

**ASSESSING THE POLICY SHIFT OF BILATERAL INVESTMENT TREATIES FROM
TRADITIONAL NORTH–SOUTH TO NEW MODELS OF SOUTH–SOUTH
INVESTMENT: IMPLICATIONS FOR SOUTH AFRICA AND THE GLOBAL SOUTH**

by

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DECLARATION

I, **Dan Obakeng Setsile** (student number **26454204**) declare under oath that this thesis is my own unaided work. It is submitted for the Degree of Doctor of Philosophy in International Relations in the Department of Political Sciences, Faculty of Humanities, at the University of Pretoria. It has not been submitted before for examination at this or any other institution.

Dan Obakeng Setsile

..... day of 2025

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ABSTRACT

Bilateral investment treaties (BITs) have existed since the 1950s and early 1960s. They have proliferated unprecedentedly as a global phenomenon, shaping trade and investment policies across the world. As their influence in emerging markets expanded, the Global North used BITs as both an instrument of economic diplomacy and an instrument of foreign policy while the Global South entered into BITs to attract foreign direct investment. However, BITs have often been criticised for unfavourable and imbalanced terms. They often lock developing economies into global multinational companies and their home countries in the Global North. This study provides a nuanced analysis of the patterns, trends and trajectories of investment treaty practices in the form of BITs and their impact on a host country's ability to regulate investment policies in the public interest.

To conceptualise BITs and contextualise the policy shift from North–South to South–South investment cooperation, this research follows a multidisciplinary methodological approach and an eclectic mix of disruptive innovation and rational choice theoretical frameworks in order to enhance an understanding of treaty practices. The case study of South Africa is a compelling example of this global shift in investment treaty practices. In this context, the study finds that South Africa's termination of BITs and the promulgation of the Protection of Investment Act 22 of 2015 are both disruptive and innovative. The study concludes that the future viability of BIT models, whether North–South or South–South, will continue to be contested unless they are designed to strike a balance between choice and necessity. This entails considering the interests of foreign investors while

respecting the host state's responsibility to regulate investment policies in the public interest.

Keywords: Bilateral investment treaties, policy shift, asymmetric treaty networks, public interest, Global South, Global North, disruptive innovation

ABBREVIATIONS AND ACRONYMS

4IR	Fourth Industrial Revolution
AAAA	Addis Ababa Action Agenda
AAGC	Asia Africa Growth Corridor
AfCFTA	African Continental Free Trade Area
AfDB	African Development Bank
AGOA	African Growth and Opportunity Act
AI	artificial intelligence
AIR	African international relations
AMU	Arab Maghreb Union
ANC	African National Congress
ASEAN	Association of Southeast Asian Nations
AU	African Union
AUC	African Union Commission
BIPAs	bilateral investment protection agreements
BITs	bilateral investment treaties
BRI	Belt and Road Initiative
BRICS	Brazil, Russia, India, China and South Africa
CEN-SAD	Community of Sahel-Saharan States
CETA	Comprehensive Economic and Trade Agreement
COMESA	Common Market for Eastern and Southern Africa
CSR	corporate social responsibility
CTMS	Corridor Trip Monitoring System

Covid-19	Coronavirus disease 2019
CUSMA	Canada–United States-Mexico Agreement
DBSA	Development Bank of Southern Africa
DIRCO	Department of International Relations and Cooperation
DIT	disruptive innovation theory
dti	Department of Trade and Industry
DTTs	double taxation treaties
EAC	East African Community
ECA	Economic Commission for Africa
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
ECT	Energy Charter Treaty
EDIT	Electronic Database of Investment Treaties
EU	European Union
FATF	Financial Action Task Force
FDI	foreign direct investment
FOCAC	Forum on China–Africa Cooperation
GATT	General Agreement on Tariffs and Trade
GDP	growth domestic product
GNU	Government of National Unity
GovInn	Centre for the Study of Governance Innovation
ICSID	International Centre for Settlement of Investment Disputes
IDA	International Development Association
IDRC	International Development Research Centre

IGAD	Intergovernmental Authority on Development
IAs	international investment agreements
IIR	international investment regime
IISA	Impact Investing South Africa
ILO	International Labour Organization
IMF	International Monetary Fund
IPE	international political economy
IR	international relations
ISDS	Investor–State Dispute Settlement
ITO	International Trade Organization
LDC	less developed countries
MFN	most favoured nation
MIGA	Multilateral Investment Guarantee Agency
MNCs	multinational corporations
NAFTA	North American Free Trade Agreement
NDP	National Development Plan
NEPAD	New Partnership for Africa's Development
NIEO	new international economic order
OECD	Organisation for Economic Co-operation and Development
PAIC	Pan African Investment Code
PIC	Public Investment Corporation
PTIAs	preferential trade and investment agreements
PWC	PricewaterhouseCoopers
RECs	Regional Economic Communities

RIPAs	reciprocal investment promotion agreements
RMB	Rand Merchant Bank
SADC	Southern African Development Community
SDGs	Sustainable Development Goals
SDGA	Sustainable Development Goals for Africa
TFCNs	treaties of friendship, commerce and navigation
TPP	Trans-Pacific Partnership
TRIMs	trade-related investment measures
TTIP	Transatlantic Trade and Investment Partnership
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNGA	United Nations General Assembly
UNSO	United Nations Statistical Office
US	United States
VCLT	Vienna Convention on the Law of Treaties
WEF	World Economic Forum
WTO	World Trade Organization
WWII	World War II

TABLE OF CONTENTS

DECLARATION	2
ACKNOWLEDGEMENTS.....	3
ABSTRACT	6
ABBREVIATIONS AND ACRONYMS	8
1.1 Introduction	19
1.3 Research aims and objectives	26
1.4 Central argument of the study.....	27
1.5 Problem statement	28
1.6 Research questions	30
1.7 Significance of the study	32
1.8 Research design and methods of data collection	35
1.8.1 Research design.....	34
1.8.2 Area and scope	42
1.8.3 Target population	42
1.8.4 Sample size	42
1.8.5 Data collection	44
1.8.6 Data analysis	45
1.9 Limitations of the study	48
1.10 Ethical considerations and clearance.....	50
1.11 Organisation of the study	52
CHAPTER 2.....	54
2.1 Introduction	54
2.2 Conceptual framework: Definition of key terms and concepts.....	55
2.3 Literature review.....	62
2.4 Review of literature on BITs.....	65
2.5 Global discourse and perspectives on IIAs.....	73
2.5.1 <i>North–North investment treaties</i>	77

2.5.2	<i>North–South BITs</i>	78
2.5.3	<i>South–South bilateral treaties</i>	80
2.6	Theoretical considerations and analytical frameworks for understanding treaty practice	93
2.7	Conclusion	105
CHAPTER 3		106
3.1	Introduction	106
3.2	Liberalisation of trade and movement of international capital	107
3.3	Reasons why countries sign BITs	117
3.4	Tracing the evolution, institutional and historical origins of IIAs and BITs	123
3.4.1	<i>Gunboat diplomacy and colonial-era international agreements</i>	125
3.4.2	<i>Institutionalisation of investment treaties, from TFCNs to the WTO</i>	131
3.4.3	<i>Post-WWII and post-Cold War international agreements</i>	138
3.4.4	<i>Proliferation of investment treaties in the 1990s: Implications for contemporary IIAs</i>	141
3.5	Conclusion	143
CHAPTER 4		144
4.1	Introduction	144
4.2	Substantive and procedural provisions of BITs	145
4.3	Application of philosophical perspectives on the institutional reform of BITs	150
4.3.1	<i>Evolutionary institutionalism and historical institutional perspectives</i>	150
4.3.2	<i>Rational choice theory perspective</i>	158
4.3.3	<i>Disruptive innovation perspective</i>	160
4.4	International investment agreements and the rules-based system	163
4.5	Treaty practice and the search for a global investment regime	168
4.6	Selected cases and experiences of treaty practice	174
4.6.1	<i>Vienna Convention on the Law of Treaties and its ratification</i>	177
4.6.2	<i>Lagos Plan of Action</i>	179
4.6.3	<i>OECD</i>	182
4.6.4	<i>UNCTAD</i>	184
4.6.5	<i>AU PAIC</i>	189

4.6.6 SADC BIT model	191
4.7 Conclusion.....	193
CHAPTER 5.....	195
5.1 Introduction	195
5.2 Historical evolution of apartheid South Africa and disinvestment campaigns.....	196
5.3 Investor perceptions and determinants of trade and investment	204
5.4 Determinants of trade and investment	211
5.4.1 Political risk	211
5.4.2 Development finance and rating agencies	214
5.4.3 Business confidence and institutional investors in South Africa	221
5.6 Rule of law	228
5.7 Ratification and national treaty network.....	230
5.8 Withdrawal from BITs and enactment of the Promotion of Investment Act	234
5.9 Presidential Investment Summit and IISA	236
5.10 Conclusion.....	240
CHAPTER 6.....	244
6.1 Introduction	244
6.2 BITs and policymaking in South Africa	245
6.3 Analysis of data and key findings.....	253
6.4 BIT in the context of the AfCFTA.....	274
6.5 Post-Covid-19 innovations and investments of the future.....	282
6.6 Recent developments in the BIT universe	288
6.6.1 Food security versus energy security	290
6.6.2 AI and the future of work	293
6.7 Mechanisms for strengthening policymaking.....	295
6.8 Lessons learned: Implications for South Africa and the Global South.....	304
6.9 Conclusion.....	308
6.10 Summary of findings	314

CHAPTER 7 315

7.1	Introduction	315
7.2	Policy implications	316
7.3	Future research perspectives.....	321
7.4	Conclusion.....	324

BIBLIOGRAPHY

LIST OF TABLES

Table 1: Validity procedures within a qualitative lens and paradigm assumptions.....	36
Table 2: Interview schedule.....	43
Table 3: Elements of data analytics.....	47
Table 4: Definitions of the term “investment” in BITs.....	59
Table 5: Increasing number of South–South investment agreements as per an UNCTAD survey conducted in 2004.....	85
Table 6: Institutionalisation of GATT trade rounds.....	138
Table 7: Options for states to exit and voice their concerns in investment treaty practice.....	149
Table 8: Selected cases of US regulatory and legal frameworks.....	153
Table 9: Examples of treaties around the world.....	175
Table 10: UNCTAD policy reform of BIT and its potential outcomes.....	188
Table 11: Duration of BITs between China and individual African countries.....	266
Table 12: Top-10 developing countries promoting South–South investment cooperation.....	268
Table 13: Application of a styled policy flow, from challenges to outcomes.....	303

LIST OF FIGURES

Figure 1: BIT universe.....	21
Figure 2: Host country and home country asymmetric relations.....	74
Figure 3: Geographic distribution of BITs, suggesting a slow trend towards South–South investment.....	82
Figure 4: Dimensions and indicators of regional integration.....	183
Figure 5: RMB top-10 performing economies in Africa.....	206
Figure 6: Countries’ scores and ratings on infrastructure integration.....	225

Figure 7: Host country's right to regulate policies.....	247
Figure 8: National measures favourable to investors.....	272
Figure 9: Old-generation agreements.....	273
Figure 10: UNCTAD 10 IIA reform options.....	320

ANNEXURES

Annexure 1: South Africa's Treaty Network – BITs	330
Annexure 2: Pretoria Declaration of Social and Economic Rights.....	333
Annexure 3: Concept Note of South–South Cooperation	334

CHAPTER 1

INTRODUCTION, BACKGROUND AND RESEARCH METHODOLOGY

Writing is first and foremost analysing, revisiting and polishing the text. The idea that one can produce ready-made text right away is just about as senseless as the cyclist who has never had to restore his or her balance.

– Pertti Alasuutari (1995)

1.1 Introduction

This research study seeks to provide a three-dimensional approach to understanding the BIT universe. First, it traces the historical evolution of treaty practice. Second, it assesses the policy shift from North–South to South–South investment cooperation. Third, it presents opportunities and challenges for the future of trade and investments in the form of BITs. Tracing the history of treaty practice is considered important as an analytical tool for mapping the governance of the global investment regime that is characterised by power dynamics between the Global North and the Global South. The argument is that the new BIT models of the twenty-first century, irrespective of whether they are between North and South or between South and South, are now taking into consideration systems of change unfolding within the host country before foreign investors assert their legitimate expectations.

This chapter provides a critical analysis of the patterns, trends and trajectories of investment treaty practice as well as unprecedented treaty reforms unfolding at the global level. This research is an attempt to explain new issues that have been exposed in the evolving and ever-changing international investment environment.

Furthermore, it highlights implications for South Africa and the other countries of the Global South when implementing investment policies to address public policy interest. Thus, this research argues that when such policies are used constructively with measured determination and well-informed norms of rulemaking, they will no doubt improve the living conditions of citizens and build a future based on social justice and equitable distribution of resources.

The current practice of IIAs offer a greater opportunity for countries of the Global South, including South Africa, to individually and collectively be influential role-players and not only rule-takers when terminating, renegotiating and reviewing investment agreements. As Schemikau and Smith (2023) observe, investment is to modern civilisation what blood is to the human body.

This introductory chapter sets the scene and provides the context or background of the study, the research aims and objectives, the central argument of the study, the research questions, the significance of the study, the research methodology, the limitations of the study, ethical considerations and the chapter outline.

1.2 Background of the study

This study is timely, as it marks over 65 years since the first BIT was introduced and commemorates the 30-year review of South Africa's constitutional democracy and the establishment of the WTO. Furthermore, it signals a historic milestone in addressing the shortcomings of treaty practice and socioeconomic challenges of trade and investment in the twenty-first century. Worth noting is that the contemporary trade wars, driven by nationalistic interests, present both challenges and opportunities to the global trade and

investment architecture, thus requiring changes in negotiating BITs in future. Best practices in BITs reflect a shift towards more inclusive and collaborative agreements that addresses not only investment protection but also complementarity by aligning the domestic policy objectives of the host country with broader SDGs.

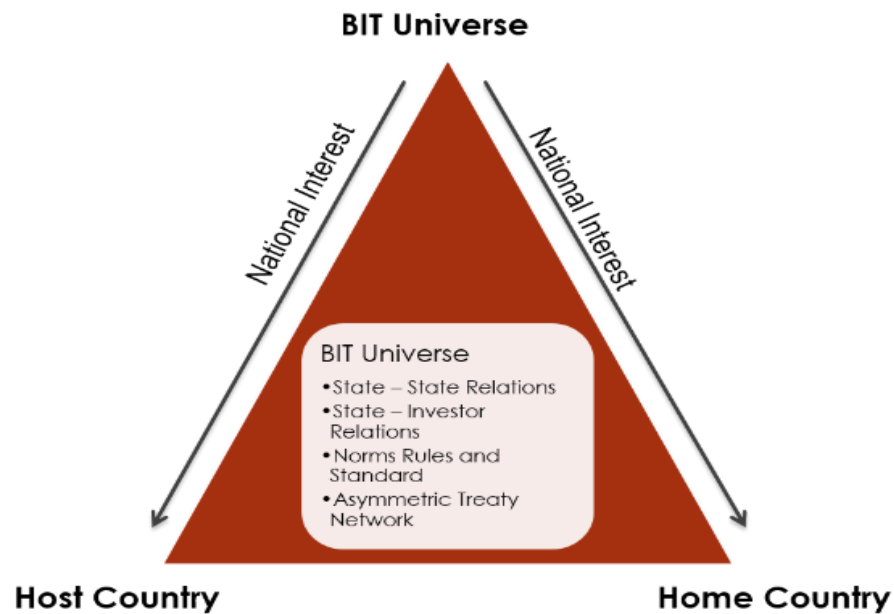


Figure 1: BIT universe

Source: Own construct

According to Okeke (2021), the BIT framework that dominates the international investment legal regime today is a reactionary response to the hard-won political battles, which periphery economies waged against the Euro-American dominance of the global economy. This study assesses the BIT universe and concludes that a significant policy shift is taking place within the investment discourse and treaty practice, whereby awarding investment is moving away from the dominant and traditional North–South investment model to the South–South investment model. Against this background, this study attempts to achieve the following objectives:

- Assess the impact of BIT on a host country's ability to regulate investment policies in the public interest.
- Elucidate how BITs have evolved over time and space.
- Explain why countries continue to sign BITs with each other.
- Apply rational choice and disruptive theoretical frameworks to explain the investment policy shift and country behaviour in relation to institutional reforms and the persistence of regulating policy space in the public interest.

While this research study assesses what is already known about BITs, of significance is its contribution to understanding the geostrategic and legal-political implications of BITs on the host country's ability to implement domestic policies that promote sustainable investment, which has been a gap in previous studies. Essentially, this study provides a fresh look at analysing political and legal dynamics around the transition from traditional North–South BIT models to new South–South BIT models and their implications for South Africa and other countries of the Global South. Schneiderman (2008) argues that investors have used BIT entitlements to meddle significantly in the regulatory systems of host states., As a Rand Merchant Bank (RMB) report (2024) shows, there is a need to dispel the myth about investing in Africa. In his 2023 speech during the 36th Ordinary Session of the AU Assembly in Addis Ababa (Ethiopia), United Nations Secretary-General António Guterres stated: “Despite its challenges, the African continent's abundant natural resources, diverse culture and youth population could see the twenty-first century being Africa's century.”

This study examines the BIT universe from the historical and evolutionary perspectives of the contemporary era. Brantlinger (1996:29) observes, “The founding moments of all

modern nation-states are identical to the funding of their debts”. In context, it is inevitable that out of the 192 member states of the WTO, every individual country – irrespective of it being developed or developing – has experienced the process of negotiating, signing and or terminating IIAs in one form or another, including BITs. Thus, there has been calls to transform the WTO to be transformative and equitable.

As Schwandt *et al.* (2016) postulate, policy formulation has to be understood as part of a continuous process and not only as exogenous, limiting agents’ possibilities for action. The global system of investment and treaty practice is changing and consequently the traditional way of doing business has changed. Furthermore, Alvarez and Khamisi (2009) point out that the IIR has witnessed an imbalanced and dichotomy of legitimacy crisis based on two premises. On the one hand, there is a view that advocates for and supports foreign investment as a positive tool or instrument for development. On the other hand, investment treaties are viewed as necessary but not a sufficient condition for attracting foreign investment (Alvarez and Khamisi, 2009).

Given such divergent perspectives, it should be understood that these two premises are contested and in juxtaposition to each other, suggesting that a thorough analysis of literature, and further research on the topic, is required to reach convergence or consensus on the future of BITs. This study introduces conceptual and theoretical frameworks that have not been explored in IR literature with a view to providing a more nuanced analysis of the substantive and procedural aspects of BITs.

The practice of signing BITs spread worldwide following the initial agreement signed between Germany and Pakistan (Germany–Pakistan BIT) in 1959. However, it is worth noting this agreement was never ratified. Switzerland and Sweden followed the trend in

1960 and 1962 respectively by signing BITs with Pakistan. Easterly (2001) assessed the political economy of growth in Pakistan between 1960 to 1999. During that period, the intensive involvement of donors and international agencies resulted in US\$58 billion in foreign aid (Easterly, 2001). Furthermore, the country has had respectable per capita growth, with a well-educated and high-achieving elite and diaspora. However, in contrast to countries similar to or with the same income level and Pakistan being the third largest recipient of official development assistance in the world (after India and Egypt) from 1960 to 1999, the country systematically underperforms on most social and political indicators such as education, health, sanitation, fertility, gender equality, corruption and political instability (Easterly, 2001). Considering that Pakistan was the pilot project of the BIT, it makes sense that countries need to do a thorough cost–benefit analysis of any agreements to ensure that they do not suffer from unintended consequences of policymaking in the end.

When BITs were initially designed, they were conceived as agreements between countries that create rights and obligations only for treaty parties. However, with the passing of time, countries started to consider third parties such as individual investors and non-state actors such as MNCs, which essentially could not be treaty parties (Roberts, 2015).

In retrospect and against popular belief, the first ratified North-South BITs include the one Switzerland signed with Niger and Côte d'Ivoire in 1962 and the one signed between Italy and Chad in 1969 (Lejour and Salfi, 2015). While many developed countries benefited from the protections provided by BITs, a great deal of developing countries have long called for policy change and transformation of the IIR. Global calls for policy shift and

promoting economic rights of developing countries is not a new phenomenon. It was during the NIEO of the 1970s that leaders from the Global South, President Gamal Abdel Nasser of Egypt and Prime Minister Jawaharlal Nehru of India, were vocal and instrumental at the United Nations in promoting the rights of developing countries to participate in the global economy.

Since then, the popularity of BITs has increased. UNCTAD noted in 1990 that nearly 470 treaties had been signed, with this figure increasing exponentially to 2 857 by 2012. To date, over 3 000 BITs have been signed and negotiated, making this treaty practice a global phenomenon with varying results. However, one of the major concerns of this study is the question of whether these treaties (BITs) really promote FDI or hinder the growth of local industries. Li and Zhao (2021) argue that irrespective of whether or not a host is developed, BITs work alongside good institutions to increase the attractiveness of FDI.

Proponents of BITs have often argued that FDI is a means of accelerating economic growth for developing countries. As such, investments by MNCs offer developing countries access to advanced technology and create productivity in upstream and downstream firms. What is therefore significant to this study is examining the changing patterns of BITs with a view to providing a fresh perspective on how treaty practice and policy shifts in the IIR have evolved and changed over the years. Based on the rapid growth and proliferation of BITs, Lobero (2012) argues that it would not be exaggerating to state that bilateralism, rather than multilateralism, has become the norm through which international investment law progresses.

Prior to 1994, South Africa had only one BIT signed and in force (South Africa-Paraguay BIT 1974). Post-apartheid South Africa's¹ journey in the BIT universe started with the signing of the UK–South Africa BIT in 1994. Subsequently, about 41 BITs were concluded in the immediate post-apartheid era (1994–1998, see Annexure 1). However, this pattern has begun to change, as many developing countries have increasingly entered into BITs among themselves, showing a shift towards South–South cooperation (UNCTAD, 2015).

Of interest to this research is the need to transform the governance of the IIR, ensuring that developing countries draft investment policies that address principles of accountability, reciprocity and sustainable investment. Traditional BIT models typically reflected a one-way flow of investment from North to South; however, due to China's outward FDI and the emergence of BRICS, there has been a policy shift towards South–South investment cooperation. The policy shift in the new BIT models acknowledges measures related to developing countries' need to pursue not only economic development policies, but also public policy choices such as improved labour relations, public health and safety, environmental protection, financial stability, national security, and transparency in information exchange and rulemaking. Based on the background provided, this study acknowledges that the discourse on BITs has a long history with complex dynamics; however, it still warrants further research.

1.3 Research aims and objectives

The purpose of this study is to analyse the patterns, trends and trajectories of investment treaty practice in the form of BITs. Thus, it offers global perspectives on the changing

¹ South Africa has since reviewed its BIT policy through the introduction of the Promotion and Protection Investment Act, which was promulgated in November 2013.

dynamics of BITs from the traditional North–South investment model to South–South investment cooperation as well as implications for South Africa and the Global South. To conceptualise BIT, this study applies a multidisciplinary methodological approach and an eclectic mix of disruptive innovation and rational choice theoretical frameworks to understand treaty practices. Such an approach is helpful in answering the question of whether new BIT models (South–South investment cooperation) have empowered developing countries to regulate their investment policy framework.

Other areas of concern include assessing the future of investments in embracing SDGs and particularly principles of reciprocity and sustainability such as CSR and protection of the environment. Regarding policy implications, possible solutions are suggested (such as multilateral investment agreements, incorporating CSR in IIAs, intra-Africa trade and implementation of a continental free trade area) that are deemed necessary for securing comparative advantage for South Africa and the Global South in the changing IIR.

1.4 Central argument of the study

The central argument of this study is that the standard operating procedure of the traditional North–South BIT model is a reflection of an asymmetric treaty network, which has created power imbalances between the developed North and the developing South. As a rules-based system, BITs are characterised by substantial and procedural provisions embedded in the dispute settlement mechanism, which I argue has proven to pose an inordinate threat to sovereignty or the right of the host country to regulate investment policies in the public interest.

According to Arcuri (2017), international investment law inherently rests on great asymmetry. This is demonstrated by the nature of unequal or skewed trade and investment negotiations favouring the protection of investors in volatile environments. The one-directional nature of traditional North–South investment model also reflects limitations on host countries to promote developmental needs. Traditional BITs impose obligations on host countries, but do not hold MNCs accountable for the social, environmental and socioeconomic consequences of their activities in host countries. Another concern about the asymmetric nature of BITs is the lack of consideration of involving citizens, community-based organisations and other social stakeholders in investment decision making.

Cotula and Shroder (2017) observe that the interests of local communities in investment arbitration remain marginalised. However, recent treaty practice reflects a shift away from asymmetric relations to a more nuanced and balanced approach that promotes accountability and publicly sharing information on the content of BITs. The promulgation of the Protection of Investment Act 22 of 2015 in South Africa is a clear example of balancing the interests of foreign investors while respecting the host country's responsibility to regulate investment policies in the public interest.

1.5 Problem statement

The chronic shortage of development finance, increasing debt to GDP and the pressing need to address socioeconomic challenges propelled developing countries to sign BITs. Thus, BITs were often promoted as tools to attract FDI, but their structure (especially in North–South arrangements) frequently favoured and protected the interests of foreign investors.

After signing BITs, developing countries found themselves trapped in unfavourable terms of trade and their sovereign right to regulate investment policies constrained. The current policy shift away from traditional BITs has been witnessed in many countries of the Global South, including South Africa, India and Indonesia where new BIT models are being negotiated, renegotiated and terminated. Kirayoglu (2017) argues that by 1996, more South–South BITs were concluded per year than North–South BITs, and this trend has been maintained. This shift is manifested when governments of major FDI source countries such as the US actively embark on a policy of improving the investment and intellectual property protection regimes on behalf of their companies, thus linking the signing of BITs and commercial treaties with foreign policy objectives.

As will be demonstrated throughout this research, BRICS countries and other countries in the Global South have responded to this policy shift in BIT renegotiations by safeguarding public policy interests, demanding fairness and socioeconomic justice, and developing new BIT models that reflect the current reality.

A review of South Africa’s BIT policy noted: “The current BITs extend far into developing countries’ policy space, imposing damaging binding investment rules with far-reaching consequences for development” (dti, 2009: 54). As indicated by Friedman and Verhoosel (2003) and Kollamparambil (2016), traditional BITs have been a source of political controversy across the world because of the alarming increase in dispute settlement cases in the investor state. In his study, Boyce (2017) observes that, as is typical with most significant changes to the status quo, the move away from traditional BITs has been met with much uncertainty and consternation, and even outright objection from trading partners.

Given the flexible nature of soft power, Meyer and Guzman (2010) are of the view that when entering into international agreements, states create expectations about their future conduct. Meyer (2017) argues that shifts in relative bargaining power are a major cause of treaty renegotiation. To that extent, states are likely to favour non-binding soft laws in their quest to renegotiate IIAs, including BITs.

Furthermore, Buckley *et al.* (2008) tested the effect of various supranational institutional factors, including BITs, on the decision making of Chinese multinational enterprises from 1991 to 2003. Their studies concluded that there was no significant relationship between Chinese outward FDI patterns and the conclusion of a BIT with China (Buckley *et al.*, 2008). It is worth noting that many IIAs in the form of BITs have changed and evolved over time through the increasingly common practice of re-negotiation or termination.

South Africa has made a clarion call to countries in the Global South to challenge the structure of BITs and advocate for a robust regulatory space that promotes environmental protection, labour standards, public health and CSR. Thus, the core argument that this research hopes to sustain is that the international investment rule-making system is evolving and is being transformed. To that extent, the policy shift offers developing countries an opportunity to participate actively in challenging the asymmetrical BIT network and transforming the global governance institutions and the IIR while at the same time taking into account the developmental needs of the Global South.

1.6 Research questions

The point of departure for this study is Zina O' Leary's (2005) assertion: "Without a clear articulation of your research question, you really are travelling blind." Based on that

profound observation, it is worth highlighting what Silverman (2022) considers to be imperative before undertaking any research:

- Define the investigation.
- Set boundaries by showing which new ideas are relevant to your research.
- Provide direction about what sort of concepts and data are appropriate.
- Set a frame of reference assessing your work by providing benchmarks.

The critical analysis and evaluation of the impact of BITs on developing countries have received increasing scholarly attention in recent years. The literature in both academia and the policy space has essentially raised two key research questions. The first concern in the review of such literature is to seek answers to the question of to what extent BITs attract FDI in developing countries. The second common research question is: What are the implications of BITs on governments of developing countries in terms of regulating foreign investment? The gap in the literature, which this research hopes to address, is to assess the policy shift of BITs from traditional North–South investment model to new models of South–South investment cooperation.

According to Denscombe (2002) and Mouton (2001), research questions should specify exactly what needs to be investigated, and they should be formulated to focus on the research problem that has been identified. Therefore, the four key research questions (RQ) guiding this study are:

RQ1: What are BITs and why do countries continue to sign them?

RQ2: How has the policy shift from traditional North–South BIT to South–South BIT models shaped the governance and practice of international investment rulemaking?

RQ3: How has the withdrawal from BITs and the enactment of the Promotion and Protection Act affected South Africa’s international reputation as an investment destination?

RQ4: What is the future of investment treaty practice in the post-Covid-19 policy environment?

To provide further clarity on the policy shift towards new models of South-South investment, I added the following sub-questions:

RQ5: How does rational choice and disruption theory explain state behaviour in relation to treaty practice and policy change?

RQ6: What are the lessons and experiences that can be shared from treaty practice in the Global North and in the Global South?

RQ7: What is the future of investment treaty practice following Covid-19 and the Paris Climate Agreement?

1.7 Significance of the study

The study is topical, timely and relevant given the growing significance and influence of South Africa and other countries of the Global South in setting the global agenda. In addition, this study sheds light on the need to transform the global governance system, including investment and trade relations. The significance of this study is its contribution to knowledge and scholarly literature in providing broader insight into the trajectory of the

policy shift of BITs from traditional to new models of the IIR, both in theory and in practice. Notably, this study offers both empirical and theoretical contributions to IIR literature and treaty practice. As Schemikau (2023) points out, humanity's development will not be limited to scientific advances alone; rather, it will also require spiritual advances that allow us to better understand the energetic connections between mind and matter, letting us access more parts of our brain and therefore find solutions that we cannot yet dream of.

The findings of the literature survey reflect divergent opinions and policy positions on the effectiveness of BITs. This research study applies a multidisciplinary approach that departs from earlier approaches and studies. The study uses a dataset collected from UNCTAD and the OECD, which contains all the BITs that were signed, ratified and to an extent terminated, starting from the first BIT signed in 1959 to the termination of South Africa's BITs with OECD countries in 2009.

Thus, this research fills the gap in the literature. To that effect, an attempt is made to critically assess whether there are disparities between BITs signed between developed and developing countries and those signed between developing countries. According to UNCTAD (2015), China is the top developing country signatory of South–South investments, with 112 BITs concluded worldwide and 63 of these concluded with other developing countries. From a geostrategic perspective, Shoba and Mlambo (2024) point out that apart from its power and influence at the United Nations and BRICS, China holds a sizeable voting share of 6.09% in the IMF, making it the third largest member of the IMF (after the US and Japan).

Of critical importance is the question of whether the economies of South Africa and the entire African continent are structured and driven to benefit optimally from the transformation of the IIR and address the triple challenges of poverty, unemployment and inequality. This study argues that in order to survive in the complex, uncertain and dynamic global economic environment of the twenty-first century, there is a need for each African country to lay appropriate foundations and formulate policies for economic, social, environmental and natural resource management. Put differently, it calls African countries to action by investing in existing and future infrastructure projects to reduce the environmental burden and increase efficiencies.

This study is an attempt to fill this important gap in the literature by focusing specifically on the research theme of the Global South's quest to have policy influence in the design of new BIT models and the opportunity to shape the future of the global investment regime. As Picciotto (1998) argues, there was a new shift towards BITs between 1996 and 1998, when IIAs experienced the growing trend of "regionalisation".

In other words, through increased regional interactions, it is no longer individual home and/or host countries that are negotiating terms of investment but rather regions of home and/or host countries, as in the case of COMESA and SADC. Another significant contribution of this study is its comparative and multidisciplinary approach to understanding investment treaty networks. To that end, BRICS constitutes significant trading partners and new investors that are collectively and individually contributing to the policy shift towards South–South investment models and transformation of the global investment regime.

1.8 Research design and methods of data collection

1.8.1 Research design

According to Babbie and Mouton (2006), the research design should be explicit, objective and replicable to ensure that the roadmap for collecting, measuring and analysing the data is appropriate. In order to understand the reasons why countries sign BITs, a qualitative research design was adopted as a method of analysis for this study. Iyamu (2022) notes that research is an investigative practice to reveal the unknown or to empirically substantiate the known by using a vehicle referred to as “research methodology”. In addition, Mouton (2001) defines a research design as a plan or blueprint of how the researcher intends to conduct the research. Creswell (2009) points out that a research design has two characteristics: (i) it is the constant comparison of data and (ii) it is the theoretical sampling of different groups of data.

Given the descriptive and exploratory nature of the qualitative research method, concerns and criticisms have been levelled against it because of the reliability and validity of research findings. In addressing criticism of the qualitative research method, Merriam (1998) and Creswell and Miller (2010) developed an innovative two-dimensional framework to help researchers identify appropriate validity procedures for their studies. The two-dimensional framework is illustrated in the table below, which provides a clear demonstration of the lens that researchers choose to validate their studies and paradigm assumptions. While Creswell and Miller’s (2010) innovative two-dimensional framework has been commonly used and cited in data analysis, of significance is the solutions it provides on different types of validity in qualitative research.

Table 1: Validity procedures within a qualitative lens and paradigm assumptions

PARADIGM ASSUMPTIONS/LENS	POST-POSITIVIST OR SYSTEMATIC PARADIGM	CONSTRUCTIVIST PARADIGM	CRITICAL PARADIGM
Lens of the researcher	Triangulation: the process of using multiple investigators, sources of data or data collection methods to confirm emerging findings.	Disconfirming evidence: purposefully seeking variation or diversity in sample selection to allow for a greater range of application of the findings by consumers of the research.	Researcher flexibility: critical self-reflection by the researcher regarding assumptions, worldviews, biases, theoretical orientation and relationship to the study that may affect the investigation.
Lens of study participants	Member checking: taking data and tentative interpretations back to the people from whom they were derived and asking if they are plausible.	Prolonged engagement in the field: adequate time spent collecting data such that the data become saturated. This may involve seeking discrepant or negative cases of the phenomenon.	Collaboration: to respect and support participants in a study, and not further marginalise them.
Lens of people external to the study (reviewers and readers)	The audit trail: a detailed account of the methods, procedures and decisions points in carrying out the study.	Rich, thick description: providing enough descriptions to contextualise the study so that readers will be able to determine the extent to which their situation matches the research context, and whether findings can be transferred.	Peer review/ debriefing: discussion with colleagues regarding the process of the study, the congruency of emerging findings with the raw data, and tentative interpretations.

Sources: Merriam (1998); Creswell and Miller (2010:126)

According to Creswell and Miller (2010), the framework in the table above helps researchers to select procedures based on how to assess the credibility of a study and their own philosophical positions on a qualitative inquiry. Worth noting is that the validity procedures in the framework present criteria with labels distinct from quantitative approaches, such as trustworthiness (credibility, transferability, dependability and confirmability) and authenticity (fairness).

Furthermore, Merriam (1998) argues that the key to understanding qualitative research is the idea that individuals, during interaction with their world, socially construct meaning. For example, the best that a researcher can do is to be conscious of the ethical issues that pervade the research process and to examine his or her own philosophical orientation. Kellinger (2005) notes that qualitative research is a constructivist methodology that follows a postmodernist and naturalistic approach, and is often associated with the interpretivist approach in the analysis of data. Walsham (1993) argues that an interpretive approach can help the researcher to gain knowledge of reality through social constructs such as language, shared meaning, documents and tools of analysis.

Silverman (2022) argues that qualitative research consists of many different endeavours, many of which are concerned with the objective study of realities. The choice of a qualitative research method is also influenced by the view that it allows the researcher to observe events and actions as they happen, without removing them from the context or natural setting (Babbie and Mouton, 2002). The logic behind the use of a qualitative methodology is that it is open, flexible and inductive, as it allows the researcher to begin with general observations.

As pointed out by Neuman (2000), although qualitative and case study research are not identical, almost all qualitative research seeks to construct representations based on in-depth detailed knowledge of cases. Therefore, this study followed a qualitative method on the basis that it is concerned with what people think or perceive of the external environment. Silverman (2022) cautions researchers against misleading assumptions about qualitative research by stating that the presence or absence of numbers and rigid structures is insufficient to distinguish between qualitative and quantitative research. Furthermore, Silverman (2022) contends that what is much more important is how the researcher defines the research problem using a particular model of reality.

A qualitative method enables researchers to have insights into attitudes and motives rather than measuring the frequency within which different attitudes or behaviours occur (Hedges, 2005:9). In addition, Collins and Hussey (2003) argue that the main characteristic of qualitative research is that it is mostly appropriate for small samples, while its outcomes are not measurable and quantifiable. De Vos *et al.* (2022) identify five key strategies of a qualitative methodology:

- 1) Bibliography
- 2) Phenomenology
- 3) Grounded theory
- 4) Ethnography, and
- 5) Case study.

The objective of qualitative research has been described as gaining a contextual understanding of data or a given topic by using data obtained through an interpretive analysis (Hennink, Hutter and Bailey, 2020:10). In terms of this study, a descriptive and

explanatory case study design was adopted. As a unit of analysis, South Africa was selected as a case study. Yin (1984) defines the case study research method as an empirical inquiry into a contemporary phenomenon in its real-life context; when the boundaries between the phenomenon and the context are not evident, sources of evidence are used. Furthermore, a case study adds to a theoretical and empirical field in that each empirical case is analysed separately in a qualitative manner (Yin, 2014).

As Simons (2009) argues, a case study is broadly a process of conducting a systematic, critical inquiry into a phenomenon of choice and obtaining an understanding to contribute to cumulative public knowledge on the topic. The justification for using the case study approach is that it presents data-bearing cause–effect relationships, explaining how events happened and how they are connected to formulate a theory (Mills, Durepos and Wiebe, 2010). Thus, according to Mills *et al.* (2010), the characteristics of a case study include the following:

- A focus on the interrelationships that constitute the context of a specific entity, such as an organisation, an event or a phenomenon.
- Analysis of the relationship between the contextual factors and the entity being studied.
- The explicit purpose of using those insights (into the interactions between contextual relationships and the entity in question) to generate theory and/or contribute to extant theory.

I elected to use a case study approach because it would enable me to conduct a comparative analysis of cases involving countries' experiences when signing and negotiating international agreements. A case study approach was also chosen because

it would provide national, regional and continental perspectives as well as lessons learned in creating a more level playing field in treaty negotiations.

By focusing on South Africa, I had the opportunity to closely monitor developments and evaluate the phenomenon under investigation with rigour and vigour while at the same time suggesting recommendations and implications of the policy shift towards South–South BIT models for South Africa and other countries of the Global South.

As Creswell (2010) argues, a case study can be regarded as an exploration or in-depth analysis of a bounded system. Lijphart (1971) explained the analysis of comparable cases, where the cases selected are similar in a larger number of important characteristics (which one wants to treat as constants) but are dissimilar as far as the variables are concerned (which one wants to relate to each other). Additionally, Imas and Rist (2009) state that case studies are frequently used in development interventions and are useful for describing what the intervention looks like in the real world and why things happen as they do, focusing on the effects of the intervention. Yin (2009) alludes to the fact that researchers often choose a case study approach based on three key reasons.

The first reason why researchers opt for a case study approach when conducting research is the ability to produce a detailed description of a phenomenon. In this case, it involved trade and investment (BITs). The case study was also linked to the research questions, which were based on the literature review and discussion with the respondents, which further guided the study by providing additional information on the following questions:

- What are BITs and why do countries sign them?
- Why did the post-apartheid government opt to sign BITs in 1994?
- At the substantive and procedural levels, what reasons were provided for the termination of BITs?

The second reason to opt for a case study approach is that it allows the researcher to produce a detailed description of the phenomenon being studied. The third reason is because a case study approach is deemed critical to evaluate a phenomenon, including its future trajectory. However, like any other research method or theoretical framework, the case study approach has its challenges and limitations. Neuman (2000) identifies the following three challenges related to the case study method:

- 1) It is more difficult, costly and time consuming than research that is not comparative.
- 2) Random sampling cannot be used.
- 3) The test theory cannot be applied and only limited generalisations can be made.

Despite the challenges, the case study approach gives the researcher the opportunity to gain an in-depth understanding of an unfolding process, event or situation, and explains why results occur in a given situation. As Babbie and Mouton (2006) point out, case studies can inform best practice on issues relating to policy implementation, organisational culture, process of change and re-engineering. The study identified issues related to the implementation of investment policies and assessed the progress made in relation to the behaviour of countries – in this case, understanding South Africa's preference for regional trade agreements over BITs, hence a policy shift towards South–South investment cooperation.

1.8.2 Area and scope

This study examines the scope, evolution and implications of BITs, particularly from the perspective of developing countries in the Global South, with a specific focus on South Africa. The study further explores how these treaties, traditionally signed with countries of the Global North, have impacted the host country's ability to regulate investment policies in the public interest. It argues that traditional North–South BITs are preferential legal-political instruments that have historically advantaged foreign investors over host countries, creating asymmetric treaty networks and power imbalances and often constraining host countries' right to regulate investment policies in the public interest.

1.8.3 Target population

The target population of this study included public service officials, diplomats, and subject matter experts and researchers in the fields of development finance, the IPE, international organisations, and legal and treaty practice. Thus, such individuals and institutions were identified and targeted as subjects of the study. In addition, data and policy documents of research institutes and non-governmental organisations such as the Institute for Global Dialogues and the South Africa Institute for International Affairs were used.

1.8.4 Sample size

Considering the qualitative nature of the study, it consisted of an investigation aimed at providing answers to questions, collecting evidence, and producing findings not determined in advance and applicable beyond the immediate boundaries of the study (Guest *et al.*, 2006:1). Thus, I considered a sizable and manageable focus group or group interviews with people who were knowledgeable about the research topic and

strategically located in Pretoria and Johannesburg for easy access. With regard to the participants' responses during the interviews (informal discussions), I acknowledge and recognise that interviewees might have been biased in their responses and I was limited in terms of what the respondents were able and willing to share about their knowledge and expertise on the subject. Lee (2000) cautions that the researcher should attempt to be unobtrusive so as not to disrupt functions and/or generate an unnatural or contrived response. While I wanted to cover a large sample size, there were limitations and constraints such as a low return rate, travel restrictions during the Covid-19 pandemic and the availability of respondents. The sample size is indicated in the table below.

Table 2: Interview schedule

INTERVIEW	PARTICIPANTS
Interview 1	Researchers and think-tank members – 2
Interview 2	Civil society officials – 2
Interview 3	Academics and policy experts – 2
Interview 4	Legal representatives – 2
Interview 5	South African government officials – 2
<i>Total</i>	<i>10</i>

The cut-off date for the completion of the study was December 2024. However, delays in getting permission letters to conduct the interviews and fieldwork had implications, to the point that I had to rely on informal discussions with antidotes. Nonetheless, I made an effort to have informal discussions with public officials and individuals in the private sector about their understanding of South Africa's experience regarding treaty practice and trade negotiations.

1.8.5 Data collection

To collect, interpret and analyse data, this study involved a review of literature, both primary and secondary sources; a qualitative research method; and a case study. Kumar (2014) asserts that for the process to qualify as research, it must have certain characteristics and fulfil some requirements; it should, as far as possible, be controlled, rigorous, systematic, valid, verifiable, empirical and critical. In terms of the methods of data collection, both primary and secondary sources were used to gain a better understanding of the phenomenon (BITs). Secondary information sources that were consulted included books, journal articles, think tanks, government websites and policy papers. In addition, relevant information was gathered from international newspapers such as *The New York Times*, *Time* magazine and other related international online materials relevant to the study.

The data collection was conducted through a literature review and critical thematic analysis of commentaries, policy briefs, books, journal articles, research papers, UNCTAD Watch and OECD reports, to mention a few. Babbie (2014) argues that researchers who conduct exploratory research must be creative, open minded, flexible, adopt an investigative mind-set and explore all sources of information. In addition, the data collection sources included a novel database on investment treaties (EDIT) introduced by Alschner, Elsig and Palanco (2020), which provided unprecedented access to the most extensive set of IIAs text to date. EDIT² is considered useful in that it is an evidence-based tool that provides an informed public discourse on treaty practice in five

² The goal of EDIT is to facilitate and inform public discourse and to provide evidence-based reform to the extensive set of IIAs text to date (UNCTAD).

different ways: comprehensive, uniform, machine readable, annotatable, and freely accessible to researchers and the public (Alschner, Elsig and Palanco, 2020).

The fieldwork phase of the study involved gathering data and interviewing respondents (informal discussion with persons of interests to validate research data) and subject matter experts on the political economy of BITs. A series of digital interviews through Zoom, and sending questionnaires via email, was conducted with relevant individuals and institutions related to trade and investment. The benefits of digital interviews include access and flexibility without restrictions of funding and time constraints.

1.8.6 Data analysis

At the very best of human enquiry, research questions reveal and provide answers that are hidden or concealed. As Iyamu (2022) explains, research is essentially vested in data and in the analysis of data. Research is conducted for the purposes of innovation and contributing to knowledge. In that regard, data analysis is considered critical when conducting research given that as a systematic approach, logical reasoning or techniques are used that describe, evaluate and interpret data to find meanings that alter the ontological position before the research was conducted and conclusively contribute to knowledge (Iyamu, 2022).

Iyamu (2022) acknowledges that data analysis is aimed at evaluating and examining sets of data, and gaining insights and an understanding as to why and how the components of systems interact, interconnect, interrelate and influence one another in the process. According to Kelliher (2005), the qualitative research method is a field of enquiry that is explored through different paradigms and through a naturalistic approach, and is often

associated with the interpretative approach in the analysis of data. While Iyamu (2022) argues that the greatest challenge facing researchers is implicitly associated with over-reliance on an interpretivist approach for analysis and interpretation of qualitative data, a counter-argument indicates that the analysis of data is aimed at answering research questions and providing insights into solving problems.

The approach taken regarding data analysis was to integrate inputs from informal discussions with experts (interviews) and validate it with information from the literature review. To assess and analyse data on South Africa's BIT journey and treaty practice, qualitative content analysis was applied by using EDIT. Hsieh and Shannon (2005) define qualitative content analysis as the subjective interpretation of the content of text data through the systematic classification process of coding and identifying themes or patterns. This approach has proven to be a valuable source of information on computational data analysis of treaties and conventions. Mayring (2014) contends that to infer meaning from text data systematically, qualitative content analysis typically relies on different forms of coding such as assigning classifications to bits of text in order to uncover common themes.

To explicitly assist researchers to respond to questions during data analysis, Iyamu (2022) suggests the following elements of analytics.

