changes to the arbitration system; while others are terminating their existing agreements and calling for a complete overhaul of the treaties and the regime for enforcing them. African governments should therefore critically assess and review their international investment agreements, and develop new approaches to investment protection that better support the continent's economic structural transformation, development, and integration efforts.

From left, Ms Sanusha Naidu, former Senior Researcher, Centre for Conflict Resolution, Cape Town, South Africa; Dr Adekeye Adebajo, Executive Director, Centre for Conflict Resolution, Cape Town; Mr Xavier Carim, Deputy Director-General, South African Department of Trade and Industry, Tshwane; and Dr Brendan Vickers, Chief Director, Research and Policy, South African Department of Trade and Industry, Tshwane

Policy Recommendations

The following ten policy recommendations emerged from the Stellenbosch policy advisory group seminar:

1. African governments should include properly researched and tested policies on international investment in their development strategies in order to support national economic diversification and industrialisation priorities;

2. African governments must draft investment laws that mobilise and harness domestic savings and funds, thereby decreasing dependence on foreign direct investment. Governments should also encourage international investors to look beyond international investment agreements for other means of creating an enabling environment to attract foreign direct investment;

3. African governments must review their international investment agreements to determine whether these treaties contribute to inclusive and socially equitable economic development. They should seek to amend or renegotiate these treaties, as necessary, in order to create a fair balance between the rights of investors and those of governments and their citizens;

4. African governments must retain their right to regulate investments in the public interest and minimise their exposure to damaging litigation in all negotiations related to aid, trade, and international investment agreements;

5. African civil society and private sector bodies; governments; and sub-regional and continental organisations should coordinate their efforts in order to harmonise protocols and legal frameworks regulating foreign investment. African governments must also ensure that commitments agreed under investment treaties do not undermine the continent's integration efforts;

6. The oversight role of African parliaments over international investment agreements should be strengthened through greater coordination between national legislatures and the sub-regional and continental committees responsible for promoting investment legislation in support of Africa's economic development;

7. The existing institutional architecture for investor-state dispute settlement must be reviewed to ensure fairer and more equitable outcomes; measures to ensure the transparency of the system, particularly in respect of investor-state disputes, should be integrated into investment treaties; the processes for nominating and selecting arbitrators in investment disputes must also be revised to enlarge the pool and ensure representation of a broader spectrum of interests. Consideration should be given to employing tenured judges as arbitrators. A code of conduct for arbitrators must also be introduced, and an effective appeals process should be established;

8. African governments must explore alternative models for the investor-state dispute settlement process, such as promulgating national legislation that prioritises the domestic adjudication of disputes; establishes independent trade courts; and promotes African dispute settlement systems. State-to-state dispute settlement should be promoted as an effective alternative to investor-state dispute settlement;

9. The African Union Commission must facilitate a dialogue among African trade ministers and sub-regional bodies on the impact of international investment agreements on the continent's development agenda, at which lessons learned in international investment agreement negotiations should be shared and implemented; and

10. Africa's regional organisations must coordinate with the continent's think-tanks to develop common benchmarks for evaluating the quantitative and qualitative impact of investment policies – including those that promote international investment agreements – on sustainable development in Africa.

Participants of the CCR policy advisory group seminar, "South Africa, Africa, and International Investment Agreements", Devon Valley Hotel, Stellenbosch, South Africa

Annex I

Agenda

Day One Monday, 17 February 2014

09:00 – 09:45 Welcome and Overview

Chair **Ms Felleng Sekha**, Board Member, Centre for Conflict Resolution (CCR), Cape Town, South Africa

Speakers: **Dr Adekeye Adebajo**, Executive Director, Centre for Conflict Resolution, Cape Town

Mr Xavier Carim, Deputy Director-General, South African Department of Trade and Industry (DTI), Tshwane

09:45 – 11:15 Session I: Global Change and the International Investment Agreements Landscape

Chair: **Mr Xavier Carim**, Deputy Director-General, South African Department of Trade and Industry, Tshwane

Speakers: **Dr Kathryn Gordon**, Senior Economist, Investment Division, Directorate for Financial and Enterprise Affairs, Organisation for Economic Cooperation and Development (OECD), Paris, France

Mr Hamed El-Kady, International Investment Policy Officer, Division on Investment and Enterprises, United Nations Conference on Trade and Development (UNCTAD), Geneva, Switzerland

11:15 – 11:30 Coffee Break

11:30 – 13:00 Session II: Determinants of Foreign Direct Investment and the Role of International Investment Treaties

Chair: **Ms Nathalie Bernasconi-Osterwalder**, Programme Leader, Investment and Sustainable Development, International Institute for Sustainable Development (IISD), Geneva