Table 3: Elements of data analytics

ELEMENT	PURPOSE
What?	Clarifies the object, subject or tools that are used or can be applied in an activity within the context and relevance to an environment.
Who?	Establishes and identifies the actors that show an interest, participate or can enrol in an activity.
How?	By implication, defines and interconnects the actors involved in an activity.
When?	This defines the context or period in which an activity takes place.
Where?	The location, boundary, and scope within which an activity takes place are identified and defined.
Why?	Helps to induce the enabling and constraining factors in an activity.

Source: Iyamu (2022)

Silverman (2022) argues that many novice qualitative researchers tend to define the research problem by using an approach that is better fitted to quantitative research. Iyamu (2022) supports this perspective, suggesting that it gets worse because the data sets are often small compared to quantitative studies. Related challenges include data saturation and budgetary constraints. Despite such challenges, the purpose of undertaking research – as Iyamu (2022) contends – is the demonstration of knowledge ability, revelation of the unforeseen, or empirical confirmation of situations or circumstances. From the perspective of the IDRC (2008), a research design requires that the extensive qualitative data be properly organised for analysis and the guidelines, which have been established for documenting the process, ensure completeness and accuracy of data.

In an attempt to achieve the highest levels of consistency, credibility and validity in a qualitative research method, I requested my colleagues and editors to peer review my research, check for any inconsistencies and provide feedback. As Creswell and Miller (2010) observe, qualitative researchers routinely use members' checking, triangulation, checking descriptions, peer reviews and an external audit. Triangulation refers to using two or more types or sources of qualitative material in order to generate more robust evidence (Patton, 2015). To ensure the validity, reliability and objectivity of the research study, Pidduck (2019) advises that a researcher should follow a structured framework, which enables other researchers to reach the same conclusions and findings.

Iyamu (2022) contends that data analysis is therefore a systematic approach that uses logical reasoning or techniques to describe, evaluate and interpret data to find meanings that alter the ontological position before the research was conducted and conclusively contribute to knowledge.

1.9 Limitations of the study

The cut-off date for the collection of data and completion of the study was November 2024. However, as indicated previously, delays in getting permission letters to conduct the interviews and fieldwork had implications, to the point that I had to rely on informal discussions with antidotes. Nonetheless, I made an effort to have informal discussions with public officials and individuals in the private sector to obtain their opinions and understand South Africa's experience on treaty practice and trade negotiations.

The greatest challenge and limitation was accessing data and securing interviews with busy public officials, particularly leading members in strategic sectors (such as trade,

industry and competition; international relations and cooperation; and treasury), academics and think tanks. Pressures regarding work schedules and the availability of respondents were the major limitations. The other limitations were logistical in nature. Carrying out fieldwork is not only time-consuming, but also a very expensive and intense endeavour.

The challenges notwithstanding, I initiated strategies to overcome the limitations and constraints. These included emailing the research questionnaires to the respondents with clear instructions on how to complete and submit them. Although I was cognisant of the disadvantages of emailing questionnaires (such as a low response rate, self-selecting bias and a lack of opportunity to clarify issues), I attempted to complement such limitations. In addition, I considered telephonic interviews to get clarity on some of the issues arising from the literature review and fieldwork. Worth noting is that during the data collection, I was referred to persons of interest who gave a personal account of their experience without necessarily representing the official government position but rather to enhance and validate research data.

Considering that the fieldwork was conducted during the Covid-19 pandemic from 2020 to 2022, there were limitations such as health-related risks and travel and other restrictions. Notwithstanding such limitations, I was innovative and worked within the confines of the limitations.

The rapidly changing geo-political environment has the potential to affect the stability and predictability of trade and investment decisions and policy, making them difficult to predict. To date, over 3 600 overlapping treaties govern international investments, with an additional 472 treaties with investment provisions, DTTs and preferential investment

agreements. The sheer volume and proliferation of BITs, pace of policy shifts, ambiguity and multiplicity of provisions of investment treaties surpass the ability and capacity of any researcher to complete such a study without limitations of time, space and resources, as well as logistical constraints at a postgraduate studies level.

The sheer volume, length and breadth of BITs (over 3 600) presented logistical limitations and suggest ongoing and future research at a post-doctoral level to appraise the phenomenon beyond this study. However, there is no shortage of evidence in the literature that the nature and future of investment treaties are changing rapidly. However, I was cognisant of the limitations of time and resources, and limited funds were available to attend international conferences on the topic. Notwithstanding these limitations, this study examines the policy dimension of BITs in the context of South Africa and other countries of the Global South. It does not dwell too much on inter-state arbitration or state–investor disputes, as these themes are beyond the scope and timeline of this research.

While the study was ambitious in aiming to assess the policy shift from North–South to South–South investment cooperation, there were limitations; thus, the focus was on selected case studies and therefore I have been careful to avoid making general statements.

1.10 Ethical considerations and clearance

As a postgraduate student, researcher, I was cognisant of the University of Pretoria's Code of Ethics for Responsible Research Practices. In addition, the research proposal was submitted to the Department of Political Sciences' Research Committee.

However, I did not obtain ethical approval prior to the commencement of the data collection, as I considered the process to be document analysis of publicly available information on investment agreements and treaty practice. In conducting the research, I ensured that during any contact with the research participants, I maintained ethical values consistently, including respect, integrity, accountability and professionalism.

This research was conducted in English, which was understood by every research respondent, and full consent of all the respondents was sought and obtained prior to the interviews. During the data collection, I was referred to persons of interest who gave their opinions in their personal capacity and not as official representatives of their organisations. These informal discussions were limited to a few people during the attendance of seminars and research workshops, aimed at validating data.

Babbie (2007) describes ethics in conducting research as conforming to standard operating procedures in accordance with professionalism, which includes the respondents' responsibilities, protection of confidentiality, and a person's right to participate or not to participate in the research study. I have also ensured that all sources cited in the study are acknowledged and referenced accordingly. According to McMillan and Schumacher (2011), the researcher is ethically responsible for protecting the rights and welfare of those participating in the research project. Neuman (2011) argues that ethics define what is or is not legitimate to do and the researcher has a moral and professional obligation to be ethical even when the Neuman research participants are unaware of or unconcerned about ethics.

In compliance with the University of Pretoria's norms and standards of conducting research, I completed a declaration and made a commitment to pursue the highest standard of excellence and ethical conduct throughout the research study.

1.11 Organisation of the study

This thesis is organised into seven chapters. **Chapter 1** consists of an introduction, the background of the study, the objective of the study, the central argument of the study, the problem statement, the research questions, the significance of the study, the research design and method, limitations of the study, ethical considerations, the organisation of the study and a conclusion.

Chapter 2 covers the conceptual framework, definitions of key terms and literature review, applying the analytical framework to explain and understand treaty practice.

Chapter 3 traces the history and origins of BITs, and assesses the impact of BITs by mapping out the global landscape of IIAs. Briefly, the chapter examines how traditional North–South BITs shape the governance and practice of international investment rulemaking up to the present date.

Chapter 4 assesses the rules-based system of treaty practice through the application of philosophical and doctrinal perspectives on the institutional reform of BITs. This was achieved through the evaluation of selected cases and experiences of treaty practice across the world, from the Vienna Convention to the SADC BIT model.

Chapter 5 is a case study of South Africa and critically assesses opportunities and challenges of the policy shift towards South–South investment agreements. This chapter critically assesses how host countries should best use domestic policy prescripts to

engender changes in investment regulations and influence the transformative agenda of human rights law in treaty practice. The intent and purpose is to demonstrate how South–South BITs provide opportunities and challenges for countries of the Global South to develop and implement policies that address domestic needs with limited risk of hindering investment.

Chapter 6 traces South Africa’s journey in the BIT universe, from the apartheid regime to the new democratic dispensation established in 1994. It sets out to understand the country’s efforts to transform the global investment regime. Worth noting are the determinates of investment, South Africa’s integration into the global economy, strengthening mechanisms for policymaking and lessons learned.

Chapter 7 presents the conclusion of the study and the summary of the findings, and highlights policy recommendations for South Africa and the Global South in shaping the future and governance of the global investment regime. Of critical importance is suggesting areas for further research on strengthening South–South BIT models through intra-trade and future research perspectives.

CHAPTER 2

CONCEPTUAL AND THEORETICAL FRAMEWORKS

When it comes to interpreting the world, evidence is meaningless without the theoretical lens and it is the clear specification of the theoretical lens, which often determines which empirical, observations count as evidence and which are trivial noise.

– Mario Scerri (2018:14)

2.1 Introduction

From the onset, it is worth noting that BITs – in whatever shape, form or structure (North and South) are decades old agreements, designed by developed countries to protect foreign investments in volatile and risky markets. Recently, new BIT models have been developed and appear in the development agenda and key priorities of countries of both the Global North and the Global South. This chapter is an attempt to assess how the policy shift influences both host and home countries to engage differently in treaty practice. There is also a realisation that the shift from traditional North–South BIT models to South–South BIT models has and continues to shape the governance and practice of international investment rulemaking.

The contemporary world, with its fluidity and imperfections, can be interpreted, analysed and understood through the application of different worldviews or theoretical lenses. A key phenomenon that requires clarity of thought is whether there is an IIR that regulates BITs and IIAs. Notwithstanding this, various political scholars and jurists have studied the phenomenon under investigation extensively, yet it remains a complex and over-studied phenomenon that still requires further enquiry to litigate and mitigate contractual disputes

between actors. In this case, it involves managing expectations of foreign investors and commitments by host countries.

Thus, this chapter is an attempt to shed light on the conceptual and theoretical frameworks of understanding BITs and related treaty practice. It provides the conceptual framework, a literature review and engagement with theories that explain investment discourse, treaty practice and contractual agreements; and explains what has influenced the policy shift from traditional North–South investment to new models of South–South investment. Now that the conceptual and theoretical perspectives have been set out and articulated, the sub-section that follows defines key terms and concepts mentioned throughout this research study.

2.2 Conceptual framework: Definition of key terms and concepts

The premise of academic writing is to ensure that the reader is taken into confidence in a way that ensures the discourse is clear, precise and well understood. While the premise of this research study is based on the institutional analysis of IIAs and BITs, Lowe (2007) cautions that it is much easier to buy into the system of investment guarantees provided by BITs than it is to build a reputation as a safe place for investment. A reputation takes years to build, while a BIT can be concluded with the stroke of a pen or signature. As Badenhorst (2017) points out, a conceptual framework is where the researcher unpacks the key concepts used in the research and identifies the relationship between the concepts. A starting point for assessing the policy shift of BITs from traditional North–South investment to new South–South investment models is to define key concepts and provide a conceptual framework.

As articulated by UNCTAD (1999), the purpose of definitions in legal instruments such as BITs is to determine the object to which the rules of the agreement shall apply and the scope of the applicability.

In the context of ensuring that IIAs provide mutual benefits for the investor (home country) and receiving country (host country), understanding the principles of reciprocity and differential treatment is deemed critical. In addition, host governments are often prevented from favouring domestic firms that match domestic environmental or social policy goals (Blake, 2013). As Djeflal (2013) argues, there are still treaties that remain silent on the question of termination and withdrawal.

The World Benchmarking Alliance uses the term **developing countries** (receiving countries) to refer to countries on the OECD list of countries and territories eligible to receive official development assistance.

The definition of **investment** is quintessential in understanding international investment treaty practice. For the purpose of this study, UNCTAD (2018) provides two definitions of investment: **enterprise based and asset based**. The asset-based definition is broad and generally includes intellectual property rights, short-term speculative portfolios, good will and direct investment; while the enterprise-based definition is much more restrictive and narrower, and mostly features a rejection of the broad-based definition.

An **investment regime** is a massive web of IIAs comprising mainly BITs and other IIAs such as investment chapters in regional and multilateral trade agreements (Alvarez, 2011).

IIAs and **investment treaties** are used interchangeably. For the purpose of this study, IIAs are broader than BITs, as they encompass a variety of regional or multilateral instruments (including investment chapters) that offer special and differential treatment.

Alschner, Elsig and Polano (2020) define IIAs as treaties concluded under international law between two or more states, territories or economies, which in whole or in part contains substantive obligations to protect and/or liberalise foreign investment in general or specific to a sector. Generally, IIAs are agreements that establish binding rules of investment protection. Types of IIAs include BITs and investment chapters of free-trade agreements.

Expropriation refers to the state taking ownership or control of foreign investments. Investment treaties typically protect investors from either direct or indirect expropriation without adequate compensation. Jandhyala *et al.* (2011) indicate that the expropriation clause in an investment agreement stipulates how investors will be compensated in the event of a seizure of property that deprives investors of their investment value.

Host states/countries refers to capital importing countries or recipient countries where the investment is located. The Etymology dictionary traces the origins of the term to both the guest and the enemy. Reinisch (2016) states that the US and Switzerland are both host countries where the United Nations is headquartered. The Nigeria–Morocco BIT defines a host state as the party in whose territory the investment is located (OECD, 2016). In international investment law, the host country incurs certain rights (such as the right to regulate) and duties (such as the duty not to interfere with the investor's investment) as a result of its control over a particular geographic territory (Boon, 2023).

Today, host countries are changing the dominant global narrative and are demanding a policy shift so that they no longer have to accept the position that they are just passive recipients of investments from abroad.

Home states/countries refers to capital exporting countries, which are investing abroad. Roberts (2017) notes that the frequent power imbalance in the international system creates an uneven playing field between the home country and the host country.

Investments are primarily private transactions, mostly done by multinational corporations, with the aim of generating positive rates of return. It is worth noting that investments can have far-reaching implications for the welfare of host countries, including prospects for sustainable development, use and protection of natural resources, employment, income and economic activity (Von Moltke, 2000). According to the OECD Policy Framework (2015), investment takes many forms, from physical assets to human or intellectual capital. In the language of IIAs, an **investor** is a private person (whether an individual or a legal person), a national of the party to an investment agreement that has been made to cover an investment in the territory of the other party to the agreement (Chevry, 2015).

A general practice in international investment rulemaking defines a **BIT** as an agreement between two countries (hence, bilateral) in which each country pledges to provide favourable treatment to the other country (hence, investment). Put differently, BITs are agreements signed between two countries concerning the reciprocal promotion and protection of investments (De Gregorio, 1994). According to UNCTAD (2005), BITs are the historical products of TFCNs.

The IMF (2024) defines FDI as “investment that is made to acquire a lasting interest in an enterprise operating in an economy other than of an investor, the investor’s purpose being to have effective choice in the management of the enterprise”.

A significant number of BITs include a standard definition of investment, covering “every kind of asset” owned or controlled by an investor of another state party. Examples of language variations used to exclude assets for personal use from the definition of investment include the BIT between Belarus and the Czech Republic and the BIT between Swaziland and Mauritius, as follows:

Table 4: Definitions of the term “investment” in BITs

Belarus–Czech Republic BIT (1996) definition	Mauritius–Swaziland BIT (2000) definition
The term “investment” shall mean every kind of asset invested in connection with economic activities by an investor one Contracting Party in the territory of the other Contracting Party in accordance with the laws of the latter...” (emphasis added)	Investment means every kind of asset admissible under the relevant laws and regulations of the Contracting Party in whose territory the respective business undertaking is made... ” (emphasis added)

Source: UNCTAD (2007)

The VCLT (1969) defines a **treaty** as “an international agreement concluded between two states (bilateral) in a written form and is governed by international law”.³ As articulated in the VCLT, the term “treaty” is used generically to describe a variety of instruments that establish obligations between states, including conventions, agreements, arrangements,

³ VCLT, 1969. <http://treaties.un.org/> [Accessed 18 December 2023].

protocols, covenants, charters and Acts. A general treaty practice often takes the form of a contractual agreement or a joint declaration between state parties.

Wang (2010) defines **an investment treaty** as a “legal instrument designed to govern the particular circumstances of investment, such as its scope, treatment received by foreign investors, and dispute settlement and compensation mechanism”.

Investment treaties are formal preferential instruments designed to protect the investments of one treaty party in the territories of the other treaty party (Bonnitcha, 2017). For the most part, foreign investors have occasionally lobbied their home countries to conclude investment treaties to protect existing investments that they made in a given host country.

Policies refers to measures that societies put in place to foster the achievement of certain development goals and objectives. The term **policy space** was coined by UNCTAD in its 2002 documents and was officially used in the 2004 São Paulo Consensus in Brazil.

UNCTAD (2004) defines policy space as the scope of domestic policies (especially in the areas of trade, investment and industrial development), which might be framed by international discipline commitments and global market considerations.

Put differently, Britannica (2023) defines policy space as an autonomous decision-making space that a host country considers essential for promoting and protecting its citizens’ basic needs.

Policymaking refers to measures that policymakers deem essential and imperative to promoting and safeguarding basic development needs of citizens, including access to water and sanitation, poverty reduction, health and safety, and environmental protection.

Political risk is defined as risk or probability of occurrence of some political events that will change the prospects for the profitability of a given investment (Kobrin, 1979). This refers to the sovereign-related threats that an MNC is exposed to while conducting its economic activities in the territory of a foreign country (Lipson, 1985).

The principle of **reciprocity** is a common factor in international investment treaties. Reciprocity refers to the idea that states will be more willing to comply with their legal obligations if they believe that other states will do the same (Simma, 2012). It has been argued that reciprocity correlates with a common interest in the economic world order in the context of ensuring mutual benefits and assisting LDCs (Agbo-Ejeh, 2023).

The term **norm/s** is used in a general context to refer to legally binding instruments.

National treatment and MFN are essentially provisions related to the standard of treatment in IIAs.

Put differently, the national treatment clause protects investors against nationally-based discrimination policies such as Broad-Based Black Economic Empowerment in the case of South Africa, and thus provides socially or previously disadvantaged guarantees for investors to have a level playing field when competing with domestic investors.

According to Fukasaku (2000), **special and differential treatment** refers to the “provision of special consideration for developing countries in the rules and operations of the World Trade Organization”.

According to Gazzini (2014), the term **preamble** refers to the part of an investment agreement that sets the overall tone of the BIT. In the context of treaty practice, the preamble is an integral part and must be looked at to elucidate the object and purpose of

the treaty with a view to reaching a balanced interpretation or as a contextual element contributing to the establishment of the meaning of the provisions to be interpreted (Gazzini, 2014).

The term **Global South** is loosely used in this study to refer to the solidarity of likeminded countries (such as India and China) that pursue and advocate for policy change in the IIR and call for change in global governance. Generally, countries from different continents (including Africa, Latin America, the Caribbean, Asia and Oceania) are included in the description of the Global South. Contextually, the Global South is an all-inclusive concept, as it encompasses geographical, geopolitical, historical and developmental issues.

Kleinschmidt (2018) argues that the Global South has replaced “Third World” as the prevalent term for describing structural global inequalities in IR literature. For the purpose of this study, the term is used to refer to the grouping of countries located in the global south that share common political, economic and geostrategic issues to assert their influence in order to address issues of common interest in global governance.

2.3 Literature review

For this study, a systematic and in-depth review of literature was conducted. Thus, the area of focus was spread widely to cover definitions of BIT and related concepts; the evolution of BIT; associated links between FDI and BIT; and evolutionary and institutional analyses of past, present and future investment treaty practices. A systematic review of databases, grey literature sources, targeted internet searches on Google Scholar was conducted.

De Vos *et al.* (2011) essentially outlines the main goal of a literature study as, “it is there to provide a clear understanding of an identified problem”. Hart (2001) suggests that a literature review has two significant uses. First, it gives the researcher access to material relevant to a research project. Second, it provides appropriate methodologies and data collection techniques. Silverman (2022), adapted from Punch (2006), suggests that the completion of literature review helps to answer key questions in research, mainly:

- Where does the study fit in relation to the relevant literature?
- What is its connection to the literature?
- How will the research move beyond what we already know?

To fully appreciate the importance of an extensive literature review, it is worth quoting Mouton (2011), who identifies the aims of a literature review as follows:

- To find most widely accepted definitions of key concepts
- To identify available instrumentation that has proven validity and reliability
- To ascertain the most widely accepted empirical finding within the field
- To learn the most recent theories on the subject, and
- To ensure that there is no replication.

From what Mouton (2011) has highlighted, it is clear that a systematic review of literature provides a researcher with broader guidance on how best to develop scholarship as well as a clear understanding of concepts and theories from different perspectives or worldviews. In line with the questions articulated earlier by Silverman (2022) and Punch (2006), the literature review for this research study points out that BITs continue to attract scholarly attention from various disciplines and sub-disciplines, especially international law, IR, international development finance, public administration, development studies

and the IPE. Interestingly, IR research has contributed immensely to understanding the governance and political economy of IIAs and investment treaties broadly.

An in-depth literature review was undertaken with a view to address the information gaps and potentially contribute to policy perspectives that will enrich broader participation by South Africa and other countries of the Global South in influencing the necessary changes in international investment rulemaking. Through the literature review, I present the background and context within which to understand the evolution and history of investment treaties, thus providing perspectives on past, present and future policy shifts of BITs. As expected, various disciplines have analysed IIAs and BITs from their own vantage points, thus providing various perspectives and adoption of different methodologies that have resulted in broader ontological and epistemological perspectives on analysing BITs.

At the conceptual level, BITs are known by other names, such as BIPAs and RIPAs. For the purposes of this study and to remain consistent, BIT is the preferred concept, which will be used throughout.

There is consensus in the literature that the IIR is riddled with contentious discourse centred on the role of IIAs versus the rights of developing countries to regulate policies that address their domestic issues (UNCTAD, 2015; 2018; 2019). An in-depth review of literature such as doctoral theses completed at various universities; policy documents; journal articles; commentaries; internet databases; books; and conferences and speeches by investors, business leaders and policymakers guides this research study. It is worth noting that while many scholars have discussed BITs, there has been a limited focus on the link between investment treaty practice and its implications on policymaking.

Although the binding nature of investment treaties are still debated in theory and practice, Hirsch (2008) identifies six normative frameworks and sources that are useful in interpreting the proliferation of BITs:

- 1) Investment treaties
- 2) Customary international law
- 3) General principles of law
- 4) Judicial decisions
- 5) Scholarly writings, and
- 6) Soft laws.

Thus, the point of departure is that investment treaties are not self-explanatory. Therefore, their complexity and legal doctrine require extensive research to analyse, interpret and make sense of why countries sign such treaties and what ratification or non-ratification means to a policymaker and to an ordinary person.

2.4 Review of literature on BITs

The literature on BITs is vast and covers the proliferation of BITs, policy reform and why states sign BITs. The validity of traditional North–South BIT models has been debated and questioned in various publications. Ideologically and politically, the extent of the debate can be traced back to the dramatic shifts made popular by expropriation and nationalisation policies in the 1970s, 1980s, 1990s and early 2000s in Latin America (Cuba, Venezuela and Bolivia) and Africa (Tunisia). Yackee (2008) posits that investor–state relations have become more cooperative because of major ideological shifts in developing countries as well as the high reputational costs associated with the nationalisation or expropriation of foreign investments.

Scholars have also debated the role and influence of MNCs, suggesting that they are politically influential in host countries due to the benefits they bring to the host economy (Dunning, 2001). Furthermore, Brower (2008) argues that BITs represent a serious encroachment on national democratic institutions. One of the longest-standing critiques of BITs is that they have failed to resolve this uncertainty, which arguably has arisen with regard to the line between the legitimate host government's treatment of foreign investors and its conduct (Peterson, 2004). Such a challenge is said to violate standard treaty practice provisions such as those on fair and equitable treatment, national treatment or expropriation (Peterson, 2004).

Empirically, the efficacy and costs of investment treaties to local populations have produced mixed results. On the cost of BITs, Freeman (2009) argues that BITs entail a significant loss of regulatory sovereignty. In 2014, the Centre for Conflict Resolution (a think tank based in Cape Town), in partnership with South Africa's dti, hosted a policy advisory group seminar to create public awareness. The seminar was entitled "South Africa, Africa and the International Investment Agreement". 10 policy recommendations were proposed and 10 years later, BITs remain a subject of academic and policy debate. On the question of treaty design and diversity, Alschner, Elsig and Polano (2020) argue that the IIR sits somewhere in the middle by providing two global perspectives. Other scholars have found that BITs tend to be highly similar within national/country treaty networks, but generally differ between countries (Alschner, Elsig and Polano, 2020; Allee and Peinhardt, 2014).

The literature review further revealed that many BITs, while differing in language, share a set of common norms, rules and principles (Alschner, Elsig and Polano, 2020; Saluce, 2010). From a legal perspective, Olmedo (2020) argues that the legitimacy crisis confronting the IIR calls for reforms to eliminate the asymmetric and troubled nature of investment treaties. These arguments and perspectives from various scholars are valid, based on the unbalanced relationship between host states and investors, leading to investor–state disputes. Thus, such disputes have led countries like South Africa to take rational choices of exiting and terminating BITs in favour of domestic remedies such as the Investment Protection Act.

Another area of interest is the law of treaties and treaty interpretation, which various scholars continue to explore (Kearny and Dalton, 1970; Klabbers, 1996; Aust, 2007; Cannizaro, 2011; Hollis, 2012). Cox (2010) argues that even though critics of BITs and their arguments of how BITs constrict the regulatory power of host countries are gaining more and more prominence in the international investment discourse, FDI continues to play a central role in economic development prospects for low-income countries. As a source of external finance, the absolute amount of FDI has increased dramatically; between 1980 and 2006, the global stock of FDI grew from US\$551 billion to nearly US\$12 trillion (UNCTAD, 2007). While BITs have evolved beyond their historical North–South orientation, the growing number of investment treaties signed between two developing countries necessitates a research study to assess how the shift to South–South investment cooperation differs from traditional treaty practice. UNCTAD (2013) cautions that negotiating and ratifying a treaty involve huge transaction costs.

Manger and Peinhardt (2014) indicate that governments deliberately choose to exclude particular sectors or policy areas from the applicability of a BIT. Such a view has been widely discussed by legal scholars, but largely ignored by political scientists. Freeman (2009) notes that many BITs contain binding procedural commitments on the part of host states to submit their disputes with foreign investors for arbitration. Ironically, these commitments often create a situation where host states become rule-takers within the context of the IIR, and this perhaps is where rational choice theory becomes applicable. The theory continues to face criticism from various fronts. Kemp (2022) argues that people (including leaders) do not always behave in rational ways, as such emotions, passions and perceptions are factored into the process.

In applying the principle of rationality, all countries are called upon to practice “flexilateralism” (Kemp and Krumm, 2021:34). A shift in treaty practice has been noticed by Abbot (2000), who indicates that capital exporting states have over the years increased the legal precision in successive treaties by moving from vague rules to highly elaborated rules. As Manger and Peinhardt (2014) note, legalisation involves a continuously evolving search for commitments that meet state demands, and this explains a move towards soft law/power politics as well as increasing constraints on sovereignty. Interestingly, many countries regularly negotiate BITs in their own official languages as well as in English to cover themselves in the event of disagreement (Manger and Peinhardt, 2014).

Poulsen (2020) argues that irrespective of discipline, most scholars group BITs into two distinct categories: those that offer investors a right of admission (typically Northern American BITs) and those that do not offer investors a right of admission (typically OECD BITs).

Another categorisation of BITs groups host countries into three regions: South, West and East. For ease of reference, the South region comprises sub-Saharan Africa, the Middle East and North Africa, and Latin America; the West covers Europe and Central Asia, North America, and the East include South and East Asia, and the countries in the Pacific Ocean. According to Trebilock and Howse (1995), at the time of the negotiation in Bretton Woods institutions (e.g. World Bank and IMF), developing countries had little or no influence in shaping the agenda and design of the international investment regime that would govern international trade over the decades that followed.

With regard to lessons learned, UNCTAD conducted a study on ratified BITs in different geographic regions where host countries were differentiated by income groups. The study concluded that in the South region, lower middle-income countries accounted for more than 300 treaties, followed by upper-middle-income countries with 120 treaties; high-income countries had almost 100 BITs, the same as low-income countries (UNCTAD, 2013).

The African Regional Integration Index (ARII, 2019) confirms this development, suggesting that an individual country's trade dimension and regional integration dimension determine whether it has signed or ratified the agreement establishing the AfCFTA. The regional integration of a country is rated in terms of the ratification of the AfCFTA Agreement, where the ratification score is = 2, signed = 1 and not signed = 0. This suggests that geography matters and a country such as Eritrea (which has not ratified any BITs nor signed and ratified the AfCFTA Agreement) will be left behind, while the rest of the continent yields low hanging fruits from intra-Africa trade and the free movement of people.

For free trade to happen seamlessly, African countries need to implement the Protocol on the Free Movement of People, which will enable traders and investors alike to operate beyond their national borders (ARII, 2019). Current debates on investment policy change express the view that the sovereign power of the host state, which will regulate investment, should be respected. This view is supported by Simmons (2014), Sachs and Sauvant (2009), and Neumayer and Spess (2015), who argue that, under the current global economic order, developing countries face a political and economic climate that restricts their flexibility to act autonomously regarding their economic development trajectories.

This includes restrictive entry provisions of the WTO, remnants of structural adjustment programmes, and excessive debt burdens that maintain an asymmetric power balance between developed and developing countries (Mkandawire, 2015). Learning from best experience requires the adoption of innovative management strategies and strengthening regional value chains to support beneficiation in agro-processing and investment in infrastructure projects.

It is worth noting that the importance of maritime assets continues to be a key factor in determining the flow of FDI, as countries such as Angola, Gabon, the Democratic Republic of Congo, Egypt, Nigeria and South Africa possess strategic minerals and marine resources. Thus, the Global North's domination of IIR has pushed African and Caribbean countries into abject poverty and a perpetual debt burden. This study has also observed that the African continent has remained the source of important mineral resources for foreign investors.

Onditi (2019) cautions that the pendulum of treaty practice will keep shifting in different directions and the future of African states in relation to BITs could be shaped by the following four initiatives:

- 1) The formation or strengthening of African regional financial institutions and RECs to support the continent's attainment of economic dependence.
- 2) Exploring the notion of lead nations as a model of development. This includes the consideration of affording Kenya, South Africa, Egypt, Nigeria, Botswana and Senegal nodal points for the operationalisation of this South–South model.
- 3) The establishment of African credit relations.
- 4) Revisiting the “shared resource development regime”. This development model is aligned with agro-ecological zoning, which includes shared lakes, rivers and other physiographic features such as the Suez Canal in Egypt, the Akosombo Dam in Ghana, the Zambezi River, the Chad River Basin, the Limpopo River and the Nile River.

Africa's position in the world economic order depends on the vision of the leaders and their political will and commitment to ensure that BITs and related agreements that are negotiated and signed are sustainable to the extent that, in the short to medium term, they benefit future generations. According to Onditi (2019), countries of the Global South will thrive only if the following measures are put in place when negotiating BITs:

- The South-South cooperation in the global system should promote ownership of the development process.
- Fortify self-help mechanisms and self-reliance.
- Promote a culture of dialogue.

- Foster responsibilities. African states and countries of the Global South must take full responsibility for their actions in the global order.
- The focus in any cooperation frameworks, including BITs, should be “home-grown” solutions.

Although several studies have been conducted to understand the political economy of BITs, the body of literature linking BITs with international investment law and treaty practice remains limited. Historically, the governance of international investment has, for the most part, promoted the economic interests and investment returns of developed countries. The developed countries were deemed to be promoting good governance and the rule of law by providing their investment capital to the developing countries. The LDCs were expected to create an enabling environment that would guarantee investment protection, including economic policy reforms, privatisation of state enterprises and limited state intervention. Power dynamics have always played a major role in negotiating and signing BITs, which implies that capital exports from developed countries to emerging or developing countries were always designed to be one directional.

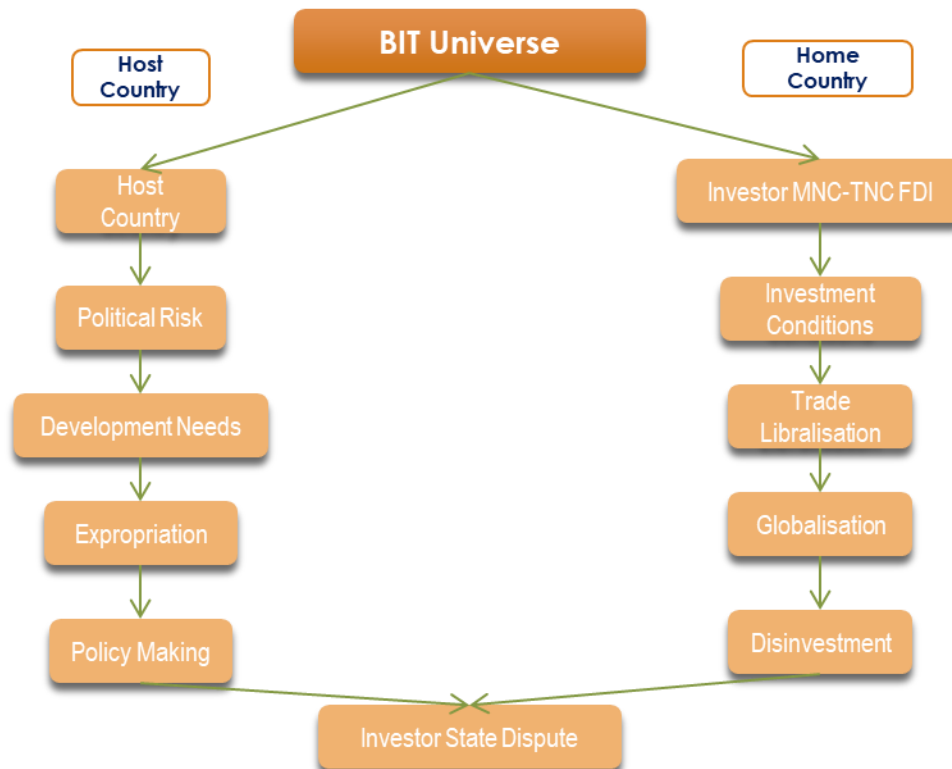
This research study is premised on the view that the traditional BITs signed in the 1960s and 1990s were skewed in favour of developed countries in that they were legally privileged and their investments were protected by all means necessary. Scholars have also identified the principle of rule-takers versus rule-makers in the governance of the IIR. To that extent, powerful capital exporting countries tend to be the system’s rule-makers, while less developed capital importing countries are considered to be the system’s rule-takers (Alschner, Elsig and Polano, 2020; Allee and Peinhardt, 2014; Alschner and Skougareverkiy, 2016).

Thus, developing countries (as receiving host countries) do not have any sovereign rights to regulate FDI and prioritise their development needs. This directional approach to BITs has disadvantaged developing countries, and going forward the new South–South BIT models encourage cooperation and partnership. Despite facing significant global pushback and declining competitiveness, South Africa remains a preferred destination and a regional hub for investing across the continent.

2.5 Global discourse and perspectives on IIAs

The study of trade and investment in IR is done within the context of the IPE and international institutions. From their inception, international investment treaties were historically negotiated between developed and developing countries. Beyond the general objectives and purposes of strengthening bilateral economic and diplomatic cooperation, investment treaties have traditionally advocated the importance of creating conducive conditions in developing countries to ensure reciprocal promotion and protection of investments. The global public discourse on IIAs and BITs is characterised by divergent worldviews and perspectives. In their commentary on mapping the BIT universe, Alschner and Skougarevkiy (2016) make the following key observation: “Our analysis reveals that the BIT universe is split into older, short and shallow agreements that focus on investment protection only, and newer, comprehensive and complex ones that treat investment in its wider policy context.” It is the latter part of newer, comprehensive and complex BITs with wider policy context that guides this study.

Figure 2: Host country and home country asymmetric relations



Source: Own construct

Skougarevskiy (2001) states that the nature, character, trajectory and universe of IIAs have undergone significant changes in the last sixty years. Critics of BITs argue that it is becoming increasingly evident and alarming that corporations operate in an irresponsible manner while enjoying virtual impunity under the protection of IIAs. It is thus not surprising that the BIT universe is witnessing unimaginable and unprecedented policy shifts. This includes Finland's policy shift towards pre-establishment BIT models in the 1990s, Japan's decision to shift to American-style treaty practice templates in 2002, and Israel copying its BIT language from British investment agreements.

Scholarly work and policy debate on investment treaties often focus on countries that either terminated their BITs or entered into new investment agreements. The BIT universe shows that the policy shift is not only experienced North to South, but even developing

countries have been adapting and aligning their investment policies to suit the current reality of meeting the UN's SDGs and Agenda 2030. For instance, to access investment through the clean development mechanism, the South African government adopted various policies and strategies to promote sustainable development, such as the National Climate Change Response Strategy of 2004. Changes such as these affect the balance of power in world affairs and are likely to affect the political regimes of the countries involved, either by empowering those with vested interests in those countries or subjecting those countries to the economic and political will of foreign vested interest (Ramazzotti, 2016).

According to the International Institute for Sustainable Development Report (IISS, 2017), some critics of investment treaties cite Brazil's experience of a significant increase in FDI in the 1990s and 2000s as a successful case study, despite it being one of the few countries that has never ratified an investment treaty.

In their East Africa Research Papers in the *Economics and Finance Series*, Heshmati (2018) points out that the way that the world emerged from the 2008 global economic crisis was, in a way, predicted by Frank (1998) with his theory of a global shift of economic growth away from the Euro-Atlantic area towards China and India, with economic dynamism extending not only to the rim countries of the Pacific but also to the Indian Ocean.

The global discourse on investment agreements is further articulated in Guzman's (1998) seminal work on IIAs, arguing that: "BITs have become the dominant international vehicle through which North–South investment is protected from host country behaviour." Put differently, the global shift provides a good opportunity for Africa, Asia, South America

and all other countries of the Global South to participate equally in the rulemaking of global governance. According to Perrone (2023), it is worth noting that the most common feature of international investment law has been negotiations, trading and signing international treaties designed for the protecting of foreign investment. Viner (1951) observed the following:

As I read the evolution of international law under modern capitalism, as revealed from 1600 to 1914 in the detailed provisions of international treaties, one of its work outstanding characteristics was its attempt to build legal protection for property and for private expertise from the power activities of foreign states both in times of peace and in times of war.

Based on the projections and economic models of various scholars, it is safe to say that they have not been far off the mark in identifying accurately that the trend of BITs would intensify – and with the pace at which this trend is going, there is a greater chance that it will reach an unprecedented pace by the year 2030. As Scerri (2018) argues, change is assumed to be the permanent core feature of an economic system. Across various disciplines, policymakers, researchers, think tanks and civil society organisations have developed an interest in understanding the phenomenon of IIAs.

One of the prominent feature of the past 60 decades of development finance and the IPE, international economic law and other disciplines has been analysing the proliferation of international treaties. To understand this IIA phenomenon, it is necessary to explore the global discourse and perspectives on IIAs through different forms of BITs.

2.5.1 North–North investment treaties

UNCTAD acknowledges that North–North bilateral investments are rare and limited. What has been observed over time is that developed countries rarely sign BITs among themselves. The justification for rarely having North–North BIT models are that countries such as the US, Canada, Australia and other OECD countries have well-developed judicial systems, which makes signing BITs unnecessary (Lejour and Salfi, 2015). By implication, BITs are considered to signal government and legal accountability to foreign investors. As a developed country, the US encountered various challenges regarding BIT and these were reviewed in 1994 and 2004, with successive administrations in power. Vandavelde (2010) identifies various factors that have influenced the US to revise and review its earlier BIT models, including the following:

- The US experience in investor–state dispute mechanisms as a defendant under NAFTA.
- Numerous ICSID decisions against Argentina in relation to the claims arising from its 1998–2002 crisis to which the US–Argentina BIT was applicable.
- The persistent advocacy of non-governmental organisations to include environmental and human rights norms in BITs.

Typical examples of a North–North investment agreement are:

- NAFTA, involving the US, Canada and Mexico
- TPP
- Canada–EU CETA, and
- EU–US: TRIP.

On matters of substantive and procedural provisions, CETA stipulates the following in Article 8.99: “...the Parties reaffirm their right to regulate...to achieve legitimate policy objectives such as the protection of public health, safety, the environment or public morals or consumer protection...”

Canada; the US and Mexico signed CUSMA on 30 November 2018, on the margins of the G20⁴ Leaders’ Summit in Buenos Aires (Argentina).

While North–North international investments are rare, CUSMA became the largest free-trade agreement globally. The three countries set the following as key objectives in promoting investment (CUSMA, 2018):

- Generating economic growth
- Helping to raise the standard of living for the people of all three countries, and
- Reinforcing strong economic ties between the three countries

CUSMA entered into force on 1 July 2020, incorporating new and updated provisions.

2.5.2 North–South BITs

The traditional investment treaty practice (North–South) demonstrated that BITs were often closely tailored to match the treaty templates of developed countries.⁵ Since the signing of the first BIT in 1959, between West Germany and Pakistan, the trajectory of IIAs in the form of BITs accorded developed countries more advantages than developing countries. According to Masamba (2014), the rationale behind BITs is underpinned by

⁴ The G20 is an international forum consisting of countries from the Global North and Global South. In recent years, it extended invitations to the EU and the AU. Key priorities of the G20 include addressing global issues such as international financial stability, sustainable development and climate change.

⁵ For the purposes of this research, developed countries/states refer to members of the OECD, excluding the Republic of Korea and Mexico.

industries in developed countries traditionally seeking to set up their manufacturing extractive and other operations in less-developed regions of the world, which traditionally offer lower labour costs and cheaper raw materials. Developed countries thus became the primary rule-makers, with the negotiation outcomes of BITs reflecting the economic interests of MNCs and the foreign policy agenda of their countries' at the expense of developing countries' desires to attract investment and address developing needs. Thus, there is a need for greater accountability and responsibility among MNCs to ensure that the full impacts of their supply chains are fully integrated into their business models (WWBA, 2023).

Historically, investment treaties regularly encode what Guzman (1998) calls the "Hull Rule", which requires "prompt, adequate and effective compensation" in the event that a host country expropriates a foreign investment that belongs to a capital importing country. Salacuse and Sullivan (2005) assert that investment treaties represent a "Grand Bargain", according to which host countries promise to protect capital in return for the prospect of more capital in the future. In relation to BITs, a country's signature is often considered sufficient to validate its intentions to be bound by such a treaty.

Douglas (2003) defines investment treaties as international instruments between states that are governed by public international law on treaties. International investment law literature concurs that despite a few differences between the texts, these treaties constitute a regime with common "principles, norms, rules and decision-making procedures" (Salacuse, 2010). According to UNCTAD,⁶ BITs were traditionally used by the OECD

⁶. UNCTAD is a permanent intergovernmental body that was established in 1964. It is the principal organ of UNGA dealing with trade, investment and development. For further details, see <http://www.unctad.org/iia>.

countries as a tool for protecting international investments of developed countries across the world. Despite such revelations, BITs have historically been the most popular and widespread tool of IIAs.

According to Peterson (2004), in BITs signed with a number of developing countries (such as Benin, Burundi, Angola, The Gambia, Laos, Lesotho, Sierra Leone and Uganda) the UK only agreed to provide national treatment. This suggests that numerous LDCs continued to sign up for full and binding national treatment commitments in investment treaties with the UK (Peterson, 2004).

Empirical studies conducted by Peterson (2004) in over 150 treaties showed that investment treaties signed by the UK, Canada and Switzerland typically did not refer to development in any context, neither the preamble nor the substantive provisions of the treaty. This therefore suggest that the exceptions clauses did not include development and drafters of the treaty omitted reference to development deliberately and both treaty parties agreed to the terms of the agreement.

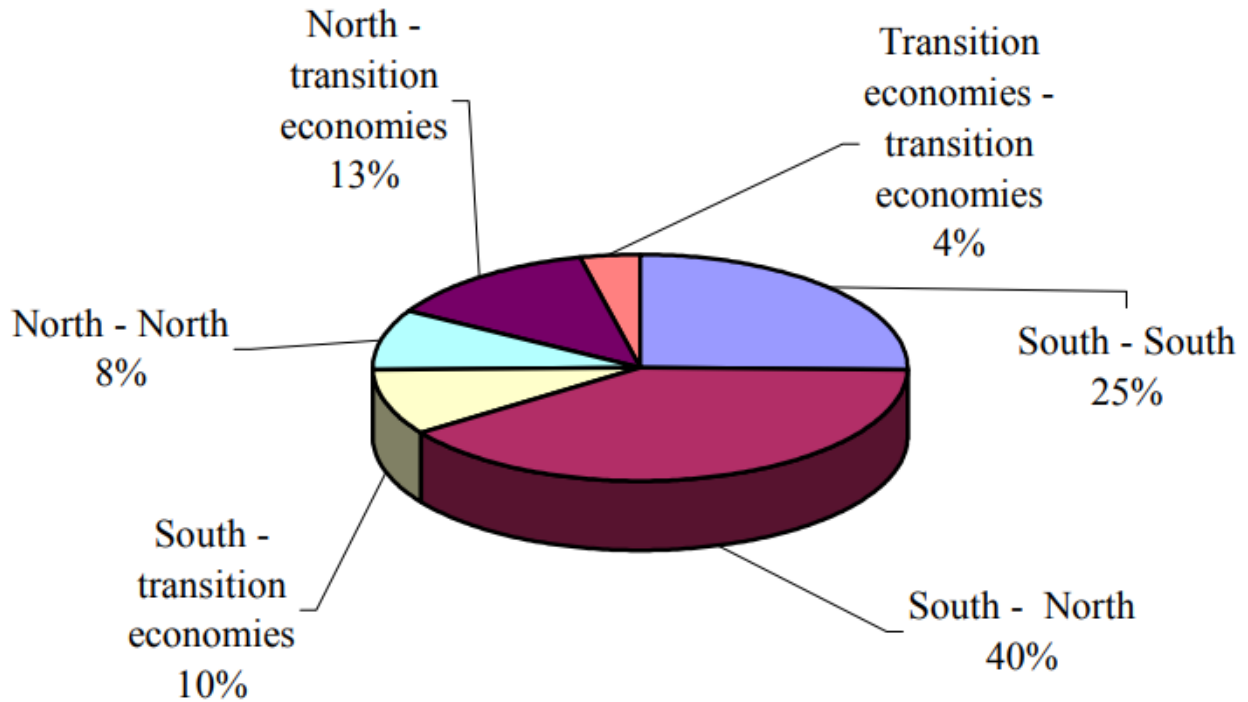
2.5.3 South–South bilateral treaties

Over the years, international investments have changed and evolved, with developing countries moving towards South–South investment cooperation. From an institutional historical perspective, the first South–South IIA was signed in 1964 – the Kuwait–Iran BIT. By 1990, the number of South–South BITs had reached 44 and by 2004 they had increased to over 653 (UNCTAD, 2005). According to UNCTAD (2005), 113 developing countries have entered into BITs with one another. China, Egypt, Singapore and Malaysia have each signed more than 40 such agreements.

In providing a statistical analysis of South–South BITs, Malik (2010) states that in 2005 20 of the 70 new BITs were concluded between developing countries; and a year later (in 2006), 23 of the 73 new BITs were concluded between developing countries. With a policy shift towards South–South cooperation, it is anticipated that increasingly more BITs among developing countries will be concluded with China's win-win strategy. Furthermore, regional integration across Asia, Africa and Latin America, and even North America and the EU, is intensifying South–South and South–East cooperation.

The emergence of BRICS (now, with additional countries, BRICS Plus) and the bloc expanding and becoming a capital exporter have further enhanced the policy shift towards South–South cooperation.

Among the East Asian Tigers, Singapore has emerged as a pioneer in promoting Southeast Asia regional cooperation as well as South–South cooperation by signing investment agreements with countries such as Cambodia, Mongolia, Laos, Pakistan and Sri Lanka. According to UNCTAD (2005), in a survey conducted from 1990 to 2004, the South–South BIT universe accounted for only 25%, the North–South BIT universe accounted for 40%, and the remainder (35%) was shared by the North–North BIT universe and transitional economies.



Source: UNCTAD (www.unctad.org/iia).

Figure 3: Geographic distribution of BITs, suggesting a slow trend towards South–South investment

Malik (2010) describes the policy shift towards South–South BITs as an exotic relationship between Latin American, Asian and African countries. While the South–South BIT universe is becoming significantly entrenched, some critics have labelled them repetitions of the old North–South template or even typified European BITs.

During the Third Annual Forum of Developing Country Investment Negotiators held in Quito, Ecuador, on 8-11 November 2009, former South African trade negotiator Mr Randal Williams highlighted the following: “South Africa used the SA–UK BIT as its template for future treaty negotiations, not fully understanding at the time the consequences of the UK model or its suitability for South Africa.”

Furthermore, Williams noted that a state's responsibilities were not limited to providing protection to foreign investors, but that it also owed a broader range of obligations to its citizens. In this regard, he concluded by stating that it is the responsibility of each developing country to better understand the rationale behind entering BITs and to choose their approaches carefully. While the policy shift towards South–South cooperation is becoming a trend, inherent challenges are embedded in developing countries. Malik (2010) argues that it is surprising that countries of the Global South have not taken “advantage of the more equal negotiating space”, free of traditional political pressures associated with North–South postcolonial relationships, to design more bespoke provisions in their treaties. From Malik's (2010) perspective, the South–South BIT universe is still tied to the traditional BIT template developed by countries of the Global North in the 1950s and 1960s, as characterised by the following:

- Broad definition of investment and investor
- Traditional broad guarantees of fair and equitable treatment
- Full protection and security
- National treatment
- MFN treatment
- Compensation for expropriation, and
- Broad offers to arbitrate all disputes with investors.

Until such time that countries of the Global South have developed capacity and confidence to completely develop the South–South BIT universe to reflect the aspirations and development goals of their treaty practice, the aim of transforming IIR is far from being reached.

Table 5: Increasing number of South–South investment agreements as per an UNCTAD survey conducted in 2004

Number of BITs with other developing economies	Number of economies	Name of economy
40 and above	4	China, Egypt, Korea (Republic of), Malaysia
26-39	7	Argentina, Chile, Cuba, Indonesia, Mauritius, Morocco, Turkey
11-25	31	Algeria, Bahrain, Ecuador, El Salvador, Ethiopia, Ghana, Guinea, India, Iran (Islamic Republic of), Jordan, Kuwait, Lao People's Democratic Republic, Lebanon, Mongolia, Oman, Pakistan, Peru, Philippines, Senegal, Singapore, South Africa, Sudan, Syrian Arab Republic, Taiwan Province of China, Thailand, Tunisia, United Arab Emirates, Venezuela, Viet Nam, Yemen, Zimbabwe
1-10	66	Afghanistan, Angola, Bangladesh, Barbados, Belize, Benin, Bolivia, Botswana, Brazil, Brunei Darussalam, Burkina Faso, Burundi, Cambodia, Cameroon, Cape Verde, Chad, Colombia, Comoros, Congo (Democratic Republic of the Congo), Congo (Republic of), Costa Rica, Côte d'Ivoire, Djibouti, Dominican Republic, Equatorial Guinea, Eritrea, Gabon, Guatemala, Guyana, Haiti, Honduras, Hong Kong (China), Iraq, Jamaica, Kenya, Korea (Democratic People's Republic of), Libyan Arab Jamahiriya, Madagascar, Malawi, Mali, Mauritania, Mexico, Mozambique, Myanmar, Namibia, Nepal, Nicaragua, Niger, Nigeria, Palestine Authority, Panama, Papua New Guinea, Paraguay, Qatar, Rwanda, Saudi Arabia, Sierra Leone, Sri Lanka, Suriname, Swaziland, Tanzania (United Republic of), Togo, Trinidad and Tobago, Uganda, Uruguay, Zambia

Source: UNCTAD (www.unctad.org/iaa).

Since BITs became a global phenomenon, there has been a mix of successes and failures across both developed and developing countries over the past six decades (1959–2024). In the context of traditional North–South investment, Masamba (2014) argues that BITs share five core provisions:

- 1) Protection from expropriation or nationalisation
- 2) MFN treatment, which entails treatment that is not less favourable than that accorded to other foreign investors in like circumstances
- 3) National treatment, being treatment not less favourable in similar circumstances than treatment of nationals of the home country
- 4) Repatriation and investment of earnings, and
- 5) Dispute resolution.

For stimulating trade and investment, additional provision of BITs include free movement of investment related payments, transfer of capital and technology, investment facilitation and umbrella clauses. The template reflecting the influence of Global South in reviewing, negotiating and terminating BIT models to accommodate domestic policy imperatives include efforts by countries such as South Africa and Indonesia to promote South–South cooperation. For example, these two countries of the Global South have launched a process to terminate certain investment agreements, either unilaterally or by mutual agreement (Echnadi and Sauve, 2013). Bandera (2009) points out that negotiations on the content of a bilateral agreement between Zimbabwe and South Africa have been ongoing since 2002. The OECD (2015) suggest that investment treaty law reflects a permanent tension between stability and flexibility. From the OECD (2015) perspective, stability nurtures predictability, while flexibility helps legal systems stay in alignment with changing circumstances and evolving needs. Worth noting is that out of a total of 1 724 treaties in force in 2015, 415 treaties (24%) were still in the initial validity period. The remaining 76% of the treaties had either passed the initial period (70%) or had not foreseen such a period at all (6%) (OECD, 2015).

Essentially, this suggest that states rarely make use of the mechanisms available to them to influence treaty use and interpretation of investment treat law (OECD, 2015)

Poulsen (2015) states that political scientists have often asked critical questions, such as “Why [have] states sacrificed their sovereignty over investments?” To take this matter further, Egger and Pfaffermayr (2004) show that only ratified treaties have a significant impact on FDI. The discourse of the World Bank on investment law reform is reflected in the following published statement: “If a country wants to attract significant levels of private investment and promote itself as a place to do business, it must protect investments and investors in terms of the acquisition, management, conduct, operation, and sale or other disposition of the investment in the host country” (Egyir and Xavier, 2010;, World Bank, 2010). Historically, the World Bank, UNCTAD and the OECD have shown a strong interest in promoting and protecting the interests of foreign investors at the expense of the host country.

The idea behind signing BITs is that there is some cooperation through which foreign investment requires protection from the host country’s actions, such as expropriation, and BITs provide such investment protection. Relatedly, economists have studied the relationship between BITs and FDI using different econometric methodologies and different samples over a period of time. (Lejour and Salfi, 2015). They also investigated whether these treaties yield the investment promotion benefits they promise (Bellak, 2015; Desborders, 2016; Egger *et al*, 2019; Pohl, 2018; Sauvant and Sachs, 2009; Yackee, 2008; Yackee, 2010).

Perrone (2013) and other legal scholars consider the interplay between using the private law paradigm to describe ownership and using the public law paradigm to explain state

authority. To simplify this matter, Rose (1996) favours projecting state authority as public-rights institutions because such an approach avoids losing sight of the complementary character of public and private rights in any functioning property rights. The other contentious issue in the literature is noted by Perrone (2013), who indicates that the IIR shares both the perception of distrust in the host country's political institutions and the objective of protecting foreign investors against political risk. Other legal studies on the burgeoning investment arbitration case law interpret and apply these agreements under the ICSID Convention (Brown and Miles, 2011). Salacuse (2020) presents the position that the existing literature on international investment law concurs that despite a few differences between the texts, the treaties constitute a regime with common "principles, norms, rules and decision-making procedures". By implication, this means that the treaties use similar terminology, structures and standards of protection. Worth noting are the legal debates on the effectiveness of investment law and the legitimacy of ISDS, as well as whether the arbitrators deciding these disputes are truly impartial or are influenced by extra-legal factors (Strezhenev, 2016).

As Lipson (1985) points out, historical analyses show that colonial institutions and international laws governing the resources of different countries principally dealt with the situation of foreign-owned property. This implies that in resolving disputes, public international law substantially focused on the controversies about foreign-controlled resources between investors, home states and host states. The discourse on the policy shift of BITs has significantly increased the importance of the Global South in setting global agendas, including calls to transform international financial institutions and for solidarity, equity and sustainability.

Consequently, there are calls to transform the IIR to reflect the needs of developing countries in formulating policies that address the emerging challenges of poverty, inequality and human rights in the approach to investment. Bennet and Howlett (1992) provided a refined conceptual framework for a policy shift or policy change, which provided some guidance on policy change and how it can be applied in the case of developing countries such as South Africa.

Additionally, Howlett and Cashore (2009) suggest a clear definition of what constitutes incremental change, so that it can be distinguished from a paradigmatic shift. In addition, Dunlop and Radaelli (2013) reflect on the state of policy learning by asking four key questions:

- 1) Who learns?
- 2) What do they learn?
- 3) How do they learn?
- 4) What is the effect of this learning?

At a more practical level, there is a view that unlike during the earlier period when international treaties or diplomatic correspondence had to be collected in published volumes due to a lack of accessibility, access to public information no longer poses a problem (Djeffal, 2013:1237). The prevailing practice worldwide is gravitating towards embracing the view that trade discussions should be made public and transparent. As Klareen and Halim (2020) argue, opening and making trade discussions more transparent would ensure that foreign policy decisions remain congruent with the national interests and the constitution.

While the US is considered the pioneer of BITs, Rodrik (2017) describes the TPP trade discussions as shrouded in secrecy. Therefore, it is not surprising that developing countries demand a policy shift, offering them preferential treatment when trading with developed countries. Within the transformative agenda of IIR, South Africa took a policy decision indicating that addressing procedural issues without consideration of substantive issues will not solve the problem of reforming international investment treaties. Bergsten (1978) suggests that many countries perceive MNCs to be instruments of economic diplomacy for capital exporting countries and a source of continuing foreign domination. However, Mathew and Adewale's (2017) analysis of the activities and performance of South African MNCs across the continent shows that they have largely performed well. Empirical evidence has also revealed that these firms have contributed positively to the growth of the SADC zone. Recently, the World Benchmarking Alliance (WBA, 2020) disclosed that the political influence of MNCs had come under scrutiny due to the tax gap, which undermines governments' ability to fund essential services, particularly those related to SDGs.

In the 1970s, policy shift became more popular when the NIEO movement represented the interests of developing countries. Thus, the debate on the position of Africa and the Global South during the NIEO era prompted political thought on how best to include them in the IIA debate. Some scholars view the NIEO period as "transformative" for most Africa states (Ewoh, 1997), while others are sceptical that the world's political and economic systems were "unfair" to Africa and therefore they marginalised the continent further (Salio and Lipede, 2000). The transformative school of thought argues that during the NIEO, the world became conscious of regionalism.

Onditi *et al.* (2019) observe that Japan and other newly industrialised countries, which have been instrumental in shaping global processes by drawing parameters that define the economic world order, have amplified the rise of regionalism. The unfair school of thought holds the view that the US and its Western allies are in control and, through the Washington Consensus, they influence the global development finance institutions, particularly the World Bank, IMF and WTO. Stoll (2010) highlights that the NIEO, as an alternative system, was created in the IIR for the benefit of less powerful countries. However, Volman (1993) argues that the downfall of the NIEO in supporting the interests of the Global South was characterised by unconventional forms of intra-state aggression, ethnic antagonism, national rivalries, religious tensions, personal ambition and lingering authoritarianism.

Furthermore, Schwardt *et al.* (2016) define policies as measures that societies put in place to foster the achievement of certain objectives. Put differently, in order to deal with the ever-changing economic and political environment policies, host countries ought to be cognisant of the changing patterns and trends of BITs to ensure that they address public policy interests. The literature suggests that policy processes consist of politically engaged individuals (commonly referred to as policy actors) interacting to influence government decisions about a topical issue over time.

As is reflected throughout this research, a policy shift does not occur in a vacuum but within institutional systems globally and through BITs signed between countries. On the question of whether BITs really work, Freeman's (2019) study concluded that in attempting to find a positive link between BITs and FDI flows, the possibility of a spurious correlation arising from the simultaneity of domestic reforms and BIT signings should be

considered. In the interest of developing accountability and global discourse, Alschner, Elsig and Polano (2020) have demonstrated that various institutions have introduced public international databases, online blogs and indexes such as EDIT, ICSID Investment Laws of the World, the Kluwer Arbitration Blog and the United Nations Treaty Collection. Despite the availability of information and literature on IIAs, Alschner, Elsig and Polano (2020) caution that the key aspects of the IIA universe remain unknown and understudied.

Given this background, it is clear that there is still controversy and divergent views on IIAs; therefore, the literature will elucidate various perspectives on the nature and future of the IIA universe. With regard to North–North BITs, Lejour and Salfi (2015) observe that developed countries such as the US, Canada, Australia, and countries in Western Europe have well-developed judicial systems and interdependent courts, which make BITs unnecessary for them. This suggests that developing countries are characterised by political risk, and therefore their legal systems are considered weak and not reliable enough to provide the required investment protection.

UNCTAD's studies (2005) on trade and investment show that many of the South–South BITs were facilitated at unilateral conferences organised by the OECD and were often sponsored by capital exporting countries such as Germany, France and Switzerland. Alvarez (2002) argues that in all areas of global affairs, from the environment and human rights to trade, countries have used treaties to codify customs and establish new rules, resulting in a dramatic proliferation of treaties in the decades after WWII.

Kirayoglu (2017) notes that that by 1996, more South–South BITs were concluded per year than North–South BITs, and this trend has been maintained. The manifestation of this shift is reflected in governments of major FDI source countries, such as the US and

EU countries, actively pursuing policies to improve the investment and intellectual property protection regimes on behalf of companies, thus linking the signing of BITs and commercial treaties to foreign policy objectives.

Freeman (2009) argues that a country's policies on FDI and its institutions for the protection of property rights constitute its regime for FDI. In addition, a country's investment profile represents an assessment of factors affecting the risks to foreign investments, including expropriation risk, contract viability, the ability to repatriate profits and payment delays (Freeman, 2009). According to Dolzer and Stevens (1995), four substantive are considered in any BIT: (i) admission, (ii) treatment, (iii) expropriation of foreign investment and (iv) settlement of disputes. As part of attracting FDI, a number of developing countries were encouraged to enter into BITs with developed countries. However, there was limited knowledge and understanding of the far-reaching legislative and socioeconomic implications of the policy environment. The principle of reciprocity did not apply, as the traditional BIT models mostly considered the economic interests and protection of the capital exporting developed country and the aspirations of the host developing country were hardly considered.

According to UNCTAD (2015), China is the top developing country signatory of South–South agreements, with 112 BITs concluded worldwide (63 of which are with other developing countries). Egypt is considered to be second, with 90 BITs (48 of which are South–South BITs). Other countries of the Global South that follow this new trend include Cuba, which signed 57 of its BITs with partners in the Global South (UNCTAD, 2005). This trend shows that developing countries are increasingly becoming capital exporters and thus the signing of BITs among them reflects their increased economic integration

(UNCTAD, 2005). As is demonstrated throughout this research, selected countries of the Global South (South Africa, Indonesia and Brazil) and other BRICS countries have formulated new BIT models, which have been cited increasingly as a template for renegotiating IIAs. However, the jury is still out on what the positive spin-offs are, and what criteria will be developed in the new BIT models that influence the policy choices of developing countries.

2.6 Theoretical considerations and analytical frameworks for understanding treaty practice

Iyamu (2022) argues that theoretical lenses are intended to assist researchers to gain a deeper understanding of the phenomenon that they study. Essentially, evolutionary and historical institutionalism, rational choice and DITs are applied to navigate the complex and dynamic phenomenon under investigation. It is thus deemed prudent that this study is grounded in theoretical frameworks that explain various forms of change in treaty practice and policymaking. According to Iyamu (2022), the application of theory in explaining a phenomenon is significant for two reasons: First, it helps to follow the traces in a relationship and interaction between actors. Second, it is an integral part of research, primarily because it is used to gain a deeper and better understanding of what happens, how things happen and why things happen in the way that they do.

Furthermore, it helps to reach findings, explain the findings, give meaning to findings and draw conclusions (Iyamu, 2022). For each of the theories being used, there will be explanations on how they interpret state behaviour, agents and institutions, particularly how they relate to each other and interact in world affairs as well as their reasons for signing BITs. For example, in the BIT universe, the theory of competing for capital is

highly common among developing countries, as they compete for FDI. According to Elkins, Simmons and Guzman (2006), developing countries will likely sign a BIT if its competitors have also signed BITs.

Thus, at the theoretical level, Bonnitcha *et al.* (2017) identify four motivating factors for developing countries to sign BITs:

- 1) Promoting business interests
- 2) Depolarising investment disputes
- 3) Building customary international law, and
- 4) Using investment treaties for diplomatic and symbolic reasons.

Assessing a policy shift implies addressing significant governance issues at a global scale. Bovaird and Luffler (2009) state, “Trying to define public governance seems to open a Pandora’s box due to the complexities and may also be seen as how an organisation works with its partners, stakeholders and networks to influence the outcomes of public policies.” Termeer *et al.* (2017) add a different perspective, suggesting that governance entails interactions between public and private entities, ultimately aiming to realise collective goals. A critical component in the analysis of BITs is the behaviour of actors.

As North (1990) and Meyer (2001) observe, countries have institutions with different effectiveness and therefore good institutions play a significant role in attracting FDIs. A major trend in BIT is the shift and transition from being a tool that attracted FDIs in the 1980s to being a legal mechanism designed to promote investment overseas. Governance is all encompassing; it includes domain operations and management, fiscal policy, planning, budgeting, the rule of law, regulations, discursive debate, negotiation,

mediation, conflict resolution, elections, civic engagement, and other formal and informal decision-making and policy-making processes (Caffrey and Farmer, 2014).

In view of this complexity, Gbomagba, Afinowi and Kumi (2023) note that the multilevel nature of governance requires the strengthening and promotion of innovation, problem-solving capacity, learning and the development of solutions that benefit more sectors. Thus, the theoretical framework adequately explains the justification for a policy shift from North–South to South–South BIT models and further reflect on whether both models are complementary or if the South–South model total replaces the traditional model.

A theme that has featured prominently in BITs over the years has been political risk in host countries. However, countries like China have encouraged their MNCs to operate abroad. Since China began implementing its Going Global Strategy in 2000, it has encouraged and influenced its MNCs to radically invest abroad in various infrastructure projects. Alden and Wu (2021) observe that the dawn of democracy opened the possibility of diplomatic ties with China and Chinese FDIs for two reasons: investment and economic impact.

BITs have also demonstrated asymmetric treaty networks between the host and home countries. For instance, in a typical North–South BIT, a developed country such as France, Germany, the UK and the US would display their asymmetric treaty network differently from countries such as Madagascar, Ecuador and Bolivia. Such significant differences and power dynamics have serious implications for the manner in which a BIT is signed with a host country.

As Chandler *et al.* (2005) argue, economic, political, legal and technologically factors have combined to make an MNC a key player in the twenty-first century. A prominent scholar in international law, Vicuna (2004), suggests that the increasing level of multinational economic activity has created a need for individuals and corporations to have access to dispute settlements, which thus far have been a limited feature of the inter-state system. Nonetheless, the economic and political power displayed by MNCs differ substantially across the world.

To take this point to a conclusion, the most difficult challenge for the least developed countries is that when negotiating BITs, they often lack adequate skills to negotiate with MNCs and often do not represent the local population when it matters most. Greener (2002) argues that it is generally difficult to change policies because institutions are rigid and actors protect the existing model. The validity of this argument will be tested in relation to the policy shift towards a South–South BIT model. The critics of BITs in IR theory are of the view that North–South BIT models are immersed in power dynamics that are biased to developed countries.

In terms of applying theoretical frameworks or a theoretical lens in this research study, Leedy and Ormond (2005) indicate that the word “theory” refers to a particular phenomenon. It is thus worth noting that theories explain how and why something operates as it does (Johnson and Christensen, 2007). Similarly, Inyamu (2022) contends that theories are intended to explain how and why factors connect with each other to produce and reproduce results. As argued by McMillan and Schumacher (2000), a theory is applied to develop scientific knowledge through the following:

- Providing a simple explanation for the observed relations regarding/relationship to a phenomenon
- Being consistent with the existing body of knowledge and the observed relations
- Providing a device for verification and revision, and
- Stimulating further research in areas needing investigation.

Wacker (2004) posits that for a theory to achieve legitimacy and widespread acceptance, it must crystallise clear and mutually agreed definitions, particularly of key concepts. In support of this view, Nilsen (2015) suggests that a theory helps to provide a clear explanation of how and why specific relationships lead to explicit events or actions.

While the selection of a theory or theories is not easy or simple, as is sometimes claimed, I took the risk of selecting theories that are rarely used in IR or political studies as a way of contributing to a multidisciplinary approach. Gregor (2006) argues that theories are significant in explaining the social context in which a phenomenon is studied.

The three theories chosen to guide this research are, firstly, the historical institutional theory. As the name suggests, the focus is on evolution, history and institutions. While assessing the relations between countries and their behaviour towards each other, it is important to locate BITs within historical institutional theoretical perspectives to trace their evolution and suggest institutional reform. The rational choice theory and the disruptive innovation theory are the other two theories chosen to guide this research. They are explained below.

The rational choice theory was chosen on the basis that it would explain the behaviour of state actors (developed and developing countries) as well as non-state actors (MNCs) in

relation to regulating and protecting investments in risky environments. There is a sense among scholars who have studied BITs that there has been a rush by developing countries to sign BITs. Such haste could be viewed as a rational choice, considering that state behaviour is influenced and motivated by self-interest, such as survival and competitive advantage, as countries need investment to boost economic growth.

In terms of the DIT, Christensen (2006) and Rayno (2011) state that “innovation can be disruptive regardless of its outcome”. This theory comes from Harvard Business School’s Professor Clayton Christensen;⁷ it was chosen on the basis of bringing a fresh perspective and a multidisciplinary approach to IR scholarship. The theory is applied to facilitate and examine the interactions and relationships between states, people and technology. It is considered appropriate for assessing how South–South BIT models are, in a way, disrupting the traditional approach of the BIT model, which has existed since the 1960s. According to Christensen (2011), the theory’s core concepts remain “widely misunderstood” and are commonly applied to businesses that are not “genuinely disruptive”. Christensen (2018) further notes that disruption theory is likely to occupy a prominent position in any assessment of relevance.

Over the past two decades, besides being an influential business theory, the DIT has inspired extensive scholarly work. However, the theory has also inspired divergent views and critique among academics and researchers. It has largely invoked and evoked

⁷ Christensen *et al.* (2015) provide a concise summary of disruptive innovation as: “a process whereby a company with fewer resources is able to successfully challenge established incumbent businesses. As incumbents focus on improving their products and services for their most demanding (and usually most profitable) customers, they exceed the needs of some segments and ignore the needs of others. Entrants that prove disruptive begin by successfully targeting those overlooked segments, gaining a foothold by delivering more-suitable functionality—frequently at a lower price. Incumbents, chasing higher profitability in more-demanding segments, tend not to respond vigorously. When mainstream customers start adopting the entrants’ offerings in volume, disruption has occurred”.

debates on its evolution and applicability, thus suggesting refinement and broadening perspectives (Ansari and Krop, 2013).

Lile, Ansari and Urmetzer (2022) observe that the widespread use of terms such as disruptive in popular culture and corporate jargon may have inadvertently led to their diluted application in academic research. Considering that the concept of innovation is complex and has a long history, Schumpeter (1942) states that innovation is “creative destruction, which leads to the dynamic changes in employment and market competitiveness in firms”. From a practical and policy perspective, Dai (2016) relates innovation to the social and political environment within which state actors operate as follows: “Innovation policies should reflect the differences in the existing systems historically and/or geographically, so that concrete empirical and comparative analysis are the ways to identify problems and design policies.”

Thus, this study is aligned with the DIT in ways that enable practical application of innovative policies to address inherent problems of asymmetric BIT relations and demonstrate South Africa’s innovative and disruptive approach in reviewing its investment policies, which reveals that innovation is risky but profitable and worthwhile (Dai, 2016).

South Africa demonstrated, through its behaviour and actions, that instead of adhering to the old and traditional investment arrangements that are harmful and detrimental, it is profitable and worthwhile to take the risk of innovative disruption by changing its approach to favouring regional cooperation as a model for trade and investment. At a theoretical level, if we create a scenario of disruptive innovation, South Africa would be in a bilateral agreement with Agent A (North–South BIT model) and switch strategy in a policy shift to Agent B (South–South investment cooperation). The next action would be disruption,

given that the strategy would have changed from A to B, thus giving South Africa a comparative advantage in determining its policy position and short-circuiting the process, which would ultimately create cognitive dissonance for strategic partners. Dai (2016) surmises that disruptive innovation would be effected, as Agent A would profit and benefit from the change of strategy and would thus intuitively be ahead of the game.

As a theoretical concept, the DIT has evolved from a technology-change framework (essentially descriptive and relatively limited in scope) to a more broadly explanatory causal theory of innovation and competitive response (Christensen, McDonald and Altman, 2018). As illustrated by several scholars, theory building should be based on a clear definition. However, the DIT has been plagued by the following theoretical controversies:

- Definitional ambiguity
- The case-study conundrum
- The question of generalisability
- The challenge of defining a unit measure
- The DIT outcome bias, and
- The predictive, prescriptive and performance potential of the theory.

While the DIT is more compatible with business management, this research takes the risk of applying it in IR, policy analysis, IIAs and treaty practice.

As Christensen (1996) indicates, the DIT has links with theories of resource dependence and resource allocation. As demonstrated throughout this research, there has been rigorous academic and scholarly debate on the DIT, which continues to refine its

development (Yu and Chieh, 2008; Kumaraswamy *et al.*, 2018). Lile, Ansari and Urmetzer (2022) state that by focusing predominantly on successful disruptions, the DIT might have inadvertently overlooked nuances and lessons learned from unsuccessful or potential disruptions that never took off. In the recent past, technological innovations brought with it successful disruptions or at times resulted in dismal failure. Thus, the intent and purpose of applying the DIT are to reflect the necessity for a multidisciplinary approach and infusing disruptive innovation technologies in explaining the policy shift in BITs.

According to Iyamu (2022), technological innovations have five components:

- 1) Knowledge, the first step of the process where awareness is required
- 2) Persuasion, a point where a prospective adopter shows an interest in the new technology
- 3) Decision, an adopter decides based certain factors
- 4) Implementation, operationalisation of the innovation
- 5) Confirmation, finalisation of the entire process.

The findings of this research show that when terminating its BITs, the South African government considered all the above steps; thus, the country is considered a disruptor in treaty practice. South Africa considers itself a reformer and a bridge builder with the aim or purpose of transforming the global governance system. The emergence of international human rights treaties and the host country's right to regulate investment policies in the public interest contributed immensely to the policy shift from traditional North–South to new South–South BIT models. As an example of learning from best practices, this study argues that the US government applied disruptive innovation technologies to assess both threats and opportunities related to its national interests and foreign policy.

To illustrate the point succinctly, the Committee for Forecasting Future Disruptive Technologies was tasked by the US government to provide clarity on the following key questions:

- How should data be integrated from diverse sources to identify potentially game changing technological innovations?
- How can disruptive technologies facilitate informed decision making for policymaking?

As the National Research Council (2010) concluded, the Committee for Forecasting was successful, as it managed to provide the US with a competitive advantage in policymaking.

In a different setting, and by using disruptive technologies, China surpassed the US and OECD countries as it radically applied principles of the DIT in its overseas engagements. According to MacFeely (2016), the DIT arises from globalisation and technological advancement, and essentially change presents threats and opportunities. Like all other theories, the DIT has its own limitations and shortcomings. In this regard, critics such as Steenhuis, Pretorius and Weeks (2017) highlight that the DIT has not been universally accepted among business theorists.

The theory has also been criticised on the basis that its definition remains somewhat vague and specific characteristics of innovation are not identified (Nagy *et al.*, 2016). Other critics argue that it is difficult to identify a singular definition of the DIT and there is still not sufficient research for a clear understanding of this theory (Assink, 2006; White, 2017). Despite the criticism, the success and impact of the DIT (depending on where the pendulum shifts) have been enormous and unprecedented.

Generally, companies, governments and policymakers have applied this theory to transform society or the environment in which they operate. It is my considered view that, if applied effectively and with good intension, this theory can transform global governance and improve the implementation of IIAs and treaty practice in both theory and actual application.

As Christensen (1997) points out, good managers face a dilemma because by doing the same things, they run the risk of ignoring disruptive innovations and losing their position of leadership. Thus, the same principle can be applied to the host and home countries in relation to their status in the BIT universe. In the event that traditional North–South BITs are not negotiated and terminated, the host country runs the risk of ignoring disruptive innovations and remaining in the position of rule-takers and not rule-makers.

GovInn, which is based at the University of Pretoria, is the first research institution in Africa dedicated to governance innovation. GovInn focuses on innovative forms of governance in economic and human development as well as on common resources (“the commons”) and regional cooperation in fields such as human security, migration and wildlife management. The innovative approach of GovInn was influential in and guided this research, through stimulating new thinking in public affairs and policymaking. It is my considered view that it would be worthwhile to use the three identified theories to critically assess the policy shift in the governance of international investment.

To explore the merits and demerits of the DIT in explaining the phenomenon under investigation, I highlight its assumptions, limitations, shortcomings and milestones. Put differently, the theories identified also assist in answering the following key research questions:

- 1) How has the policy shift from traditional North–South to South–South BIT models shaped the governance and practice of international investment rule making?
- 2) What are the lessons learned and best practices that can be shared by the Global South in negotiating South–South BIT models?
- 3) To what extent has the new BIT models (South–South) improved the position of the countries of the Global South in negotiating coherent and beneficial investment agreements?

Kogan (2005) argues that while theories aim to generalise observations, it is difficult to generalise the implementation of theories in culturally saturated areas because national policymaking and implementation systems vary widely. This research is an attempt to demonstrate that the policy reviews of BIT models presented developing countries with opportunities to regulate investment policies in the public interest – a treaty practice that did not prevail previously.

The application of theories of change is also used in this research to explain why developed countries such as the US as well as BRICS countries, particularly South Africa and Brazil, have implemented new BIT models. Furthermore, the DIT framework is helpful in examining implementation challenges across policy areas and what lessons can be learned from South Africa and other countries of the Global South.

While policymakers may be justified in new policies, the dynamics of the policy environment are rather complex; thus, the unintended consequences ought to be managed delicately, as bad investment decisions could result in disputes between states or disputes between the investor and the state, with serious reputational damage. Therefore,

it is essential to better understand the material conditions and underlying factors that necessitated the need for a policy shift regarding the BIT models.

2.7 Conclusion

As this chapter has demonstrated, it is important to follow a chronological sequence when doing research. In an attempt to contribute to scientific and academic enquiry, this chapter provided a conceptual framework, reviewed literature and applied theoretical frameworks to explain the BIT phenomenon.

Inyamu (2022) argues that research is an investigative practice to reveal the unknown or to empirically substantiate the unknown using a vehicle that is called a research methodology. While policymakers can plan to pass new policies, the dynamics and uncertainty brought by any policy change are rather complex; thus, a successful policy change and implementation thereof often affect the nature of relations either positively or negatively. It is therefore essential to understand the material conditions and underlying factors that necessitated the need for a policy shift regarding the BIT model in South Africa and other jurisdictions. Consequently, evolutionary /historical institutionalism, rational choice and disruptive innovation assist in navigating the complex theoretical and doctrinal terrain being studied.

This study concludes that the future viability of BIT models (North–South or South–South) and international investment practice in general will continue to be contested unless they strike a balance between choice and necessity, respecting the rights of foreign investors, while at the same time honouring the host country’s responsibility and right to regulate investment policies in the public interest.

CHAPTER 3

HISTORY AND EVOLUTION OF IIAS, FROM TFCN TO BIT

Another peculiarity of these agreements is their termination procedure. About 80% of BITs are characterised by an “anytime termination stage”, in which the treaty can be ceased at any time after its automatic renewal.

– Lejour and Salfi (2015)

3.1 Introduction

This chapter provides an analytical framework on the origins, history and trajectory of IIAs, on which the underlying principles of global trade and investment are based. Despite a growing body of literature on IIAs, scholars of the IPE have paid little attention on treaty practice and the legal implications of treaties in individual countries (host states) and their commitments to international law. This chapter attempts to close the gap in the literature by linking BITs with the treaty practice and public policy concerns of developing countries.

By assessing treaty provisions, one can distinguish a broad variety of approaches with regard to the policy shift from traditional North-South to new BIT models for South–South investments. As stated in the UNCTAD (2016) report, “with thousands of treaties, many ongoing negotiations and multiple dispute-settlement mechanisms, today’s IIAs regime has come close to a point where it is too big and complex to handle for governments and investors alike”. One way to understand this complexity is to trace the history of BITs and provide historical and institutional perspectives on the IIR and treaty practice.

3.2 Liberalisation of trade and movement of international capital

Academic interest in the BIT phenomenon witnessed extensive studies that assessed the relationship between trade and investment as the two major global economic activities. The focus of such studies was to assess how governments and private entities operate in relation to investment (state–state relations and state–investor relations), thus suggesting that in general states comply with the treaties they sign (Henkin, 1979; Chayes and Chayes, 1993a; Chayes and Chayes, 1993b; Simmons, 2000). Footer (2013) describes the relationship between trade and investment as “living apart together”, while Brouder (2013) designates the relationship as the “Lottie and Lisa” of international economic law.

In addition, Footer (2013) points out that the relationship between trade and investment gets stronger as investment is negotiated more extensively inside trade arrangements. Pauwelyn (2014) observes that investment regulation has mainly developed bilaterally as opposed to trade, which has a significant multilateral component. While acknowledging conceptual differences between trade and investment, Disierto (2014) argues that such differences explain the different regulations to which each regime is responding, particularly policy purposes and challenges.

According to Lubambo (2019), an investment liberalisation treaty may be negotiated as a concession to the other treaty party in exchange for other benefits. In addition, Lubambo (2019) observes that it is difficult for states to advocate for an investment liberation agenda when they adopt internal protection measures. However, Perrone (2013) presents an interesting perspective, suggesting that the consensus between investment treaties is not aimed at liberalising the movement of capital.

When comparing the international trade and investment regimes, Pauwelyn and DiMicascio (2008) assert that although they share a common origin (treatment of aliens), trade and investment have traditionally focused on different but complementary objectives. Among others, these include the liberalisation of trade flows in the case of trade, and the protection and promotion of investment in the case of investment.

As was the tradition in the seventeenth century, capital-exporting countries in Europe conducted trade among themselves and over time extended it to North–South relations. In recent years, the liberalisation of trade and investment have converged with investment protection in most free-trade agreements, such as NAFTA. However, Lubambo (2019) cautions that the withdrawal of the US from the TPP, which did not enter into force, is a sign of antipathy towards regionalism, in favour of bilateralism or straightforward unilateralism. Proponents maintain that the adaptability of BITs to unilateral preferences is their key advantage over a multilateral treaty, which would require multiparty compromises (Alschner and Skougarevskiy, 2016)

Despite such convergence, Perrone (2013) cautions that the issues of investment liberation and protection remain divorced in most of the literature. A point that Perrone (2013) argues about vehemently is that the characterisation of the IIR as a form of judicial review, and the categorisation of this regime as part of global administrative law, makes it even more difficult. Thus, Ruggie (2010) cautions that some investment treaties' guarantees and contract provisions may unduly constrain the host government's ability to achieve its legitimate policy objectives, including its international human rights obligations. Essentially, this implies that BITs have the potential to interfere with the domestic regulatory and administrative sovereignty of host countries.

The literature on the recent outflows of FDI shows a dominant global narrative, which is influenced and characterised by the political ideology that advocates for the liberalisation of trade and movement of international capital necessary for economic development. As such, scholars observe that the post-socialist countries, which were mostly Eastern European and Latin American states, were transformed into a market mechanism that operated the same way as the liberal market programme (Bandelj, Mahutga and Shorette, 2015). In view of this, Chevy (2015) argues that foreign trade and foreign investment are interdependent and sometimes complementary economic activities. In addition, the co-existence of international trade and investment activities has in recent years led governments across the world to sign bilateral agreements that infused the regulation of trade activities and the regulation of investment.

Over the years, factors such as power dynamics, political and economic interests of home countries, and the interests of foreign investors were substantially aligned to what Staley (1935) describes as a world where “diplomacy serves investments” and “investments serve diplomacy”.

Essentially, Ding Xiaoping’s Southern Tour Speech and his determination to create a socialist market economy became influential through outlining the following three key characteristics:

- 1) Rapidly increasing the rate of FDI; expanding investments to include resource development, agriculture, industrial production and other service industries
- 2) A domestic shift in policy objectives demonstrated by the ability of the state to increase profits, and
- 3) Influence on world politics and economics.

It is therefore not surprising that China's policies on outward investment reflect the "Going Global" strategy by encouraging all its MNCs to expand and provide investment abroad. While this policy shift was initiated in 1979 with the implementation of its "open door policy", China's economic and political policies shifted immensely after joining the WTO. However, scholars and economists (Stephenson, 2015; Chung, Chang and Zhang, 1995; Chi and Li, 2021) noticed that in 2001 China's FDI started to expand exponentially to developing regions, and is still prevalent today. Through the liberalisation of trade and the movement of capital, by 2004 China was the eighth most important FDI source country in the developing world and it became the leading investor, even in the US (Buckley *et al.* 2007). Gallagher (2009) states that China expanded its approach to trade and FDI in Latin America consistently through three principles (Gallagher, 2009):

- 1) Remaining an exporter of manufactured goods to countries in the region
- 2) Functioning as a buyer of raw materials principally from South American countries, and
- 3) Becoming a strong competitor in the export market.

Undoubtedly, these historical antidotes and intentional key strategic objectives enabled and propelled the Chinese government to leverage its global comparative advantage and become a preferred investor of African, Asian, Caribbean and Latin American countries through its global infrastructure development strategy known as the BRI (adopted in 2013). It is worth noting that China's disruptive innovation strategy has created global value chains that still influence and shape the flow of FDI and BITs across the world. Shoba and Mlambo (2024) point out that South Africa was the first African country to sign

a memorandum of understanding with China (in 2015). South Africa is strategically essential to China due to its endowments of mineral resources; therefore, trade and investment linkages between South Africa and China should be enhanced.

Those who advocate for protection of investment are considered promoters of global administrative law. They are labelled thus because the premise of their studies is biased in favour of the view that the IIR serves to enforce protection of foreign investment when domestic institutions, in particular the judiciary, do not guarantee this enforcement (Perrone, 2013).

As indicated by Frieden and Rogowski (1996), the study of the relationship between international trade and the growth of the economy dates as far back as the eighteenth century, when David Ricardo and Adam Smith asserted that trade had a general influence on the growth of the economy.

While trade includes the movement of labour, goods and services, investment involves the movement of capital flows and the transfer of technology. Thus, the nature, character and shape of foreign-owned rights over resources invested abroad are fundamental to finding solutions to ongoing disputes between foreign investors and host countries.

Given the close relationship and interdependence between the two economic activities, scholars of international law referred to international investment law and trade law as two pillars of the international governance of economic activities (Lin, 2019). The trend of the liberalisation of international capital and the rise of FDI contributed significantly to the evolution of IIAs and BITs. Polanyi (1944) argues that competitive markets originated at the international level and found their way to the local level. However, economic history

suggests that the evolution of markets from local to international was gradual, through the natural human tendencies to exchange, barter, trade and seek maximum profit. However, Adda (2001) points out that it was not a natural phenomenon; it was raid rather than trade, which was something that was imposed on societies in amid conquest by colonial states and their MNCs. This suggests that international trade was not a peaceful enterprise, as gunboat diplomacy reflected foreign aggression by major powers.

According to Lipson (1985), historical analysis shows that colonial institutions and international law governing the resources of different countries are not a new phenomenon; however, it has been dealt primarily in the case of foreign-owned properties. As Shihata (1986) observes, Latin American countries were particularly exposed to abuses of diplomatic protection and (at times) to armed intervention and occupation by foreign forces dispatched by the governments of foreign investors.

Krasner (1982) defines the international regime as “sets of implicit or explicit principles, norms, rules and decision-making procedures around which state actors’ expectation converge in a given issue area”. Put differently, international regimes are sets of inter-related institutions that regulate state behaviour.

Freeman (2009) argues that the regime concept is also used within the legal fraternity to describe institutionalised rules and policies in a variety of different issue-areas at the domestic level. To some extent, these norms, rules and procedures are often used in the IR and IPE to determine whether national policy regimes are either congruent with or divergent from international regimes. Interestingly, Ginsburg and McAdams (2004) suggest that international trade can be described as an “iterated prisoner’s dilemma”, implying game theory based on the ability of role-players to defect or cooperate.

In IR, the iterated prison's dilemma has been studied in game theory to analyse state behaviour and how states cooperate in the international system. Essentially, the iterated prison dilemma strategy has three dimensions or approaches, suggesting that state behaviour is characterised by cooperation (those who cooperate), defectors (those who deviate or defect) and reciprocators (those who reciprocate the actions of opponents).

The current trade war that the world is witnessing under the second administration of US President Donald Trump reflects state behaviour in terms of defection, cooperation and/or reciprocity. As Broude (2013) argues, Adam Smith's "invisible hand" and David Ricardo's "comparative advantage" are not only theories of international trade (the international mobility of goods and services) but also theories of investment, because they may concomitantly be understood as explanations of investor responsiveness to market returns from manufacturing activities. There is no dispute that globalisation has intensified economic activities among developing and developed countries at a grand scale. World trade has become far more complex; therefore, efforts to liberalise services and the movement of capital have been inevitable and are ongoing.

In terms of trade and investment, all countries have an interest in protecting their investors/investments abroad. In recent decades, BITs have spread rapidly, as developing countries have been under pressure to attract FDI. Similarly, the end of the Cold War, which resulted in the breakdown of the Soviet Union and the establishment of independent republics in Eastern Europe, was a crucial global event that liberalised capital movements and made BITs the most preferred tool to attract FDI.

Pursuant to attracting foreign investment, many countries with emerging markets have made the promotion of FDI a policy priority. Molkte (2000) argues that it is a mistake to view FDI simply as an adjunct to trade, as efficient allocation of capital is critical for the achievement of economic growth and sustainable development. According to the Declaration on the Right to Development that was adopted by UNGA in 1986, development is defined as follows: “An inalienable human right that entitles every human person and all peoples to participate, contribute to and share the benefits that obtain from the process, as a guarantee for the full realization of all other human rights and fundamental freedoms.”

Undoubtedly, the observance and respect of universal values such as human rights, the rule of law and human development are considered sacrosanct. As enshrined in the African Charter (1981, Article 24) for development to be holistic and equitably beneficial, a natural environment is required that is generally satisfactory. Elkins, Guzman and Simmons (2003) note that in pursuit of the right to development, developing countries sought to adopt policies that would increase foreign investment. Likewise, capital-exporting countries saw BITs as a useful tool for protecting the investments of their nationals and MNCs abroad, thus leveraged their bargaining power in the form of binding investor-friendly commitments from their partners (Simmons, 2014; Allee and Reinhardt, 2014). Due to the demands of both capital-importing and capital-exporting countries, the number of BITs increased exponentially over time since the initial BIT was signed.

While BITs were proliferating, the major concern was that the governments of OECD countries largely focused on securing additional rights for their investors to improve the security of their foreign investments, in the process disadvantaging developing countries.

The IIR has for a long time been skewed towards favouring OECD countries – a situation that is being challenged, considering that countries of the Global South are calling for the transformation of the contemporary investment regime to promote equity and sustainable investment.

However, the requirements of international investment law and trade law have been met with a global backlash, such as protectionism and trade wars. The actual FDI-enhancing effects of investment treaties remain a hotly debated and controversial topic. For instance, over-reliance on FDI to fund development is an unsustainable approach, as in the long run this leaves many countries without resources. In view of this, Ngang (2021) argues that the realisation of the right to develop (which should translate into improved well-being for the people of Africa) ought to be progressive and incremental, and thus disallows regression in the enjoyment of existing entitlements. Ngang (2021) posits that an alternative model suited to Africa is best described as the right to development governance. All 55 African states have ratified the African Charter, which obligates state parties to put in place regulatory frameworks that act against regression (Ouguergouz, 2003). This suggests that the IIR needs to be restructured, as Molte (2004) observes that the most comprehensive study of the law of international investment concluded that multilateral instruments, whether binding or non-binding, are difficult to construct in the area of foreign investment. Butler and Subedi (2017) highlight that there is as yet no comprehensive international treaty for the regulation of foreign investment. Thus, in order to ensure legal certainty and predictability, they propose the creation of a world investment organisation that will ensure the promotion of investment flows in a sustainable and responsible manner (Buttler and Subedi, 2017).

With regard to the governance of the IIR, Ostry (1997) highlights that the WTO introduced four principles or normative frameworks governing BITs. These are:

- 1) Right of establishment
- 2) National interest
- 3) Non-discrimination or MFN treatment, and
- 4) Transparency.

However, the contentious issue in the literature is that international investment law continues to perceive and approach IIAs purely from the perspective of foreign investment protection. Fatouros (1971) argues that there is a need to provide for the protection of investors' interests without attempting to safeguard the host country's interests. Over the years, globalisation has transcended national borders by bringing together both state actors and non-state actors (MNCs/transnational corporations) to compete in the global economy from across various regions and continents.

A comprehensive study of the law of international investment was done by Baker (2024), who concluded that:

The multilateral instruments, whether binding or non-binding, are difficult to construct in the area of foreign investment. It further stated that a satisfactory code must address both the issue of how foreign investors conduct themselves in host states as well as the treatment of foreign investors by the host states.

In view of the brief account of foreign investor and host country relations, Cox (2020) observes that in the past 50 years, the pendulum has swung from the "honeymoon" to the "confrontation" and "reconciliation" phases. The Global South has been proactive in

exploring changes in the investment landscape by convening an experts' meeting in Brazil in 2024 under the theme World Order Project with the aim of exploring North–South trade and investment practices. Darnal (2024) acknowledges that although hyper-trade liberalisation has encouraged worldwide acceptance of free-trade agreements and investment treaties, these deals have not yielded the expected economic development in many countries of the Global South.

3.3 Reasons why countries sign BITs

Over the years, signing a BIT was seen as an opportunity for developing countries to attract FDI. Thus, the history of developing countries' policies reflects persistent FDI promotion and competition for FDI, as well as massive competition for foreign capital flows. Traditionally, signing BITs was premised on the reality that developed countries were effectively the only sources of FDI while developing countries were, and to a certain extent still are, perceived to be riskier and politically volatile business environments for international investment. Lejour and Salfi (2015) identify the following as reasons why developing countries signed BITs:

- BITs support and initiate market liberalisation.
- BITs create conditions to facilitate the entry of FDI.
- They protect foreign investors, facilitating the entry and operation of investment.
- Ratifying BITs often signals a change towards political stability.
- Signing BITs helps the host country to remove certain impediments in its regulatory system.
- BITs guarantee certain standards of treatment, which are usually not enforceable within the judicial system.