	Speakers:	**Dr Stephen Gelb**, Director, International Investment Initiative, World Trade Institute, University of Bern, Switzerland
		Dr Lauge Poulsen, Research Fellow in Politics, University of Oxford, England
13:00 – 14.00		Lunch
14:00 – 15:30	**Session III:**	**The Policy Impact of International Investment Agreements in Africa**
	Chair:	**Ms Joanmariae Fubbs**, Chair, Portfolio Committee on Trade and Industry, Parliament of South Africa, Cape Town
	Speakers:	**Dr Yao Graham**, Coordinator, Third World Network-Africa (TWN-Af), Accra, Ghana
		Dr Malan Lindeque, Permanent Secretary, Namibian Ministry of Trade and Industry, Windhoek
17:30 – 19:00	**Public Dialogue "Investment and Development in South Africa"**	
	Chair:	**Dr Adekeye Adebajo**, Executive Director, Centre for Conflict Resolution, Cape Town
	Speaker:	**Dr Rob Davies**, South Africa's Minister of Trade and Industry
	Discussant:	**Mr Martin Khor**, Executive Director, South Centre, Geneva

Day Two Tuesday, 18 February 2014

09:30 – 11:00	**Session IV:**	**Analysing Investment Treaty Provisions**
	Chair:	**Dr Malan Lindeque**, Permanent Secretary, Namibian Ministry of Trade and Industry, Windhoek
	Speakers:	**Mr Martin Khor**, Executive Director, South Centre, Geneva
		Ms Kekeletso Mashigo, Director: Multilateral Organisations, South African Department of Trade and Industry, Tshwane
11:00 – 11:15		Coffee Break

11:15 – 12:45	**Session V:**	**Comparative Regional Integration: Caribbean and Pacific Perspectives**
	Chair:	**Dr. Yao Graham**, Coordinator, Third World Network-Africa, Accra
	Speakers:	**Ms Nathalie Bernasconi-Osterwalder**, Programme Leader, Investment and Sustainable Development, International Institute for Sustainable Development, Geneva
		Professor Aluisio de Lima-Campos, Chair, Brazilian International Trade Scholars Institute; and Adjunct Professor, Washington College of Law, American University, Washington D.C., United States
12:45 – 13:45		Lunch
13: 45 – 15:15	**Session VI: Regional Regulation of Investments in Africa**	
	Chair:	**Dr Said Adejumobi**, Director, Sub-Regional Office for Southern Africa, United Nations Economic Commission for Africa (UNECA), Lusaka, Zambia
	Speakers:	**Dr Mustaqeem de Gama**, Director, South African Department of Trade and Industry, Tshwane
		Ms Treasure Maphanga, Director, Department of Trade and Industry, African Union Commission, Addis Ababa, Ethiopia
15:15 – 15:45		Coffee Break
15:45 – 17:00	**Session VII: Policy Recommendations and the Way Forward**	
	Chairs:	**Dr Adekeye Adebajo**, Executive Director, Centre for Conflict Resolution, Cape Town
		Mr Xavier Carim, Deputy Director-General, South African Department of Trade and Industry, Tshwane
	Rapporteurs:	**Ms Sanusha Naidu**, former Senior Researcher, Centre for Conflict Resolution, Cape Town
		Dr Brendan Vickers, Chief Director: Research and Policy, South African Department of Trade and Industry, Tshwane

Annex II

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Annex III

List of Acronyms

ACP	African, Caribbean, and Pacific Group
AEC	African Economic Community
AGOA	African Growth and Opportunity Act (US)
ANC	African National Congress
AU	African Union
BEE	Black Economic Empowerment
BITs	Bilateral investment treaties
CCR	Centre for Conflict Resolution
COMESA	Common Market for Eastern and Southern Africa
DRC	Democratic Republic of the Congo
DTI	The Department of Trade and Industry (South Africa)
EAC	The East African Community
ECOWAS	Economic Community of West African States
EPAs	Economic Partnership Agreements
EU	European Union
FDI	Foreign direct investment
FIP	Finance and Investment Protocol (SADC)
FTA	Free trade agreement
ICBC	Industrial and Commercial Bank of China
ICSID	International Centre for the Settlement of International Disputes
IIAs	International investment agreements
IISD	International Institute for Sustainable Development
IMF	International Monetary Fund
ISDS	Investor-State Dispute Settlement
MDG	Millennium Development Goal
MFN	Most favoured nation
MNCs	Multinational corporations
NAFTA	North American Free Trade Agreement

NEDLAC	National Economic and Development Council
OECD	Organisation for Economic Cooperation and Development
PTAs	Preferential trade agreements
RECs	Regional economic communities
SADC	Southern African Development Community
SMEs	Small and medium-sized enterprises
SSDS	State-to-State Dispute Settlement
TTIP	Transatlantic Trade and Investment Partnership
TRALAC	Trade Law Centre (South Africa)
TWN-Af	Third World Network - Africa
UN	United Nations
UNASUR	*Unión de Naciones Suramericanas*
UNCITRAL	UN Commission on International Trade Law
UNCTAD	UN Conference on Trade and Development
UNECA	UN Economic Commission for Africa
US	United States