These reasons perpetuate the North–South model, thus suggesting an asymmetric treaty network favouring developed countries. From 1959 to date, over 3 600 treaties have been signed on a bilateral basis between one of the advanced industrialised countries (capital exporting) and an LDC (capital importing). Thus, BITs are arguably designed to prevent host countries from violating the property rights of foreign investors as defined by the investment treaty regime. In this regard, capital-exporting countries have been influential as the key drivers of successive investment treaties by moving from vague rules to highly elaborate rules (Manger and Peinhardt, 2014).

Historically, the standard treaty practice disproportionately favoured developed countries as capital-exporting countries, while developing countries were seen as capital-importing countries destined to receive FDI from developed countries. Given the increased importance of FDI in recent decades, the competitive struggle to attract investment resulted in an increase in signing BITs.

This developing trend allowed developing countries to open up their economic sectors that were initially excluded from foreign investment. Following their independence in the 1960s, developing countries were dependent on donor aid from OECD countries as well as investment by MNCs. According to Yackee (2007a), annual inflow to LDCs increased by a factor of almost 18 over the period 1970 to 2000. In addition, Encarnation and Wells (1985) point out the rise of “competition” for foreign investment among developing countries, with the focus being increasingly on offering investment “incentives” rather than imposing investment controls. For Freeman (2009), BITs represent a ratification of prior policy changes made on a voluntary and unilateral basis.

With the recent policy shift, foreign investors display the characteristics of a home or host country to the extent that investment has improved institutional development and capacity building. Roberts, Moraes and Ferguson (2019) argue that the changing geopolitical dynamics suggest that the international economic order is transitioning away from neoliberal order and flourishing towards a new geo-economic order. The policy shift is further characterised by a growing securitisation of economic policy and economisation of economic policy (Roberts, Moraes and Ferguson, 2019).

Scholars such as Leo (2010) view BITs as a development tool in that it channels much-needed capital and infrastructure development to poor countries. This view is supported by evidence that countries which are signing more BITs are likely to see a greater inflow of FDI (Buthe and Milner, 2009; Kerner, 2009; Allee and Peinhardt, 2011; Haftel, 2010). Egger and Pfaffermayr (2004) caution that only ratified treaties have a significant impact on FDI. When comparing it by region, Lejour and Salfi (2015) discovered that the FDI impact was much larger if the host country was in East Asia and Eastern Europe, while the investment effects were not significant for countries in sub-Saharan Africa, Latin America and the Caribbean. This suggests that the location or geography of the host country matters most when it comes to foreign investment.

However, many academics and policymakers are opposed to the assumption that increases in investment flows do not necessarily translate into development. Thus, current policy interventions in Africa have sought to anchor developmental state ambitions in the restructuring of the mineral sector (Simmons, 2014; Bonnitcha *et al.*, 2017; Saunders and Caramento, 2018). Bhattacharya (2006) identifies two main goals in signing BITs during the earlier period. The first goal was to send a signal to domestic

investors regarding the protection of existing and prospective investments. The second goal was to send a signal to all investors irrespective of whether home countries had actually signed a BIT with a particular country or whether it had signed one with another source country (Bhattacharya, 2007). According to Dolzer and Schreuer (2012), BITs share common principles of investment protection while differing in their fine print.

The purpose of bilateral agreements is not benevolent; they are transactional agreement intended to yield long-term investment returns for the capital-exporting country. There is a view that countries that are most likely to enter into BITs are those whose policies and institutions are most congruent with the behavioural dictates of the international investor rights regime that BITs represent (Freedman, 2009). In addition, there are indications that countries that are most likely to sign and ratify BITs are those whose domestic-level policies and institutions are most favourable to investor rights (Freedman, 2009). According to Lejour and Salfi (2015), the top three countries with more than 100 ratified investment treaties are Germany, Switzerland and China.

During the early 2000s, many governments looked to international legal arrangements to improve the attractiveness of their country for global capital (Freedman, 2009). Undoubtedly, competitive pressures from other countries (Elkins, Guzman and Simmons, 2006) and economic downturns (Simmons, 2014) often push countries to sign these agreements with major capital exporters.

The nature of the traditional BIT model (North–South BITs) demonstrated the geostrategic interests and influence of developed countries, as they could dictate the terms and conditions of the agreements. As illustrated by Bodea and Ye (2017:4), BITs are purely intended to guarantee investor protection, including through compensation for

expropriation and fair and equitable or MFN treatment. While proponents of traditional investment treaties contend that these investor protection and privileges are successful at catalysing international investment flows, Bonnitcha (2014) has a different view.

For Bonnitcha (2014), the evidence is far from conclusive in showing that treaties have been successful in promoting investment flows. The need to protect investments and the interests of foreign investors have been the cornerstone of the OECD, UNCTAD and the World Bank. The OECD has been promoting BITs and since 2000, they have published an updated calendar of events that provides a chronological listing of treaties signed among and between countries.

The World Bank has also published reports on BITs. Of note was the 2010 publication that stated: “If a country wants to attract significant levels of private investment and promote itself as a good place to do business, it must protect investments and investors in terms of acquisition, management, conduct, operation and sale or other disposition of the investments in the host country”.

In terms of World Bank reports, developing countries continue to be followed by controversy in that by signing BITs, they have essentially surrendered a significant amount of their sovereignty over FDI, which often lacks reciprocity. However, the treaty practice where the capital-exporting country is the sole investor in the international investment landscape is changing rapidly. Today, emerging economies are increasingly becoming capital-exporting countries and are therefore demanding equitable and fair trade with their counterparts from the Global North. The number of BITs in which both parties are considered developing countries has increased significantly. Mondli (2020)

highlights that noteworthy investments that have been made by South African MNCs in Africa are:

- Wimpy (fast food restaurant)
- Engen (petrol station)
- Kwikserve (mini supermarket)
- Woolworths (food and clothing retailer)
- Game (general merchandise retailer, which has been rebranded as Massmart and is part of the global Walmart Group), and
- Shoprite-Checkers (food supermarket).

As of July 2004, there were at least 653 South–South BITs, representing 28% of the 2 300 existing BITs (UNCTAD, 2004:6) There has been noticeable recent developments regarding treaty negotiations around the world.

In a famous speech to the Economic Club of Chicago in April 1999, former UK prime minister Tony Blair⁸ said: “By the new doctrine of the international community, it is believed there is an explicit recognition that today more than ever before, we are mutually dependent; than national interest is to a significant extent governed by international collaboration”. In addition, Blair (2001) revisited the idea of the power of community asserting itself globally by articulating the view that the community had become a lesson of financial markets, climate change, international terrorism, nuclear proliferation and world trade because our self-interest and our mutual interest are indivisible. Scholarly work and policy documents provide insights into the historical origins and traditions of

⁸ Speech by Tony Blair to the Economic Club of Chicago on 22 April 1999. <http://www.britishpoliticalspeech.org/speech-archive.htm?Speech=279> [Accessed 18 July 2023].

investment treaty practice, types of BITs signed between countries, and reflections on the policy shift from North–South to South–South models of investment.

This study proposes that the initial BIT that was signed between Germany and Pakistan in 1959⁹ was a typical North–South traditional BIT. An analogy of the impact of BITs on the policymaking of developing countries is provided by Peterson (2004), who states that “once the shoe is on – no matter how uncomfortable the fit – the shoe may need to be worn, rather than altered”. However, as will be demonstrated in various chapters, investment treaties may be negotiated, renegotiated or terminated by mutual agreement.

3.4 Tracing the evolution, institutional and historical origins of IIAs and BITs

Froman (2014) observes that the structure and character of IIAs in the IPE have for the past seven decades been viewed as among the most successful and controversial aspects of international commercial law. In view of this, contentious issues in foreign investment relations are numerous because, in most cases, there is always a pervasive tension between the global and the local. Despite the successes, some radical changes and drawbacks have emerged behind the scenes (Froman, 2014).

The above information shows some serious structural, institutional and capacity constraints concerning how BITs were drafted/written, enforced and imposed on developing countries over the course of history. For a long time, developing countries have raised concerns about the ambiguity in old and traditional BITs signed with OECD countries.

⁹ The year 1959 serves as the start of the BIT era and it was during this era that developing countries blindly signed BITs with the hope of attracting FDI and competitive pressures.

In tracing the history and origins of BIT, Peronne (2013) narrates a story about Harman Abs (Chairperson of the Deutsche Bank) and Lord Shawcross (former Attorney-General of the UK) meeting at a conference in San Francisco. During the meeting, they used the phrase “Let investors unite”, which later became a popular expression to promote BIT globally. During the 1950s and 1960s, these two individuals were involved in the societies advancing and advocating for the protection of foreign investments. The two individuals were influential in the establishment of entities known as the French Association de Detroit Minie et Petrolier and the Association for the Protection and Promotion of Private Foreign Investment¹⁰. According to Batselé (2023), the two key actors acted symbiotically. The businessmen provided access to policy-makers and introduced company lawyers into the policy-making cycle. Batselé (2023) further describes the strategy of the two entities as an international convention by which all contracting parties undertake to treat foreign capital and other foreign interests fairly and without discrimination. In 1959, the Association for the Protection and Promotion of Private Foreign Investment passed two resolutions. Resolution 1 focused on private foreign investments, while Resolution 2 proposed the establishment of a special international court of arbitration (Batselé, 2023). Thus, the lobbying and advocacy for the protection of foreign investors led to the popularity of bilateral investment treaties as we know them today.

UNCTAD releases annual investment reports that shed light on the state of IIAs involving member states and private investors. To date, Germany, China and Switzerland are the top three countries, with more than 100 ratified investment treaties (UNCTAD, 2013). With

¹⁰ The key actors (businessmen and lawyers) involved in APPI were a transnational advocacy network of businessmen and lawyers at multinational companies, mainly in the oil and banking sector. According to Batselé (2023) the two key actors acted symbiotically. The businessmen provided access to policy-makers and introduced company lawyers into the policy-making cycle.

regard to the future of BITs, UNCTAD forecasts that IIAs will no longer be driven by BITs but rather by regionalism, allowing for agreements comprising more countries together (UNCTAD, 2012). Examples include recent investment chapters within the EU and ASEAN, as well as NAFTA. As is shown throughout this study, BITs have had mixed results, ranging from controversies and drawbacks, increased trade, economic development to improvements in foreign relations and increases in arbitration claims against developing countries for non-compliance with international agreements.

3.4.1 Gunboat diplomacy and colonial-era international agreements

The term “gunboat diplomacy” originated in the nineteenth century during the period of colonial and imperialism, with powerful Western countries (including European countries and the US) intimidating and overwhelming less powerful countries with their naval and military power. During that period, the most powerful countries pursued their foreign policy objectives through naval power, forcing less powerful countries to give them concessions and expand their trade. The pervasive gunboat diplomacy of Western powers resulted in expropriations of land and other assets of several countries under their control. The great Western powers of Great Britain, Germany, Spain, France, Italy and the Netherlands protected their assets and/or the interests of their MNCs abroad.

Over the years, these major powers expanded their international trade and spheres of influence by force through colonising territories endowed with mineral resources, especially in Africa, Asia and the Caribbean. Through gunboat policies, these Western powers protected their national interests through complete political control over other territories and countries by forcing them to negotiate asymmetrical treaties after military

defeat. Historically, the regulation of bilateral and multilateral trade agreements followed gunboat diplomacy.

As Borchard (1951) observed, the joint naval intervention of Germany, Great Britain and Italy in Venezuela in 1902 had all the features of gunboat diplomacy. It was during the colonial era that gunboat diplomacy became the dominant system of trade and investment, as Western powers had control over occupied territories in Africa, Asia, the Americas and the Caribbean. The conquests of other territories brought with it new economic opportunities for the colonial empires of the time and asymmetrical trade relations. Developing countries in Asia, Africa, the Pacific and the Caribbean continue to suffer from the historical imbalances and treaty networks still reflect asymmetric relations that no way help but make the situation even worse.

Lipson (1985) observes that in Asia, Africa and Latin America, European powers resorted to direct colonial annexation, capitulation treaties and ad hoc diplomatic intervention. All these efforts were to ensure the security of their respective nationals' investments when local legal structures or political remedies proved inadequate (Lipson, 1985:12). In analysing the relationship between gunboat diplomacy and international investment, Young (1982) identifies three orders used by European powers:

- 1) Spontaneous orders
- 2) Negotiated orders, and
- 3) Imposed orders.

Young (1982) notes that imposed orders are deliberately established by dominant actors who succeeded in getting others to conform to the requirements of these orders through some combination of coercion and the manipulation of incentives. It is therefore

incumbent on leaders to ensure that investment treaties are aligned to address climate change and sustainable development not merely as rhetoric but to ensure that human rights imperatives are embedded in future investment treaties.

Developing countries continued to suffer suppression and legal repression at the hand of European powers through asymmetric treaty practice. Freeman (2019) notes that the Bolshevik Revolution in Russia brought communist ideologies, which nationalised foreign assets. Freeman (2019) argues that the Bolshevik Revolution resulted in the large-scale nationalisation of foreign-owned property, most of which was not accompanied by compensation, resulting in heavy losses for British and German investors who had invested heavily in the former Czarist regime. Schneiderman (2010) raises serious concerns in his seminal work on investment rules. One concern is that international investment law perpetuates relations of domination and subordination reminiscent of colonialism. Kishoiyian (1993) argues that before 1914, Latin American countries protested violently against debt collection by European navies through gunboat diplomacy.

Latin American countries' contestation against debt collection required international intervention, which ultimately led to the birth of the Drago Doctrine and the Calvo Doctrine. In 1868, the Argentinian jurist Carlo Calvo developed the Calvo Doctrine, articulating: "As a matter of international law, no state may intervene diplomatically or otherwise to enforce its citizens' private claims in a foreign country." According to Lipson (1985), Calvo argued that such intervention would violate the sovereignty of the host nation and, assuming that foreigners in the host country were treated equally to that country's own nation, would be unnecessary.

Essentially, the principles of the Calvo Doctrine were derived from the constitutions and statutes of Latin American countries and treaties signed among them. The normative and legal framework developed earlier was the Drago Doctrine, named after Argentinian jurist and then Foreign Minister Luis Drago. Freeman (2009) argues that in 1902 and 1903, the British and Germans navies blockaded the Venezuelan coast in an effort to force a settlement of the financial claims of their citizens against Venezuela.

As a legal intervention, Drago argued that public debt was either an acceptable pretext for armed intervention or the material occupation of the soil of any Latin American nation by a European power.

In order to address forcible debt collection by European countries from Latin American countries, The Hague Convention of 1907 on the Limitation of the Employment of Force for the Recovery of Contracts Debt was promulgated (Lin, 2018). History seems to repeat itself in that between April 2006 and May 2007, the leftist government of Hugo Chavez in Venezuela seized control of oil projects controlled by US and European energy companies. This action resulted in a protracted dispute between Venezuela and the MNCs, including Exxon Mobil and ConocoPhillips (Freeman, 2019).

Learning from the experiences of Western powers during the colonial period, Eastern European and South American countries introduced unceremonious rules related to the protection of investments and expropriations. It is worth noting that during the post-colonial period (1960s onwards), international agreements in the form of treaties on trade and investments witnessed the promulgation of powerful instruments used by Western powers to maintain economic and political relations with their former colonies.

This tradition took the form of North–South BIT models, involving home and host countries. Through bilateral engagements and strengthening diplomatic and economic ties, the majority of the countries of the Global South have initiatives such as binational commissions, presidential investment summits, trade expos and benchmarking excises for the established investment economic zones. Such practices are still common among Commonwealth English-speaking, French-speaking and Portuguese-speaking countries. The Industrial Development Corporation is one of the successful South African development financial institutions promoting the country’s investment and industrial policies. Thus, it has been instrumental in providing development finance to infrastructure projects in the special economic zones.

The situation of promoting investment and regional integration was also evident when the European countries established the European Economic Community in 1957 (now the EU). The signing of trade and aid agreements with South American countries as well as African, Caribbean and Pacific countries, for example the Lomé Agreement of 1975, was also reminiscent of the colonial-era agreements.

The Lomé Agreement introduced the principle of preferential trade agreements by providing greater access to markets of European countries to export manufactured goods and almost 90% of their agricultural products and other commodities. As Kishoiyian (1993) argues, The Hague Convention brought a willingness among contracting parties to submit to the peacefully settlement of investment disputes and to carry out awards, which became an acceptable principle as a substitute for unilateral and forcible debt collection by the home countries of the creditors concerned. Previously, international law faced various challenges in regulating trade and investment. These included developing

normative frameworks to govern relations between states, particularly in addressing the host country's rights over alien (foreign) property such as protection of investments abroad.

One of the challenges in the regulation and protection of foreign investment was how to deal with the high risk of expropriation and nationalisation of foreign assets. As Bandera (2019) points out, the nationalisation of British oil assets by Iran in 1951, the expropriation of LAMCO's concessions in Libya in 1955 and the nationalisation of the Suez Canal in 1956 were indications of the sovereign risk in host countries. Lin (2019) argues that in the early part of the twentieth century, the Mexican government practiced mass nationalisation of US interests and assets in the agrarian and oil sectors.

Similarly, Diehl (2012) notes that large-scale expropriations were enacted by Eastern European countries after WWII. In an attempt to find a solution to the challenge of the high risk of expropriation of US assets by Mexico after the revolution, the then US secretary of state, Cordell Hull, wrote a diplomatic note to the Mexican minister of foreign affairs. In terms of Mexican expropriation without compensation, Hull raised concern that "no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment thereof" (Forere, 2018, adapted from Guzman, 1998). In the modern era, the rule of prompt, adequate and effective compensation has become known as the Hull Rule, following his advice on international investment law.

In accordance with the Hull Rule, countries that expropriated property without compensation were at least required to provide prompt, adequate and effective measures. This effort was an indication that investors relied on their governments to

defend their interests by taking up their claims on their behalf through diplomatic channels. Although the right of diplomatic protection was a necessary measure, it evidently became insufficient and inadequate in protecting foreign investments from expropriation. Due to international pressure and changes in global politics, such as developing countries' demands for the NIEO, the Hull Rule ceased to be a normative framework for international investment law in the 1970s. The frequency and sequence of events are considered equally important in explaining the evolution of international investment law and contracting countries' decisions in response to international issues during the gunboat diplomacy and colonial era.

3.4.2 Institutionalisation of investment treaties, from TFCNs to the WTO

As a system for the exchange of goods and services among states, international trade underwent significant changes over centuries. Thus, it is inevitable that the legal principles governing the protection of foreign investment and trade relations originated from institutions and treaties developed among states. According to Garcia (2004:12), a comparative legal examination shows that many of the real differences between how legal systems operate today are as much a consequence of a country's development as the civil law versus common law divide. For Garcia (2004), these difference range from the niceties of weighting and submitting evidence to basic procedure and the essence of law itself.

From the historical and institutional perspectives, the rules and regulations governing foreign investment and trade derive from the Anglo-America Saxon model, which was embedded through bilateral treaties in the form of TFCNs between capital-exporting countries and capital-importing countries. Initially, TFCNs were bilateral commercial

treaties aimed at facilitating trade and creating a stable diplomatic and economic relationship between contracting TFCN parties. However, Alscher (2013) points out that TFCNs have inspired a new generation of IIAs that are complex and comprehensive. Prior to TFCNs, historical analysis shows that in the early 1500s the relationship between the Ottoman Empire and the West were cordial. This is illustrated by the fact that property rights and rules were extended beyond Europe during the seventeenth century.

Further historical records shows that France signed the earliest capitulation treaty in 1535. After the establishment of permanent diplomatic relations between the Ottoman Empire and France, “capitulations” acted as an essential element in France’s commercial and diplomatic policy in the Mediterranean (Jean-Pierre Farganel, 2025). Among others, the treaty included concessions such as conducting trade according to the French law.

Alshahram (2020) argues that the tradition of applying the jurisdiction of the home country in foreign commercial activities can be traced back to 10 centuries ago. It was during that era that Arab traders travelled to Canton¹¹ (China) with permission to have a *qati* (judge) and their own laws and to erect a mosque. The practice of unequal treaties was historically seen as a product of actual or threatened use of force by the dominant Western commercial powers of the day.

Contrary to popular belief, it was from the eighteenth century onwards that the US adopted the treaty practice of TFCNs. It was then that the US negotiated and signed TFCNs with many European countries (including France and Italy) and Latin American

¹¹. The Canton years saw the evolution of the Kuomintang of China (abbreviation KMT), also often translated as the Chinese Nationalist Party. The KMT was the sole ruling party in China during the Republican Era from 1928 to 1949, when most of the Chinese mainland was under its control. (Wikipedia)

countries with the objective of improving and protecting foreign and trade relations (Vandeveld, 1992).

According to Chevy (2015), TFCNs were concluded during the post-Industrial Revolution era, which allowed Western powers to promote and protect investments and trade. The purpose of TFCNs was to give US nationals access to foreign ports and markets on a reciprocal basis and to guarantee national and MFN treatment for their possessions (Alscher, 2013). In addition, Lipson (1985) points out that Great Britain, France, Holland and Spain played important roles in the development of such treaties, while the German Empire, Sweden and Russia were involved to a lesser extent.

It is worth noting that the common treaty practice at that time included investment protection rights, which contracting parties enforced through diplomatic channels. Such treaty practice included using custom duties and tariff provisions for goods and services imported from a treaty partner. Thus, the purpose of TFCNs was to cement an alliance with the US and they were undoubtedly measures to spread the influence of the major powers. Alschner (2013) argues that the US had negotiated TFCNs nearly 200 years; however, the practice ground to a halt by the mid-1960s. It is argued that the TFCNs after 1945 had specific investment provisions, which are considered progenitors of current BITs.

The concepts and language in TFCNs provisions on investment issues such as expropriation, establishment, MFNs, national treatment and international law standards for capital transfers are reflected in current BITs. A number of factors contributed to the end of TFCNs, including that many of the matters regulated by the agreements started to be governed by other sources of international law. While these treaties provided

international legal standards for the protection of natural and legal persons, the weakness of TFNCs was that clauses failed to address the challenge of expropriation and they suffered from poorly drafted arbitration clauses (Bandera, 2019; Sonarajah, 2021).

In his seminal work on the *Americanization of the BIT universe*, Alschner (2013) notes that TFCNs are often presented as the ancestors of today's BITs. Historically, TFCNs were comprehensive and broad agreements covering a vast range of matters ancillary to trade or commerce, such as shipping, transit of goods and persons, the right of a country's nationals to establish and operate business, the ability to do business in the territory of the other, freedom of communication, and acquisition as well as tenure of property. Like other treaties before, TFCNs failed to meet minimum international standards and therefore were considered inadequate to protect and safeguard foreign investors.

After WWII, attempts the United Nations attempted to establish a Charter for an ITO with the purpose of finding solutions to challenges related to international trade and economic development globally. The challenge was that it was an ambitious programme, which extended beyond the realm of trade to include rules on employment, commodity agreements, restrictive business practices, international investment and services (WTO, 2024). However, Footer (2009) explains that for reasons known to everyone, the ITO's Havana Charter did not see the light of day and ever since, trade and investment legal regimes have been institutionally separated. The failure of the ITO in 1947 led to the adoption of the GATT, which paved the way for the establishment of the multilateral forum in the form of the WTO. As Narlikar (2005) argues, the agreement establishing the WTO commits member states to a variety of noble objectives, including:

- Improved standard of living

- Full employment
- Expanded production of and trade in goods and services
- Sustainable development, and
- Enhanced share for developing countries in world trade.

While these objectives are indeed noble, it is worth noting that the identified commitments are not an end in themselves but should be viewed as a means of achieving sustainable goals. Be that as it may, there is a historical and inherent challenge of state behaviour, which is intrinsically chaotic and anarchic. Thus, in terms of the economic and political realms, Narlikar (2005) asks the pertinent question of why states act in ways that turn out to be detrimental to their self-interest. In view of explaining this inherent challenge of state behaviour, Hoekman and Kostecki (2001, quoted in Narlikar, 2005) provide a succinct interpretation of this problem in terms of a classic “prisoner’s dilemma game”: It is in each country’s interest to impose restrictions, but the result of individually rational policies is inefficient.

The WTO is currently the only viable international investment legal regime governing a multitude of multilateral and regional investment agreements. The 1982 dispute between Canada and the US concerning the Canadian Foreign Investment Review Act became one of the milestones where GATT introduced institutional instruments of dispute settlement in the form of TRIMs. Article 9 of the WTO on TRIMs states the following:

Not later than five years after the date of entry into force of the WTO Agreement, the Council on Trade in Goods shall review the operation of this Agreement and, as appropriate, propose to the Ministerial Conference amendments to its text. In

the course of this review, the Council for Trade in Goods shall consider whether the Agreement should be complemented with provisions on investment policy and competition policy.

Alschner (2014) contends that although plurilateral and regional investment treaties have been concluded among larger subsets of states, they tend to complement rather than substitute parallel bilateral treaties. This implies that despite the global efforts to institutionalise international trade, countries continue to negotiate and rely on BITs to protect their investments abroad.

Throughout the difficult period of trade protectionism and unilateralism, GATT helped to establish and institutionalise a strong and prosperous multilateral trading system through rounds of trade negotiations across the world, including in Cuba, France, Japan, Uruguay, Canada, Belgium and Morocco. The World Bank has also institutionalised initiatives concerning trade and investment. To promote investment flows globally, the World Bank (as part of the Bretton Woods Institutions) contributed to the negotiations on the Convention Establishing the Multilateral Investment Guarantee Agency, which entered into force in October 1985. For example, Article 23 of the MIGA Convention provides for a research function with respect to investment activities in developing countries and authorises MIGA to promote and facilitate among its members the conclusion of agreements on the promotion and protection of investments. Sadly, the ambitious MIGA suffered the same casualty as the ITO, and it was aborted in 1998.

This suggest that seeking an IIR through a multilateral approach is not ideal, as countries still prefer bilateral agreements. For Cho and Kurtz (2014), the creation of the WTO at the end of the Uruguay Round operated as a paradigm shift, which has manifested in today's

investment case law and in the drafting of the new IIAs that are increasing accommodative of public interest. A significant development in treaty practice is the signing of the Guiding Principles for Global Investment Policymaking by the G20 countries in July 2016. This development culminated in the pursuit of SDGs, which affirms a country's right to regulate, the importance of transparency and the responsibility of investors, which has become a cornerstone of sustainable investment practice (G20, 2016). As illustrated in the table below, there has been global efforts to institutionalise global trade.

Table 6: Institutionalisation of GATT trade rounds

YEAR(S)	PLACE/NAME	SUBJECT COVERED	NUMBER OF PARTICIPATING COUNTRIES
1947	Geneva	Tariffs	23
1949	Annecy	Tariffs	13
1951	Torquay	Tariffs	38
1956	Geneva	Tariffs	26
1960–1961	Geneva Dillon round	Tariffs	26
1964–1967	Geneva Kennedy round	Tariffs and anti-dumping measures	62
1973–1979	Geneva Tokyo round	Tariffs, non-tariff measures, framework agreements	102
1986–1994	Geneva Uruguay Round	Tariffs, non-tariffs, rules, services, intellectual property, dispute settlement, textiles, agriculture, creation of WTO	123

Source: Understanding the WTO. 3rd edition, August 2003 (WTO, Geneva)

From an institutional perspective, the establishment of the WTO in 1994 is a significant development in the global governance of trade and investment. Thus, the WTO has

mechanisms within which developing countries can lobby for or solicit support to strengthen their bargaining power. Narlikar (2005) argues that as a multilateral institution, the WTO presents the most rigorous codification of rules, and international economic life without the WTO would be “nasty, brutish, and short” for small and weak states.

3.4.3 Post-WWII and post-Cold War international agreements

With WWII just ended, there were global efforts to correct and rectify the legacy of previous treaty practice. As Lavranos (2013) argues, European countries preferred to sign predominantly short and simple international agreements. Scholars in international trade contend that one of the initial IIAs in the form of BITs concluded during the post-Cold War era was the bilateral air transport agreement, modelled after the original agreement between the UK and the US signed in Bermuda in 1946 (Elkins, Guzman and Simmons, 2006). This international agreement established a precedent for signing BITs. In addition, Switzerland signed and ratified a BIT with Niger in 1962, which is still in force. As Kishoiyian (1993) observes, the UK–Singapore BIT of 1975 highlighted investment terms covering the following key areas:

- Movable and immovable property and property rights such as mortgages, liens and pledges
- Shares, stocks and debentures in companies, as well as other interests in companies
- Claims to money or to any other performance under contracts with a financial value
- Intellectual property rights and goodwill
- Business concessions, including concessions relating to natural resources

The global landscape of investment regimes in the post-Cold War era is characterised by the proliferation of BITs and related trade agreements. Developing states are under pressure to attract highly mobile international capital and adopt policies to increase their relative attractiveness for FDI (Freeman, 2009).

Since the end of the Cold War, global FDI stock increased more than 500% since the mid-1990s from US\$341 billion to US\$1.746 billion (UNCTAD: 2014). This suggests that countries are increasingly becoming interdependent, relying on regional and global value chains. Okeke (2021) notes that the history of BITs is deeply rooted in the politics of decolonisation. As has been shown, newly decolonised African states joined objections to the principles developed by capital-exporting countries assigning them sovereignty over natural resources through the adoption of the United Nations Charter of Economic Rights and Duties of States. Article 2(2)(c) of the charter states:

Each state has the right to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the state adopting such measures, taking into account its relevant laws and regulations and all circumstances that the state considers pertinent. In any case, where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing state and by its tribunals, unless it is freely and mutually agreed by all states concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

In this regard, the concept of sovereignty gave nation states the legal status and authority to determine and exercise their rights to forge relations with each other. Discussions on the supremacy of sovereignty in IR have highlighted four characteristics (Jackson, 2008):

- 1) Supreme political authority and monopoly over the domestic affairs in the state's territory
- 2) The capacity to regulate movement across its borders
- 3) Freedom of deciding foreign policies, and
- 4) Freedom from external intervention.

In view of these characteristics of sovereignty, the United Nations Charter of Economic Rights and Duties of States reiterates the rights of decolonised states to expropriate and pay appropriate compensation in accordance with their laws and settlement of disputes through their national courts. In addition, the idea of an NIEO emerged in UNGA at its 6th Session in 1974. The NIEO, which comprises LDCs, advocated for the improvement of international trade and committed itself to the following objective:

To work urgently for the establishment of a new international economic order based on equity, sovereignty equality, common interest and cooperation among all states, irrespective of their economic and social systems, which shall correct inequalities and redress existing injustices, make it possible to eliminate the widening gap between the developed and developing countries and ensure steadily accentuating economic and social development and peace and justice for present and future generations.

While the NIEO affirmed developing countries' sovereignty over their natural resources and supported their approach to expropriate investments. Even today, the nature of BITs is characterised by the North–South dialogue.

In assessing the relationship between national interests and IIRs, Freeman (2009) argues that in order to secure FDI, developing countries pursued two strategies. The first strategy was domestically oriented. Developing countries' domestic focus was oriented towards liberalising their regulatory regimes and policies governing FDI. The strategy included providing tax subsidies to foreign investors as well as improving domestic infrastructure.

The second strategy was oriented towards international appeasement. This was reflected through signing treaties, which committed and obliged host countries to respect and protect the rights of foreign investors (Freeman, 2009). Such practice became the norm in IIAs as a basis for developing countries to receive foreign investment. Thus, it is not surprising that investment treaties were modelled according to the traditional North–South BIT, which disproportionately protected the interests of the more powerful signatories. Over the past six decades, developing countries signed investment treaty regimes even if they offered negative net benefits and the treaty was often imposed on them (Krasner, 1999).

3.4.4 Proliferation of investment treaties in the 1990s: Implications for contemporary IIAs

International law, rules, norms, principles and provisions regulating the relationship between capital-exporting countries and capital-importing countries resulted in what become known as an investment treaty regime. There is consensus in both the literature on the IPE and international law that protecting foreign investment against the host

country's actions is the main objective or purpose of investment treaties (Garcia-Bolivar, 2004; Jandhyala, 2011). This led to a trend of what Lin (2019) calls “treatification” in the 1990s, which witnessed the proliferation of treaties (including BITs) at an exponential rate. According to UNCTAD (1999), the number of BITs increased from 385 at the end of 1980s to 1 857 at the end of the 1990s.

Consequently, the number of BITs concluded by developing countries and Central and Eastern European countries rose from 63 at the end of the 1980s to 833 at the end of 1990s. Thus, the proliferation of investment treaties in the 1990s was characterised by the following factors:

- The resurgence of market-related policies through neoliberal ideologies (Washington Consensus)
- The collapse of communist regimes, and
- Political risk and uncertainty in emerging markets.

During this time, developing countries experienced a transformation of their political structure, ideologies and market dynamics. Given the nature of this transformation, negotiating BITs symbolise their commitment to creating an investment-friendly environment.

This chapter has set the scene by analysing state and institutions' behaviour in relation to trade and investment. The IIR is evolving and, just like the broader global system to which it belongs, it has faced major challenges. Among the challenges that will be reflected on are institutional and structural concerns regarding how BITs have been written, enforced and imposed on developing countries prior to the reform of the IIR.

3.5 Conclusion

In mapping the global landscape of international investment treaties, this chapter critically assessed standard treaty practice, traced the history and evolution of BITs, explained the proliferation of BITs and reasons countries signed BITs, reflected on the incremental shift towards South–South BIT models, which have and continue to shape the governance and treaty practice of international investment rulemaking. This chapter shed light on the history of IIAs, from the gunboat era to the contemporary period.

When tracing the history of IIAs, Vandevelde (2009) considers three separate historical periods. The first included the colonial era, which began in the late eighteenth century and continued until the end of the WWII. The second was the post-colonial era, which began at the end of WWII and continued to approximately 1990, with the collapse of the Soviet Union. The final period is the contemporary era, which began in 1990 and continues.

The waves of BITs are summarised in distinctive periods: first generation (1959–1989), second generation (1990–2000), third generation (2001–2010) and fourth generation (2011–2021 and beyond). These periods are considered practical in order to make sense of the BIT phenomenon and suggest the future and lessons learned from the historical and institutional tradition of the IIA universe. Colander (2014) points out, “Policy search requires a practical sense of real-world institutions, a comprehensive knowledge of past literature, familiarity with history, and a well-tuned sense of nuance”. Thus, efforts to reform the international investment agreement (IIA) regime will continue beyond this study.

CHAPTER 4

GLOBAL DISCOURSE AND THEORETICAL PERSPECTIVES ON BITS

States are not benevolent actors; rather they grant enforceable rights to investors as third parties in order to effectuate their own goals. Recognising this requires us to rethink traditional accounts of the two main goals of investment treaties: investor protection and the depoliticisation of investment disputes.

– Anthea Roberts (2015)

4.1 Introduction

There is an assumption that BITs are linear and designed for benevolent reasons. The reality is that BITs present vertical and horizontal challenges for both state–state relationships and state–investor relationships, including residual issues emanating from past treaty practice. Contrary to popular belief, risk-averse investors thrive in a climate of volatility, uncertainty and unpredictability. Thus, Roberts (2015) contends that investment treaties should be reconceptualised as triangular treaties and such triangular frameworks must draw on principles of public international law, domestic contract law and public law in a way that captures the unique, hybrid nature of investment treaties. In the following sections, the global investment discourse is assessed by applying various theoretical frameworks and analytical tools.

Consequently, there can be no one-size-fits-all approach, as analysing and interpreting BITs are complex and require understanding the behaviour of actors, often manifesting through inter-state and investor–state relations, which are frequently compounded by questions related to acrimonious relations between investors and home countries and protocols governing investment treaty practice.

4.2 Substantive and procedural provisions of BITs

A substantive question that has created much controversy in the BIT universe is whether the establishment of a legal mechanism for foreign investment protection is an end in itself. Mbengue and Schacherer (2017) refer to the continent-wide reform process as the “Africanisation of international investment law”. For Perrone (2013), investment treaties present a Grand Bargain according to which most host countries make a promise to protect capital in return for the prospect of more capital in the future. While there are different normative views on IIAs and BITs, Guzman (1998,) claims that BITs have become the dominant international vehicle through which North–South investments are protected from the behaviour of the host country. When tracing the popularity of BITs, Perrone (2013) claims that there have been many calls for the calibration and reconsideration of the purpose of the IIR. Such efforts are worthwhile in that the literature examining the IIR as a legal regime that fulfils essential constructional property rights requires the substantiation and enforcement of property rights.

The standard treaty practice requires each BIT to be preceded with a preamble, where contracting parties should state their objectives and intentions when signing an international agreement. As stipulated in Article 31 of the VCLT, the preamble is relevant for the interpretation of the treaty. Thus, the language used in the preamble ought to be simple, specific and articulate a clear policy position. From a political perspective and foreign policy analysis, a preamble should contain unambiguous messages from the government to both national and international stakeholders.

Put differently, when signing a BIT, contracting parties need to ensure that the preamble is consistent with the substantive provisions of the BIT. Clarity of thought and simplicity

of language, particularly in the substantive provisions, should be used to ensure that the objectives of investment promotion and protection is not pursued at the expense of other key public policy goals, such as the protection of health, safety, the environment, and the promotion of internationally recognised labour and human rights. For example, most recent BIT preambles focus strategically on fostering economic cooperation among contracting parties and promoting favourable conditions for reciprocal investments. A typical example of a preamble of a BIT (between Mongolia and Singapore, signed in 1995) stated the following:

DESIRING to create favourable conditions for greater economic co-operation between them and in particular for investments by nationals and companies of one State in the territory of the other State based on principles of equality and mutual benefit;

RECOGNIZING, that the encouragement and reciprocal protection of such investments will be conducive to stimulating business imitative and increasing prosperity in both States.

Various approaches have been adopted by both developed and developing countries in relation to the substantive and procedural treaty provisions of BITs. The OECD (2014) identifies key channels for influencing treaty interpretations, which include the following:

- Careful crafting of treaties.
- Documenting the intent of treaty parties prior to adopting treaties.
- Using various tools, for influencing interpretations after the investment treaty has been adopted.

- In cases where more substantial adjustments appear necessary, amendment or replacement of the treaty should be considered.

Investment law and treaty practice are characterised by the sharing of responsibilities for treaty interpretations between governments, which provide guidance for interpretation on behalf of their citizens – and arbitrators, which have received delegated authority to interpret treaties (Gordon and Pohl, 2015). However, it cannot be taken as a given that the sharing of roles and responsibilities between states, as provided by the interpretation of international law, has been a smooth process. Treaty practice dictates that state parties or signatories to a treaty should comply and commit to the agreement, failing which there will be far-reaching implications for public policy, fiscal constraints, and a direct impact on the policy-making process in the short to medium term.

By design, investment treaties tend to operate on the principle of lock-in, which is the legal process that ensures treaty partners accomplish their commitments and obligations to the extent that the treaty remains in effect for as long as possible. According to UNCTAD (2005), the signing of a BIT signals that a country wishes to provide a stable, transparent and predictable environment for investment to thrive. It is worth noting that while signing a treaty is signalling, enforcing is another matter altogether. This suggests that the longer the BIT remains unratified, the weaker the signal becomes.

While treaty practice is binding, there has been significant changes in international law and public-policymaking, which has gone against legal convention and treaty practice. Roberts (2010) argues that countries will now have greater incentives to demand an effective voice when exit options are limited.

Table 7: Options for states to exit and voice their concerns in investment treaty practice

EXIT	VOICE
Unilateral denunciation or withdrawal from treaties	Clear treaty drafting
Termination of treaties by mutual agreement of treaty partners	Joint or unilateral instrument clarifying the intent of treaty parties
	Pleadings filed by respondent governments for ISDS cases
	Other evidence of state practice
	Authoritative interpretations issued by treaty partners
	Treaty amendment
	Treaty replacement
	Influencing the broader legal framework for arbitration
	Withdrawal from institutions or mechanisms associated with treaties

Source: OECD (2014)

However, the degree and magnitude to which individual countries express the option of voice and exit in treaty practice varies significantly. The OECD (2014) conducted a survey of 1 896 IIAs in a sample of countries that came into force since 1959. The survey showed that at least 170 treaties (9% of the sub-sample) had been amended, complemented after the signature by protocol, replaced, denounced or ended by mutual agreement (OECD, 2014). The exit and voice option available to states brought significant changes in treaty practice.

According to Alschner and Skougaverskiy (2016), the BIT universe is split into older, short and shallow agreements that focus on investment protection only and newer, comprehensive and complex ones that treat investment in a wider policy context.

Cho and Kurtz (2017) acknowledge that the creation of the WTO at the end of the Uruguay Round operated as a “paradigm shift”, which manifested in the drafting of new IIAs that are increasingly accommodative of public interest. Due to the significant policy change, an emerging trend developed where treaty termination became the norm. Three countries from the Global South (Bolivia, India and South Africa) declared their intention to terminate their North–South BIT model. As such, these countries became pioneers in influencing the policy shift towards terminating BITs since 2009. It is anticipated that this will have spill-over effects and spread throughout the Global South.

South Africa’s influence in reviewing BITs and treaty practice has spread to sub-regional reviews, such as by COMESA, ECOWAS and SADC. These developments bear testimony that the current policy shift is real and will continue to shape discourse on the future of BITs.

South Africa, as a disruptor and pioneer, advocates for more comprehensive and multilateral treaties in an attempt to strike a balance between protecting investments abroad and allowing the host state to regulate policy in the public interest. Terminating BITs provides domestic safeguards and a policy space allowing host countries to implement policies that address domestic needs such as climate change and sustainability. In the main, a theoretical discourse has ensued between the rational choice and legalisation schools of thought on shaping or reimagining the design of future BITs.

4.3 Application of philosophical perspectives on the institutional reform of BITs

In order to provide ease of reference on the application of various theoretical frameworks or perspectives, various doctrines or worldviews are considered appropriate in explaining rules, norms and standards governing the relationship between the host country and foreign investors. Given that this research assesses the policy shift regarding BITs and institutional reforms, it is necessary to apply appropriate philosophical and theoretical perspectives to understand the phenomenon under investigation. In that regard, evolutionary and historical institutional theoretical frameworks, rationale choice and disruptive innovation are used to develop a better understanding of how BITs have evolved and what future direction they are likely to take.

4.3.1 Evolutionary institutionalism and historical institutional perspectives

Kapeller and Scholz-Wackerle (2016) assert that while the evolutionary political economy is still a developing research area, it should be credited for asking critical questions about power, knowledge and learning. Thus, institutions are considered to be social learning environments that change the knowledge base of society (Scholz-Wackerle, 2013).

As is shown throughout this study, BITs and treaty practice are embedded in the dynamics of power, knowledge and learning. Thus, tracing the evolution of BITs shows how developed countries used their power through gunboat diplomacy to pursue their national interests. Worth noting is Kapeller and Scholz-Wackerle's (2016) view that the evolutionary institutionalist perspective concerns two significant and critical questions: (i) How best should society assess change and novelty and (ii) how should institutions influence the historical course of events, including whether organised political intervention

is suitable for improving social development. These authors state: “Institutions evolve as social interventions are sustained over time and thereby acquire social legitimacy, which may guide and coordinate the behaviour of individual actors (states)” (Kapeller and Scholz-Wackerle, 2016). On the asymmetric nature of BITs, they surmise that power relations are not only be viewed as constitutive of capitalist development as a whole but also as determining future historical development.

The theory of change has gained traction in policy discourse, to the extent that scholars made claims that transformation in “patrimonial capitalism” represents a desirable path of development (Kapeller and Scholz-Wackerle, 2016). The theoretical analysis of the institutionalist perspective is derived from the earlier research work of Veblen, Hamilton, Clark, Commons and Witte, who played a significant role in the social control of business (Sturgeon, 2016).

Sturgeon (2016) argues that the institutional framework is an opportunity to move away from ideas of the past to ideas lodged in an evolutionary perspective. According to Sturgeon (2016), the institutionalist perspective is significant as an analytical framework because it shows which patterns of the past were responsible for the maladjustment of the present, thereby helping to reconstruct the values of society, which make it possible for ideals as well as facts to operate. The table below shows selected cases demonstrating how the US institutionalised laws to form the regulatory and legal frameworks for policymaking in the public interest.

Table 8: Selected cases of US regulatory and legal frameworks

NAME OF LAW	PURPOSE	YEAR
Interstate Commerce Commission	Public regulation	1887
Sherman Anti-Trust Act	Anti-trust/pro-competition	1890
Federal Reserve Bank	Banking regulation	1913
Federal Trade Commission Act	Anti-trust/pro-competition	1914
Securities Act	Financial regulation	1933
Dodd-Frank Wall Street Reform and Consumer Protection Act	Financial regulation	2010

Source: Sturgeon (2016)

The table above shows that the US has a long history of policymaking in the public interest, from both the evolutionary institutional perspective and the historical institutionalism perspective. Thus, the lessons learned from the US experience show that the country has been persistent and intentional in leveraging comparative advantage compared to developing countries. In its efforts to strengthen economic cooperation and investment between the US and Africa the Trump Administration has recently demonstrated a policy shift. This policy shift is intended to move away from the traditional aid approach to a policy based on promoting trade and investment. In the end, the US is positioning itself as a credible alternative to the growing influence of China and Russia in Africa through BRICS and related strategic partnerships (win-win solutions).

From a historical and institutional perspective, treaty practice and rules governing economic activities evolve. The lesson for developing countries is to ensure that legal instruments governing trade and investment are updated, otherwise countries run the risk of becoming rule-takers or even continuing the asymmetric relations of the traditional

North–South BIT models that are one directional and keep developing countries at the periphery of global trade.

From the perspective of an institutional framework, BITs are characterised by a means–end continuum, where the signing or ratification of a BIT as a means for investment protection will have ramifications for the end, which implies that commitment or non-commitment to the provisions of the BIT will have consequences for the host country.

On institutional adjustment, Sturgeon (2016) argues that the institutional perspective is valuable in identifying problems and suggesting adjustment. In this case, the tools of institutional economists are applied to understand, liberate, direct and control the evolutionary and dynamic forces of the economy. In explaining the policy shift from North–South to South–South investment cooperation, Sturgeon (2016) argues that an institutional perspective would recognise that change, progress and evolution are at the heart of any conception of planning, and that human beings (rational state actors and policymakers) can enrich their lives by using experimental methods.

Rudd (2016) warns: “History teaches us that the concerted efforts of states that are party to the creation of an agreed order are required to continue to invest in its future”. Similar to BIT and treaty practice, an evolutionary institutional framework consists of societal rules, norms and values. Kapeller and Scholz-Wackerle (2016) argue that the first principle that the evolutionary political economy addresses is that of “history matters”. As realist and pragmatists in analytical frameworks, evolutionary institutionalists hold the view that historical circumstances determine which economic mechanisms eventually shape production, distribution, technology and overall economic development (Kapeller and Scholz-Wackerle, 2016).

Charles Darwin (who was concerned with ecological systems and survival of species) developed evolutionary theory, resulting in what is known in science as “survival of the fittest”. As Darwin would have said, “It is not the biggest beasts that survive, but rather those that can adapt” (Kemp, 2022). Hayden (2016) argues that although Darwin’s evolutionary theory provided an important explanation for the evolution of species, one should not expect a theory about such a minute part of a whole to be a paradigm for the analysis of change. Despite its shortcomings and limitations, evolutionary theory has advanced as a political thought.