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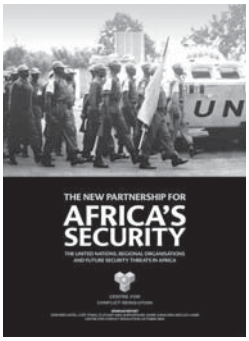


VOLUME 1

THE NEW PARTNERSHIP FOR AFRICA'S SECURITY

THE UNITED NATIONS, REGIONAL ORGANISATIONS AND FUTURE SECURITY THREATS IN AFRICA

The inter-related and vexing issues of political instability in Africa and international security within the framework of United Nations (UN) reform were the focus of this policy seminar, held from 21 to 23 May 2004 in Claremont, Cape Town.

VOLUME 2

SOUTH AFRICA IN AFRICA

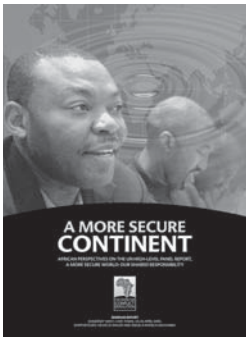
THE POST-APARTHEID DECADE

The role that South Africa has played on the African continent and the challenges that persist in South Africa's domestic transformation 10 years into democracy were assessed at this meeting in Stellenbosch, Cape Town, from 29 July to 1 August 2004.

VOLUME 3

THE AU/NEPAD AND AFRICA'S EVOLVING GOVERNANCE AND SECURITY ARCHITECURE

The state of governance and security in Africa under the African Union (AU) and The New Partnership for Africa's Development (NEPAD) were analysed and assessed at this policy advisory group meeting in Misty Hills, Johannesburg, on 11 and 12 December 2004.

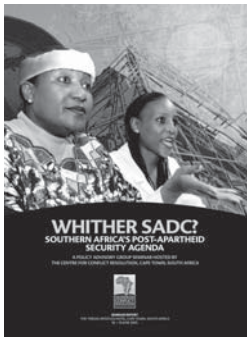


VOLUME 4

A MORE SECURE CONTINENT

AFRICAN PERSPECTIVES ON THE UN HIGH-LEVEL PANEL REPORT, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY

African perspectives on the United Nations' (UN) High-Level Panel report on Threats, Challenges and Change were considered at this policy advisory group meeting in Somerset West, Cape Town, on 23 and 24 April 2005.

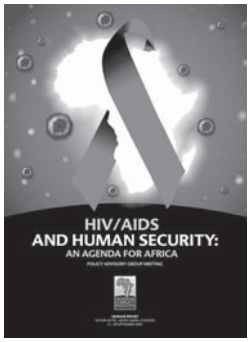


VOLUME 5

WHITHER SADC?

SOUTHERN AFRICA'S POST-APARTHEID SECURITY AGENDA

The role and capacity of the Southern African Development Community's (SADC) Organ on Politics, Defence and Security (OPDS) were focused on at this meeting in Oudekraal, Cape Town, on 18 and 19 June 2005.

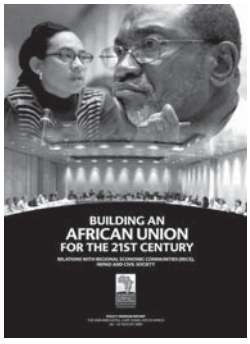


VOLUME 6

HIV/AIDS AND HUMAN SECURITY

AN AGENDA FOR AFRICA

The links between human security and the HIV/AIDS pandemic in Africa, and the potential role of African leadership and the African Union (AU) in addressing this crisis were analysed at this policy advisory group meeting in Addis Ababa, Ethiopia, on 9 and 10 September 2005.

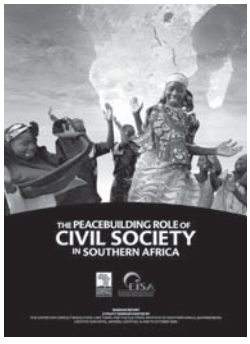


VOLUME 7

BUILDING AN AFRICAN UNION FOR THE 21ST CENTURY

RELATIONS WITH REGIONAL ECONOMIC COMMUNITIES (RECS), NEPAD AND CIVIL SOCIETY

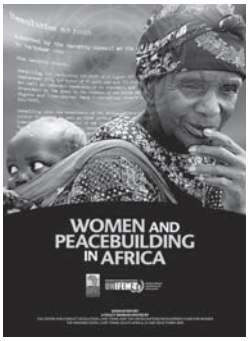
This seminar in Cape Town, held from 20 to 22 August 2005, made policy recommendations on how African Union (AU) institutions, including The New Partnership for Africa's Development (NEPAD), could achieve their aims and objectives.



VOLUME 8

THE PEACEBUILDING ROLE OF CIVIL SOCIETY IN SOUTHERN AFRICA

This meeting, held in Maseru, Lesotho, on 14 and 15 October 2005, explores civil society's role in relation to southern Africa, democratic governance, its nexus with government, and draws on comparative experiences in peacebuilding.



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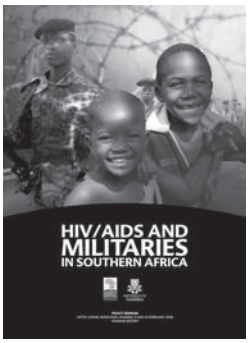
WOMEN AND PEACEBUILDING IN AFRICA

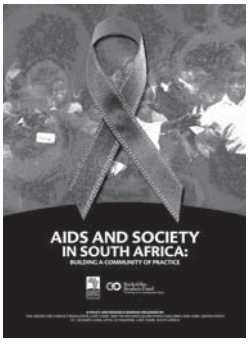
This meeting, held in Cape Town on 27 and 28 October 2005, reviewed the progress of the implementation of United Nations (UN) Security Council Resolution 1325 on Women and Peacebuilding in Africa in the five years since its adoption by the United Nations (UN) in 2000.



VOLUME 10

HIV/AIDS AND MILITARIES IN SOUTHERN AFRICA

This two-day policy advisory group seminar in Windhoek, Namibia, on 9 and 10 February 2006 examined issues of HIV/AIDS and militaries in southern Africa.

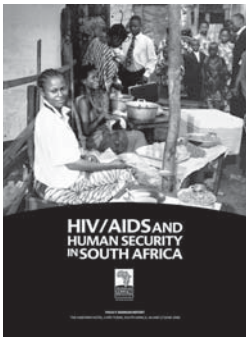


VOLUME 11

AIDS AND SOCIETY IN SOUTH AFRICA

BUILDING A COMMUNITY OF PRACTICE

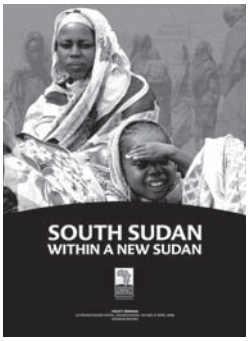
This policy and research seminar, held in Cape Town on 27 and 28 March 2006, developed and disseminated new knowledge on the impact of HIV/AIDS in South Africa in the three key areas of: democratic practice; sustainable development; and peace and security.



VOLUME 12

HIV/AIDS AND HUMAN SECURITY IN SOUTH AFRICA

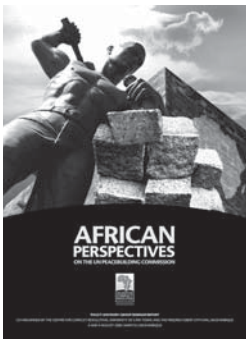
This two-day policy seminar on 26 and 27 June 2006 took place in Cape Town and examined the scope and response to HIV/AIDS in South Africa and southern Africa from a human security perspective.



VOLUME 13

SOUTH SUDAN WITHIN A NEW SUDAN

This policy advisory group seminar on 20 and 21 April 2006 in Franschhoek, Western Cape, assessed the implementation of the Comprehensive Peace Agreement (CPA) signed in January 2005 by the Government of the Republic of the Sudan (GOS) and the Sudan People's Liberation Movement/Sudan People's Liberation Army (SPLM/A).



VOLUME 14

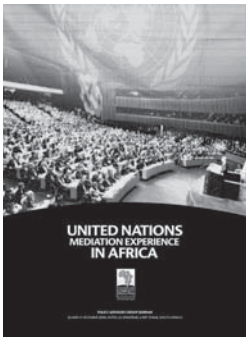
AFRICAN PERSPECTIVES ON THE UN PEACEBUILDING COMMISSION

This meeting, in Maputo, Mozambique, on 3 and 4 August 2006, analysed the relevance for Africa of the creation, in December 2005, of the United Nations (UN) Peacebuilding Commission, and examined how countries emerging from conflict could benefit from its establishment.

VOLUME 15

THE PEACEBUILDING ROLE OF CIVIL SOCIETY IN CENTRAL AFRICA

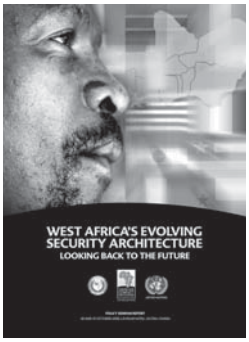
This sub-regional seminar, held from 10 to 12 April 2006 in Douala, Cameroon, provided an opportunity for civil society actors, representatives of the Economic Community of Central African States (ECCAS), the United Nations (UN) and other relevant players to analyse and understand the causes and consequences of conflict in central Africa.



VOLUME 16

UNITED NATIONS MEDIATION EXPERIENCE IN AFRICA

This seminar, held in Cape Town on 16 and 17 October 2006, sought to draw out key lessons from mediation and conflict resolution experiences in Africa, and to identify gaps in mediation support while exploring how best to fill them. It was the first regional consultation on the United Nations' (UN) newly-established Mediation Support Unit (MSU).