Kapeller and Scholz-Wackerle (2016) defend it by arguing, “Science is still part of a social life and any generation of scientific knowledge is informed by the scientist’s habits, practices and location in society”. Schwardt *et al.* (2016) state that an evolutionary framework allows economic issues to be analysed, without being tied to a static foundation but rather acknowledging change as an integral aspect of modern economies.

In addition, the foundation and origin of this analytical framework is a combination of the evolutionary and institutional perspectives, with institutions emerging from individual interactions and becoming habituated as correlated patterns of thought (Veblen, 2010; Bush, 1987; Elsner, 2012). Similar to preceding theories, evolutionary theory has its own limitations and challenges. For instance, Kapeller and Scholz-Wackerle (2016) note that as any scientific endeavour, the evolutionary political economy faces the classic problem that it could possibly say something about how to reach certain aims but, at the same time, is unable to indicate which aims are worth pursuing.

As has been demonstrated in the preceding chapters, the IIR is governed by rules, norms and principles. According to Elsner (2012), a crucial aspect of institutions is that they

depend on individual behaviour and, at the same time, affect individual decision making. Using an institutional perspective, Schwardt *et al.* (2016) allude to the fact that the physical character of investment goods does not change, but their projected revenue streams do and influence investment behaviour as well as the use of existing structures.

As the name suggests, the analysis of an institutionalism framework lies in understanding institutions. Furtenberg (2016) argues that the three most important factors that are easily identifiable in evolutionary institutionalism are variation, selection and retention. In its purest form, evolutionary institutionalism assumes too much objective/rational decision-making ability and that actors have information about a choice scenario. In simple terms, this implies survival of the fittest and adjusting to change in society.

The application of evolutionary institutionalism in IR and political science is based on the assumption that institutions are subject to change and that change occurs over time. According to DiMaggio (1983) and Powell (1991), the neo-institutional theory provides a different lens to view the relationship between organisations, as it highlights that beyond the quest for efficiency and effectiveness, organisations seek legitimacy, which induces them to conform to different isomorphic pressures.

Another paradigm in evolutionary political economy is the historical institutionalism perspective. This analytical framework applies rules-based norms, with actors having strategies-based norms restricted through constraining institutions (Furtenberg, 2016). Furthermore, historical institutionalism takes formal political, cultural and social restrictions seriously. For instance, polity, constitutions, legislature, courts and governments usually represent formal institutions, while informal rules and procedures

are often embodied in socioeconomic norms and values, followed by negotiated agreements.

As a way of analysing the IIR, it was considered prudent to explore how institutions and policies change over time. Within the context of historical institutionalism, there is a broader question regarding to what extent Africa features as a unit in analysing IR. In responding to this question, Isike (2023) advances the notion of an AIR scholarship, suggesting that Africa is a worthwhile location of experiences, realities, dynamics and activities that give rise to theorising about IR.

Tieku (2022) theorises that AIR scholars can build on emerging ideas and scholarship about decoloniality, relationality and solidarity to develop theoretical frameworks to capture the nuances of life in Africa and the world. In an effort to contextualise AIR scholarship based on historical institutionalism, Isike (2023) advances AIR scholarship that is embedded in theories derived from African experiences based on methodologies centred on “Africa” as the subject (means to an end). According to Isike *et al.* (2023), the basic outline of AIR scholarship is the reflection of three African perspectives relevant to explaining state behaviour:

- 1) Group hegemonic leadership, which explains regional hegemonic behaviour of African states such as Nigeria and South Africa
- 2) African hybrid regionalism, and
- 3) Exploring bureaucratic acquiescence as an institutional strategy of the AU.

In an effort to apply AIR scholarship and group hegemonic leadership as enunciated by Isike (2023), the study shows that South Africa provided leadership regarding the SADC BIT model through a subsequent review of trade and investment policies, which was used

as a template by other countries across the region, including Namibia and Tanzania. The description of a regional power includes the role of a regional source of moral authority, promoter of rules and norms, in regional politics that are acceptable to all the countries in the region (Flemes, 2007).

Schoeman (2003) and Cox (1996) state that to become a regional power, a country ought to meet the following criteria or preconditions:

- Have the capacity to play a stabilising role in the region
- Be willing to play a stabilising role
- Neighbours accepting it playing the role, and
- Supporting the objective of international peace and security while not seeking to impose an ideologically pre-conceived vision of an ideal world.

Put differently, evolutionary institutional and historical institutional frameworks are valuable in analysing systems that do not simply move from equilibrium to equilibrium in the wake of shocks, but systems where factors can produce dynamics of change endogenously (Schwardt, 2016). Consequently, evolutionary and institutional frameworks are used as analytical tools to share perspectives and trace the evolution of BITs globally, as well as to unpack policy shifts in the IIR and the implications for South Africa and the other countries of the Global South.

According to Steinmo (2001), proponents of the neo-institutional theory argue that the prevailing institutional environment is a key determinant of the choices and behaviour of political actors, shaping both process and outcomes. From the historical institutional perspective, Leipziger and Dodev (2016) argue that the exponential rise in economic

growth since the Second Industrial Revolution and the massive increase in living standards serve as a historical testament to the importance of technological innovation.

Against this background, evolutionary institutionalism and historical institutionalism are analytical frameworks relevant in the IPE to explain change and continuity in society over time and space.

4.3.2 Rational choice theory perspective

From the rational choice perspective, the political economy of trade and investment is comprised of various institutions and individual actors including states, policy makers, interest groups, and MNC. Essentially, all these actors behave rationally and expect policy outcomes to be in their favour. As Van Aaken and Kurtz (2019) observe, each actor has asymmetrical attitudes towards gains and losses. At a theoretical level, the rational choice is based on the assumption that state actors have a fixed set of preferences and act rationally in order to maximise the attainment of their preferences and interests. As Abbott and Snidal (2000) point out, rational states “choose to order their relations through international law and design treaties and other legal arrangements to solve specific substantive and political problems”. The best starting point is to provide the context of and a philosophical perspective on why governments sign BITs. Essentially, state actors – like human beings’ existence and survival – are inherently inspired by survival instinct and the desire for prosperity and maximisation of national economic prosperity.

Salucuse (2010) argues that today’s network of investment treaties adds to an emerging global regime of international investment. IR scholars define an international regime as principles, norms, rules, and decision-making procedures around which actors’

expectations converge in a given area of IR" (Krasner, 2009; Salacuse, 2010a; Wells, 2010). However, the story does not end there. Wells (2010:43) identify criteria to qualify as a regime, including:

- Constrain and regularise the behaviour of participants (actors).
- Look at which issues should be affected to the extent that protagonists move on and off agenda.
- Determine which activities are legitimised or condemned.
- Influence whether, when and how conflicts are resolved.

While there are additional qualifying criteria, there is no consensus among IR scholars regarding a common conception of "regime" despite investment rules associated with the WTO or investment flows from rich countries (Wells, 2010:43). Wells (2010) cautions that the BIT debate is further convoluted by a lack of consensus on language usage in treaty practice.

Language differs considerably from treaty to treaty and only limited common interpretation has emerged from arbitration tribunals. It becomes difficult to reach consensus, as the US still threatens to cut off aid, withdraw its generalised system of preferences and vote against multilateral loans for countries that take US property without prompt and adequate compensation. Wells (2010) identifies other contentious issues in relation to the IIR in the literature:

- The scope of investment covered by the regime has frequently been stretched beyond what many host countries probably intended when they signed investment treaties.

- The absence of significant escape clauses and safeguards that have crucial roles in making other international regimes politically acceptable and long-lived.
- The unusual structure makes it extremely difficult for concerned parties to effect constructive change.

Waldrons (2012) states, “The connection established between private property and the Rule of Law is advanced as a major plank in state-building so that foreign investors can have some advanced assurance of the amount of wealth they can extract from a developing economy”. Investment discourse dictates that managing relations between the host country and the foreign investor requires policy certainty and the application of the rule of law.

4.3.3 Disruptive innovation perspective

According to Christenson (1997), disruptive innovation refers to innovation that creates a new market, by applying a different set of values, which ultimately and unexpectedly overtakes an existing market. Essentially, the DIT is a framework or model of social change adopted from the economic management discipline. In a different setting, Kaplan (1977) proposes a transdisciplinary approach to research:

The disruption of the environment and its protection raise problems of such complexity that no single academic discipline within its present boundaries can hope to make significant contributions to their solution without at least a basic familiarity with the knowledge of other relevant social and natural sciences. For this reason, it is necessary that social and natural scientists concerned with environmental problems and policies engage in transdisciplinary research.

When applying this theoretical framework to this study, I am of the opinion that by withdrawing from the North–South BIT model, South Africa became a game changer and disrupter in treaty practice. The bold step that the country took when terminating the BITs and withdrawing from ISDS is considered a disruptive innovative approach in policymaking and treatymaking. In taking such a risky approach, South Africa anticipated and witnessed global backlash from OECD countries, the UK and the US, as well as threats of possible investment withdrawal.

Disruption of policymaking is also related to what the McKinsey Global Institute has identified as key areas of disruptive innovative technologies, which are considered to have the greatest economic impact and could cause disruption in 2025 and beyond.

According to Manyika *et al.* (2013), the following are considered innovative disruptions:

- Mobile internet
- Internet of Things
- Automation of knowledge work (AI)
- Cloud technology
- Advanced robotics
- Autonomous and near autonomous vehicles
- Next generation genomics
- Energy storage
- 3D printing
- Advanced materials
- Advanced oil and gas exploration, and
- Renewable energy.

In reality, no country can claim to be immune and unaffected by the mega trends that are unprecedented and interrelated. The WEF highlighted similar issues during its annual investment summits (2020–2024). These disruptive innovation technologies are already part of investment for the future. Leipziger and Dodev (2016) observe that most advanced and emerging economies are dominated by sector employment and most new jobs are created in the service sector. It could therefore be argued that disruptive innovative technologies are here to stay, and therefore future investment agreements should embrace these disruptive innovations by embracing the digital economy and e-government. Leipziger and Dodev (2016) suggest that nations that will be able to cushion themselves best against the negative consequences of disruptive trends and facilitate adjustment are those that can handle the negative consequences of climate change and increasing income inequality. While disruptive trends bring positive innovations, the focus should also be on spill-over effects. Leipziger and Dodev (2016) identify inequality side-effects as follows:

- The growing gap between labour income and capital income.
- The growing gap between high earners and low earners.

Having identified inequality challenges, it is worth noting that the rising gap between labour and capital remains a challenge in many BITs signed across the world. Public-policy making in BITs and the related environment need to be agile and consider the impact of innovative disruptive innovations as well as linking future investment with climate-change resilience.

Thus, while embracing policy shift, RECs across the world should be cognisant that BIT models are not cast in stone but should have a future outlook geared towards promoting regional integration as well as effective collaboration between public and private investment.

4.4 International investment agreements and the rules-based system

As articulated in the previous sections (Chapters 2 and 3), scholarly work on the IIR and the history of a rules-based system provide divergent views, resulting in various discourses on the analysis of international investment law and treaty practice. Wu (2014) identifies the extent to which the international trade regime impacts international investment law, categorising it into four key areas: (i) the design and architecture of the investment regime, (ii) the patterns treaty formation, (iii) the substance of the investment treaty and (iv) treaty interpretation.

There is consensus in the literature that the IIR was designed to provide the most stringent and certain protection of foreign investment abroad by limiting governments in a predictable regulatory framework far into the future. The international trade and investment law regime has developed over time through formal treaties, agreements and the establishment of institutions. It has been argued that in countries where the instructions are inherently credible, BITs add no value because investors do not need a treaty to be convinced to invest (Daele, 2013; Daele, 2014). However, Bandera (2009) argues that it was found that BITs were of much value to states with a reputation of being corrupt and lacking law and order.

The nature of the IIR dictates that non-compliance by a host country has serious repercussions, including tarnishing its image and international reputation in the eyes of potential investors. Thus, Guzman and Simmons (2006) caution that clear violation of treaties would result in much reputational costs for the host country.

The scope of the issues covered by investment-related agreements have been expanding in both theory and practice. To understand the BIT ecosystem and its complexity, Sheffer (2011) identifies five major actors on the international investment stage:

- 1) Host state – a developing country that imports more FDI
- 2) Home state – a developed country that exports more FDI and a country of corporate citizenship for the investing MNC
- 3) Investors – the MNCs that are corporate citizens of the home state and are making investments in the host state
- 4) Impacted non-state actors – groups of people or citizens affected by the actions or demands of the investing MNCs, and
- 5) Arbitration tribunals – the dispute resolution mechanisms for disputes arising under a BIT.

All these role-players are impacted by the nature of the BIT that has been signed and therefore are interested parties as regards the rules-based system of the IIR. Given the traditional nature of North–South BITs, the EU (whose members are party to a plethora of BITs) recently took steps to solidify its members' investment policies (Maes, 2010). An example of a rules-based system of an IIR is taken from the US 2004 BIT model, which indicates how BITs often confer foreign investors' rights and protection as follows:

Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

Despite having a rules-based system, worth noting is the noticeable increase in the number of disputes between the host state and the home state, particularly due to real or perceived threats of nationalisation and appropriation policies adopted by successive governments. According to UNCTAD (2016), 70 new ISDS claims were against various nations in 2015 alone, making it the year with the most disputes reported.

Interestingly, Gal-Or (2013) notes that the global investment regime is riddled with a perpetual search for coherence and consistency. Most BITs have a dispute resolution clause that constitutes a unilateral offer to settle disputes through arbitration, extended to the investor by the state, and which the investor accepts by initiating arbitration under the treaty (Gal-Or, 2013). A variety of arbitration institutions have been established to resolve disputes arising from BITs. The two popular known institutions are the International Centre for the Settlement of Investment Disputes between States and Nationals of Other States and the United Nations Commission on International Trade Law.

According to Newcombe and Paradell (2009), the regulation of international investment has deep roots in the development of laws regarding the treatment and legal status of foreigners over the past centuries. A popular type of treaty governing international commerce was the TFCN, which introduced the investment protection function that dominated the post-WWII era, ultimately adopted into the BITs as we know them today.

Salacuse (2010a) argues that BITs have converged into a global regime for investment protection that is characterised by common structures, principles, norms, rules and decision-making processes. Other scholars have assessed that rules for the regulation of foreign investment and trade were once blended in a single instrument. Proponents of treaties argue that the formality of treaties and delegation of sovereignty to institutions have lead international law to what is commonly known as a rules-based international system that is different from the past system, which rested on diplomatic relations and decisions of nation states. However, Pohl, Mashigo and Nohen (2012) observe that investment treaties themselves have only rarely been found to contain any interpretive guidance for treaty users.

One of the many other challenges facing investment rulemaking involves the principle of transparency. The principle of transparency has been one of the obligations imposed on countries to exchange information. This requirement and obligation in treaty practice was considered significant on the basis of ensuring that a rules-based system is open, fair and transparent to all the signatories to an investment treaty. A survey of transparency provisions by the OECD (2004) indicated that new approaches deemed this to be a reciprocal obligation involving host countries and foreign investors. Put differently, transparency obligations are no longer exclusively geared towards fostering exchange of information; rather, they relate to transparency in the domestic rulemaking process, aimed at enabling interested investors and other stakeholders to participate in the process (OECD, 2004).

Unlike in the past, the transparency of laws and other governmental measures can now be addressed through practical measures. Such measures include publication of all

relevant legislation in accordance with the host country's legal framework. Article 3 of the BIT between Finland and Azerbaijan (2003) on transparency provision is a case in point:

Each Contracting Party shall ensure that its laws, regulations, procedures, administrative rulings and judicial decisions of general applications, as well as international agreements after their entry into force, which may affect the investments of investors of the other Contracting Party in its territory, are promptly publishes, or otherwise made publicly available.

While there are calls for the inclusion of transparency provisions in BITs between the host country and the investor, equally there are demands at a global level to extend this beyond the traditional notion of publication of laws and regulations. Interestingly, a shift away from traditional practice embraces transparency, which is increasingly being applied in rulemaking. Such development has resulted in using transparency as an instrument not only to promote due process but also to allow stakeholders to actively participate in the investment rule-making process.

Regarding the transparency provisions, the BIT between the US and Uruguay explicitly highlighted obligations on administrative procedures and the right to have an impartial review and appeal in respect of administrative decisions on investment-related matters.

In broad terms, treaty practice and investment rulemaking have gone through significant policy shifts, embracing principles of transparency to an extent unimaginable, from the time of the Westphalia Peace Treaty and the TFCNs.

4.5 Treaty practice and the search for a global investment regime

On international political theory, Cavallar (2023) argues that some historians, political scientists and sociologists have referred to the “Westphalia World Order”¹² as a proper description of the modern international society of sovereign and equal states, where order is established by a new European law of nations and the balance of power.

However, there are divergent views in the literature, with some scholars claiming that it is unclear whether the Peace of Westphalia started or even triggered anything close to a system (Duchhardt, 2014) and others arguing that a better term for or description of the current international order would be “the nineteenth-century inter-state system in transition”, divided into four different schools:

- 1) The imperialist school
- 2) The Christian-commonwealth school
- 3) The society-of-state school, and
- 4) The cosmopolitan school.

(Cavallar 2023)

Since the signing of the Westphalia Peace Treaty in 1648, treaty practice and international law have undergone significant changes or paradigm shifts. Given the divergent views on the matter, Gross (1948) provides a counter-narrative:

Instead of creating a society of states, the Peace of Westphalia, while paying lip service to the idea of a Christian commonwealth, merely ushers in the era of

¹² According to Cavallar (2023), the Westphalia World Order was founded with the Peace of Westphalia, a series of peace treaties signed in Osnabruck and Munster in 1648, thus ending the Thirty Years’ War.

sovereign absolutist states, which recognized no superior authority. In this era, the liberty of states becomes increasingly incompatible with the concept of the international community, governed by international law independent of the will of states.

A search for a common global investment regime continues, and changes brought by the globalisation technological advances of the post-Cold War era and post-Covid-19 innovations challenge old and traditional treaty practice. For instance, the influence and power of MNCs, which often have capital budgets superseding those of developing economies, challenge the very notion of the sovereignty of states, suggesting that change is imminent because IR and economic diplomacy are no longer only the purview of states but also of non-state actors that have a significant role to play in shaping world affairs.

In providing the political economy and a historical perspective on the IIR and treaty practice, Broude (2013) notes that the goals of trade law and investment law – with all their nuances – are strikingly similar and ultimately concerned with the facilitation of economic efficiency through international economic activity. Sheffer (2011) argues that the frenetic rate of globalisation has increased the number of MNCs, consequently the frequency of FDI and the continuous use of BITs. It is thus not surprising that over the past five decades or so (1959–2024), developing countries entered the international investment environment with the hope of attracting FDI.

Logically, BITs were designed to encourage FDI flow from capital-exporting developed countries to capital-importing developing countries, resulting in asymmetric or unequal relationships. UNCTAD (2015) reports show that by 2015 almost 600 BITs were ratified in East Asia and the Pacific, followed by the Middle East and North Africa with 500; the

lowest number of BITs were ratified in South Asia and North America. Peterson (2003) argues that BITs are considered to be a double-edge sword. On the one hand, they attract investment; on the other hand, they constrain government policymaking. Historically, treaties were used as instruments of international law to regulate the governance of institutions and state behaviour.

In the absence of a global investment treaty, most international laws governing the relationship between host countries and international investors have been developed at a bilateral level (UNCTAD, 2007). Treaties establishing minimum guarantees regarding the treatment of foreign investment have existed for more than two centuries (UNCTAD, 2007). As UNCTAD (2007) studies show, in the latter half of the twentieth century, BITs emerged as the first international agreements exclusively focusing on the treatment of foreign investment.

Given that BITs are legal and binding agreements, the contracting parties commit themselves to be governed by the rules, norms, principles, standards and regulations of treaty practice. Most of the traditional BITs concluded since the 1960s were designed with similar structure, content and treaty provisions. At best, BITs included the principle of full protection of investors as an international minimum standard of treaty practice.

However, when looking closely at an individual country and the details of each treaty, one would notice distinct and distinguishing approaches to legal provisions. While BITs had a relatively uniform standard that had not changed significantly over the early period, globalisation and democratisation of the former colonies brought freedom and human rights in treaty practice. As a result, there has been convergence towards implementing some innovations in BIT practice rooted in human rights and sustainable development.

Largely, a growing number of investment disputes referred for arbitration under ISDS has led to significant changes. These include the introduction of national treatment and investor–state or state–state dispute settlement mechanisms in the early 1990s.

Since 1995, only six cases of investor–state dispute cases were reported. However, at the end of 2005, the number was almost 38 times higher, with an exponential increase to 226 cases (UNCTAD, 2005). This development contributed immensely to the demand by developing countries seeking to clarify their individual BIT provisions with a view to reducing the risk of future state–investor disputes.

The growing number of free-trade agreements early in the 1990s brought a realisation among developing countries that there was a need to review treaties on economic cooperation containing investment provisions. According to UNCTAD's (2005) studies, since 2001 the number of BITs concluded annually showed a constant downward trend, suggesting a shift towards new agreements, which were not only limited to investment issues but were extended to deal with related matters such as trade, services, competition, intellectual property rights and industrial policy.

Given the exponential growth and the increasing number of BITs concluded annually between developing countries, it became inevitable that the evolution of the BIT ecosystem based on North–South treaty practice is essentially shifting and evolving. With hindsight, a number of countries did not give in-depth consideration to the language and provisions adopted when they signed their BITs, and it became necessary to adjust treaty practice to suit their policy imperatives. Most BITs set initial validity periods that determine the period in which the treaty cannot be terminated unilaterally. Since the initial BIT signed in 1959, initial validity periods have locked treaty partners into treaty obligations for

extended periods, at most 15 to 20 years. Such treaty practice seems to have been designed to advance the treaty goal of providing a stable legal framework for the protection of investments (OECD, 2014).

Pohl, Mashigo and Nohen (2012) caution that treaties are often silent on substantive and procedural issues. There is a strong argument that treaty practice is made more complex due to the structure of investment treaty law, divergence and convergence of international law, and state behaviour. In simple terms, investment treaty jurisprudence can be hard to access and assess (Gordon and Pohl, 2015).

As a typical instrument of international law, the role of states in interpreting and influencing the outcomes of any investment treaty is considered the first line of defence and the most crucial part of treaty practice. However, some scholars question whether states have fully assumed their responsibilities in influencing treaty interpretation (Gordon and Pohl, 2015). This view is supported by Roberts (2010), who argues that tribunals' decisions can convey the impression of a closed-circuit feedback loop between tribunals and academics, unconstrained by the discipline of treaty parties' practice or expectations.

As indicated earlier, the Treaty of Westphalia represents a significant evolution of treaty practice, as it established norms and rules of IIAs as well as the operationalisation of sovereignty. In view of the looming policy shift, scholars of international law and the IPE interpret sovereignty according to two functional dimensions (Lin, 2019, Shaw, 2014). The one dimension is external sovereignty, which refers to the ability of a country to create relations with other countries. The other dimension is internal sovereignty, which means the country's ruling power over domestic affairs (Lin, 2019). This shows that international agreements define the boundaries of sovereignty on specific issues, while the conclusion

of international agreements outlines the relationship between the signatory countries (Lin: 2019). Thus, treaty practice involves written agreements with substantive and procedural provisions.

Chapter 5 provides a detailed analysis of substantial procedural provisions of BITs with a view to showing asymmetries in treaty practice, the future impact of investor–state disputes and the investment policy shift in different jurisdictions, including South Africa. Treaty practice requires that agreements between the signatory states on specific issues be recorded (Henkin, 1995).

As scholars and policy-makers look back over decades of treaty practice and investment rulemaking, there is consensus that some challenges remain (change and continuity debate), which requires ongoing regulatory reforms and further research. It is in this spirit that countries across the world are continuously, albeit through trial and error, reassessing and reviewing their existing and future international agreements in line with reality.

A common understanding of the benefits of signing international agreements should serve the interests of every country when it commits itself to treaty practice. In light of the economic, political, social, prudential and fiscal implications of entering into international agreements for extended periods, due consideration should be given to ensuring that transparency is achieved and multistakeholder consultations are done to incorporate lessons learned in investment treaty practice in the last six decades.

In amplifying the voice of the Global South, India's Prime Minister Narendra Modi articulated these sentiments at the G20 Summit in India in 2018: "We, the Global South,

have the largest stakes in the future. As the eight-decade old model of global governance slowly changes, we should try to shape the emerging order.” However, while India’s sentiments are noble and appeal to the Global South, due to its geopolitical and geostrategic interests, it has joined the Quadrilateral Security Dialogue (Quad),¹³ together with the US, Australia and Japan. Arguably, many countries of the Global South, across Asia Pacific, the Caribbean and Africa, are no longer passive participants on the world stage as they are acting independently of the influence of the East and West.

4.6 Selected cases and experiences of treaty practice

The general practice in international investment law suggests that African matters are an integral part of global investment regimes.

Table 9: Examples of treaties around the world

COMMON REFERENCE	FULL TITLE	AREA OF FOCUS
United Nations Charter	The United Nations Charter came into force on 24 October 1945.	International peace and security
AU Charter	The Constitutive Act of the African Union came into force on 26 May 2001.	Peace and sustainable development, self-determination
AAAA	The AAAA of the Third International Conference on Financing for Development came into force on 26 July 2015.	Financing sustainable development, developing sustainable finance
United Nations Anti-Corruption Convention	The United Nations Convention Against	Anti-corruption

¹³ The Quad is a grouping comprising Australia, India and the US. It was established in 2007 to discuss regional security issues.

	Corruption came into force on 14 December 2005.	
Sustainable Development Goals	Transforming Our World: The 2030 Agenda for Sustainable Development Goals came into force 25 September 2015	Climate change
AfCFTA	The African Continental Free Trade Area came into force on 30 May 2019.	Regional integration, continental unity and deepening economic ties
Economic Rights and Duties Charter	The United Nations Charter of Economic Rights and Duties of States was adopted by UNGA on 12 December 1974.	Fundamentals of international economic relations, economic rights and duties of states, and common responsibilities towards the international community

Source: Own construct

Furthermore, to address trade and investment-related issues, the United Nations adopted various resolutions and declarations, such as the 1974 General Resolution on the declaration for the NIEO. The most notable research on Africa's role in the reform of the IIR includes Elias' (1988) work on the general theoretical context of Africa's position in the development of international law. Adekele (2018) explores issues of policy, human rights and dispute settlement. Sauvant, Lisa and Sachs (2009) provide the best critique of the IIR by taking into account a public international law and public policy approach, which previous studies ignored.

From a doctrinal and theoretical perspective, these authors eloquently reflect on Africa's prison dilemma and predicament, conundrums and contradictions regarding general norms, and rules of investment treaty practice.

Mann (2003) argues that the investment regime is at a crossroads and it can either “crystalise as a new form of colonialism or evolve into a new field of global cooperation on development”.

On a similar theme, Friedman (2002) argues that direct colonial control was likely associated with cross-border investments whose rents were particularly easy to seize or control and whose protection did not require multilateral actors.

Gazinni (2017) argues that the dissatisfaction with traditional BITs has generated four types of reactions among African countries:

- 1) Reluctance to ratify BITs (in Africa, 25 BITs, including three between African countries, have entered into force since 2012)
- 2) Conclusion of facilitation agreements, which radically downgraded the substantive protection standards found in traditional BITs and do not provide for arbitration
- 3) Termination of BITs and adoption of investment legislation (examples of countries include South Africa, India and Indonesia).
- 4) Introduction of new models of BITs aimed at striking a better balance between private and public interest.

In assessing Africa’s role in BITs, Onditi *et al.* (2019) observe that Africa’s significance in the international system has been mostly determined by the following geopolitical and geostrategic factors:

- Strategic location
- Minerals and marine resources, and

- Ideological orientation.

While the continent is open to investment, Tandon (2015) cautions that FDI flows do not necessarily bring the benefits that they are purported and supposed to bring, such as efficiency of production or transfer of technology; if not careful, the very same FDI could kill local initiative and local enterprises. While acknowledging the need for caution, Tandon (2015) acknowledges that FDI does have a significant role, but its role must be carefully negotiated and its encumbrances as well as their conditionalities be thoroughly exposed and subjected to critical inquiry. It is thus inevitable that countries of the Global South are increasingly gaining influence in transforming the IIR.

In retrospect, descriptions of Africa often falls into two categories. The first category provides a pessimistic view, suggesting that there is something wrong with the continent and its leaders, by citing levels of corruption and poor infrastructure development. The second category provides an optimistic view of “Africa rising” and becoming the next frontier with potential for growth and development due to the youth bulge and discoveries of rare minerals and related opportunistic endeavours.

4.6.1 Vienna Convention on the Law of Treaties and its ratification

The approach taken in this study suggests that the rules in individual treaties need to be interpreted and analysed to ensure that there is clarity of thought and that both state parties comply and conform to treaty practice. The general rules contained in the VCLT stipulates that a treaty should be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in the context of its purpose (VCLT, Articles 31–33). In that regard, the executive authority of the state has the responsibility to ensure

that treaties are signed and ratified, and commitments fulfilled. According to UNCTAD (2005), treaties signed by the authority of the state have some legal effect.

Thus, Article 18 of the VCLT stipulates and obligates the executive authority not to defeat the purpose of a treaty prior to its entry into force (VCLT, 1969). Until the 1980s, at most 10 treaties were signed annually. Over time, the number of new treaties increased to about 100 per year. UNCTAD (2013) data shows that in 2012, nearly 3 000 BITs were signed but only 2 233 were ratified.

Worth noting is that Germany, China and Switzerland are the top-three countries with more than 100 ratified investment treaties (UNCTAD, 2013). Following ratification, the validity period of BIT ranges from 10 to 20 years. Lejour and Salfi (2016) note that about 80% of BITs are characterised by an “anytime termination stage”, whereby the treaty can be ceased at any time after its automatic renewal. While UNCTAD provides information about signed and ratified treaties (including BITs), at times countries do not inform UNCTAD directly if there is a new agreement or if a treaty has ceased to exist.

From a public international law perspective, it is common practice that countries that have signed treaties have the intention to rectify them; if not, they are expected to make some statements to the contrary. In view of such developments, the VCLT (1969) stipulates that a country is obliged to refrain from acts that would defeat the purpose of a treaty when:

- It has signed a treaty or has exchanged an instrument constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to a treaty.
- It has expressed its consent to be bound by the treaty pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

Historically, investment treaties regularly encode what Guzman (1998a) calls the Hull Rule, which requires “prompt, adequate and effective compensation” in the event that a host country expropriates a foreign investment belonging to a capital-importing country. Salacuse and Sullivan (2005a) state that investment treaties represent a Grand Bargain, according to which host countries make a promise to protect capital in return for the prospect of more capital in the future. In relation to BITs, a country’s signature is often considered to be sufficient to validate its intention to be bound by such a treaty.

Douglas (2003) summarises investment treaties as international instruments between states governed by the public international law of treaties. International investment law literature concurs that despite a few differences between the texts, these treaties constitute a regime with common “principles, norms, rules and decision-making procedures” (Krasner, 1983; Santiago, 2009).

4.6.2 Lagos Plan of Action

In the era of the Organisation of African Union (now the AU), the Lagos Plan of Action was designed and adopted in 1980 as the economic development plan of the continent. Through this plan, member states made various commitments, such as non-interference and the need for regional economic integration. Continental treaty instruments included the Abuja Treaty, the Lomé Convention and the treaty establishing the African RECs in 1991. This treaty practice resulted in the ultimate establishment of RECs across the continent to promote intra-African trade and investment.

Worth noting is that since 2009, African countries – individually and collectively through RECs – have reviewed and amended investment laws to be aligned with domestic imperatives. From the institutionalist perspectives, RECs include the following:

- SADC, with 16 member states
- ECOWAS, with 15 member states
- ECCAS, with 11 member states
- IGAD, with eight member states
- EAC, with six member states
- CEN-SAD, with 29 member states
- COMESA, with 21 member states
- AMU, with five member states.

Of the eight RECs, only the EAC and ECCAS have not signed and ratified any BITs. For this reason, countries in those regions have performed poorly in the infrastructure development and productive dimensions, as investment has not been encouraged. Mbegue and Schacherer's (2017a) review of treaty reforms in Africa revealed the following key features:

- Traditional and restrictive BIT provisions were replaced with provisions on fair and equitable treatment.
- Provisions that promote sustainable development through socially and responsible investments were introduced.
- Benefits available to investors depending on priority sectors were specified.
- There were concessions for the development of the most deprived areas of the country (Broad-Based Black Economic Empowerment).

- New laws were enacted to proclaim permanent sovereignty over the host country's natural resources.
- Exclusive jurisdiction was granted to the domestic courts to provide a dispute resolution mechanism.

The Lagos Plan of Action was adopted in 1980 at the Special Summit of the Organisation of African Unity (now AU). Essentially, the plan laid the foundation for the African continent and its leaders to formulate other related initiatives such as NEPAD and the AfCFTA. With the AfCFTA now in its operational phase, trade and investments are likely to increase exponentially.

According to the African Regional Integration Index (ARII, 2019), the notion that the centrality of foreign investment and regional trade to the production of final or intermediate goods ultimately leads to economic growth and development is deeply ingrained in contemporary discourse. To that extent, the African Regional Integration Index (2019) has developed a road of regional integration consisting of 16 indicators that are grouped into six dimensions.

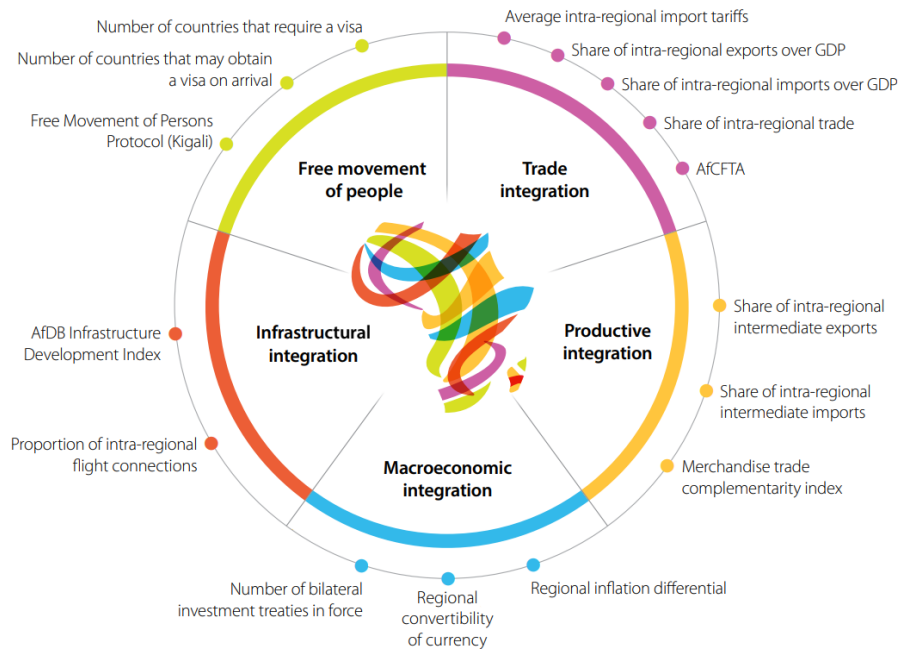


Figure 4: Dimensions and indicators of regional integration

Source: ARII (2019)

4.6.3 OECD

The OECD is a Paris-based multilateral organisation, while the World Bank and IMF are Washington-based financial institutions. These developmental finance institutions, as well as private foreign investors and MNCs based in developed countries, have always shown a strong bias and interest in promoting protection of foreign investment. This was often done without safeguarding the host country's interests. The justification was that investors were concerned with political risk and uncertainty in host countries, particularly regarding the threats and opportunities inherent to foreign investment.

A growing number of traditional BITs signed between OECD countries and developing countries (North–South) have protection and promotion clauses as well as admission

clauses. Thus, the treaty practice of the past decades reflected existing standards of investor protection and investment promotion. As rule-makers, the OECD countries have been influential in determining the flow of investment. Their involvement is measured through the development of the OECD Policy Framework for Investment, which is a comprehensive tool for evaluating and enhancing the investment climate in a country. It covers 10 key policy areas:

- 1) Investment policy
- 2) Trade policy
- 3) Competition policy
- 4) Taxation
- 5) Corporate governance
- 6) Business conduct
- 7) Human resource development
- 8) Infrastructure
- 9) Financing, and
- 10) Public governance.

In explaining the OECD's approach to BITs, Schill (2016) highlights the following: "Promoting and protecting foreign investment behoves the establishment of institutions that reduce political risk and outweighs incentives for the host state to act opportunistically in order for private actors to unfold foreign investment activities."

Interestingly, OECD (2014) studies suggest that for the most part, states have chosen to remain silent on many important matters that influence their treaty obligations. It is

therefore fair to argue that state behaviour goes a long way in determining the success or failure of international agreements.

4.6.4 UNCTAD

As the name suggests, the Geneva-based UNCTAD is the United Nations entity mandated to specifically deal with issues of trade and investment. Thus, its purpose is to provide relevant and updated information on the ratified or non-ratified BITs, including the year when it was entered into, the contracting parties and the expiry year. As the United Nations nodal point for an international investment regime, UNCTAD is guided by three pillars. Essentially, these are substantive and procedural matters:

- 1) Research and policy analysis
- 2) Technical assistance, and
- 3) International consensus building.

Based on the identified three pillars of work, recent developments and trends in investment policymaking have gravitated towards more and more countries building global consensus/convergence on the need for reform of the global investment regime, negotiating new treaties and developing new investment models. Worth noting is the groundwork that was done in 1998, when UNCTAD published a comprehensive study entitled *Bilateral Investment Treaties in the Mid-1990s*.

As groundbreaking research, this was one of the first studies ever published to explain the scope, nature and content of BIT provisions, as well as basic conceptual frameworks related to international investment rulemaking (UNCTAD, 1998).

In the last decade (2014–2024), the BITs universe has been evolving. As a consequence, considerable conformity has emerged in terms of the contents of BITs, albeit with significant differences in substantive and procedural provisions. As global economic integration grows and becomes interdependent, managing state–state relations and addressing the impact of signing BITs have become correspondingly greater, requiring contracting parties to design agreements that are clear and concise (UNCTAD, 1998).

Against this background, BIT provisions became more nuanced and articulated a clear reason why countries sign IIAs. Thus, UNCTAD (2011) has also acknowledged that today's IIA regime has come close to the point where it is “too big and complex to handle for governments and stakeholders alike”. To that extent, UNCTAD (2015) recognises that governments across the world are going through a period of reflection, review and revision of early generation treaties.

The preamble establishing the WTO unequivocally stated the following: “In order to help create a more prosperous and stable world economy in which all members can benefit from economic growth, the WTO aims to promote trade and cooperation.” However, it is debatable whether the ideal of promoting trade and cooperation as proposed by the WTO will be implemented in the signing of investment agreements.

Proponents of the new approach to BIT calls for a policy shift in investment treaty practice to embrace what Stoll (2011) refers to as “reciprocity and special treatment that can be extended to the less powerful countries when signing trade agreements”. As illustrated by Sachs, Johnson and Coleman (2019), new investment agreements on trade and sustainable development contain provisions that reaffirm commitments to include other instruments, such as the following:

- Sustainable development
- Labour rights
- Protection of the environment, and
- Commitment to implement the Paris Climate Agreement.

This research will therefore contribute and add value on the discourse on the policy shift from traditional North–South investment treaties to new models of South–South investment. Current estimates of UNCTAD indicate that approximately 180 countries are involved in at least one BIT in one way or another, suggesting that more than 2 900 BITs have been signed worldwide. To date, BITs are the most important instrument for protecting foreign investment and they form part of the wide range of provisions on bilateral economic, cultural and political cooperation between and among countries of the Global North and the Global South. In line with calls to transform BIT and treaty practice, UNCTAD identified 10 actionable steps and possible outcomes. These are as follows:

Table 10: UNCTAD policy reform of BIT and its potential outcomes

ACTIONABLE OPTION	OUTCOME
1. Jointly interpreting	Clarifies the content of a treaty's provisions and narrows the scope of interpretive discretion of tribunals
2. Amending treaty provisions	Modifies an existing treaty's content by introducing new provisions or altering or removing existing ones
3. Replacing "outdated" treaties	Substitutes an old treaty with a new one
4. Consolidating the IIA network	Abrogates two or more old IIAs between parties and replaces them with a new, plurilateral IIA
5. Managing relationships between coexisting treaties	Establishes rules that determine which of the coexisting IIAs applies in a given situation
6. Referencing global standards	Fosters coherence and improves interaction between IIAs and other areas of international law and policymaking
7. Engaging multilaterally	Establishes a common understanding or new rules among a multitude of countries, coupled with a mechanism that brings about change "in one go"
8. Abandoning unratified old treaties	Conveys a country's intent to not become a party to a concluded but as yet unratified treaty
9. Terminating existing old treaties	Releases the parties from their obligations under a treaty
10. Withdrawing from multilateral treaties	Similar in effect to termination, but leaves the treaty in force among the remaining parties who have not withdrawn

Source: UNCTAD (2017) IIAs Issue Notes

The institutional reforms of treaty practice, as articulated by UNCTAD (2017), are not in any chronological order; however, it would be in the best interest of the host country to

consider issues per priority or urgency. Given the journey and controversy surrounding the traditional or old treaties, it is safe to argue that at this stage policy change has been fully supported at both bilateral and multilateral levels, including the Global North and the Global South respectively. Notwithstanding the progress achieved, transforming the IIR has structural and mechanical constraints. The most delicate process involves managing the transition from old BITs to new, nuanced and transparent investment agreements. Other challenges related to strengthening the investment policy framework include addressing transparency and predictability issues. Worth noting are the developments that unfolded at the UNCTAD X and Africa's development challenges when African trade ministers issued a collective statement to register their dissatisfaction and discontent with being excluded and marginalised in treaty negotiations:

There is no transparency in the proceedings, and African countries are being marginalised and generally excluded on issues of vital importance for our people and their future. We are particularly concerned over the stated intentions to produce a ministerial text at any cost including at the cost of procedures to secure participation and consensus (UNCTAD, 1999).

South Africa continues to play a significant role in effecting policy change. Worth noting are the country's efforts when representing the Global South at the meetings of finance ministers and governors of central banks of the G20. Rose-Innes (2020) notes that South Africa's Finance Minister Trevor Manuel served as Special Envoy of United Nations Secretary-General Kofi Annan at the International Conference on Financing for Development in Monterrey (Mexico) in 2002, which reached consensus on the following:

- Mobilising domestic financial resources for development
- Mobilising international resources for development: FDI and other private flows
- Using international trade as an engine for development
- Increasing international financial and technical cooperation for development
- Addressing external debt, and
- Addressing systemic issues: enhancing the coherence and assistance of the international monetary, financial and trading systems in support of development.

Other prominent efforts that contributed to South Africa's role in the transformation of international financial institutions include former president Thabo Mbeki's advocacy work when he led a 10-member team that produced the high-level panel report on illicit financial flows, supported by the United Nations Economic Commission for Africa (Rose-Innes, 2020).

4.6.5 AU PAIC

As a continental institution, the AU supported efforts and initiatives to address socioeconomic challenges, including efforts to improve infrastructure development such as NEPAD. Mondi (2020) notes that in an attempt to align Africa's development needs, NEPAD identified the following key priorities:

- Eradicate poverty.
- Place African countries, both individually and collectively, on a path of sustainable growth and development.
- Halt the marginalisation of African in the globalisation process.
- Accelerate the empowerment of women.

- Fully integrate Africa into the global economy.

Pursuant to addressing African development needs, the AU member states – with an overwhelming majority – adopted the PAIC in 2017. While the PAIC was intended as a binding instrument, the lack of a coherent African approach to trade and investment meant that a compromise was reached that the PAIC would be implemented as a non-binding provision.

The challenge of a lack of consensus among the state parties further derailed progress on the PAIC. Critics of the PAIC, such as Kidane (2018), are of the view that while it is an attempt to contribute to the Africanisation of international investment law, it created a two-track system of investor protection that disadvantages African investors. As far as Kindane (2018) is concerned, despite the fact that the PAIC repeats references to sustainable development in its preamble paragraph, it must be recommended because its chapter on development-related issues is unique.

Despite coming late to the game, years after South Africa initiated the review of its BITs in 2009, the PAIC contains provisions for both state–state dispute settlement and ISDS. On matters of dispute settlement, the PAIC made profound commitments that state parties should seek to resolve the dispute through negotiations and consultations. To that end, it is summarised as follows:

If no agreement is reached within six months, the parties may seek to resolve their dispute through arbitration, subject to the applicable laws of the host state or mutual agreement of the disputing parties and the exhaustion of local remedies. If the parties go to arbitration, it should be at an African centre under the UNCITRAL rules.

While acknowledging that the Africanisation of international investment law has been integrated into intra-Africa BITs, Akinkugbe (2021) cautions that the conundrum is exacerbated by the asymmetry and vulnerable status of African countries' commodities in global markets. To overcome this conundrum, the continent needs to diversify and accelerate African economic integration through the implementation of the AfCFTA, which will create a single market of over 1.3 billion people and a combined GDP exceeding US\$ 2.5 trillion (World Bank, 2020a). As of April 2023, 54 of the 55 AU member states had signed the AfCFTA Agreement; however, only 46 had ratified it.

4.6.6 SADC BIT model

At a sub-regional level, there has been various attempts and efforts to develop strategic and standard operating procedures for investment and treaty practice that are congruent with local and regional conditions. In an attempt to harmonise the investment policies and laws of member states, the SADC Treaty was acceded to in 1994. This means that all the signatories (member states) acceded to all the protocols under the SADC Treaty, which must be domesticated through national legislation. In South Africa, the Constitutional Court has already affirmed the binding nature of SADC protocols.

The SADC Protocol on Finance and Investment establishing the BIT model was adopted in 2012. This protocol was modelled after the General Agreement on Trade and Services. Similar to other treaty practice, the SADC Protocol on Trade and Investment embraces liberalisation provisions, almost always allowing foreign investors to receive national treatment when making an investment. While the SADC BIT model is comprehensive and contains provisions on national treatment, it excludes the MFN treatment on the

assumption that it may lead to “unintended multilateralism”. Annexure 1 (Articles 5 and 6) highlight the following:

Cooperation on investment provides a framework for the promotion and protection of investment in Southern Africa and binds Member States to harmonise their investment regimes in accordance with the Protocol. Investments shall not be nationalized or expropriated...except for a public purpose, under the process of law, on a non-discriminatory basis and subject to the payment of prompt, adequate and effective compensation, that investments and investors shall enjoy fair and equitable treatment of any member state, and that either party may submit a dispute to international arbitration upon the exhaustion of domestic remedies.

Mbegue and Shacherer (2017a) point to the fact that the SADC BIT model offers members a choice between a provision on fair and equitable treatment and on fair administrative treatment.¹⁴ Mondi (2020) highlights four key elements of the SADC Protocol on Trade and Investment:

- 1) Implication of trade procedures to facilitate and promote trade
- 2) Elimination of tariffs and non-tariff barriers
- 3) Promotion of industrial development and diversification, and
- 4) Provision of safeguarding counter measures and exceptions for special cases.