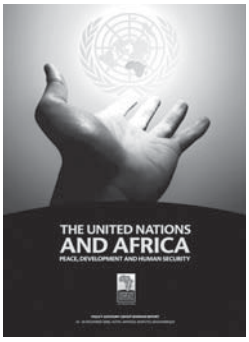


VOLUME 17

WEST AFRICA'S EVOLVING SECURITY ARCHITECTURE

LOOKING BACK TO THE FUTURE

The conflict management challenges facing the Economic Community of West African States (ECOWAS) in the areas of governance, development, and security reform and post-conflict peacebuilding formed the basis of this policy seminar in Accra, Ghana, on 30 and 31 October 2006.

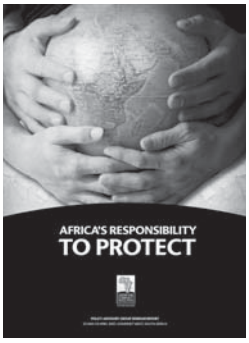


VOLUME 18

THE UNITED NATIONS AND AFRICA

PEACE, DEVELOPMENT AND HUMAN SECURITY

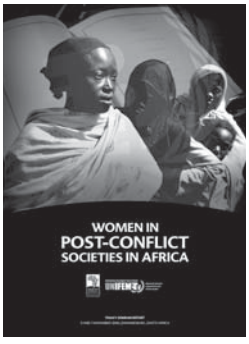
This policy advisory group meeting, held in Maputo, Mozambique, from 14 to 16 December 2006, set out to assess the role of the principal organs and the specialised agencies of the United Nations (UN) in Africa.



VOLUME 19

AFRICA'S RESPONSIBILITY TO PROTECT

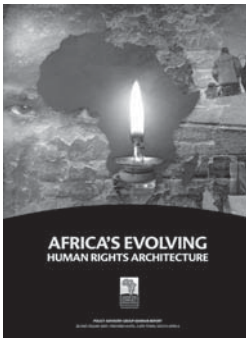
This policy seminar, held in Somerset West, South Africa, on 23 and 24 April 2007, interrogated issues around humanitarian intervention in Africa and the responsibility of regional governments and the international community in the face of humanitarian crises.



VOLUME 20

WOMEN IN POST-CONFLICT SOCIETIES IN AFRICA

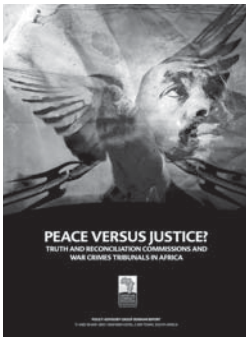
The objective of the seminar, held in Johannesburg, South Africa, on 6 and 7 November 2006, was to discuss and identify concrete ways of engendering reconstruction and peace processes in African societies emerging from conflict.



VOLUME 21

AFRICA'S EVOLVING HUMAN RIGHTS ARCHITECTURE

The experiences and lessons from a number of human rights actors and institutions on the African continent were reviewed and analysed at this policy advisory group meeting held on 28 and 29 June 2007 in Cape Town, South Africa.

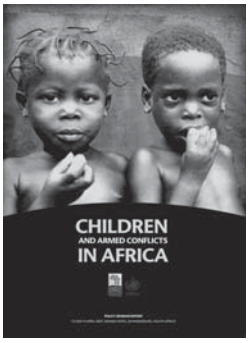


VOLUME 22

PEACE VERSUS JUSTICE?

TRUTH AND RECONCILIATION COMMISSIONS AND WAR CRIMES TRIBUNALS IN AFRICA

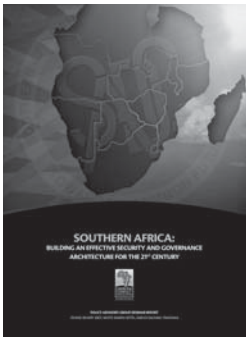
The primary goal of this policy meeting, held in Cape Town, South Africa, on 17 and 18 May 2007, was to address the relative strengths and weaknesses of "prosecution versus amnesty" for past human rights abuses in countries transitioning from conflict to peace.



VOLUME 23

CHILDREN AND ARMED CONFLICTS IN AFRICA

This report, based on a policy advisory group seminar held on 12 and 13 April 2007 in Johannesburg, South Africa, examines the role of various African Union (AU) organs in monitoring the rights of children in conflict and post-conflict situations.

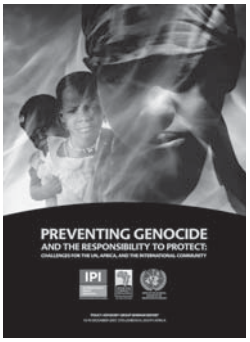


VOLUME 24

SOUTHERN AFRICA

BUILDING AN EFFECTIVE SECURITY AND GOVERNANCE ARCHITECTURE FOR THE 21ST CENTURY

This report is based on a seminar, held in Dar es Salaam, Tanzania on 29 and 30 May 2007, that sought to enhance the efforts of the Southern African Development Community (SADC) to advance security, governance and development initiatives in the sub-region.



VOLUME 25

PREVENTING GENOCIDE AND THE RESPONSIBILITY TO PROTECT

CHALLENGES FOR THE UN, AFRICA, AND THE INTERNATIONAL COMMUNITY

This policy advisory group meeting was held from 13 to 15 December 2007 in Stellenbosch, South Africa, and focused on six African, Asian and European case studies. These highlighted inter-related issues of concern regarding populations threatened by genocide, war crimes, "ethnic cleansing", or crimes against humanity.

VOLUME 26

EURAFRIQUE?

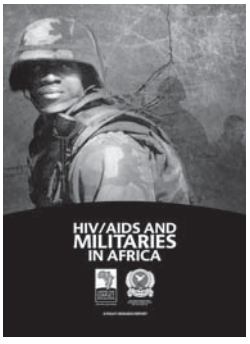
AFRICA AND EUROPE IN A NEW CENTURY

This seminar, held from 31 October to 1 November 2007 in Cape Town, South Africa, examined the relationship between Africa and Europe in the 21st Century, exploring the unfolding economic relationship (trade, aid and debt); peacekeeping and military cooperation; and migration.

VOLUME 27

SECURITY AND DEVELOPMENT IN SOUTHERN AFRICA

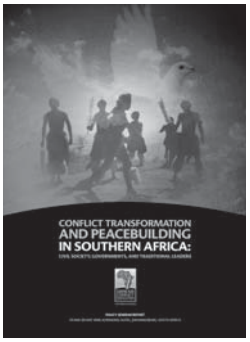
This seminar, held in Johannesburg, South Africa, from 8 to 10 June 2008, brought together a group of experts – policymakers, academics and civil society actors – to identify ways of strengthening the capacity of the Southern African Development Community (SADC) to formulate security and development initiatives for southern Africa.



VOLUME 28

HIV/AIDS AND MILITARIES IN AFRICA

This policy research report addresses prospects for an effective response to the HIV/AIDS epidemic within the context of African peacekeeping and regional peace and security. It is based on three regional advisory group seminars that took place in Windhoek, Namibia (February 2006); Cairo, Egypt (September 2007); and Addis Ababa, Ethiopia (November 2007).

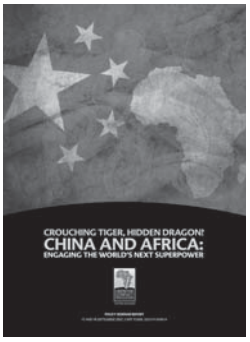


VOLUME 29

CONFLICT TRANSFORMATION AND PEACEBUILDING IN SOUTHERN AFRICA

CIVIL SOCIETY, GOVERNMENTS, AND TRADITIONAL LEADERS

This meeting, held on 19 and 20 May 2008 in Johannesburg, South Africa, provided a platform for participants from Lesotho, Swaziland and Zimbabwe to share insights on sustained intervention initiatives implemented by the Centre for Conflict Resolution in the three countries since 2002.



VOLUME 30

CROUCHING TIGER, HIDDEN DRAGON? CHINA AND AFRICA

ENGAGING THE WORLD'S NEXT SUPERPOWER

This seminar, held in Cape Town, South Africa, on 17 and 18 September 2007, assessed Africa's engagement with China in the last 50 years, in light of the dramatic changes in a relationship that was historically based largely on ideological and political solidarity.

VOLUME 31

FROM EURAFRIQUE TO AFRO-EUROPA

AFRICA AND EUROPE IN A NEW CENTURY

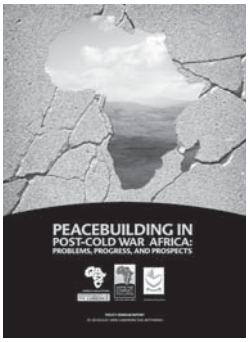
This policy seminar, held from 11 to 13 September 2008 in Stellenbosch, Cape Town, South Africa, explored critically the nature of the relationship between Africa and Europe in the political, economic, security and social spheres.

VOLUME 32

TAMING THE DRAGON?

DEFINING AFRICA'S INTERESTS AT THE FORUM ON CHINA-AFRICA CO-OPERATION (FOCAC)

This policy seminar held in Tshwane (Pretoria), South Africa on 13 and 14 July 2009 – four months before the fourth meeting of the Forum on China-Africa Co-operation (FOCAC) – examined systematically how Africa's 53 states define and articulate their geo-strategic interests and policies for engaging China within FOCAC.