¹⁴. The FAT focuses on administrative, legislative and judicial processes, and stipulates that they should not be arbitrary or deny administrative and procedural justice or due process to the investor. For further details, see the SADC model, Article 5.

While the SADC Protocol is a guiding principle, South Africa has implemented its own domestic policies that regulate trade and investment, as prescribed in its 1996 constitution, known as the Protection of Investment Act.

4.7 Conclusion

The discussion above reveals that treaty practice and international agreements are contested, controversial and complex phenomena, with a history of conquest, trade and liberalisation. As Cavallar (2023) argues, the world has seen too much change over the last centuries and decades. The increasing influence of China and other countries of the Global South resulted in the policy shift from the traditional North–South BIT model to South–South investment cooperation.

With the dawn of democracy and the proliferation of BITs in the 1990s and early 2000s, the rule-making investment regime witnessed significant and comprehensive transformation supported by regional, interregional and multilateral institutions such as the OECD, UNCTAD, the AU-PAIC and SADC, championing the rights of host countries to regulate investment policies in the public interest. As shown in the discussion, historically treaty practice followed trends and patterns of North–South tradition, which considered developing countries risky for investment.

In an attempt to search for a common understanding of the global investment regime, various perspectives and divergent views of scholars were examined to reflect the experiences of various countries and institutions (such as the OECD, the AU, SADC and UNCTAD) in the rules-based system governing investment treaties.

Frieden (1989) argues that countries at the lower end of development may be characterised by a preponderance of foreign primary investments and a propensity on the part of the home country to intervene. Going forward, this pattern and trajectory are likely to change, as economic development has led to diversification of foreign investment.

CHAPTER 5

SOUTH AFRICA'S EXPERIENCE AND JOURNEY IN THE BIT UNIVERSE

Just as the US government was embarrassed when images of police brutality against civil rights protesters were published worldwide, corporations investing in South Africa were equally embarrassed each time apartheid's escalating brutality became widely published.

– Cecelie Counts (2013)

5.1 Introduction

This chapter presents a case study of South Africa. Through the lens of the historical institutionalism perspective, it provides an introspective reflection on the evolution and political dynamics under apartheid while at the same time reflecting on the waves of change ushered in by the democratic dispensation in 1994. Cavallar (2023) cautions that while many had hoped for legal progress and for dynamic changes for the better, dynamic change to a different state of affairs does not necessarily lead to moral progress.

While the focus is on South Africa, it is worth reflecting on lessons learned and best practice emerging from treaty reforms at the domestic, regional, sub-regional and global levels. In recognition of fundamental, structural, systemic and interrelated concerns, the South African government continues to pursue substantive and procedural reforms of investment agreements and general reforms of treaty practice to embrace regional integration.

5.2 Historical evolution of apartheid South Africa and disinvestment campaigns

In a systematic analysis of South Africa's recent past, it is essential to put into context the role of disinvestment campaigns against the apartheid regime, both in theory and practice. At a theoretical level, this reflects the basic human instinct of fight, flight or freeze. At a pragmatic level, the survival instinct of the apartheid regime was a priority through the maximisation of wealth creation for the white minority and external support, while internally the regime faced a legitimacy crisis.

As changes continued to manifest, so too did investor perception, which started to shift and the apartheid government faced international isolation, economic embargoes and a domestic onslaught, resulting in the status of a pariah state. A great deal of effort and pressure were exerted by frontline states in Southern Africa and international partners that supported the ANC, with global¹⁵ disinvestment campaigns to isolate apartheid South Africa in both bilateral and multilateral engagements.

In retrospect, South Africa's experience and journey in the BIT universe were characterised by years of colonisation, white minority rule, police brutality, economic embargoes and international disinvestment campaigns, to mention a few. Writing in *The New York Times* on 27 January 2013, Cecelie Counts highlighted:

The apartheid's regime brutality reached a new level in 1948, and one response came when the Free South Africa Movement engaged people from all walks of life in daily demonstrations and in civil obedience for more than a year. The

¹⁵ The system of apartheid or racial segregation was introduced by the National Party in 1948 and officially came to an end through a series of negotiations (CODESA 1 and CODESA2) that took place between 1990 and 1993. Thus, in the first between 1993 and 1996, South Africa operated under an interim constitution that served as a roadmap for transition and the drafting of the Constitution in 1996.

groundswell of opposition against apartheid led the US Congress to override President Reagan's veto of the Comprehensive Anti-Apartheid Act of 1986.

It is worth noting that as part of the geopolitical and geostrategic contestations during the Cold War (similar to gunboat diplomacy), the US supported and collaborated with European colonisers to support repressive white minority rule and capitalist interests, not only in Southern Africa but also across Latin American, Asia and the Caribbean. With the passing of time and concerted efforts through global solidarity campaigns, such as the Free South Africa Movement, the ANC and associated civic movements and political parties (particularly the United Democratic Front) heightened local boycotts and disinvestment campaigns against the Royal Dutch Shell and other MNCs. The apartheid government faced pressure from all fronts. Thus, from the 1950s to the 1990s, pressure was mounting and it became apparent that the apartheid system was becoming unsustainable as the apartheid regime was rendered ungovernable. Counts (2013) reflects:

Disinvestment campaigns began to affect South Africa as corporations led apartheid leaders to know it had become too expensive to continue operating there. Some would argue that many corporations simply shifted to indirect investment, but when banks began to refuse to renew loans it causes some real pain as the value of the rand fell.

When the winds of change were sweeping across the world in 1990, the apartheid regime was not spared and the last apartheid president, FW de Klerk, made a famous speech that resulted in the unbanning of all political parties and the release of political prisoners.

During the first democratic elections in South Africa on 27 April 1994, Nelson Mandela became president and ushered in the hope of “A better South Africa and a safer world”. At the time, President Nelson Mandela (who had been released from prison on 10 February 1990) made a profound statement: “The white monopoly of political power must be ended, and we need a fundamental restructuring of our political and economic systems to address the inequality of apartheid and to create a genuine democratic South Africa.”

Fukuyama (1992) notes that the ANC government was among many governments that, after the fall of the Soviet Union, were encouraged to recognise that liberalisation had triumphed. Furthermore, Fukuyama (1992) observed that humanity had reached not just the end of a particular period of post-war history but the end of humanity’s ideological evolution, and the universalisation of Western liberal democracy as the final form of human government.

Coincidentally, when the ANC came to power in 1994, a policy shift shaped the country’s foreign policy and international economic outlook. From the historical institutionalism perspective, the change unfolding in South African politics was more complex than a change of power from one political part (National Party) to another (ANC). There was a transition and a transformation of the political system and global governance system (Bradlow and Sidiropolous, 2020), as the previous ruling party saw the world through a Eurocentric, white and anti-communist lens. In the post-1994 period, the ruling party saw itself through an African lens, developing and part of the Non-Aligned Movement and Global South in its interaction with the world (Bradlow and Sidiropolous, 2020).

When one looks at the preamble of the Constitution of the Republic of South Africa 1996, the first impression and consideration is a value-laden approach and a policy shift embedded in the following phrases: “We, the people of South Africa, Recognise the injustices of our past; Honour those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and Believe that South Africa belongs to all who live in it, united in our diversity.”

By any measure, this is a powerful policy statement that reflects and reaffirms the country’s commitment to justice, equality and other universal principles. While South Africa has successfully embarked on a democratic journey, addressing the triple challenges of poverty, inequality and unemployment is far from over and have yet to be reached. However, as Chinese philosophy states, “A journey of a thousand miles begins with a single step”. It is in the same spirit that this chapter paves the way for understanding South Africa’s difficult and complex journey traversing the landscape of the international investment regime and treaty practice.

EDIT is an independent and reliable source of data in ensuring that facts and details of BITs are applied, including dates of termination. In mapping the IIA universe, Alschner (2020) distinguishes treaty practice into four different categories:

- 1) Global level: investigates the effects of asymmetries of negotiation outcomes. This involves developed versus developing countries, rule-makers versus rule-takers.
- 2) Country level: The National Treaty Network uncovering investment policy changes, such as the Finnish government’s policy shift to a pre-establishment template in 1999.

- 3) Inter-treaty level: investment policy diffusion highlights that Israel copied its BIT language from the UK investment agreement.
- 4) Individual treaty level: assessment of newly concluded agreements like the TPP.

Additionally, this study relied on the Asian Development Bank's (ADB, 2021) web-based IIA toolkit, which provides stakeholders with information on BITs, including date of signature, date of entry into force, termination period, notice time for treaty cancellation and new time period after normal treaty period.

At a continental level, South Africa signed 14 BITs but most were not ratified. In terms of efficacy, only three BITs were ratified and entered into force: The South Africa–Mauritius BIT, the South Africa–Mozambique BIT and the South Africa–Zimbabwe BIT (Disenyana and Sogoni, 2014). In assessing the demographic patterns of BITs on the continent, Disenyane and Sogoni (2014) highlight that out of the 767 African BITs, the North African region concluded 320 BITs, while the West African region concluded 205 BITs, the East African region concluded 178 BITs and the Southern Africa region concluded 124 BITs. The North Africa region has an advantage due to its proximity and geostrategic location close to Europe and the Middle East, and has attracted and signed more BITs than its contemporaries in West, East and Southern Africa.

In terms of South Africa's investment policy framework, the dti's (2010) Trade Policy and Strategy Framework stipulates: "The government's broad development strategy aims to promote and accelerate economic growth along a path that generates sustainable, decent jobs in order to reduce poverty and extreme inequality." In 2015, the Minister of Trade and Industry, Rob Davies, stated that South Africa's stock of FDI accounted for around 42% of GDP and for the bulk of new investment projects in Africa (Davies, 2015).

This is indicative that South Africa has a sound regulatory and legislative environment for investment. The dti Task Team was mandated to review BITs as early as 2008. In the review of the BITs that South Africa signed with OECD countries, the Task Team observed that the existing IIAs were based on a 50-year-old model that remained focused on the interests of investors from developed countries (dti, 2009). According to Carim (2013a), the review commenced in 2008 with the aim of developing a policy framework as well as guidelines for assessing BITs already concluded and engaging on BITs in the future. In 2010, South Africa joined the BRICS¹⁶ bloc: Brazil, Russia, India, China, and South Africa.

Considering the changing nature of the environment that the country was dealing with, Bradlow and Sidiropoulos (2020) state that the 2011 White Paper on foreign policy identified four key priorities:

- 1) South Africa's national interests are intrinsically and inherently linked with Africa's stability, unity and prosperity.
- 2) Foreign policy is not an abstract matter separate from domestic policies.
- 3) South Africa's national interests are "people-centred", including promoting the well-being, development and upliftment of its people; protecting the planet for future generations; and ensuring the prosperity of the country, the region and the continent.
- 4) Desire for a just humane and equitable world order with greater security, peace, dialogue and economic justice.

¹⁶ BRICS is an association of regional powers across four continents, originating from an informal alliance in trade negotiations.

In view of the unfolding changes and in an effort to integrate the South African economy into the global economy, the NDP Vision 2030 stipulates that the country's existence is informed by its national interests.

Furthermore, the NDP states that South Africa promotes and contributes to democracy, the rule of law, human rights, peace, and security within a safe and prosperous Southern Africa and rest of Africa as well as a fair and just world. With regard to trade and investment policies, the NDP states:

The main objective in terms of foreign policy making should be to expand regional, continental and African trade based on an informed understanding of the geopolitics of Africa: to develop a healthy consultative and practical relationship with South Africa's research and corporate institutions in order to deploy its foreign service more efficiency in the pursuit of expanded trade and investment and to improve the country's leadership role in a regional and global affair.

Gordon and Pohl (2015) caution that a considerable number of countries entered treaties with little prior analysis or awareness of their legal implications and economic costs and benefits. In addition, treaty compliance, as well as legal and economic analysis, may not have seemed warranted to some treaty adopters (Gordon and Pohl, 2015).

On the lessons learned, Carim (2013a) highlights the following:

The DTI believes the Promotion of Investment Act provides confirmation that South Africa remain open to FDI and provides effective protection while preserving the sovereign right of the government to pursue legitimate public policy objectives in line with constitutional requirements. The Act is informed by the DTI's vision of a

legal and policy framework for investment that learns from the lessons of the past and is better attuned to the challenges of sustainable development and inclusive growth.

In accordance with the findings of the dti Task Team, in July 2010 the South African Cabinet issued this statement:

Henceforth, South Africa will refrain from entering into BITs unless there are compelling political or economic reasons to do so; terminate existing BITs and offer partners the possibility to re-negotiate BITs on the basis of a new model; develop a new Foreign Investment Act that is aligned with the Constitution and clarifies typical BIT provisions under South African law; and establish an Investment Inter-Ministerial Committee to oversee this work.

The unfolding circumstances show that the process of policymaking is not easy and requires balancing different interests, different perspectives and different value systems. An awareness of the operating environment and balancing the trade-off find expression in the NDP as follows:

While our regional priorities are important, South Africa's policy making should not lose sight of the emergence and increased influence of countries of the Global South like Turkey, Indonesia, Mexico, Colombia and Venezuela in global political, economic affairs. As it goes, Turkey is expanding its presence in Africa at a rapid pace. It is also important to bear in mind that the tilt from West to East, will necessarily be a long-term process in the sense that Europe, North America and

Japan may continue to be powerful economic forces in the world for at least the next 20 to 30 years.

As a host country, South Africa is confronted with the challenge of balancing its duty to protect foreign investment and exercising its sovereign right to regulate.

Thus, the dti's policy review of BITs concluded as follows: "The current system opens the door for narrow commercial interests to subject matters of vital national interest to unpredictable international arbitration that may constitute direct challenges to legitimate, constitutional and democratic policymaking." What has been articulated thus far is indicative of South Africa's journey and experience in the BIT universe to date.

5.3 Investor perceptions and determinants of trade and investment

Proponents tend to argue that BITs encourage investment and strengthen the rule of law, particularly in jurisdictions where macroeconomic policies and legal systems are weak. However, research conducted by Hallward-Dreimer (2009) concluded that BITs are neither necessary nor sufficient to attract FDI. As a vibrant and functioning democracy, South Africa has developed strong institutions. According to the World Economic Forum's 2015–2016 Global Competitiveness Report, South Africa is ranked 38th out of 140 countries for the strength of its institutions, including 24th for property rights and intellectual property rights (WEF, 2015).

In addition, South Africa is ranked 15th for efficiency of legal framework in settling disputes, 9th for efficiency of legal framework in challenging regulations, 2nd for protection of minority shareholders, 10th for strength of investor protection, 6th for trustworthiness and confidence in its financial markets and 1st for the regulation of security exchanges

(WEF, 2015). Essentially, all these measures are good for attracting FDI and stimulating trade and investment. The Economic Commission for Africa (2017) acknowledges that of the 15 fastest-growing economies in the world, 10 are in Africa. Thus, the continent has become the destination and a frontier for trade and investment due to improved governance and better macroeconomic policies.

To help us understand where we are and where we are going in the global investment landscape, the 2024 RMB report entitled “Where to Invest in Africa” uses the economic performance lens and operating environment lens to provide the cost–benefit analysis of investing in Africa.

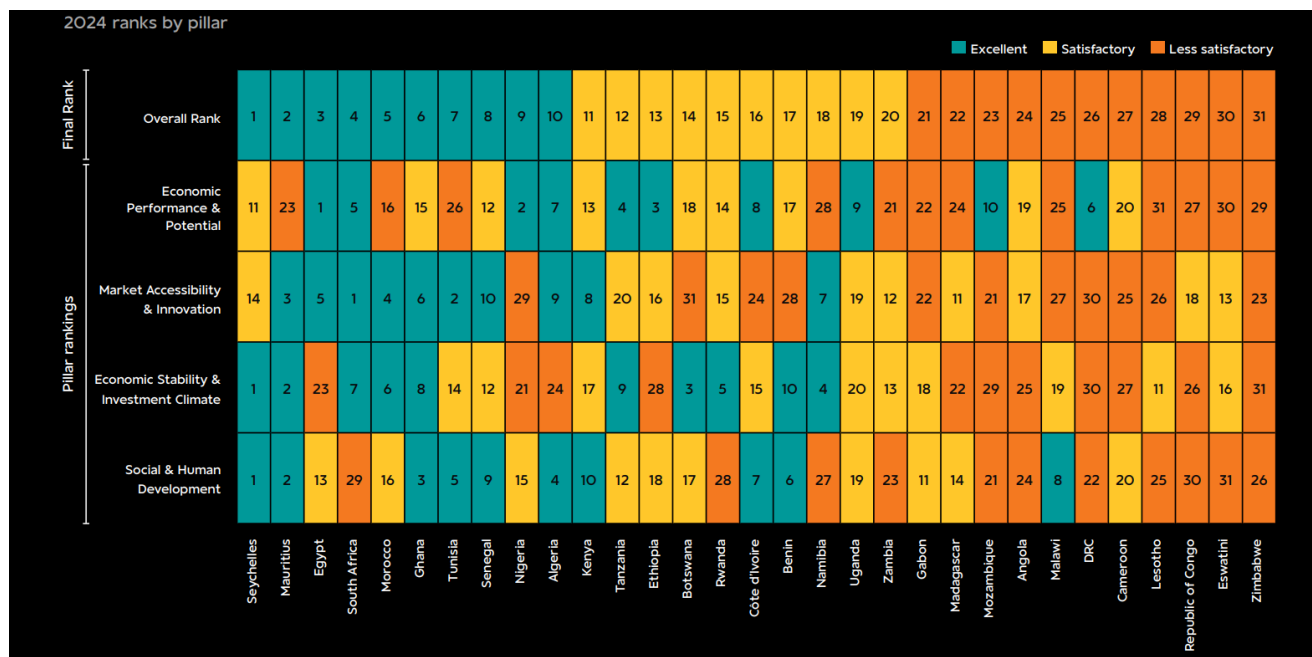


Figure 5: RMB top-10 performing economies in Africa

Source: RMB (2024)

While showing the top-10 performing countries in Africa, the RMB (2024) report sets out four pillars, ranked from bottom to top, comprising social and human development and

economic performance and potential. Worth noting are the five scenarios explained as follows:

- 1) High flyers: countries with higher scores (top 10 performing)
- 2) Cleared for take-off: countries or emerging economies with high economic growth potential and high innovation scores
- 3) People potential: emerging markets with potential that suggests an ability to take advantage of the demographic dividend
- 4) Global connectors: advanced economies with a strong international presence, and
- 5) Low-base boomers: emerging markets with high potential and higher GDP.

This cautiously optimistic outlook suggests that Africa is not monolithic. Thus, instead of applying a blanket approach, which characterises the continent as a risky investment environment, investment decisions should be focused on identifying investment potential of each country-based case-by-case approach. According to a survey on attractiveness for outbound investment conducted in 2019, the result of 67 countries assessed showed the following rankings:

- Tunisia: 48
- South Africa: 49
- Egypt: 51
- Algeria: 61
- Kenya: 65
- Nigeria: 67.

Interestingly, South Africa appears to be performing fairly while Nigeria comes last. According to the World Bank Global Investment Competitiveness report (GIC, 2018), political stability and a business-friendly regulatory environment are most important in investor decision making. Thus, investors consider a whole range of factors in decisions to invest, including the following:

- Legal and regulatory environment
- Domestic market size
- Macroeconomic stability, and
- Favourable exchange rate.

The Global Foreign Direct Investment Country Attractiveness Index reported that South Africa's rank had deteriorated from 43 in 2013 to 48 in 2019 (Alden and Wu, 2021). According to the 2025 Kearney FDI Confidence Index,¹⁷ South Africa showed the most significant improvement in the rankings, climbing from 11th to 7th place globally out of 25 emerging market ratings. The country recorded US\$661 million in FDI inflows in the first quarter of 2025 – a 56% increase compared to the final quarter of 2024. As part of the government's reform agenda, President Cyril Ramaphosa has in the short to medium term set the target for improving the country's ranking in the World Bank Annual Global Ease of Doing Business to top 50 from 82 in the latest assessments (Alden and Wu, 2021).

According to Yijun (2023), the international investment rules are now fragmented and characterised by the lack of an overall multilateral system and efficient international

¹⁷ The Kearney FDI Confidence Index® is an annual survey of global business executives that ranks markets which are likely to attract the most investment in the next three years.

operation institutions. Africa's encounter or experience with BITs is complex and controversial. Development discourse on Africa, including the debate on the benefits of FDI and BITs, is riddled with misperceptions and distortions. In most cases, investors' perceptions characterise the continent as marginalised, underdeveloped, and a risky environment for doing business and investment.

As Hurt (2013) argues, the prevailing understanding of Africa's place in world politics has been dominated by concepts such as "marginalisation" or "exploitation" – a situation that continues as long as Africa's agency is undermined in BIT practice.

The associated links between BITs and FDI have been studied across time and space, thus the literature identifies countries' commitment to treaties as crucial in determining the failure or success of signing investment and trade agreements. Li and Zhao (2021) assert that irrespective of whether or not a host country is developed, BITs work alongside good institutions to increase the attractiveness of FDI. Haskel and Westlake (2017) allude to the fact that foreign investments are beneficial to the host country and its citizens, as capital inflows increase productive or innovative capacity and provide income opportunities.

On promoting investment in complementary industries, Zhu and Li (2018) note that Chinese financial institutions such as the China Development Bank have made significant contributions to BRICS infrastructure construction, such as direct financing to support Transnet, the loan to the China Three Gorges Corporation for the acquisition of a Brazilian hydropower project and the Brazilian real guarantee support to the State Grid Cooperation of China for the Mountain Beauty Transmission Line Project in Brazil (Yijun, 2023).

In addition, North (1990) and Meyer (2001) note that emerging countries are endowed with institutions of differing effectiveness as well as good institutions to attract FDI. Notwithstanding the past/history, democratic South Africa fits the description of a country endowed with good institutions to attract FDI.

However, the country recently suffered reputational damage and lost influence in regional and continental fora, as reflected by the Zondo Commission of Inquiry into State Capture, which resulted in the grey listing by the Financial Action Task Force (FATF).

Considering the internal challenges that the country has, the 20-year review of democracy highlights major structural and institutional challenges as follows:

- South Africa's ability to use platforms such as the G20 and the Forum on Africa–China Cooperation to advance its national interests.
- South Africa's ability to promote the interests of SADC, Africa and the Global South.
- South Africa's ability to reconnect with the interests of the African Renaissance and Pan Africanism.
- The need to leverage fintech digitalisation to enhance efficiency and effectiveness.

All these goals are directly linked to the country's declining influence in global affairs, such as at the United Nations, the AU and SADC. Empirical evidence on the country's declining influence and soft power is demonstrated by the Royal Elcano Institute,¹⁸ which releases an Annual Global Presence Index focusing on military presence, economic presence and soft power presence. Worth noting is that the 2017–2018 Index notes that South Africa is

¹⁸ The Royal Elcano Institute was established in 2001 as a strategic think tank. It is based in Madrid, Spain.

declining substantially. Admittedly, the explanation for the decline is attributed to corruption, policy uncertainty and immigration laws, which made it hard to obtain visas. With the GNU in place, there is need to self-reflect and improve the country's international standing.

Within the realm of international investment, policy certainty is sacrosanct, followed by political willingness, the necessity to trade and cost-effectiveness. The World Bank (2018) notes that enhancing investment competitiveness requires establishing a business environment in which both domestic and foreign companies can efficiently enter the market, expand operations, and develop more and better linkages with local, regional and global economies. As an emerging economy, South Africa's MNCs have made their presence felt across the continent, with MTN, Standard Bank, Vodacom and Absa having broad investments in the communication and service sectors.

Notwithstanding the country's goals and institutional weaknesses, it is safe to say that South Africa is still considered an attractive destination for investment. To understand investor perception, four determinants of investment have been identified:

- 1) Political risk
- 2) Financial development and rating agencies
- 3) Business confidence, and
- 4) The rule of law.

From the investors' perspective, an increase in certainty in the regulatory and policy space ensures a conducive and investor-friendly environment.

5.4 Determinants of trade and investment

The discussion that follows highlights various determinants of trade and investment in both theory and practice.

5.4.1 Political risk

The concept of risk is often misunderstood and the definition of risk often depends on who is being impacted. While risk is hard to measure and quantify, at most the level of risk exposure depends on the risk aversion or risk appetite of an investor. In the investment environment, there is a common expression: “The higher the risk, the more the returns.”

According to the Centre for Conflict Resolution and the dti (CCR and dti, 2014), MNCs involved in mining, oil and gas in volatile environments such as in Angola, Nigeria and Libya are driven overwhelmingly by prospects of high returns. Thus, political risks are often conflated, suggesting vulnerabilities and hindrances that may constrain investors to operate, such as social and political instability. It is vital to note that although risk is frequently more a perception than a reality, it is an important determinant in decision-making processes (Croukamp and Malan, 2011).

According to the World Bank’s Doing Business (2019–2024) report, which surveyed 190 countries, African countries perform poorly on many metrics. Thus the continent was placed at number 141, with only seven countries featured in the top 100. The World Bank identified challenges associated with political risk as follows:

- Risk versus reward trade-off. This includes weak fundamentals, uneven growth pressure, poor credit environments and policy uncertainty.

- Poor regulatory frameworks and operating environment.
- Lack of liquidity.
- Poor governance, political instability and corruption.
- Lack of infrastructure development.
- Information and trust deficit.

Arguably, the most important challenges related to political risk are concerns about political instability, corruption and poor governance. As in the case of South Africa, the spill-over effects of challenges of political risk is disinvestment, which negatively affects economic opportunities and economies of scale. From the political risk perspective, an evolving fiscal and debt management crisis negatively affects investor confidence. By their very nature, investment decisions are risky, take time and often involve a cost–benefit analysis. This implies that investors with a high-risk appetite must comprehensively understand the nature of risks associated with their operating environments.

According to the IMF's Debt Sustainability Report (2019), 16 countries in Africa are classified as high risk. These countries include the Democratic Republic of Congo, Mozambique, Sudan and Eritrea. Despite being endowed with natural resources, which attract FDI, they remain a danger zone because they continue to be confronted with internal challenges that pose a risk to foreign investment. Haber, Razo and Maurer (2003) argue that credible commitment by the state or agents of the state is significant.

Within the context of political risk, this view suggests that the state as a rational actor, while pursuing its foreign policy and national interests, ought to operate within the purview

of political and legal commitments. In line with standard treaty practice, the political commitment principle (perceived or real) provides guarantees to potential, current or future investors that the state commits itself that, within reason, it will not expropriate or nationalise assets or the resources of the investor without compensation. Put differently, the political commitment principle needs to be seen or interpreted as credible by assuring investors that state parties will not renege on the agreements signed.

Worth noting is that the political commitment principle is embedded in reciprocity (two-way approach or bilateral) in that the investor must make similar commitments. The critical question is whether investors are willing to share part of their investment returns with the host state by paying taxes and revenues? Over the years, the maximisation of profit has superseded care for the environment, as is often the case in the extractive sector and the automobile industry. Considering such inconsistencies, there is a heated debate in development finance literature and policy studies on the successes and failures of state parties to reach consensus, as one party often reneges on fulfilling previous commitments. This trend has also been witnessed in investment pledges made during the Paris Climate Accord.

Through the empirical and evidence-led approach, future research should further explore the following:

- Whether the credible commitment principle can be viewed as both a necessary and sufficient condition for capital accumulation
- Whether the credible commitment principle can be viewed as a necessary, but not a sufficient condition, as the levels of risk and operating environment changes constantly (including threats and opportunities).

Just like any other theory, or innovation, the principle of credible commitment has its shortcomings and limitations. For instance, in the event that a successive government or administration does not honour prior commitments, it will face the wrath of global rating agencies and suffer reputational damage.

On their part, investors have the right to withdraw development finance on realising that they will suffer continuous loss due to political risk and the trust deficit.

A lack of trust between the host and home countries will eventually create asymmetric relations and trust deficits and will eventually affect future development finance, leading to disinvestment and loss of future revenue, as seen during disinvestment campaigns against the apartheid regime.

5.4.2 Development finance and rating agencies

The determinants of trade and invest are cross-cutting and interrelated. Thus, access to investment and financial development carries with it conditions and rules of engagement. Funding constraints are a major challenge for many African countries. Another contributing factor is productivity weakness, which has further exacerbated the problem. As of December 2019, South Africa had taken out US\$2 billion in loans from the BRICS New Development Bank; however, the country's economic woes compounded the problem, resulting in it being downgraded to sub-investment or junk status by Moody's in late March 2020 (Alden and Wu, 2021).

According to IMF data, due to the weakness of total factor productivity from 2007 to 2015, the economic growth rates of advanced economies and emerging market economies declined by an average of 0.04% and 0.12% respectively. The negative impacts

accounted for 47% and 86% of the losses in annual growth of advanced economies and emerging markets economies respectively (Adler *et al.*, 2017, cited in Yijun, 2023).

Worth noting is that the outbreak of the Covid-19 pandemic in 2020, as well as the social and economic restrictions intended to contain the spread of the disease, had far-reaching implications for development finance. Significant challenges included recessions and job losses in global markets, not only in developing countries but also in the UK, EU and US. According to the Economic Intelligence Unit (EIU, 2020) international migrant remittances have collapsed amid the coronavirus (Covid-19) pandemic. Such collapse represents worrying news for developing countries, as it increases the likelihood of balance-of-payments crises and delayed economic recoveries. At the midst of COVID-19, the EIU (2020) forecasted that remittance flows into sub-Saharan Africa would fall by 23% on aggregate. As a contributor of development finance, remittances are key sources of financing for most developing countries. On a large scale, and in the absence of development finance, they are a critical contributor to consumption, investment and the balance of payment.

The importance of foreign remittances for the continent is evident in the total value of remittance flows, which increased from US\$4 billion in 2019 and were higher than inward FDI at US\$31.7 billion (EIU, 2020). Furthermore, in the past remittances supported macroeconomic stability during periods of economic stress. Amid shocks in senders' countries of origin (including economic recessions, natural disasters and political crises), the interrupted flows of remittances have increased over time as migrant workers support their families from abroad (EIU, 2020).

During the Covid-19 pandemic, developing countries were not able to count on remittances, as the simultaneity of lockdown measures and recessions across the world affected both senders and receivers. The continued failing of remittances on the African continent affected financial development and exacerbated the already severe tourism losses, reduced trade flows, uncertain commodity prices and lower FDI. Kalantaryan and McMahon (2020) observed that the African countries receiving the largest remittance inflows in 2019 were Egypt (\$26,791 million), Nigeria (\$23,800 million), Morocco (\$6,669 million), Ghana (\$3,521 million) and Kenya (\$2,819 million).

The decline in remittances flows to Africa and challenges brought by the Covid-19 pandemic exposed the continent to funding constraints beyond 2020, as the situation heightened political risk and reduced prospects for attracting foreign investment. Often, the carrot-and-stick approach is used by rating agencies to apply and exert pressure on emerging economies when they notice heightened political risk, non-compliance and a lack of legislative frameworks on the part of the host country. Yijun (2023) contends that rating grades reported by rating agencies are used in all countries to do an initial evaluation of the country's reputation. The standard operating procedure applied by rating agencies often involves a negative rating in the event that a host country does not create an enabling environment and enforce effective institutions for checks and balances.

Some of the well-known rating agencies are S&P Global Ratings (previously Standard & Poor), Fitch and Moody's, which use +AAA or sub-standard ratings for development finance. However, these agencies have been criticised for limiting the right of emerging markets to obtain a sovereign rating, thus they cannot secure finance by issuing bonds in the international market (Yijun, 2023). As part of the calls to transform global governance

institutions, countries of the Global South have proposed establishing alternative rating systems, as the current ones were designed and developed for countries of the Global North. Thus, they lack an accurate accountability mechanism to ensure the authenticity of their ratings (Yijun, 2023). Sharma and Bhogal (2017) note that in comparison to South Africa, India's position on global trade negotiations has witnessed a shift over the last decade from being obstructionist in the Uruguay Round to being constructivist in the trade negotiations of the Doha Round.

Suggestions for the establishment of a BRICS multilateral agency has gained prominence, and Yijun (2023) has proposed the following key steps:

- The rating business of a BRICS credit rating agency should begin with the foreign currency loans provided by New Development Bank infrastructure projects.
- Increase the popularity of a BRICS credit rating agency so that the banks and financial institutions in BRICS countries and emerging markets will use the BRICS credit rating agency.
- The credit rating agency should aim to expand its membership and provide more services to other emerging markets such as Mexico and the Philippines.

In addition to the key steps identified above, Yijun (2023) recommends that the establishment and operationalisation of an alternative credit rating should include the following:

- Institute regulatory and legal frameworks.
- Develop an ownership and equity structure.
- Establish the independence of the shareholding institution that issues the loan.
- Eliminate political influence and conflict of interest.

- Introduce competition among world-renowned credit rating agencies.

Another determinant factor in relation to development finance is overcoming the challenge of coordination failures. Investors have often encountered many coordination challenges, particularly when the return on their investment is low.

As the global economy today is moving towards a knowledge-based society, characterised by technological advancement in the form of the 4IR or 5G, no one should be left behind. Thus, it is crucial that current BITs have a strong focus on investing in skills sets that are congruent with the knowledge and digital economy. Fulfilling that capacity requires commitments on the part of the state and the investor to build resilience and develop a well-institutionalised workforce that is fit for purpose, while simultaneously allowing each other to acquire the expertise necessary to perform and coordinate development finance effectively. As Chen (2017) cautions when referring to treaty liability, BITs are failing to produce their expected benefits. Worth noting is the inherent creation of substantial costs for capital-importing countries, in terms of both exposing the state to investment treaty liability and constraining its regulatory authority. In addition, Cosbey (2013) argues that BITs may harm a host country's economy by transferring control over domestic assets to foreign investors. Many of the policies advocated for addressing market failures involve tools that create rents and vested interests (Cosbey, 2013).

Within the BIT universe, financing infrastructure development projects have often faced the challenge of walking a tight rope and balancing choices between market seeking or efficiency seeking investments. Dixit (2009) argues that in environments where institutions do not exist or are not functioning well, informal institutions such as kingship structures, social norms and patron–client networks can act as institutions of credible

commitment. Dixit (2009) extends this argument by suggesting that formal institutions can manage credible commitment through laws that prohibit the expropriation of private property. This can also be managed through formal institutions, courts' (international or domestic) legal sanction, state–state or state–investor dispute mechanisms and arbitration procedures.

The establishment of formal and informal institutions in financial development is critical to strengthen the principle of credible commitment in order to promote and protect the interests of both the investor and the host and/or home country. Due to substantive and procedural changes on treaty practice, capital-exporting countries such as the US and the UK have changed their posture on BITs.

Such developments have given India, China and Japan the opportunity to play a significant role in the development finance space as capital-exporting countries. Similarly, BRICS countries (particularly Brazil, India and South Africa) have followed the trend by terminating their traditional North–South BITs and negotiating investment agreements in line with their domestic and foreign policy imperatives. While China and India are strategic partners in BRICS, they are competing for influence and market share in Asia, Africa and beyond. As indicated previously, Sharma and Bhogal (2017) observe that India's position on global trade negotiations has shifted over the last two decades from being an obstructionist in the Uruguay Round to being a constructive participant in the recent trade negotiations of the Doha Round.

China and India are investing keenly in Africa's infrastructure and energy, seeking growth and market access. These Asian countries' aligned investment appetite towards Africa comes at a time when the US has adopted a more isolationist approach and African

economies are withstanding the worst of commodity price fluctuations. It is thus no coincidence that both India and China have leveraged their membership of BRICS to shift the global strategic alignment by partnering with Africa in the investment landscape.

However, through its expansionist policy of the BRI, China has already invested and built the continent's first transnational electric railway between Djibouti and Addis Ababa in Ethiopia at an estimated cost of US\$4.4 billion. India and Japan's influence and geostrategic positioning are seen through the partnership of the AAGC at a cost of US\$200 billion. In the short to medium term, the AAGC project will create a sea corridor linking Africa with India and other countries in Southeast Asia and Oceania. Essentially, the two countries will leverage ancient sea routes and create new sea route corridors linking ports in Jamnagar (Gujarat) with Djibouti in the Gulf of Aden and the ports of Mombasa and Zanzibar in East Africa.

The two investment initiatives are intended to provide the required development finance and improve connectivity network across the continent. While China follows a typical "cash for infrastructure" approach, it uses Africa's vast mineral and energy sectors to its benefit. In contrast, the AAGC aims to provide investment in soft infrastructure needs through the provision of skills development and sustainability across the continent.

China has often been criticised for exploiting the continent's rich mineral resources – a criticism that is voiced strongly by Angola and Zambia. Africa's ongoing needs for development finance and Asia's rise on the global stage reflect not only a power struggle of Asian powers but also a policy shift of BITs from West to East.

India and Japan have promoted the AAGC as part of their Open and Free Indo-Pacific Strategy, concentrating on value creation. This is done by creating quantity and quality in fostering a mutually beneficial relationship with Africa for long-term investing. In the final analysis, competitive Asian investments can propel significant long-term benefits for Africa across sectors and provide and further enhance the ability of African countries to identify, prioritise and maximise their economic interests and agility when negotiating BITs.

Gumede (2014) argues that the seemingly unlimited appetite for African commodities from fast-growing emerging markets, mainly BRICS countries such as India and China, have been among the key drivers of African growth.

5.4.3 Business confidence and institutional investors in South Africa

As indicated earlier, the relationship between business and the government in South Africa has been complex, riddled with a trust deficit and a lack of coordination. The characterisation of the relationship between business and the government is explicit in buzzwords such as “white monopoly capital” and “state capture”. All these expressions do not bode well for business confidence and investment attractiveness. Ideally, investment or development finance is considered essential and beneficial, provided that they are available and provide market access.

On various occasions, South Africa has and continues to play a significant role as a bridge builder between the East and the West as well as in advancing the South–South cooperation and investment through the AU, SADC, BRICS and G20 by encouraging regional integration. The provision of public goods is at the top of the value chain in

relation to the determinants of investment globally. The experience of the East Asian Tigers and other emerging economies that adopted a developmental state model thrived beyond measure, particularly when the enabling environment encouraged public–private partnership in infrastructure investment projects. As Mondli (2023) argues, the relations between the South African government and the business community since the advent of democracy have been complicated.

Before highlighting the nature of the relations between the South African government and business in the context of capital accumulation and business confidence, it is worth noting Mondli's observation (quoting Gelb, 2006):

The discussions and debates between the ANC and the business community in the 1990s were part of a broader conversation on the economic policy for the New South Africa. Since the ANC did not have its own well-developed economic policies, it was willing to listen to a range of policy options.

Business confidence is considered as strategic in attracting FDI (Freud, 2013, Terreblanche 2003a). For instance, there is an argument that the regular meetings between Harry Oppenheimer (business leader) and President Nelson Mandela at Anglo-American ushered in business confidence in that business used scenario planning to shape economic policy and communicate with the government regarding its priorities.

South Africa's experience and journey in treaty practice should be understood within the broader theoretical and analytical frameworks of the geopolitical and geostrategic threats and opportunities during each presidency. In 2009, the South African government embarked on an inter-departmental and legal process to review its investment treaty

obligations, resulting in the Cabinet approving the Protection of Investment Bill, which became an Act of Parliament.

While the country decided to withdraw and terminate its BITs, the international rules governing foreign investment are still concluded primarily at a bilateral level. During the early 2000's, South Africa become one of the top-10 investors and a trading partner of many African countries. As Games (2004) argues, South Africa is increasingly displacing those companies from Europe, particularly former colonial powers that retained their economic links with Africa. In addition, public and private institutions in South Africa are prominent in promoting the country's image and reputation as an investment destination.

Various measures have been put in place to promote the attractiveness of each region as an investment destination. Games (2004) argues that South Africa has been involved in finding solutions to the various conflicts and encouraging good governance on the African continent, making its skills and resources available to other countries in encouraging regionalism and cross-border trade, and working to make countries north of its borders more attractive to investment and better places in which to do business.

The most notable institutions doing such work are RMB, especially its annual publication entitled "Where to invest in Africa"; Stellenbosch University's Bureau of Economic Research; the University of Pretoria's Centre for the Study of Governance Innovation and Gordon Institute of Business; ABSA, especially its Africa Financial Market Index; and the PIC, to name a few.

According to the African Regional Integration Index's report (ARII, 2019), the following are countries' rankings on infrastructural integration.

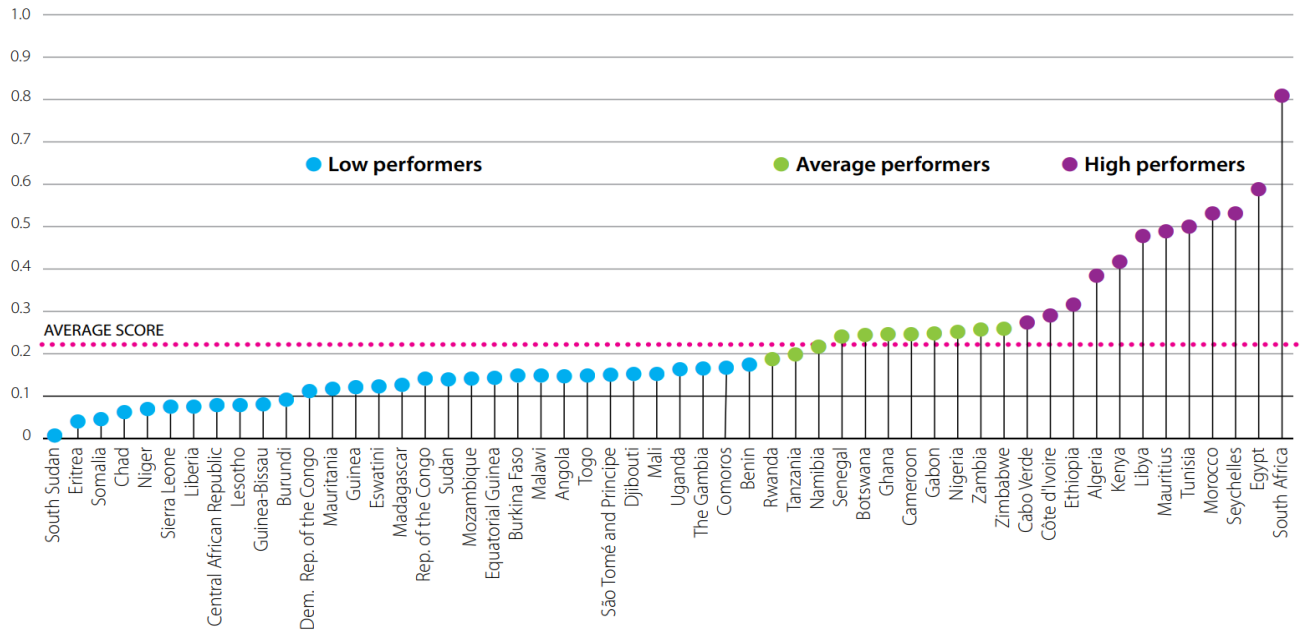


Figure 6: Countries' scores and ratings on infrastructure integration

Source: ARII (2019)

As shown in the figure above, South Africa ranks highly on infrastructure integration. Xiaohui (2023) observes that during the AU Summit in 2021, African leaders endorsed 71 key projects as part of the second phase of the African Infrastructure Development Plan 2021–2030 Priority Action Plan. The infrastructure project covers a wide range of sectors, including agriculture, communication, energy, transportation and water resources.

It is therefore prudent that future investment across the continent focuses on addressing infrastructure deficits. According to data and estimates of the AfDB (2018), the continent requires annual infrastructure funding of US\$130 billion to US\$170 billion. In addition, Xiaohui (2023) notes that currently there is an inordinate funding gap of US\$68 billion to US\$108 billion to address infrastructure deficits on the continent.

South Africa's withdrawal from BITs created opportunities and a niche market for alternative development finance institutions to play a significant role in advancing economic transformation and regional integration. To that end, South Africa propelled its development finance institutions to foster institutional capacity in the SADC region, in particular the PIC. In the SADC region, there is an estimated annual investment gap of US\$402 billion in sectors aligned to the achievement of the SDGs, such as education, energy and infrastructure. Thus, the SADC development finance institutions are called upon to advance regional integration by investing in digital trade, energy and related infrastructure development projects.

In advancing its role as a regional development finance institution, the DBSA provided a US\$35 million loan to the Kenya Pipeline Company for a project to replace a 450-km corroded multiproduct fuel pipe running between Mombasa and Nairobi in Kenya. The completed project is an example of business confidence. Thus far, the project has yielded the following investment outcomes (PIC, 2024):

- Increased fuel flow rate from 880 million per hour to 1 000 per hour.
- Increased throughput from 5.055 million m³/annum to an average of 6.4 million m³ in 2016/2017.

Worth noting is that the pipeline existed for 39 years and was nearing the end of its life cycle. It reduced national traffic by almost 700 oil tankers per day, which is a significant emissions reduction, and increased the lifespan of the road between Nairobi and Mombasa (PIC, 2024).

The successful completion of the Kenyan Pipeline Company's project is testament to the fact that investment in infrastructure development should be pursued by Africa now and in the future. The PIC is a typical sovereign fund model that is used as a tool for fostering infrastructure investment. It is a state-owned asset management company that invests in different sectors of the economy across Africa to level the playing field and provide the required investment for regional economic integration. The PIC's vision and objectives are reinforced by a firm commitment to apply environmental and social governance elements when investing. Furthermore, the PIC strongly believes in sustainable investing that transforms and positively contributes to regional integration and improving economies of scale.

Rose-Innes (2020) notes that at the World Economic Forum held in Davos (Switzerland) in 1992, Nelson Mandela highlighted that the institutions of global economic governance needed to change and identified that the key to solving problems of legitimacy and effectiveness was to reform their governance. During his keynote address, he stated the following:

If the voices of millions have been freed to enunciate the political aspirations of the people, those voices will also surely speak loudly, proclaiming an urgent desire for an end to poverty and for a more equitable distribution of opportunities of income and wealth within and among the nation. We believe that those voices must be listened to and the concerns they express addressed. If the political transformations taking place across the globe are anything to go by, it would seem clear that these masses will not allow themselves to be silenced. They will not be fobbed off with polite and courteous but meaningless response.

Within the larger global investment architecture, South Africa continues to play a role in the reform of the Bretton Woods Institutions, championed and pioneered by the Presidency, DIRCO, National Treasury, and the dti. Annually, the President and the Minister of International Relations and Cooperation attend the annual United Nations General Assembly (UNGA) to provide input on thematic issues, including meeting Millennium Development Goals and calls to ensure that future investments are linked to the impacts of climate change.

In the realm of trade and investment, former ministers of finance were principally and actively involved in World Bank and IMF reform (Rose-Innes, 2020). South Africa's role in the transformation of the global investment regime was demonstrated by the active involvement of former trade ministers in the WTO negotiations, including Alec Erwin (1996–2004), Mandisa Mpahlwa (2004–2009) and Rob Davies (2009–2019).

The pending question on investment discourse is whether the Bretton Woods Institutions can be transformed to reflect the policy shift in treaty practice and the investment landscape. As Rose-Innes (2020) argues, the institutions of global economic governance have their origins in a system of cooperation used by modern capitalist economies to support their financial and trading relationships since the early part of the twentieth century. While these institutions played a central role in advancing a liberal internalisation in countries in Africa, Asia and Latin America, they are encouraged to recognise that their political and economic security is tied to their subscription to these ideas (Rose-Innes, 2020).