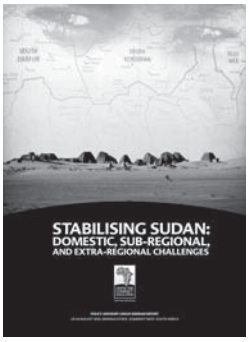


VOLUME 33

PEACEBUILDING IN POST-COLD WAR AFRICA

PROBLEMS, PROGRESS, AND PROSPECTS

This policy research seminar held in Gaborone, Botswana from 25 to 28 August 2009 took a fresh look at the peacebuilding challenges confronting Africa and the responses of the main regional and global institutions mandated to build peace on the continent.

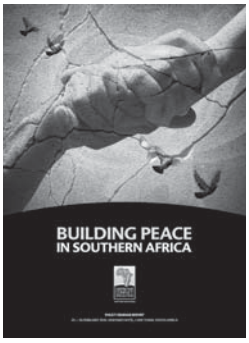


VOLUME 34

STABILISING SUDAN

DOMESTIC, SUB-REGIONAL, AND EXTRA-REGIONAL CHALLENGES

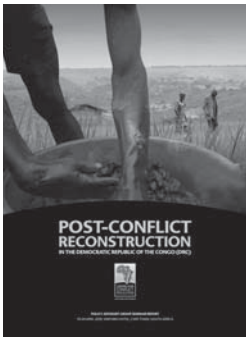
This policy advisory group seminar held in the Western Cape, South Africa from 23 to 24 August 2010 analysed and made concrete recommendations on the challenges facing Sudan as it approached an historic transition – the vote on self-determination for South Sudan scheduled for January 2011.



VOLUME 35

BUILDING PEACE IN SOUTHERN AFRICA

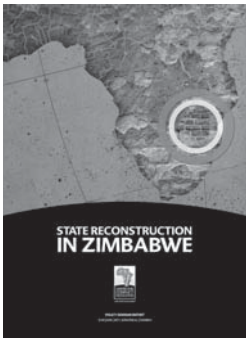
This policy seminar held in Cape Town, South Africa, from 25 to 26 February 2010, assessed Southern Africa's peacebuilding prospects by focusing largely on the Southern African Development Community (SADC) and its institutional, security, and governance challenges.



VOLUME 36

POST-CONFLICT RECONSTRUCTION IN THE DEMOCRATIC REPUBLIC OF THE CONGO (DRC)

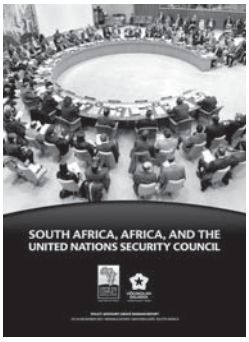
This policy advisory group seminar held in Cape Town, South Africa, from 19 to 20 April 2010 sought to enhance the effectiveness of the Congolese government, the Southern African Development Community (SADC), civil society, the United Nations (UN), and the international community, in building peace in the Democratic Republic of the Congo (DRC).



VOLUME 37

STATE RECONSTRUCTION IN ZIMBABWE

This policy advisory group seminar held in Siavonga, Zambia, from 9 to 10 June 2011, assessed the complex interlocking challenges facing the rebuilding of Zimbabwe in relation to the economy, employment, health, education, land, security, and the role of external actors.



VOLUME 38

SOUTH AFRICA, AFRICA, AND THE UN SECURITY COUNCIL

This policy advisory group seminar held in Somerset West, South Africa, from 13 to 14 December 2011, focused on South Africa's role on the UN Security Council; the relationship between the African Union (AU) and the Council; the politics of the Council; and its interventions in Africa.

VOLUME 39

THE EAGLE AND THE SPRINGBOK

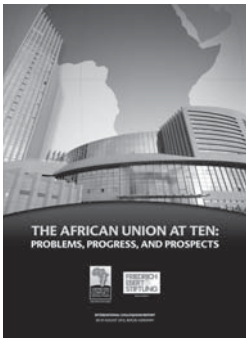
STRENGTHENING THE NIGERIA/SOUTH AFRICA RELATIONSHIP

This policy advisory group seminar held in Lagos, Nigeria, from 9 to 10 June 2012, sought to help to "reset" the relationship between Nigeria and South Africa by addressing their bilateral relations, multilateral roles, and economic and trade links.

VOLUME 40

SOUTH AFRICA IN SOUTHERN AFRICA

This policy advisory group seminar held in Somerset West, South Africa, from 19 to 20 November 2012, considered South Africa's region-building efforts in Southern Africa, paying particular attention to issues of peace and security, development, democratic governance, migration, food security, and the roles played by the European Union (EU) and China.