Ofodile (2014) argues that the desire to radically transform the status quo can be appreciated in view of the dispute settlement provisions contained in regional protocols

and in soft law instruments such as the Investment Agreement for the COMESA Common Investment Area, the SADC Model Bilateral Investment Treaty Template, and the SADC Protocol on Finance and Investment.

During the 10th BRICS Leaders' Meeting held in Johannesburg (South Africa) in 2018, China's President Xi Jinping said the following:

We will jointly build the BRICS partnership for the new industrial revolution, strengthen macroeconomic policy coordination, promote innovation and industrialisation cooperation, and jointly accelerate the transformation and upgrading of new and old economic drivers.

In addition to promoting economic integration across the continent, Xiaohui (2023) argues that Africa can overcome its structural weakness in terms of economic size and small markets only by pursuing the path of unity and self-reliance and accelerating the process of economic integration. To fully leverage AfCFTA potential, African policymakers must strategically direct investments towards key areas, including infrastructure construction, industrial development and market integration.

5.6 Rule of law

The Mo Ibrahim Index releases annual reports that assess the governance performance of individual countries. South Africa is considered a medium to moderate risk country, with high levels of corruption and growing civil unrest but with well-established political rights (South Africa Country Report, 2024; Croucamp and Malan, 2011). The Mo Ibrahim Index assesses the extent to which individuals and institutions have confidence in and respect the law. Worth noting is that across all markets, investors cited efficient legal and

regulatory environments (rule of law), alongside robust domestic economic conditions, as top priorities when considering investment destinations.

As a sovereign state, South Africa is a signatory to a number of treaties, conventions and international agreements governing trade and investment, human rights and achieving SDGs. Most significantly, the constitution and NDP Vision 2030 set the trajectory that the country has to follow. At a governance and institutional level, South Africa enacted the Prevention and Combating of Corrupt Activities Act 12 of 2004, the Prevention of Organised Crime Act 121 of 1998 and the Protected Disclosure Act 26 of 2000. On determining investor confidence, the World Bank World Governance Indicator has identified the following six variables:

- 1) Rule of law
- 2) Government effectiveness
- 3) Accountability
- 4) Political stability
- 5) Absence of violence, and
- 6) Regulatory quality and control of corruption.

While all these variables are considered important, for the purposes of this discussion, the focus is on the rule of law, government effectiveness and regulatory quality. From Lejour and Salfi's (2016) perspective, the rule of law refers to the perception of and agents having confidence in the rules of society, particularly regarding contract management, property rights, and the power of the police force to enforce the law, reliability and transparency of the court system, and the likelihood of crime and violence.

The other two important indicators for attracting investment are government effectiveness and equality. Lejour and Salfi (2016) argue that they capture perceptions of the quality of public services, the quality of the civil service and the degree of its independence from political pressures, the quality of policy formulation and implementation, and the credibility of the government's commitment to such policies.

5.7 Ratification and national treaty network

According to Article 102 of the Charter of the United Nations and Article 80 of the VCLT, all countries are obliged to register their ratification with the Secretariat of the United Nations. Subsequently, all the agreements are published in the United Nations Treaty Series (UNCTAD: 2009, VCLT: 1969).

In South Africa, constitutional provisions regarding treaty signing and ratification process are found in Section 231 of the Constitution of the Republic of South Africa 1996, which provides that the negotiation and signing of international agreements is the responsibility of the executive. Poulsen (2010) cautions that the existence of a BIT which is in force does not play a large role in the decisions of major public and private insurers to underwrite an investment. It is worth noting that at the policy level, the BIT life cycle consists of the following:

- Signature
- Notification, and
- Ratification (entry into force).

Typically, treaties are signed during high-level state visits, binational commissions and often at multilateral forums such as BRICS, UNCTAD, the WTO and the G20. Experience

with treaty practice shows that these signature events are often accompanied by media attention, even though the public learns about their existence after the effect. Further observations indicate that when a BIT is signed, there is no guarantee or certainty about whether and when it will be ratified by the contracting parties. On average, it takes almost two years between signature and entry into force.

In South Africa, the national treaty network provides information on which role-players are involved in treaty practice. As shown in the early section, the executive authority (the Presidency) is responsible for the signing and ratification of treaties. The official South African Treaty Register provides electronic access to South African treaties and agreements dating back as far as 1654. Information on the DIRCO website shows that the Office of the Chief State Law Adviser in DIRCO is the custodian of all international agreements to which the South African government is a party. To that end, the South African Treaty Section is responsible for the management of this information source.

In terms of procedural arrangements, the tabling of all international agreements (including BITs) are by law required to be approved by Parliament. For ease of reference, the explanatory memorandum should meet the following requirements:

- Briefly set out the history, objective and implications of the agreement.
- Indicate the recommendation of the Cabinet.
- Include the legal opinions of the state law advisers of the Department of Justice and Constitutional Development and of DIRCO.
- State whether the agreement has self-executing provisions that will become law in the South Africa upon the approval of the agreement by Parliament.

- Give account of the projected financial and other costs of the agreement for the state and contain all information needed by Parliament to make an informed decision. (DIRCO website See www.dirco.gov.za/ratification-accession-procedure)

Regarding the process of the ratification of treaties, DIRCO as the nodal point of the treaty network, follows strict procedures to safeguard all the international agreements as follows:

- The text of the agreement must be submitted to the state law advisers of the Department of Justice and Constitutional Development for scrutiny to ensure that it is consistent with domestic law.
- The text of the agreement must be submitted to the state law advisers of DIRCO, through the relevant political desk, for scrutiny to ensure that it is consistent with international law.
- The state law advisers of DIRCO must certify the text of the agreement.
- All agreements must be bound before signature. The Treaty Section of DIRCO is responsible for the binding of all international agreements, declarations of intent and instruments of ratification/accession.
- International agreements are printed on special treaty paper, bound and sealed in the South African treaty covers.
- Once an agreement has been certified by the Office of the Chief State Law Adviser and a President's Minute has been obtained, the line-function department or relevant desk at DIRCO can provide the Treaty Section with an electronic copy of the finalised text as well as a copy of the President's Minute.

- The Treaty Section will then commence with the formatting, printing, binding and sealing of the agreement.

(DIRCO website See www.dirco.gov.za/ratification-accession-procedure)

According to Peterson (2004), governments have embarked on an ambitious effort to conclude international treaties in the form of BITs, which purport to protect, promote and in some instances remove barriers to foreign investment flows. UNCTAD (2013) notes that the overwhelming proportion of recent changes to domestic laws affecting foreign investment were designed to promote greater openness to FDI. There have been universal calls to reform and transform treaty practice, and South Africa has emerged as a pioneer in the transformation agenda.

Consequently, Hudleston (2025) argues that with a changing world order and positive domestic developments, there is reason for hope in South Africa. Such positive sentiments are essential. In January 2025, South Africa assumed the rotating chairship/presidency of the G20, which gives the country a golden opportunity to set the global agenda. The G20 uses the principle of a rotating chair, comprising of a troika of an outgoing chair (Brazil in 2024), a chair (South Africa in 2025) and an incoming chair (US in 2026). As a matter of principle, the three countries will forge a strategic partnership in implementing G20 objectives and sustainable development goals. To champion the agenda of the Global South, including levelling the playing field, South Africa lobbied and campaigned for the full participation of the AU at the G20. Thus, for the first time, the AU was invited and participated in the G20 Summit in Rio de Janeiro (Brazil) in November 2024. For its part, South Africa has intentionally set the priority of focusing on poverty, inequality and climate change.

With South Africa chairing the G20 in 2025, there is greater expectation to address the asymmetric relations between the Global North and the Global South, including levelling the playing field in terms of better terms of trade and investment, sovereign debt, access to finance and reform of global financial institutions, particularly the World Bank, WTO and IMF.

In assessing treaties and regulatory risk infrastructure investment, Walde and Dow (2000) observe that many Central African and Central American nations have seen little in investment despite entering into a raft of BITs. Peterson (2004) concurs, indicating that countries such as China and Cuba have seen sizeable flows of investments from countries with which they have not signed or concluded BITs.

Thus, opponents of BITs often touted them as being crafted in vague, open-ended terms and being maddeningly imprecise as to the substantive legal standard applied by the investor- state arbitration tribunal (Peterson, 2004).

5.8 Withdrawal from BITs and enactment of the Promotion of Investment Act

South Africa's experience in the negotiated settlement, geographic location and shared history of the Global South in trade negotiations at the WTO necessitated a shift in its investment policy. When assessing the trajectory of South Africa's experience in signing BITs, Poulsen (2015) argues that governments in developing countries typically overestimated the economic benefits of investment treaties by ignoring the inherited risks and its unintended consequences. All these developments have shaped and influenced the country's policy position on international investment, and provided lessons and best practices on the impact of treaties and conventions.

Thus, following the policy decision of the South African government to review the country's trade and investment policy framework, it did not come as a surprise that the Promotion of Investment Act was enacted in 2015. The government terminated all its BITs with OECD countries, withdrew from the ISDS, and replaced its BITs with domestic legislation and policies. In ensuring that this approach is congruent with international law, the preamble of the Promotion of Investment Act highlights the following key objectives (Mbengue and Schacherer, 2017):

- The goal of achieving a balance between rights and obligations, applicable to all investors.
- The need to promote rights enshrined in the South African constitution.
- Promotion of sustainable development.
- Obligation to take measures to protect and advance persons or categories of persons historically disadvantaged due to discrimination.
- The government's right to regulate in the public interest.
- The government's commitment to international laws through the protection and promotion of human rights, fundamental freedoms and people's resources.
- Provide for fair administrative treatment in which the government is obliged to ensure that administrative, legislative and judicial processes are not arbitrary and do not deny administrative or procedural justice.
- Investment must be created in full compliance with South African laws.
- Provide national treatment specific to deriving benefits from tax agreements or government procurement services.

- Foreign investors have a right to security for their investment in accordance with minimum standards under international law.
- Investors may have recourse to mediation and domestic courts and tribunals.

It is clear that while the BIT system was globally deemed a necessary tool to promote and protect investment, its asymmetric treaty network was not universally accepted. In the medium to long term, South African policy-makers saw the need to withdraw from the BIT system, as it did not adequately provide effective solutions to the pressing and unique development goals, risks and vulnerabilities South Africa faces in terms of achieving sustainable goals. The distinct policy challenges identified in BITs by South Africa needed to be addressed in order to best harness the benefit of investments while ensuring sustainable economic growth.

5.9 Presidential Investment Summit and IISA

In 2018, President Cyril Ramaphosa launched the South African Investment Conference (SAIC) also known as Presidential Investment Summit. The Presidential Summit has drawn delegates from South Africa and the rest of the world with the objective of displaying the investment opportunities available in the country. Hilary Joffe followed the South African delegation at the SA Tomorrow Investment Conference, which she wrote about in *Business Day* on 30 November 2024. Speaking at the SA Tomorrow Investor Conference held in New York (US) on 29 November 2024, the Deputy Minister of Finance, Dr David Masedo, said:

Infrastructure investments to enhance growth will be a focus of the Finance Minister's Medium Term Budget Speech, with the Treasury finalising a credit

guarantee scheme designed to attract private capital into investment in South Africa's transmission infrastructure. Treasury was looking at reforms to create conditions for private sector investment into infrastructure in SA's metros in waste, energy and water to enable them to become independent from municipalities in a way that could enable private infrastructure investment.

Strategically, South Africa's geographic location makes it the entry point for investors into sub-Saharan Africa. While the world at large is witnessing low growth and high debt, South Africa continues to be confronted with socioeconomic challenges such as poverty, unemployment and inequality. The formation of the GNU following the ANC losing its parliamentary majority in the May 2024 elections means that investor and business confidence in the country has improved, making it an attractive investment destination. This is further demonstrated by business confidence, respect for the rule of law, and government policies and programmes intended to address socioeconomic disparities of exclusion and discrimination such as Broad-Based Black Economic Empowerment.

Over the past 10 years, South Africa's position in the BIT universe has shifted radically from being a capital-importing country to being a capital-exporting country. Since the start of the democratic dispensation, a number of South African firms have invested across the continent as well as globally, particularly in the financial, manufacturing, services and retail sectors. Similarly, a number of leading global firms in mining and auto manufacturing continued to expand their presence and investments in the country, such as VW, Ford and BMW. Investment, in whatever form and shape, has become a necessary tool for political leaders to build their own legacy project. Thus, President Ramaphosa initiated

the Presidential Investment Summit associated with public–private partnership, particularly in infrastructure investment and development finance.

According to a PricewaterhouseCoopers report (PwC, 2024), South Africa has attractive fundamentals, such as a world-class financial services, communication industries, deep capital markets, abundant natural resources and a transparent legal system.

During the 2023 State of the Nation Address (SoNA¹⁹), President Ramaphosa promoted the Presidential Investment Model:

Since the administration took office, we have held five well-attended investment conferences that have attracted R11.5 trillion in investment commitments across a broad range of economic sectors. Over one-third of these pledges have translated into job-creating businesses and business expansions in renewable energy, mining, packaging, automotive, retail, manufacturing, transportation and other sectors. The work we are doing with business, labour and other social partners in improving the efficiency of our ports and rail infrastructure is starting to bear fruit. We have invested a lot of effort into improving our capacity to plan, package and finance major infrastructure projects, creating new investment opportunities in energy, housing, logistics, manufacturing and other areas.

Worth noting is the greater emphasis on investment commitments, working with social partners, and planning and improving efficiencies. The success of the Presidential Investment Summit requires collaboration with social partners and public–private

¹⁹. The State of the Nation Address (SoNA) is an annual address to the nation delivered by the President of the Republic of South Africa as the Head of State. During SoNA, the President highlights achievements, flag challenges, and outline interventions for the coming financial year, deliberating on South Africa's domestic affairs as well as its continental and international relations

partnerships. An area of concern that could hamper prospects for economic growth are not exogenous factors but internal factors, particularly low levels of savings and over-reliance on foreign capital to finance infrastructure projects.

Thus, the trajectory of depending on external capital flows invariably increases the risk of volatility in the domestic economy. While the investment summits are innovative and noble, over the long term, planning, monitoring and pledging exorbitant investments will not yield any positive outcome as long as many people do not work and their skills sets are not fit for purpose.

The IISA was initiated and instituted as a voluntary multi-stakeholder partnership to promote public–private coordination in growing domestic impact investment. According to the Global Impact Investing Network, there is a new trend towards impact investing. Essentially, impact investing refers to investments that are designed to generate both a measurable and positive social and environmental impact while delivering a financial return for investors. The Global Investing Network recommends that impact investing can offer capital to address some of the greatest challenges across various sectors, including microfinance, affordable healthcare, housing, agriculture, energy and manufacturing.

Through the establishment of IISA, the country became the first African member of the Global Social Impact Investing Steering Group in 2018. The Africa ESG summits are hosted annually in Southern, East and Central, West and North Africa under different banners in several South African and African cities. The ESG summits brings together local, continental and global thought leaders, experts, policy makers, institutional investors, researchers, impact investors, financial institutions, philanthropists, DFI's, governments and the private sector to address climate related risks in different sectors.

Worth noting is the promotion and incorporation of ESG considerations into investment decisions, mobilisation and promotion of the deployment of capital into impact investing in the continent.

Over the years, the IISA continued to play a significant role in promoting social impact investing, resulting in it receiving hosting rights for the Global Sustainable Goals Summit held in Johannesburg in 2020. To date, this has been the largest impact investing event on the African continent. On two occasions, the IISA (created a marketing campaign to spread the impact of investing to a wide market and developed a long-term strategy for the IISA). Furthermore, in conjunction with the Presidential Summit, initiated by President Ramaphosa, South Africa hosted a number of impact investing forums²⁰.

Furthermore, ESG summit played a significant role exploring the role of Institutional Investors in impact investing across the African continent. Some of the key focus areas of ESG summit include investing in key sectors such as renewable energy, sustainable agriculture, microfinance, housing, healthcare, and education.

5.10 Conclusion

While African, Caribbean and Latin American countries are counted among jurisdictions that experienced the worse form of exploitation and hardship, indications are that there is light at the end of the tunnel, as countries of the Global South have hope and the future looks bright.

²⁰. The 5th Annual Africa ESG, Impact Investing & Sustainable Finance Summit-Southern Africa forum was hosted on the 27-28 Feb 2025 in Cape Town, South Africa. This marks the third time the summit has been hosted in Cape Town. The 2023 Southern Africa summit was held at the Pepper Club Hotel in Cape Town while the 2022 summit was held at the Kruger National Park. The 2024 Southern Africa summit was held on the 05-06 December 2024 in Cape Town

Truth be told, political risk is not specific to a geographic area, such as the African continent, given that jurisdictions or emerging markets in Europe, Asia and the Caribbean are encountering similar development challenges, albeit at a different scale and measure. Of concern is how to integrate Africa into the global economy, particularly in view of the need to become competitive, expanding trade and investment as well as to sustain economic growth and reduce poverty.

Africa's encounter with BITs is complex and controversial. According to Miles (2013), the colonial encounter created "others" in the concept of the host country, thus excluding it from the protective principles of international investment law. Given the asymmetric treaty network, African countries suffered irreparable damage as host states. To this day, some African states are unable to call upon the rules of international investment law to address damages suffered at the hands of investors. Consequently, Alshahrani (2020) argues that it is often believed that the roots of foreign investment law served imperialist interests.

Previous investment rules safeguarded mostly the imperialist and commercial interests of European capital-exporting countries and their business interests against the real or perceived risk of nationalisation and expropriation by host countries. This fact supports the assumption that colonialism was central to the development of international law. In addition to providing perspectives on Africa's position on the international investment regime, Kidane (2020) notes that the existing literature on Africa and international law generally attempt to accomplish two principal objectives:

- 1) To situate Africa in the global and regional international investment legal order,
and

- 2) To postulate emerging trends in the governance of Africa's economic relationship beyond its traditional economic partners.

In view of the observations highlighted above, it is worth noting that the participation of any entity of countries of the Global South (including South Africa) in global economic development shows the importance of “trust” and commitment to economic growth (Alesina *et al.*, 2015; Alesina and Giuliano, 2015). Put differently, African countries have over time developed trust in international institutions to provide donor funding and investment. Contrary to Alesina's argument, global empirical evidence suggests an increasing deficit of trust in several African countries. It is worth noting that this lack of trust is not unique to Africa, as the practice has spread across regions of South America as well as parts of southern and south-eastern Europe (Heshmati and Tausch, 2018).

The negative perception of Africa as a politically risky environment for investment persists, even though the situation improved drastically with the ushering in of democracy and accountability institutions in the early 1990s. Treaty practice in Africa, as in other jurisdictions, has had almost the same history; appears to be complex, complicated and controversial; and has followed similar typologies and trajectories in the asymmetric treaty network favouring the Global North.

Africa has come of age, as sentiments of optimism and hope have driven economic development and there is potential for the continent to benefit from the youth bulge. As Norma *et al.* (2012) observe, economic development in some African countries has shifted decidedly away from the “lost continent” image and the debate has increasingly featured factors such as good governance being decisive in Africa's future trajectory in the global society.

Efforts to promote South–South investment cooperation demonstrate consideration for intra-trade and regional integration among African countries in particular and the Global South generally. The BRICS relationship emerged initially as a way for regional powers in the Global South to co-ordinate engagements on trade and geopolitical issues. As Poulsen (2008) argues, today South–South BITs account for around 40% of the global network of BITs and more than 100 developing countries have entered into BITs with another developing country. At the centre of the debate on intra-trade is the increasing discourse, as articulated by Zondi (2013), indicating that Africa is fast becoming a key actor in multilateral platforms and international trade negotiations.

CHAPTER 6

CHALLENGES AND PROSPECTS FOR POLICY FORMULATION: IMPLICATIONS FOR SOUTH AFRICA AND THE GLOBAL SOUTH

Governments are pursuing substantive and procedural reform of the international investment regime in recognition that there are fundamental systematic and interrelated concerns about current approaches to investment governance, and their current approaches have failed to meet their purported objectives.

– Anthea Roberts (2015)

6.1 Introduction

In view of the historical and institutional evolution of IIAs from TFCNs to BITs, this chapter reflects on the local and regional initiatives that symbolise commitment to challenging outdated, one-sided treaties, which have long been criticised for mirroring colonial-era structures. These include regulations and policies being developed, both in the host and home countries, to transform the global investment treaty regime and treaty practice. The challenges and prospects facing host countries in their efforts to regulate policies that serve public interests are highlighted in detail. Thus far, the key findings of this study seek to foster and reinforce regular interaction with public- and private-sector stakeholders to assess the merits and demerits of signing BITs. The analysis of data reveals that the disruptive innovation and rational choice theories provide a worldview or a lens through which to build knowledge and capacity building of investment treaty policies.

6.2 BITs and policymaking in South Africa

South Africa made a bold move by terminating several BITs it had signed with European countries. This underscores its commitment to challenging outdated, one-sided treaties that have been criticised for echoing colonial-era structures. As both a legal and political framework, BITs have failed to evolve in ways that address the growing calls from the Global South for fairness, regulatory autonomy and socioeconomic justice.

This study argues that a policy shift has occurred in both the Global North and the Global South, illuminated by new BIT models, calls to transform the investment regime, denunciation of investor–state dispute mechanisms, and host countries’ demands for a robust regulatory and policy space. An attempt is made to address the fundamental question of how to strike a balance between promoting and protecting investment on the one hand and acknowledging the sovereign rights of the host country on the other hand. BITs are fundamentally preferential legal-political instruments that warrant the advantage of foreign investors over host countries – a situation that continues, even in the current era.

The following figure shows South Africa’s journey in the BIT universe.

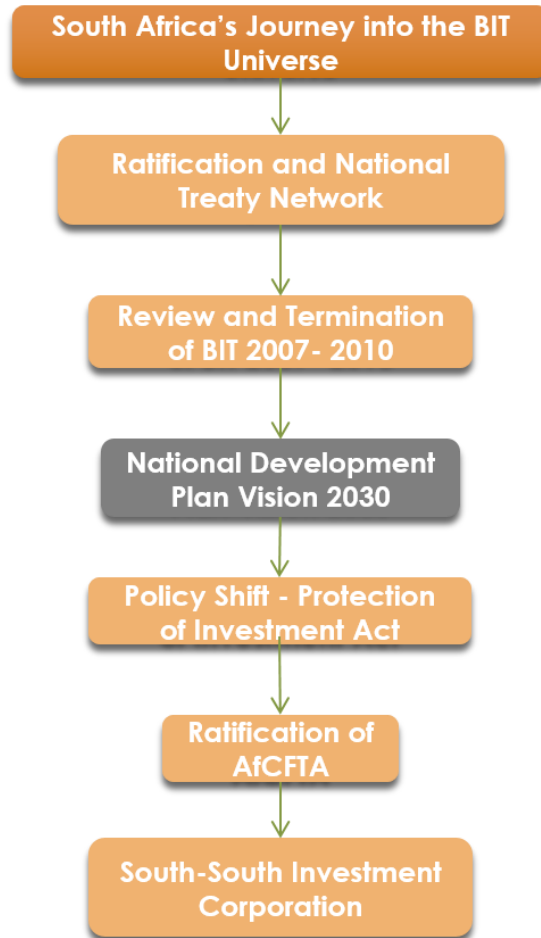


Figure 7: Host country's right to regulate policies

Source: Own construct

At the level of theory, IR scholarship has revealed that there is inherent tension between states and markets. At the same time, relations between states and markets are governed by norms, rules and treaty practices requiring contracting parties to fulfil their obligations and commitments. Vandevelde (1988) notes that the BIT phenomenon was initiated as economic nationalism and a liberal façade whereby both developed and developing countries symbolically embraced liberalism, but for nationalistic reasons.

As a way of promoting BITs, developed countries used their MNCs as investment tools to strengthen their global value chains and expand their established investment network abroad.

Regarding developing countries, Poulsen (2011) states that many LDCs thought BITs were a simple process of putting ink on paper without any meaningful effect on the real world. Treaty practice dictates that to bring a treaty into practice requires the contracting parties to fulfil their constitutional requirements by ratifying the treaty. Under normal circumstances, a BIT contains a paragraph or clause regarding the ratification and entry into force of the treaty.

Regarding the political risk associated with BITs, Dolzer and Scheurer (2012) posit that the host country is free to review its laws after the BIT has entered into force. When observing trends in treaty practice, Lubambo (2017) notes that moving concepts from the multilateral arena back to the regional one is an interesting development in treaty-making. In the context of the backlash against traditional North–South BITs, countries of the Global South (such as India, Brazil and Indonesia) reviewed, terminated and introduced new investment legislation.

When analysing and interpreting the rules and norms regulating treaties, Vandevelde (2010) posits that while the host country may change its law at any given time, it must adhere to its own law until such time as it has been changed. The willingness of governments to violate treaties exposes them as risky environments for investments, which ultimately will lead to the deterioration of their sovereign creditworthiness.

Other associated risks include reputational damage and investor–state disputes, which have far-reaching implications. The risk of compensation claims from arbitration proceedings differ from country to country, depending on the merits of each case. According to the Investment Dispute Settlement Navigator of UNCTAD (2020), the most frequently breached investment provisions involve the following in a hierarchical order:

- Fair and equitable treatment
- Expropriation
- Prohibition of arbitrary, unreasonable or discriminatory measures
- Full protection and security
- Umbrella clause
- Transfer of funds clause, and
- National treatment and MFN treatment.

Worth noting is that expropriation is often invoked by developed countries when state–state dispute settlement presents a challenge in a BIT. According to Section 25(2)(a) of the South African constitution, expropriation may be carried out for a public purpose or in the public interest. For the purpose of this discussion, public interest is defined in the constitution as the nation’s commitment to land reform and to reforms to bring about equitable access to all South Africa’s natural resources.

Other case studies involving expropriation include the Venezuela compensation case for direct expropriation of oil production (ICSID case number ARB/07/30) and Pakistan’s indirect expropriation for denying an agreed-upon mining licence (ICSID case number ARB/12/1). These cases suggest that the BIT universe has a grey area where government and private goals and interests overlap.

With regard to the review of the US BIT model of 2004, Jackson (2017) observes that the Committee on Foreign Investments has the power to vet and scrutinise foreign transactions that could negatively impact US national interests.

In the case of South Africa, Poulsen (2011) notes that policy-makers only began to take BITs more seriously when a foreign investor challenged the country's post-apartheid legislation before international arbitration (*Piero Foresti Laura de Carli & Others vs The Republic of South Africa*, ICSID case number ARB(AF)07/01). From Muchilinski's (2010) perspective, South Africa's experience in the investor–state dispute was a reality check that called for the transformation of its BIT models. Thus, the encounter shaped and influenced the dti's (now the Department of Trade, Industry and Competition – dtic) policy shift, resulting in an in-depth policy review and ultimately the termination of some of its existing investment treaties. A summary of Cabinet decisions on the BIT policy shift include the following five key issues:

- 1) Develop a new Investment Act to codify and clarify typical BIT provisions into domestic law and strengthen investor protection.
- 2) Terminate first generation BITs and offer partners the possibility to re-negotiate.
- 3) Refrain from entering into BITs in future, unless there are compelling economic and political reasons.
- 4) Develop a new BIT model as a basis for re-negotiation.
- 5) Establish an Inter-Ministerial Committee to oversee the process (dti, DIRCO and National Treasury).

In its preamble, the Protection of Investment Act recognises “the importance that investment plays in job creation, economic growth, sustainable development, and the well-being of the people of South Africa”. In furtherance of the decision to terminate the country’s BITs, the South African Cabinet published the draft of the Promotion and Protection of Investment Bill for public comment in 2013. As the process unfolded, a revised version was passed by both Houses of Parliament, followed by the ultimate endorsement of the president published in the *Government Gazette* as the Protection of Investment Act No 22 of 2015. From Carim’s (2013a) perspective, the Act is informed by the dti’s vision of a “legal and policy framework for investment that learns from the lessons of the past and is better attuned to the challenges of sustainable development and inclusive growth”. Essentially a policy shift occurred, indicating that South Africa had chosen a path to address socioeconomic development, ensuring that investment policies would be in furtherance of the constitution.

As investment treaties are integrated in foreign-policymaking, both the host country and the home country (contracting parties) should make commitments in pursuance of sustainable investment, and there should not be any blind spot in understanding the impact of climate change on investment treaty policies. In retrospect, the 2005 AU Summit made a profound and innovative call for a policy shift when the Executive Council of the AU issued the following statement: “We call on all international organisations to support African countries to review their investment policies and identify more focused and targeted investment promotion activities.”

In highlighting prospects for policymaking in South Africa and the Global South, it is worth noting that while anticipating the implementation of the African Continental Trade Area, the United Nations SDGs and Agenda 2030, all contracting parties should be cognisant of the significance and potential hindrances of political risk, determinants of investor confidence and linking of future investment policies with the impacts of climate change. For all intents and purposes, BITs are increasingly becoming controversial and continue to pose serious policy challenges to host countries. Current policy reviews geared towards transparency and accountability are enabling host countries to renegotiate BITs and other investment agreements with full appreciation and knowledge of the rights attached to land. Furthermore, the host country has the right to preserve policy space to achieve national SDGs.

As Schawdt *et al.* (2016) argue, the process of policy formulation or a policy shift is complex and requires policy-makers to strike a balance between different aspects of changing societies including different interests and different value systems. To match the continuous challenges, risks, vulnerabilities and uncertainty of the twentieth century, it is inevitable that investment policies have to be formulated, evaluated and reformulated as South Africa did when it decided to terminate its BITs and withdrew from the ICSID.

In view of the policy shift, the dti Task Team concluded as follows:

The policy review held that adequate policy space is a key developmental tool for developing countries, but the current BITs extend far into developing countries' policy space, imposing damaging binding investment rules with far-reaching consequences for development. New investment in BITs prevent developing country governments from requiring foreign companies to transfer technology,

train local workers, or source inputs locally, and that under such conditions investment would fail to encourage or enhance development.

According to UNCTAD (2007), flexibility is a central feature of the development dimension of IIAs because it allows signatories to preserve the necessary policy space for the pursuit of development-oriented policies. To take this point further, Poulsen (2011) asserts that national treatment and transfer of funds clauses in South–South treaties grant more flexibility to host countries than clauses in North–South treaties. However, Ofodile (2011) argues that the admission clause of the model adopted in all China–Africa BITs allows countries in the region to regulate the entry and establishment of foreign investment.

From an institutional perspective, the path that South Africa chose has manifested in different dimensions of the social environment within which it operates. As Schwardt *et al.* (2016) argue, an evolutionary institutional perspective recognises that the system itself may take on some different characteristics over the course of its path. Consequently, individual state actors can be affected by developments that are a consequence of their own action, which may not be within the realm of their control.

South Africa operates in a constantly changing and evolving environment. Therefore, the decision to terminate its BITs and withdraw from the ICSID exposed the country to vulnerabilities and risks outside its scope of influence. Critics contend that the Protection of Investment Act represents radical change and a missed opportunity for South Africa to develop a holistic investment protection policy based on reciprocity, thus it fails as a viable investment protection alternative to BITs (Boyce, 2017). Despite facing significant socioeconomic and declining influence and competitiveness, South Africa remains a preferred destination and a regional hub for infrastructure investments.

In May 2024, the dtic released its Industrial Policy and Strategic Review. Commenting on the implementation of industrial policy in the Sixth Administration, Minister Patel remarked “Global geopolitical tensions, fuelled by economic slowdowns and conflict around the world, will continue to challenge South Africa’s economic growth. Rising protectionism in the global north will require careful navigation to ensure that markets remain open for South African exporters”. It is thus imperative for South Africa to identify both opportunities and risks presented by the geo-political dynamics While there is consensus and global acceptance that there are asymmetric trade and investment relations between the Global North and the Global South, Hudleston (2025) argues that with its new role and standing in the international community, South Africa is poised to drive economic growth by exploiting and leveraging new international and regional trade relationships.

6.3 Analysis of data and key findings

The approach taken on data analysis in this study was to interpret information from EDIT database, attend relevant seminars on the topic and review literature to make sense of South Africa’s experience in treaty practice. In addition, qualitative data was analysed following informal discussions with subject matter experts on the IPE, trade and investment, treaty practice and conventions to solicit information on South Africa’s policy position and investment approach. As Kumar (2014) explains, both focus group and group interviews are facilitated group discussions in which a researcher raises issues or asks questions that stimulate discussion among members of the group. Given the low cost, it is a popular method for finding information in almost every professional area and academic field. At most, I would have appreciated a large sample for the interviews but due to the exploratory nature of the research methodology and other related limitations

(low response rate, time, logistics and pressure to complete the research), it was deemed necessary to limit the participants to a small and manageable group.

Alschner and Skougarevsiy's (2016) introduction of EDIT (an electronic database on BITs) as a data analysis tool in treaty practice and conventions systematically contributed in enhancing my ability and capability to track consistency and innovation in the national BIT network.

Thus, it was because of novel use of EDIT database that the researcher was able to determine that South Africa's approach and termination of its BITs are considered disruptive and innovative. To its credit, as a data analysis tool, EDIT is useful in making unknown information on treaty practice known, such as computational analysis, trend analysis and automated key word search. For instance, EDIT is able to define concepts such as BIT and policy space and to identify common language in treaties. In assisting researchers with translation and interpretation of languages, EDIT uses various languages such as English, French, Spanish, German, Russian and Arabic. Link and Hafterl (2019) observe that by using EDIT in analysing treaty practice, countries with an Islamic legal tradition were found to have systematically opted for more informal dispute settlement arrangements.

In addition, EDIT was useful in providing insights into past BITs and renegotiated, terminated and even current BITs. On content analysis, EDIT provided insightful information on preambles, annexes and data on the number of BITs signed, those in force and those that had not entered into force. Furthermore, EDIT was significantly useful in highlighting treaty provisions dealing with various themes, such as fair and

equitable treatment and MFN treatment. Through a keyword search, EDIT showed that since 1994, the US BIT model championed the provision of environmental protection in its preamble, starting with the US-Georgia BIT²¹. This trend spread across subsequent provision of BITs, suggesting that investment promotion could not be achieved without the protection of health, safety and the environment.

On the conceptual understanding and definition of BIT, the respondents indicated that they had comprehensive knowledge on the concept. When asked about South Africa's policy stance on trade and investment, they referred to the country's role and involvement in strategic bilateral engagements and its contribution in multilateral institutions such as the WTO, United Nations, BRICS, the AU and SADC. On the implications of the termination of BITs with EU countries, two respondents indicated that a number of countries of the Global South had expressed dissatisfaction with the asymmetric nature of BITs, which is skewed towards protecting the interests of investors and do not consider domestic imperatives such as addressing economic transformation.

On tracing the evolution of South–South investment cooperation, UNCTAD (2004) notes that the first South–South BIT was signed in 1964, between the Republic of Iraq and the State of Kuwait, thus marking the 60th anniversary of the Promotion of the Movement of Capital and Investment (UNCTAD, 2004). According to UNCTAD (2004), by 1990, the number of South–South investment agreements proliferated to 47 – suggesting exponential growth, which continued to increase to 451 in 2000 and 603 in 2005, marking

²¹. In 1994, shortly after gaining independence both countries signed a Bilateral Investment Treaty, which stipulates Georgia, is eligible to export many products duty-free to the United States under the Generalised System of Preference program.

average growth of 63 BITs per year. Worth noting is that the ratification rate of South–South models is low, with 50% of the BITs not signed, ratified or in force.

Ofodile (2011) argues that given the changes in the global economic landscape, it is likely that the number of South–South BITs will increase as capital-exporting developing countries seek to protect their MNCs and promote their investment geographically and beyond borders.

During the attendance of a series of seminars and workshops on South Africa’s 30th celebration of democracy, organised by the Wits School of Governance and the University of Pretoria, a number of subject matter experts on trade and investment highlighted that through BRICS, South Africa and the other countries of the Global South continued to play a critical role in the transformation of global governance, as reflected in various BRICS Summits. Reflecting on the significant shift from past treaty practice, the respondents highlighted that the new wave of treaty practice was gravitating towards predictability, transparency, administrative justice and sustainability principles.

Yijun (2023) notes that in practice, BRICS countries’ involvement in investment and financing cooperation have five key objectives:

- 1) Enhance the global financial governance system.
- 2) Advance economic structural reform.
- 3) Promote cooperation in infrastructure and industries.
- 4) Deepen trade and economic exchange.
- 5) Guide emerging market countries to establish international investment and financing cooperation standards.

Through enhancing investment and financing cooperation, the BRICS countries can integrate their development strategies and bring their comparative advantages in industrial development into full play (Yijun, 2023). Furthermore, through investment and financing cooperation, BRICS can accelerate the construction of a multilateral trade system, reset trade protectionism, and improve the openness and inclusiveness of BRICS investment and trade (Yijun, 2023).

On whether South Africa acted rationally in terminating its BITs, one respondent highlighted that it was a pioneering move that would help countries of the Global South to set standard operating procedures, norms and rules of engagement to challenge the asymmetric nature of BITs. Similarly, another respondent indicated that the country acted rationally and in the public interest by pursuing regulatory requirements as contained in its constitution.

The other respondents view South Africa's approach of terminating BIT as putting its own house in order and considered the Inter-Ministerial approach as valuable by suggesting that it should further improve communication in its engagements with stakeholders involved in trade and investment. To that end, there is a need to ensure that treaties are crafted in such a way that they incorporate the rights of the host state to regulate in the public interest, particularly ensuring that investments addresses socio-economic issues such as poverty, underdevelopment and corporate social responsibility.

On the policy shift from North–South to South–South cooperation, the findings indicate overwhelming support for cooperation among the BRICS countries to the extent of promoting regional cooperation. During a speech at the Gordon Institute of Business

Science in 2011 on FOCAC and the Beijing Action Plan 2007–2009 adopted in November 2009, Ambassador Gong Jianzhong noted:

China is Africa's No. 1 trading partner, while Africa has risen to the fourth largest destination of outbound Chinese investments. China's investment in Africa has shown new characteristics in the form of rapid growth, wide distribution, wide range of areas, multi-form methods and diverse investors.

Yijun (2023) argues that the G20 gradually replaced the G8 as the dominant force in global governance, thus BRICS countries should unite more closely as participants in the institutional design of global governance. UNCTAD (2005) data shows that while the policy shift towards South–South investment cooperation is encouraging, the extent of engagement varies across countries of the Global South.

On the growth of South–South investment cooperation, data shows that at best the top-10 countries signed between 63 and 126 BITs with each other, while a greater number of 66 developing countries have signed between 1 and 10 South–South BITs (UNCTAD, 2004). The growing phenomenon of South-South investment offers opportunities for countries of the Global South to gain market access, allocate their resources more efficiently and build South-South value chains. When assessing the trajectory of the South–South policy shift in terms of outward FDI, the statistical analysis provides a different outlook. Hong Kong (China) accounted for 100% of the ratified BITs, followed by the Republic of Korea (South Korea) at 89%, Singapore at 80%, mainland China at 75% and Malaysia at 62%. From an institutional and historical perspective, the trajectory and patterns of treaty ratification suggest that countries with higher outward FDI stock have stronger incentives to make their BITs operational (UNCTAD, 2004).

As Ofodile (2011) argues, the trends and pattern of China–Africa BITs show the following characteristics:

- Trade agreements and economic cooperation arrangements with Mauritius and the Seychelles
- Signing and concluding BITs and DTTs with nine African countries
- Reviewing 12 BITs (six BITs that are in force with Ghana, Ethiopia, Eswatini, Egypt, Morocco and Madagascar, and an additional six BITs that are available but not yet in force with Botswana, Djibouti, Benin, Uganda, Tunisia and Côte d'Ivoire)
- China–Cameron BIT, China–Madagascar BIT and China–Morocco BIT.

Ofodile (2011) argues further that within the framework of FOCAC, China has pushed African countries to conclude and sign BITs. Because of this cohesive approach, the Programme for China–Africa Cooperation in Economic and Social Development was adopted in 2000, making the following commitments (Ofodile, 2011):

- Develop a strategy for promoting trade and development.
- Create an enabling legal environment and business environment for the China–Africa economic partnership.
- Create an appropriate legal framework for trade promotion and capacity building.
- Encourage, protect and guarantee investments and avoid double taxation.

Worth noting is that Ofodile (2011) argues that in comparison to the 1960s, 1970s and 1990s when China's position was to reject BITs, China shifted its policy stance over time to embracing and encouraging the signing of BITs through the FOCAC initiative. Other initiatives that China has pursued in promoting South–South investment cooperation is the Beijing Action Plan 2007–2009, as indicated earlier.

Ofodile (2011) argues further that with the Sharm El Sheik Plan of Action adopted in 2009, Africa and China made commitments, including:

- To continue to implement BITs on investment promotion and protection, and
- To create a sound environment with a view to upscaling mutual investments.

While these initiatives are noble, China faces the negative connotation of being the new coloniser in its relations with Africa – a claim it emphatically denies. There is also a noticeable absence of provisions pertaining to human rights, labour rights, environmental protection and sustainability. Regarding labour rights, there is anecdotal evidence suggesting that China's infrastructure projects in Africa involved labour rights violations. China's work ethic and labour practices as an investor may have clashed or differed significantly with the labour practices and work ethic on the African environment. Going forward, such practices require adjustment or alignment.

The ILO (2011) conducted a baseline study on labour practices on construction sites in Tanzania. The study involved 11 large construction projects and its findings were as follows:

- There were exceptionally low labour standards.
- There were long working hours.
- There was low pay.
- There were low standards of occupational safety and health.
- Chinese contractors reported poor record management regarding workers' rights.

According to Ofodile (2011), the nationalities of the main contractors that were part of the study included:

- Chinese (4)
- Japanese (2)
- South African (1)
- Kuwaiti (1)
- Danish (1), and
- Indian (1).

In addition, Ofodile (2011) notes that environmental concerns in the context of Africa in South–South cooperation are heightened by the fact that many of the activities in the extractive industry and the construction sector are of unknown corporations and companies that are typically not on the radar of civil society organisations and have yet to develop credible environmental policies. Ofodile (2011) identifies troubling infrastructure development projects that caused and threatened environmental damage involving Chinese and other global partners as follows:

- The Belinga Mine Project in Gabon, a US\$3.5-billion dam construction involving a Chinese company, which threatened the destruction of the Kongai Falls in Invidio National Park.
- The Merowe Dam in Sudan, a US\$519-million project approved by the China EX-IM Bank, credited with displacing more than 50 000 Sudanese from the Nile Valley to desert locations.
- The Gilgel Gibe III Dam in Ethiopia, a US\$1.75-billion project by the Italian hydropower developer Salini Construtto, backed by the Industrial and Commercial Bank of China and the power equipment supplier Dangfang Electric Corporation.

The dam threatens the livelihood of 500 000 indigenous people, according to environmental groups.

The cited cases provide evidence of the unintended consequences of project planning, which shows that while the initial plan was considered novel, along the value chain the implementation phase of the project experienced unforeseen disasters Ofodile (2011) states that in the past decade, China has improved its environmental law guidelines to mitigate the threat to the environment.

Ofodile's (2011) also states that China created a Ministry of Environmental Protection to strengthen environmental regulations and adopted a green credit policy. In addition, the State-owned Assets Supervision and Administration Commission of the State Council issued CSR guidelines for state-owned enterprises (Ofodile, 2011). Pursuant to responding and putting measures in place to address threats related to the environment, the Industrial and Commercial Bank of China adopted the guidelines known as the Equator Principles.²² Moreover, the China EX-IM Bank signed a memorandum of understanding with the World Bank to share information on project evaluation procedures (Ofodile, 2011).

On the question of whether there is a move from the North–South investment model to a South–South investment model, Ofodile (2011) argues that despite the rhetoric of mutual benefit, win-win outcomes and solidarity pervading South–South discourse, Africa–China BITs appear to mirror Africa–North BITs and do not deviate from the standard model

²² In the early 2000s, the World Bank developed and initiated the Equator Principles pursuant to achieving sustainable development. Many development finance institutions and banks across the world have signed it. It essentially calls on investors to promote and incorporate CSR.

developed over time. It therefore appears that while a policy shift from the North–South investment model is occurring at a high pace; the fundamental principles of treaty practices still reflect an asymmetric relationship.

To demonstrate asymmetrical North–South relations in trade and investment, Trebilock and Howse (1995) point out that at the time of the negotiations in Bretten Woods, developing countries had little or no influence in shaping the design and agenda of the regime that would govern international trade over the decades that followed.

On the differences between traditional North-South and South-South, there is general consensus that old fashioned treaties language was rigid and restrictive. For instance, in they were ideologically entrenched and embedded in colonial, imperial one-directional and power dynamics that favoured the Global North. The Global North are therefore considered capital exporting countries, and the Global South are considered capital importing countries. The type of BIT signed dictated protection of foreign investments, without considering the developments needs of the host states. There was an increasing realisation that traditional BITs put undue risk on the host nations without obligating the investors to follow the measures necessary for ensuring the development requirements of the host state (Friedman and Verhoosel 2003).

Under the traditional North-South BITs, investor state dispute settlement cases have increased dramatically in the last 15 years to reach 608 cases in 2014 from a level of around 50 cases in 2000 (UNCTAD 2015). The gravity of policy shift towards South-South is conveyed by the huge disdain towards investor state dispute mechanism. The number of treaty disputes under traditional BITs has exponentially grown to 1, 300 amounting to 11% against African states. The amounts of claims made by investor litigants has put host

states in serious fiscal strain, as the process is expensive and brutal. The other criticism of traditional North-South BIT models is that their survival clauses continue even when the period of the BIT has lapsed.

The phenomenon of South-South investment has been gaining traction as countries of the Global South are increasingly becoming home countries of FDI flows. Furthermore, their MNC have figure prominently amongst the world major transnational corporations. According to the World Bank (2014) the share of total outward FDI stock in developing economies that is protected by a BIT was an estimated 27% in 2000. In addition, South-South FDI stock, roughly increased by 20% and was covered by South-South BITs in force as of 2003, based on data for nine developing economies that report outward FDI stock by destination (Hong Kong, China; India; Kazakhstan; Malaysia; Pakistan; Singapore; South Africa; Thailand; and Tunisia). These nine economies represent about 58% of the total outward FDI flows of developing countries. According to World Bank (2014) the 20% figure would double if one counted all BITs, including signed BITs that are not yet in force.

While South–South investment cooperation allows host countries to exercise freedom in their policy space, a similar pattern and trajectory can be seen in China–Africa treaties and traditional North–South treaties. Ofodile (2011) identifies the following common characteristics:

- China–Africa BITs contain the standard guarantees in most North–South BITs.
- They do not have provisions for “special and differential treatment”, which acknowledge the development exigencies of one or both treaty parties.

- They do not account for and are not adapted to each country's individual and changing circumstances; most appear to have been adopted more or less from a boilerplate favoured by China.
- They do not affirm a state's right to development, nor its right to regulate in the public interest or to pursue other social policy goals.
- Generally, they pay little attention to the wider policy objectives of the signatory governments.

Regarding the duration or period of the treaty, Ofodile (2011) argues that all China–Africa BITs have a definitive period and specify that they shall remain in force for a minimum fixed period; at most, an initial period of 10 years is provided, with the possibility of renewal or review.