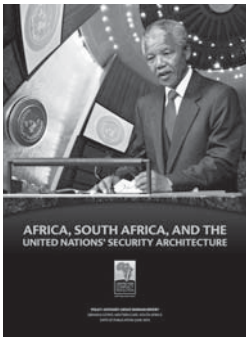


VOLUME 41

THE AFRICAN UNION AT TEN

PROBLEMS, PROGRESS, AND PROSPECTS

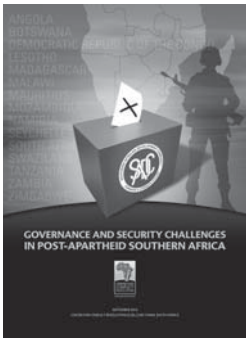
This international colloquium held in Berlin, Germany, from 30 to 31 August 2012, reviewed the first ten years of the African Union (AU); assessed its peace and security efforts; compared it with the European Union (EU); examined the AU's strategies to achieve socioeconomic development; and analysed its global role.



VOLUME 42

AFRICA, SOUTH AFRICA, AND THE UNITED NATIONS' SECURITY ARCHITECTURE

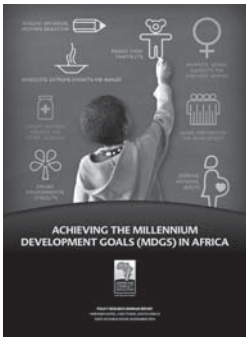
This policy advisory group seminar held in Somerset West, South Africa, from 12 to 13 December 2012, considered Africa and South Africa's performance on the United Nations (UN) Security Council; the politics and reform of the Security Council; the impact of the African Group at the UN; and the performance of the UN Peacebuilding Commission.



VOLUME 43

GOVERNANCE AND SECURITY CHALLENGES IN POST-APARTHEID SOUTHERN AFRICA

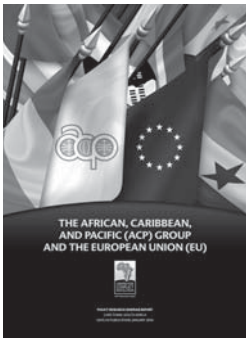
This report considers the key governance and security challenges facing Southern Africa, with a focus on the 15-member Southern African Development Community (SADC) subregion's progress towards democracy, and its peacemaking, peacekeeping, and peacebuilding efforts.



VOLUME 44

ACHIEVING THE MILLENNIUM DEVELOPMENT GOALS (MDGS) IN AFRICA

This policy research seminar held in Cape Town, South Africa, on 13 and 14 May 2013, considered the progress that Africa has made towards achieving the UN's Millennium Development Goals (MDGs), and sought to support African actors and institutions in shaping the post2015 development agenda.



VOLUME 45

THE AFRICAN, CARIBBEAN, AND PACIFIC (ACP) GROUP AND THE EUROPEAN UNION (EU)

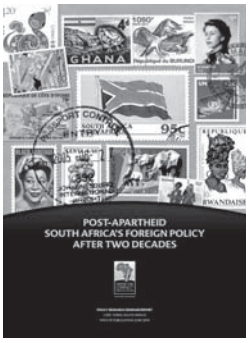
This policy research seminar held in Cape Town, South Africa, from 29 to 30 October 2012, considered the nature of the relationship between the ACP Group and the EU, and the potential for their further strategic engagement, as the final five-year review of the Cotonou Agreement of 2000 between the two sides approached in 2015.

VOLUME 46

TOWARDS A NEW PAX AFRICANA

MAKING, KEEPING, AND BUILDING PEACE IN POST-COLD WAR AFRICA

This policy research seminar held in Stellenbosch, South Africa, from 28 to 30 August 2013, considered the progress being made by the African Union (AU) and Africa's regional economic communities (RECs) in managing conflicts and operationalising the continent's peace and security architecture; and the roles of key external actors in these efforts.



VOLUME 47

POST-APARTHEID SOUTH AFRICA'S FOREIGN POLICY AFTER TWO DECADES

This policy research seminar held in Stellenbosch, South Africa, from 28 to 30 July 2013, reviewed post-apartheid South Africa's foreign policy after two decades, and explored the potential leadership role that the country can play in promoting peace and security, as well as regional integration and development in Africa.

Notes

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The Centre for Conflict Resolution (CCR), Cape Town, South Africa, and the South African Department of Trade and Industry (DTI), hosted a policy advisory group seminar on "South Africa, Africa, and International Investment Agreements" in Stellenbosch, South Africa, from 17 to 18 February 2014. The meeting brought together about 30 leading practitioners, scholars, and civil society activists to review the implications of international investment agreements (IIAs) for development efforts in Africa. The seminar assessed the principles that underpin these treaties, which are increasingly seen by critics as being at odds with emerging economic challenges confronting developing countries. The meeting focused on six key areas: the global context and changing perspectives on international investment agreements; the benefits that can accrue from foreign direct investment (FDI) and the relationship between investment agreements and foreign direct investment flows; the structure and impact of investment treaties; the core provisions of international investment agreements; the international arbitration system that provides for investor claims against states; and the implications of all this for Africa's structural transformation and economic development.

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