Table 11: Duration of BITs between China and individual African countries

CHINA–GHANA BIT	CHINA–UGANDA BIT	CHINA–ESWATINI BIT
Article 14 1. This Agreement shall remain in force for a period of 10 years. 2. This Agreement shall continue to be in force if either Contracting States fail to give a written notice to the other Contracting State to terminate it one year before the expiration specified in Paragraph 1 of this article.	Article 16 1. This agreement shall remain in force for a period of 10 years. 2. This Agreement shall remain in force unless if either Contracting Party fails to give a written notice to the other Contracting Party to terminate this Agreement one year before expiration of the initial 10 years.	Article 12 1. This Agreement shall remain in force for a period of 10 years. Thereafter, it shall continue in force until the expiration of 12 months from the date on which either Party shall have given written notice of termination to the other.

Source: Ofodile (2011).

In terms of evaluating an investment's risk and profitability, Hunter (2010) suggests the following: "There is a need to consider the essential supplementary legal protection and remedies that BITs provide, especially in the case of perceived inadequacy, unfairness or ineffectiveness in the host states' domestic legal framework." On addressing the question of whether BITs reduce investment risk and make investment more likely, Yackee (2010) concludes that BITs do not reduce country ratings on political risks. One of the respondents highlighted that during the assessment of risks and benefits associated with BITs, South Africa came to realise that the international investment regime was purely concerned with narrow economic interests (such as return on investment) and had no focus on economic transformation or CSR.

On average, the best performing countries in terms of South–South investment cooperation are China, Egypt, South Korea and Malaysia, with each having signed more than 40 BITs among each other (UNCTAD, 2004). Worth noting is that three countries are in Southeast Asia and only Egypt is in Africa. These four countries are contributing to a policy shift that calls for and promotes a South–South BIT model. UNCTAD (2014) shows that they have signed more agreements with other developing countries than with developed countries (not only by worth but also by action, as they signed more agreements).

When mapping South–South investment cooperation, UNCTAD (2014) report shows that smaller countries of the Global South (amounting to 45) have not signed or entered into any BIT with other developing countries. This trend shows that South–South BITs are growing slower than anticipated, as countries of the Global South are facing structural and legal constraints, making their commitments to treaty practice limited because the

traditional North–South BITs are still in force. To reiterate the earlier point, Asia accounts for the majority of emerging economies that are most active in South–South investment cooperation.

Table 12: Top-10 developing countries promoting South–South investment cooperation

DEVELOPING/EMERGING ECONOMY	TOTAL	SIGNED BITs WITH OTHER DEVELOPING COUNTRIES
China	112	63
Egypt	90	48
South Korea	78	47
Malaysia	66	42
Cuba	57	34
Indonesia	58	33
Argentina	58	29
Chile	51	28
Turkey	71	28
Morocco	46	28

Source: UNCTAD (2004)

Among the BRICS countries, China and India’s status improved recently from capital-importing countries to capital-exporting countries, thus making them the largest investors to developing countries. Although not included in the table, South Africa is the most significant African outward investor; it signed 16 of its 41 BITs with other developing countries. The increasing policy shift towards South–South cooperation investment is also illustrated by the trend of increasing preferential trade and investment agreements as well as the signing of DTTs amongst countries of the Global South.

According to UNCTAD (2004), DTTs are frequently concluded between developing countries to promote and facilitate investment. In 1990, 165 new DTTs were signed between 73 developing countries, bringing the total number of these treaties to 256 by the end of 1999 (UNCTAD, 2004). The growth of DTTs persisted until 2004, with the number of South–South treaties (between developing countries) reaching 345. While South–South DTTs are proliferating mainly in Southeast Asia, in Africa Tunisia emerged as the most prominent signatory of South–South DTTs among Arab countries (UNCTAD, 2004).

Another trajectory of South–South investment cooperation is witnessed through the signing of PTIAs. Essentially, PTIAs encompass a variety of international agreements aimed at facilitating trade and investment. According to UNCTAD (2004), while PTIAs contain commitments to protect and/or promote investment, they have been called by different names across the world, including:

- Free trade agreement
- Regional trade agreement
- Economic partnership agreement
- New-age partnership agreement
- Economic complementation agreement
- Agreement for establishing a free trade area, and
- Closer economic partnership arrangement.

Within the context of promoting South–South investment cooperation, there were 34 PTIAs in 1999; by 2004, they had increased to 73. While developing countries continue

to sign BITs and IIAs, out of 73 only 43 of these agreements were in force (UNCTAD, 2004).

Regarding the debate on special and differential treatment at the WTO, Agbo-Ejeh (2023) argues that the main reason for the provision of special treatment to developing countries was to placate them without changing anything fundamental about the trading system.

There is a consensus in the literature that bilateral investment agreements have been signed with haste and later a blind spot was discovered. After reading the terms and conditions later, there was a realisation that the terms of trade and investment were asymmetrical, favouring the interests of developed countries. These sentiments are congruent with previous studies, as Peterson (2004) argues that despite references to economic development, traditional North–South BITs are biased towards supporting the interests of the foreign investor, thus reflecting asymmetric relations.

During this study, I gained valuable knowledge on investment treaty regime by attending academic conferences and seminars that focused on economic diplomacy and South Africa's diplomatic relations with countries of the Global South, including Turkey; India, Brazil and South Africa (IBSA); and BRICS think tanks. Worth noting is that while South Africa terminated its BITs, the country has continued binational commissions with a number of like-minded countries to strengthen historical ties and diplomatic and trade relations. Binational commissions promote complementarity instead of competition.

This is witnessed through the signing of memorandums of understanding and joint economic commissions, which when followed through and implemented have often yielded a win-win partnership in areas of common interests. The significance of the Global

South in agenda setting witnessed South Africa being the first African country to join BRICS and the G20, which gave South Africa a comparative advantage and a voice to call for the reform of the IIR and to deepen economic and investment relations. When probed on the significance of the policy shift towards South–South investment cooperation, one respondent said: “For emerging economies like South Africa, there is value in being part of the history and being a significant player that calls for South–South cooperation.”

The World Bank Investment Report (2024) referred to a policy shift, showing that over 137 developing countries had implemented policy measures to promote and facilitate investment. This figure translates to 86% of investment policy measures favourable to investors; whereas developed countries lean towards more restrictive measures, accounting for 43%. According to the World Bank Investment Report (2024), investment facilitation and incentives were the main types of measures that were favourable to investors in both developed and developing countries, with facilitation at 39%, incentives at 33%, promotion at 14%, liberalisation at 12% and other measures at 2%.

➤ Developing countries continue to prioritize investment attraction

Share of measures more favourable to investors



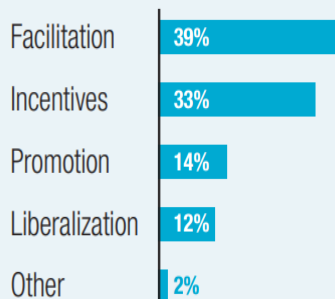
137
national
measures

➤ Key trends: facilitation and entry restrictions on the rise

Less favourable measures by type



More favourable measures by type



Countries with FDI screening

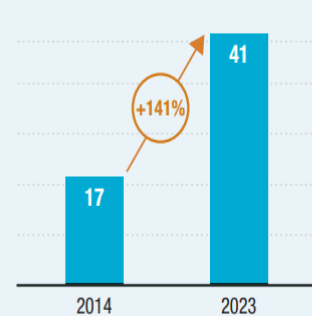


Figure 8: National measures favourable to investors

Source: World Investment Report (2024)

Figure 8 above shows 137 national measures put in place in both developed and developing countries favourable to investors.

➤ Old-generation agreements cover half of global foreign direct investment stock – with greater exposure for developing countries

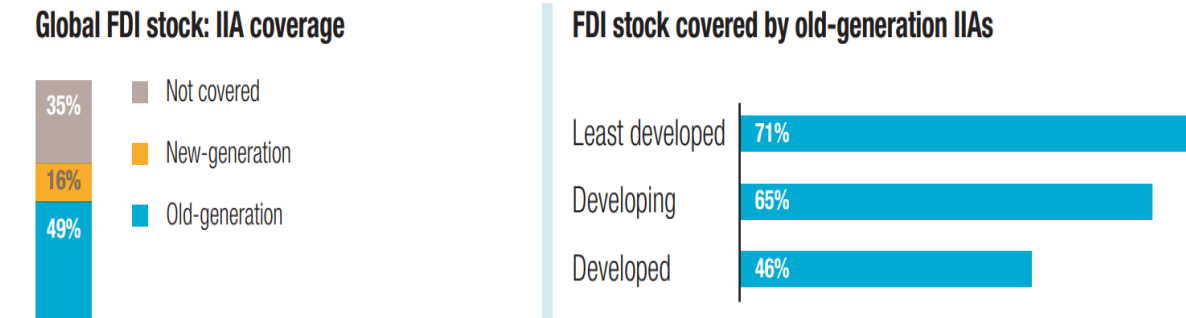


Figure 9: Old-generation agreements

Source: World Investment Report (2024)

Figure 9 shows that old-generation agreements (traditional North–South) cover half of global FDI. With regard to investment decision making, geopolitical considerations continue to shape investment policies.

Regarding the policy shift towards South–South investment cooperation, data analysis by UNCTAD (2023) confirms that South–South FDI flow has been growing faster than FDI from developed countries and the situation remains resilient. The motivation and justification for the policy shift towards South–South investment cooperation include the following 10 key trends in the past decade:

- 1) Increased competition and complementarity among countries of the Global South.
- 2) Limited growth opportunities in domestic markets, resulting in the expansion of South African retail companies across Africa.
- 3) Procurement of raw materials: China’s investments in iron ore and steel mills in Peru; oil in Angola and Sudan.

- 4) Efficiency-seeking expansion of Malaysian manufacturing companies in Indonesia and Vietnam.
- 5) Low labour costs and market access opportunities.
- 6) Geographic and strategic proximity.
- 7) Fiscal and other incentives provided by developing country governments: China offering loans on preferential terms.
- 8) Tax rebates and investment insurance: Malaysia encourages South–South FDI flows through special deals signed with countries such as India, the Philippines, Vietnam and Tanzania.
- 9) Regional trade arrangements: South Africa prefers these agreements to BITs.
- 10) Rising sovereign wealth: The emergence of alternative development finance has enabled South–South investment cooperation.

In the case of South Africa, examples of institutional investors include the DBSA and the PIC (UNCTAD, 2023). During the China–South Africa New Energy Investment and Cooperation Conference held in Sandton on 13 June 2023, South Africa’s Ambassador to China, Siyabonga Cwele, said:

Both countries had reached a consensus on several global issues, including green or sustainable development, the digital economy, the just energy transition, technology exchange, and skills required for the future. It is therefore very timely for us to cooperate more in energy investment. Electricity is necessary for development and a green and low-carbon approach will be the future. (Burger, 2023)

Through South–South investment cooperation, South Africa stands to benefit on energy security. Currently, China is a global producer of energy, with over 50% of all wind turbines worldwide and more than 80% of all solar photovoltaic panels worldwide.

On sustainable development, China’s Ambassador to South Africa, Chen Xiaodong, issued the following statement:

A green economy and sustainable development have become the global consensus and our two countries enjoy key opportunities for stronger new energy cooperation. Our two countries now both have a historical task of energy transition and sustainable development. (Burger, 2023)

On the question of future and sustainable investing, the World Investment Report (2024) states that while South–South investment cooperation is on an upward trajectory, investment in sectors relevant for sustainable development have been declining since 2023. The decline is associated with a downturn in international project finance. The report also states that developing countries mostly aim to promote and facilitate, whereas developed countries lean more towards restrictive measures. As shown earlier, 86% of investment policy measures (liberalisation, promotion and facilitation) in developing countries (South–South) were favourable to investors, whereas 57% of measures were less favourable to investors in developed countries (North–South).

6.4 BIT in the context of the AfCFTA

The AfCFTA encompasses a collective effort towards continental investment policy making. Egbo-Ajeh (2023) points out that the common interest expressed in the AfCFTA provides a greater opportunity for moving Africa to trading more robustly with the rest of

the world. As of 1 June 2021, all 54 African countries, with the exception of Eritrea, had signed and ratified the AfCFTA Agreement. According to the ARII (2019), the AfCFTA has the potential to be the largest free-trade zone in the world, with a combined GDP of over US\$3.3 trillion and a population of more than 1.2 billion people. As an initiative to promote regional integration, the AfCFTA is anticipated to deliver the following key objectives in the medium to long term:

- Boost Africa intra-Africa trade.
- Enhance regional economic integration.
- Create a more competitive continental market.
- Drive economic growth and development across the continent.
- Foster a conducive environment for global economic participation.

Pursuant to achieving the SDGs, the AfCFTA is further expected to lift at least 30 million people out of poverty across the continent. Globally, geopolitical dynamics have shaped and influenced investment decisions, which have had serious implications for South Africa and the Global South. This raises a question about the future of BITs versus the multilateral investment approach contemplated through the AfCFTA.

As a way of taking advantage and leveraging economies of scale, as envisaged in the AfCFTA Investment Protocol, Joseph Barikaco of the ECA states the following: “To attract new FDI during the post-pandemic recovery and rebuilding stage, the upcoming AfCFTA negotiations should serve as a platform to harmonize investment rules and create a level playing field for investors.”

Credit must be given to South–South BITs, as they acknowledge the rights of host countries to regulate investment policies in the public interest. This is a significant policy shift, which augers well for the calls made by the AU and UNCTAD. Essentially, there is reason to embrace the South–South BIT model in efforts to embrace change and acknowledge the human rights approach of the new treaty practice. The 5 November 2019 concept note and joint statement of the United Nations Office for South–South Cooperation and the United Nations Development Programme (see Annexure 3), in partnership with the AUC workshop entitled “The Role of South–South Cooperation in Promoting and Deepening Trade and Investment in Africa – Promoting Conducive and Legal Environment in Africa”, stipulated the following:

The promotion of South–South Cooperation, especially South–South investments, is critical for countries in Africa and other developing countries of the Global South. The AfCFTA therefore is the most ambitious economic decision that African leaders have collectively ever taken in the post-colonial period premised on achieving economic emancipation. Additionally, the AfCFTA will ensure that Africa become more resilient in the face of global financial and commodity shocks. The investment protocol is expected to build on existing investment initiatives and developments of member states and Africa’s Regional Economic Communities as well as include dispute resolution.

At the time of writing, remarkable achievements and the low-hanging fruit of inter-Africa trade emerged, including cross-border investments, which are evident in the final implementation phase of the SADC Tripartite Guidelines on Trade and Transport Facilitation for Safe, Efficient and Cost-Effective Movements of Goods and Services.

The approved guidelines will streamline and harmonise SADC, the EAC and COMESA. For instance, in implementing the effective facilitation of cross-border transport operations, Botswana, Namibia and Zambia are piloting the CTMS on sections of the Trans-Kalahari, North–South and the Walvis Bay–Ndola Lubumbashi corridors. The effectiveness of the CTMS is bearing results and is evidence of South–South investment cooperation and cross-border investment and trade flows, which are beneficial in the short to long term.

In another development, UNCTAD’s Investment Policy Hub shows that there has been a significant change in treaty practice, including nuanced language and explicit policy expression calling for the right of host countries to regulate policies in the public interest. What is being witnessed across the Global South is that new investment laws (either North–South or South–South) are proclaiming the host state’s sovereignty over its natural resources. UNCTAD’s Secretary-General, Rebecca Grynspan, acknowledges that in the current context of the policy crisis, the Global System of Trade Preferences among Developing Countries can provide a valuable platform for advancing trade cooperation to achieve a sustainable energy transition, decarbonisation and greater food security.

The common trend reflecting the policy shift is seen through making consistent reference to the following rights and obligations in the preamble of BITs and new investment laws across the world:

- Promotion of sustainable development
- Provisions allowing the host country’s right to regulate, with specific reference to safeguarding public health, the environment, and labour and human rights
- Restriction of access to dispute resolution mechanisms

- Amicable settlement of disputes through domestic courts or international arbitration, and
- State–state or state–investor disputes to be resolved through conciliation, negotiation and mediation.

South Africa has shown that addressing challenges and hindrances to BITs requires implementing innovative, disruptive and sustainable solutions for future investing. All things being equal, it is safe to argue that as a pioneer and disrupter of BITs, South Africa has used its experience of negotiated settlement to assert its position on the transformation of the international investment architecture globally. At a national level, the country adopted a disruptive innovative approach by clearly articulating and defining the character of its investment policies with its trade counterparties. This disruptive innovative approach has spread across other RECs. Learning from South Africa’s experience, in 2018 Tanzania notified the Netherlands that it intended to terminate the Netherlands–Tanzania BIT.

In addressing the deficit in infrastructure investment, one respondent claimed: “To address [the] poor infrastructure challenge, South Africa must become a construction site while balancing debt repayment and addressing the triple challenges of poverty, unemployment and inequality.”

In an interesting turn of events involving the North–North BIT model, on 5 May 2020 EU member states signed an agreement for the termination of intra-EU BITs. This was a significant development suggesting that the policy shift not only affects developing countries, as the North–North investment model is also witnessing significant changes.

On the question of whether BITs are constraining host countries to regulate policies, Chen (2017) argues that BITs are failing to produce their expected benefits, thus they are creating substantial costs for capital-exporting countries in terms of exposing them to investment treaty liability. Similar views are expressed by Cosbey (2011), indicating that BITs may affirmatively harm a host country's economy by transferring control over domestic assets to foreign investors.

According to Mbegue and Schacherer (2020), history and context matters, suggesting that the termination of the Netherlands–Tanzania BIT should be understood within the broader context where the Netherlands had already started negotiations with Tanzania, Burkina Faso, Uganda and Nigeria in line with the progressive Dutch BIT model. Mbegue and Schacherer (2020) highlight that the Netherlands–Tanzania BIT had a 15-year survival or sunset clause, which would have allowed Dutch investors to be protected under the old treaty until 1 April 2034.

Gathii's (2019) view is that Tanzania's termination of its BIT with the Netherlands was a victory for the country and civil society, as this had been at the forefront of the campaign to terminate the treaty. Worth noting is that the AfCFTA represents a policy shift away from BITs, as all member states can act and benefit as a single market. Ofodile's study (2011) shows the shifting pattern and trajectory from North–South to South–South investment cooperation as follows:

- Germany–Africa: 47 BITs signed with individual African countries
- China–Africa: 31 BITs signed with individual African countries
- Netherlands–Africa: 27 BITs with individual African countries
- UK–Africa: 21 BITs with individual African countries

- France–Africa: 21 BITs with individual African countries
- US–Africa: 10 BITs with individual African countries.

This means that African countries have signed more BITs with China, which shows a shift from traditional partners such as the UK, France and the US. It can be argued that Africa is changing the BIT universe and international investment architecture. The benefits of promoting South–South investment cooperation include the following:

- Export and capital formation in regional markets
- Potential knowledge sharing and skills transfer in 4IR and AI
- Greater government involvement through institutional investors and state-owned enterprises in industrial and infrastructure development projects, and
- Seeking efficiency and promotion of market opportunities.

During the seminar held at the Wits School of Governance on 28 October 2024 to celebrate 30 years of diplomatic relations between Turkey and South Africa, there was consensus that South–South cooperation brought the following opportunities for collaboration between the countries:

- Agro-processing and creating a global value chain
- Developing small-medium enterprises
- Ecotourism: people to people and government to government
- Mining and manufacturing complementarity
- E-commerce and transacting in local currency
- Establishing MNC headquarters to create a logistical base for market access
- Developing special relations through BRICS and AGOA

- Cooperation in supporting United Nations resolutions
- Promotion of universal healthcare: learn from each other and collaborate on areas of mutual interests, and
- Promotion of public–private partnerships.

The influence of countries such as Turkey is seen and felt in many regions of the continent, particularly in the extractive sectors and ecotourism. This suggests that the deepening of South–South investment cooperation and re-shaping of the investment landscape are occurring. In the medium to long term, the single-market approach will harness and create opportunities to grow exports and expand trade beyond borders. In recent times, an increasing number of BITs are concluded between African countries and other developing countries (South–South investment cooperation).

Calls to reform international investment laws by South Africa and the other countries of the Global South have not fallen on deaf ears. Kamau (2020) summarises treaty reforms in Africa as follows:

From Algeria to Angola, Tunisia to Tanzania, states are reviewing and amending their investment laws and treaties. While there is increased participation of African states in the reform process at different levels, the participation does not cohere around one approach. Where there should be a coordinated approach guided by common principles and policy objectives, there is instead a fragmented ad hoc approach to reform. As a result, rather than designing a streamlined investment law framework that reflects African interests, African states are spinning an ever more complex web of interlocking rights and obligations.

6.5 Post-Covid-19 innovations and investments of the future

Before Covid-19, development finance institutions and governments across the world ensured that access to health and other development needs were provided equitably, for example through promoting universal health coverage. Other measures included developing financing strategies and safety nets such as social health insurance and Covid-19 social relief grants. However, the pandemic exacerbated pre-existing risks and vulnerabilities, such as poverty, inequality and underdevelopment. The World Investment Report (WIR, 2021), which supports policy-makers by monitoring global and regional FDI trends and documenting national and international investment policy developments, was concerned about the impact of Covid-19.

Thus, at the request of the UNGA, the 2021 WRI Report included the impact of Covid-19 on investment in the SDGs. Despite such noble efforts, the world lagged behind in fulfilling the health commitments enshrined in the SDGs, which are needed for the achievement of Agenda 2030.²³

In 2018, the UNSO coordinated a globally agreed-upon programme for each country. Thus, the UNSO was tasked with the responsibility of measuring individual countries' progress in achieving SDGs in an open, timely and actionable manner (Esri, 2018). However, individual countries had challenges in setting national and regional priorities. Some of the key challenges hampering the achievement of Agenda 2030 relate to sustainable investing, including the following:

²³ Agenda 2030 comprises 17 SDGs, which are far more comprehensive than the Millennium Development Goals concluded in 2015.

- Lack of coordination between multilateral institutions and levels of government commitment in bilateral agreements
- Limited financial resources to developing countries
- High donor dependency
- Inadequate mainstreaming of SDGs in subnational planning
- Lack of reliable data, and
- Capacity constraints.

To mitigate these challenges, the United Nations initiated the SDG Hub, which is integrated into the National Statistics Office of member states to define SDG requirements and apply a service-oriented architecture known as a system of systems approach to data sharing. The data-sharing approach is intended to achieve the following key objectives related to sustainable investing:

- Allow users to engage with data as a service.
- Change the traditional approach to statistical data production and dissemination.

The impact of Covid-19 has been severe in the Global South, with the crisis reducing countries to poverty, increasing their dependence on debt and further eroding their resource capacity to build sustainable societies and economies. Such impacts disproportionately hit the poorest and most vulnerable, particularly in Africa, the Caribbean, Latin America and Asia.

At the socioeconomic level, the pandemic induced recessions deemed far worse than the 2008 global economic crisis. In the short to medium term, it was anticipated to leave millions of people jobless and under-employed.

As global multilateral institutions, the World Bank and the IMF responded to Covid-19 innovations by calling for all governments to develop “a build back better approach”. The innovative approach advocated that returning to business-as-usual was no longer an option; therefore, the BIT universe required transformational change in dealing with development finance and the promotion and protection of investment. Parliamentary and global governance institutions adjusted to a new normal, emerging from the Covid-19 pandemic with innovative methods and virtual spaces that increased inclusivity, accessibility, cost-efficiency and environmental friendliness. At the height of the pandemic, the United Nations commemorated its 75th anniversary by hosting a one-day high-level meeting during the opening of the 75th session of the UNGA (UNGA 75). The 75th anniversary of the United Nations was commemorated with a high-level event themed “The Future We Want; the United Nations We Need: Reaffirming our Collective Commitment to Multilateralism”. Niger, as the United Nations Security Council president for the month of September 2020, convened a thematic debate on global governance after Covid-19. Worth noting is that President Ramaphosa was one of the six African heads of state and government to address the United Nations on progress made on the SDGs. During his address, President Ramaphosa made the following statement:

The task before us is to chart the course for a transformative and inclusive future in the aftermath of Covid-19. It is only through multilateralism that we can forge commitment strategies for the benefit and advancement of all. Unilateral coercive and violation of international law must be dealt with firmly and consistently. It is only in meeting the Sustainable Development Goals that we shall truly see the fruits of our labour and fully reap the harvest of our work.

President Ramaphosa expressed the desire for a transformative and inclusive future of investment through multilateralism. The Covid-19 pandemic brought new ways of doing business. Thus, BITs and development finance ought to be transformed to reflect the current reality that affects both host and home countries equally. With the future of investment in mind and lessons learned during and after the pandemic, the OECD initiated a series of work programmes and virtual meetings under the theme “Future of Investment Treaties”.

Worth noting is the 6th Annual Conference on Investment Treaties held on 29 and 30 March 2021, which reflected on both the challenges that investment treaties should address in the future and desirable changes to existing approaches with a focus on climate change. According to Novik and Gaukrodger (2023), governments across the world are encouraged and mandated to implement climate impact disclosure requirements in their investment treaties. There has therefore been a concerted effort to ensure that the investment treaty regime addresses and responds to the growing demands to take global action to address the impact of climate change, which has serious ramifications and implications for livelihoods.

Pursuant to addressing the challenge of linking future investment and climate change, the OECD initiated Task 1 and Task 2, which essentially are multilateral working committees on linking investment treaties with the impacts of climate change. The stakeholders involved are the private sector, think tanks, and like-minded multilateral institutions (including UNCTAD, UNCITRAL, and the International Conference on Sustainable Development and the Intergovernmental Panel on Climate Change).

In providing guidance on the future of investment treaties, Novik and Gaukrodger (2023) highlight the pioneering committee work of Track 1 as follows:

- *Net zero: Climate and economic resilience in a changing world.* From the OECD's perspective, this committee will address cross-cutting issues and make recommendations on building climate and economic resilience.
- *Green finance and investment.* During the 10th Annual OECD Forum, two key themes related to the future of investment treaties were assessed, namely "Accelerating Policy Action to Close the Credibility Gap" and "Aligning Investment Treaties with the Paris Agreement".

With time, these OECD initiatives started to gain traction and continue to shape the discourse and policy direction of investment of the future. As a way of demonstrating global support, United Nations Secretary-General António Guterres submitted a report by the Special Rapporteur on the issue of human rights to UNGA in July 2023. Worth noting is the focus on obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (Novik and Gaukrodger, 2023).

UNCTAD has also made considerable efforts in linking climate change and investment treaties. It disbanded ISDS cases involving climate change impact and considered various policy options such as "Trends in the Investment Treaty Regime and a Reform Toolbox for the Energy Transmission" (Novik and Gaukrodger, 2023). Recent developments in linking the impact of climate change and investment included statements issued in support of OECD initiatives for future investments.

In 2023, the Vice-President of the European Commission for the European Great Deal, Frans Timmermans, issued a statement indicating the following: “The outdated Energy Charter Treaty is not aligned with our European Union Climate Law and our commitments under the Paris Agreement.”

Worth noting is the emphasis on commitments under the Paris Agreement, suggesting attempts to address and respond to the impact of climate change. Pursuant to linking climate change and investment treaties, the post-Covid-19 global environment began to witness an unprecedented policy shift in treaty practice, as demonstrated by the following key developments.

- *April–July 2023*: The European Commission formally proposed a coordinated withdrawal from the ECT. This followed a series of high-level decisions from 2023, when EU member states acknowledged that the modernised treaty was still not aligned with the Paris Agreement and other United Nations climate goals, and should therefore be terminated (Novik and Gaukrodger, 2023).
- *September–November 2023*: The UK government took a decision to review its ECT membership. It considered immediate withdrawal if a modernisation was not agreed to by November 2023.

The UK’s Minister State for Energy Security and Net Zero²⁴, Graham Stuart, made the following statement at the United Nations: “In its current form, the Energy Charter Treaty

²⁴ The Minister of State for Energy Security and Net Zero is a mid-level position in the Department for Energy Security and Net Zero in the Government of the United Kingdom. The role used to be part of the portfolio belonging to the secretary of state and minister of state at the Department of Energy and Climate Change (See [Minister of State for Energy Security and Net Zero - Wikipedia](#))

will not support those countries looking to make the transition to cleaner, cheaper energy sources such as renewables – and could even penalise the UK for being at the forefront of those efforts.”

Because of the developments highlighted above, the UK has since tabled terms under which new investments in all types of fossil fuels would lose protection under a modernised ECT. At the time of writing, the UK had not faced arbitration of any ECT claim, suggesting that the effort had good intentions, particularly on linking the impact of climate change with treaty practice. Climate change has also affected the African continent, requiring adaption, mitigation and resilient measures.

Since April 2023, in addition to the identified seven priorities of policy, infrastructure, finance, market integration, increased productivity and trade facilitation, the AfCFTA Investment Protocol has aligned its approach by including climate-related provisions in its treaty networks.

6.6 Recent developments in the BIT universe

Initially, the BIT was presented as an attractive investment vehicle for developing countries. Traditional BITs (North–South) were exclusively biased towards financial returns over the broader societal and economic development impact. Despite the rapid proliferation of BITs between 1990 and 2010, South Africa and countries of the Global South experienced major setbacks related to the termination of BITs. Similarly, the US, the UK and OECD countries introduced policy changes and adopted new BIT models to address contemporary challenges.

The emergence of human rights treaties contributed significantly to the policy shift under investigation. To reflect this policy shift, Peterson (2004) highlights the significant dilemma facing the BIT universe as follows:

Given the nature of the disputes which are arising between governments and foreign investors under investment treaties, it will be important for governments to ensure that investment treaties recognise not only the importance of a favourable investment climate, but also the prerogative of states to regulate in the public interest and the importance of other policy goals, such as poverty alleviation, environmental protection and sustainable development.

Thus, the BIT universe has witnessed unprecedented challenges, such as finding a balance between fulfilling commitments to investors and developing policies that address contemporary threats and opportunities such as food security, energy security, and AI and the future of work. According to Chen (2017), BITs should be redefined to focus on improving domestic institutions as the optimal way of achieving the ultimate goal of obtaining FDI. In addition, Skhinkman (2007) observes that a 2007 survey of 602 executives of MNCs around the world identified political risk and governance issues as the most prominent barriers to investment in emerging markets.

A similar survey conducted in 2009 ranked political risk first on a list of constraints to foreign investment in emerging markets, ahead of factors such as macroeconomic stability, access to finance, infrastructure capacity and access to qualified staff (Chen, 2017). The SDGs and AU Agenda 2063 present a great opportunity for both host and home countries to collaborate and coordinate efforts in achieving these goals through

sustainable or impact investing. Chen (2016) states, “We are at a historical turning point for a new world of sustainable economy and diversified civilisations”.

The discussion below will shed light on the BIT universe and recent developments in investment treaty practice.

6.6.1 Food security versus energy security

To date, the implementation and monitoring targets of SDGs has been incomprehensive across both the host and home countries. Worth noting is that data on SDG metrics across countries of the Global South has been inconsistent, as many countries do not have data on important metrics. According to Schwandt *et al.* (2016), there is a need to distinguish between changes that recur over time (such as in the level of economic activity) and risk exposure faced by individual countries in financial markets.

Consequently, policy frameworks have to be formulated to take into account the constantly changing environment. Having said that, there are more challenges and impediments to policymaking related to BITs, including the increasing global demographics and addressing the dilemma of food security versus energy security. This puts further pressure on development finance institutions and governments to strike a balance between investing on food security versus energy security. The socioeconomic challenges brought by Covid-19 have placed yet another burden (of food insecurity) on the already vulnerable and high-risk households and communities across the Global South.

According to the World Food Programme’s Regional Bureau for Southern Africa, an estimated 41 million people will be food insecure; this will disproportionately affect poor

and vulnerable households. In addressing investment in food security, the New Alliance for Food Security and Nutrition²⁵ committed to lift over 50 million people in Africa out of poverty between 2022 and 2024. As an entity that provides development finance, the UK's Department of International Development contributed £600 million in aid to address the challenge. Such efforts are intended to facilitate corporate investment in Africa's food systems. In return for this development aid, African countries have had to make changes in their land, seed and trade rules, thus handing control over to big business at the expense of small-scale farming. Already, 10 African countries have signed bilateral agreements with the New Alliance scheme: Burkina Faso, Côte d'Ivoire, Ethiopia, Ghana, Mozambique, Tanzania, Benin, Malawi, Nigeria and Senegal.

While the initial intention of the bilateral agreement was good, it has unintended consequences such as the impact on the environment and unsustainable use of land, leading to food insecurity. Evidence from across the continent suggests that these investment schemes have a negative impact on small-scale farmers, who are key to addressing the challenge of food insecurity. In tracing progress and assessing the impact of linking treaties with climate change, Novik and Gaukrodger (2023) conducted a survey among various stakeholders. The following key findings are highlighted (Novik and Gaukrodger, 2023):

- The interaction of investment treaties with climate goals is a vast, under-explored and fast-moving subject.

²⁵. The New Alliance, which was launched in 2012, provides aid for money from rich countries such as the US and the UK. It also provides assistance to big corporates such as Monsanto, Nestlé, Cargill and Unilever to invest in the agricultural sector.

- To date, Track 1 work has only scratched the surface.
- No government has suggested that the Paris Alignment is not important, either in the surveys or in meetings.
- While expressing a divergent view on the optimum approaches to treaty reform, the chairperson of the Investment Committee noted that all three stakeholders (Business at OECD, Trade Union Advisory Committee and OECD Watch) emphasised the importance of the work done by Task 1.
- There is overwhelming consensus that it is important to align existing investment treaties and policies with the Paris Agreement.
- A major challenge to alignment is uncertainty about what to do.
- The shared goals of aligning investment treaty policies with the impact of climate change include the principles of do no harm and to help promote as well as facilitate vital investments.
- The work of Task 1 should continue to account for sustainability, market access and implementation.
- Strong government interest in Track 1 has been accompanied and supported by strong business, labour and civil society interest.
- Due to the track record and work done by Track 1 thus far, investment treaties are ceasing to be an impediment in discussions on sustainable finance and investment.

While there has been a victory in linking investment treaty policies with climate change, there has been regression in other jurisdictions. In this regard, small-scale farmers and communities have met the challenge or opportunity presented by the increasing trend of

investment in large-scale agricultural production. This trend involves bilateral agreements between selected African countries and MNCs to use arable land for the cultivation of biofuel and diversification of crop production. This trend has been met with some resistance across the African continent.

For their part, communities have raised concern that the investment schemes contribute to food insecurity and loss of control over the means of production. In exposing such investments, civil society organisations (particularly the Oakland Institute, Greenpeace Africa and Global Justice Now) have provided empirical evidence and assessed their socioeconomic and other impacts, including the following:

- Environmental damage
- Over-indebtedness, and
- Unfair displacement of small-scale farmers by large corporations.

While investments through large land grabs for biofuel were considered significant in contributing to development finance by MNCs, it has had unintended consequences. The unintended consequences include food insecurity, recently worsened by climate change. Various regions continue to witness sporadic and widespread effects of climate change such as drought, floods and the locust infestations that spread from East Africa to Southern Africa.

6.6.2 *AI and the future of work*

The speed with which things move digitally has exposed people and institutions to both vulnerabilities and opportunities. AI is an existing and emerging technology that has potential for exponential growth, even within the trade and investment environment. Due

to the Covid-19 pandemic, the world has changed drastically and will continue to do so at a rate that is unimaginable.

Thus, BIT agreements should strengthen digital collaboration; facilitate e-commerce; and enhance regional integration in key sectors such as ICT policy alignment, 4IR technologies and cybersecurity.

Even in the realm of trade and investment, Covid-19 amplified the trend of digitisation of commercial and social activities, with the growing adoption of disruptive technologies such as the Internet of Things and AI leading to exponential data growth. Worth noting is the report of the Center for Strategies Studies and International Studies (CSSIS: 2024), which projected that the market for AI agriculture investment was expected to grow by over 25% per year between 2020 and 2026. The global investment architecture is already confronted with the following challenges:

- Shifting the focus from cross-border movement and equipment to cross-border data flows
- Unequal access to information and knowledge, and
- Cybersecurity threats.

As indicated in Section 6.3, United Nations efforts through the NSO have shown that data science is already helping policy-makers to measure progress in achieving SDGs. However, investing in public goods has had unintended consequences. The global public-health crisis has already drawn attention to the question of vaccine nationalism or vaccine apartheid, highlighting national pride for achieving innovative biotechnology and related implications for economic competitiveness and economic nationalism.

6.7 Mechanisms for strengthening policymaking

With regard to mechanisms for realising a comprehensive strategic partnership between South Africa and China, the countries established the Joint Inter-Ministerial Working Group, outlining 38 bilateral cooperation agreements ranging from political dialogue to trade and investment (Alden and Wu, 2021). Singh (2015) suggests the following: “The ongoing backlash against the current IIA regime calls for policy solutions, which not merely strike a good balance between public and private interest in principle but can be translated into workable practice”.

Recently, the African continent witnessed increasing interest in impact investing or sustainable investing through the ratification of the AfCFTA. While Africa has 10 of the fastest-growing economies, it is also home to 24 of the 31 classified low-income countries. Thus far, the levels of underdevelopment and the lack of affirming the dignity of the population are reflections of weak governance, requiring introspective policymaking.

According to the World Bank Multi-Dimensional Poverty Index (2024), 64% of poverty-stricken African citizens suffer from a mix of monetary devaluation, lack of education, and health and basic infrastructure shortages. Such projections create the impression that the future of Africa looks bleak and uninspiring. As a strategic framework intended to enable the achievement of Africa’s long-term objectives of inclusive economic transformation and prosperity, the AU Agenda 2063 consists of seven aspirational goals:

- 1) A prosperous Africa
- 2) An integrated continent
- 3) An Africa of good governance, democracy, respect for human rights, justice and the rule of law

- 4) A peaceful and secure Africa
- 5) An Africa with a strong cultural identity, common heritage, values and ethics
- 6) An Africa whose development is people driven, relying on the potential offered by African people (especially its women and youth) and caring for children
- 7) Africa as a strong, united, resilient and influential global player and partner.

In echoing the achievement of this agenda, Dave Malcomson (an official at DIRCO) presented a keynote address during South Africa's presidency of the 10th BRICS Summit:

South Africa's participation in the BRICS partnership complements South–South cooperation through reinforced political, economic, trade and investment engagement. Through BRICS, South Africa continuously endeavours to put the Agenda of the Global South on the forefront as captured in the Goa Declaration and Goa Plan of Action, which states, “We welcome the African Union's vision, aspirations, goals and priorities for Africa's development enshrined in Agenda 2063, which is complementary with the 2030 Agenda for Sustainable Development. We reaffirm our support for Africa's implementation of its various programmes in pursuit of its continental agenda for peace and socio-economic development.”

According to Kambule (2023), the increasing economic and political influence of the BRICS economies is complemented by the realisation and increasing acknowledgement that the time has come to affect reforms within global institutions. Akin to achieving Agenda 2063, the AU further formulated the first 10-year implementation plan for 2013 to 2023. In order to measure progress on trade and investment, date two continental initiatives were launched recently: the Single Africa Air Transport Market (launched in

2019) and the AfCFTA. Related to the 10-year implementation plan are the 12 flagship projects:

- 1) An integrated high-speed train network
- 2) An African virtual and e-university
- 3) Formulation of a commodities strategy
- 4) Establishment of the Continental Free Trade Area
- 5) An African passport and free movement of people
- 6) Implementation of the Grand Inga Dam Project
- 7) The Pan-African e-Network
- 8) Silencing the Guns by 2020
- 9) Africa Outer Space Strategy
- 10) Establishment of a Single Africa Air Transport Market
- 11) Establishment of an annual Africa forum, and
- 12) Establishment of an African continental financial institution.

These initiatives reflect positive efforts in strengthening the capacity of institutions and mechanisms for policymaking on the continent. Mostly, they are in line with the rational choice theory, historical institutional approach and disruptive innovation. Thus, this research calls for political will and commitment on the part of policy-makers and RECs to ensure that sustained investment in infrastructure will eventually foster regional integration. To elaborate this point further, the priorities of the RECs across the continent include sustainable and inclusive growth, achieved through the following key measures:

- Human capital development
- Gender/women development

- Youth empowerment
- Good governance
- Infrastructure development
- Science and innovation
- Manufacturing
- Peace, and
- Arts and culture.

While these efforts are aligned and linked for greater development of the continent, there has been the challenges of institutional ineffectiveness, poor coordination, and concerns by citizens that RECs do not have the ability or effectiveness to implement noble initiatives. The pressing and imminent challenge going forward is linking investment policies and treaty practice to address the impact of climate change, particularly adaption and resilience.

Although progress has been achieved in aligning institutions and the harmonisation of the BIT model across regions, there is a growing lack of providing development finance in multiple sectors. These sectors include energy, water, health care and agro-processing, as well as a rail infrastructure network, which has the potential of providing opportunities for investors to positively contribute to improving the lives and livelihoods of the next generation beyond 2063.

On issues of debt, the World Bank (2023) assessed that eight of the 38 countries on the continent eligible for support from the IDA²⁶ are in debt distress and 14 are at high risk of falling into similar distress. The IMF (2023) observes that rising food and energy prices have a negative impact on the region's most vulnerable, and public debt and inflation are at levels not seen decades.

According to the ECA (2022), Africa has had a merchandise trade deficit since 2013, reflecting continued dependence on exports of low valued-added commodities and imports of high-value manufactured goods, which reinforces its vulnerability to external shocks during a crisis. The vulnerability and risks that Africa is exposed to impose pressure on the AfCFTA to reduce poverty and accelerate intra-Africa cooperation. The 2024 Africa Sustainable Development Report (ASDR) focus on ending poverty (Goal 1); eliminating hunger (Goal 2); combating climate change (Goal 13); promoting peaceful societies (Goal 16) and strengthening global partnerships (Goal 17). At its current trajectory, Africa's attempt to implement Goal 1 and Goal 2 remain a challenge given continuing insecurity and lack of political will.

Such projections are worrisome. Therefore, to strengthen policymaking, there is a need for governments to create public awareness and strengthen public-private partnerships on existing BITs to leverage opportunities created through sustainable investing. Strengthening policy-making mechanisms also requires sourcing investment projects that meet both financial and social objectives. While the Protection of Investment Act excludes

²⁶ According to the World Bank, eligibility for IDA support depends first on a country's relative poverty, defined as GNI per capita below an established threshold and updated annually (US\$1 335 in the fiscal year 2025). Currently, a total of 78 countries are eligible to receive IDA resources.

the possibility of investor–state arbitration, it presents the greatest opportunity and potential to unlock multiple economic and development outcomes.

In strengthening policymaking, South Africa elected to resolve disputes through mediation or domestic remedies. This will improve the capacity of local courts to settle disputes, as the cost associated with international investment arbitration is astronomical in US dollars, which the country cannot afford. While sustainability issues remain acute in Africa, the RMB 2024 edition of “Where to Invest in Africa” suggests that the operating environment and future economic trajectory should focus on the following key issues:

- Economic performance
- Market accessibility and innovation
- Economic stability and investment climate, and
- Social and human capital.

Forecasters and scenario planners are already predicting that 4IR technology (AI), investment in infrastructure development and embracing disruptive innovative technologies will give the continent a more competitive edge in the coming years. During the 2022 WEF Conference entitled “Sustainable Energy for All” held in Kigali (Rwanda), Bloomberg Philanthropies announced new investments of US\$242 million to speed up clean energy adoption in 10 developing countries, including Kenya, Mozambique, Nigeria and South Africa. This suggests that the rate of return on FDI and the potential for other investments in mining, tech finance, digital commerce, banking, telecommunications and manufacturing are optimistically higher in Africa than elsewhere in the world.

Mukono and Somal (2022) argue that prospects for investing in Africa present limitless opportunities, including:

- Africa has abundant energy and natural resources.
- Africa holds 60% of the world's uncultivated arable land.
- Africa could be a green energy hub.
- The AfCFTA will revolutionise trade.
- Investing contributes to social impact and women's rights.
- New markets and increased trade ensure diversification.
- Expanding markets, increased internet penetration and digital commerce.
- Indigenous knowledge systems provide competitive advantages.

With regard to projections on achieving SDGs, JP Morgan and the Global Impact Investing Network estimate that invested capital could reach US\$1 trillion over the next decade in five impact sectors, namely (i) education, (ii) housing, (iii) health care, (iv) water and (v) financial services. While many of the innovative solutions are available, the challenge of the lack of accountability, transparency and consistency remains, as treaties remain non-binding and years pass without ratification. Such practices suggest that signing treaties without ratification will in the long term remain ceremonial, non-committal and inconsistent with achieving SDGs.

To provide innovative solutions to policy challenge and strengthening mechanism for policymaking, Fernaz and Countinho (2019) propose a template called a "styled policy flow". Table 13 below summarises essential factors for addressing policy challenges, with attributes and success factors aggregated in mission, structure, attitudes and capabilities.

If followed correctly, the styled policy flow has the potential to unlock the key to future policymaking in South Africa, the other countries of the Global South and the rest of the world.

Table 13: Application of a styled policy flow, from challenges to outcomes

ATTRIBUTES	SUCCESS FACTORS
Mission	Service the public interest.
	Engage in developing priorities defined at the political and policy levels.
	Fix failures and externalities.
	Finance new economic activities. Open new frontiers. Foster markets.
	Focus on a portfolio of policies, interventions and their interactions.
	Support national, local and related long-term planning.
	Failure is accepted and encouraged as a learning curve.
	Generate returns through efficient investment decisions and distribute them to society.
	Contribute to systemic economic stability, especially during crisis periods.
Structure	Develop a sound capital base and long-term balance sheet for consistent support of uncertain, risk-intensive development-related projects.
	Develop sufficient scale and scope.
	Increase the volume of operations; decrease the average unit cost of financial services.
Attitudes	Continuous alignment with public policies.
	Identify and address relevant sustainability challenges.
	Develop patience and tenacity to achieve development goals.
	Readiness to partner with the private financial industry to co-develop financial markets.

	Readiness to negotiate and arbitrate interests, with the public good as the guiding principle.
Capabilities	Process-based training.
	The design and implementation of actions are a consequence of learning processes, with the support of the best available quantitative and qualitative tools and an adequate understanding of the temporality of actions.
	Go digital.
	Digitalisation implies decreasing costs, increasing efficiency and customising services, including the possibility of de-intermediation (offering solutions directly to customers).
	Organisational and technical autonomy to be able to discern, foster, implement and monitor worthwhile projects.
	A collective decision-making process.
	Accumulated credibility and continued interaction with financial partners and financing beneficiaries.
	Innovativeness to open spaces for identifying opportunities.
	Development of new solutions and standard operating procedures.
	Apply financial instruments and analytical methods, with the challenges associated with sustainable development projects as the reference point.
	Continuous learning.

Source: Fernaz and Countinho (2019)

When applied to investment policymaking, the best case scenarios are summarised into the following two key issues:

- 1) Sensible political decisions with explicit and intentional support (political will) from political leaders.
- 2) Effective and capable institutions embedded in continuous learning.

Successful implementation of investment policies requires effective institutions and rational actors (such as the BRICS New Development Bank, IISA and policy-makers) that are geared towards achieving SDGs and balancing investor expectations.

Thus, two fundamental conditions must be met for development financial institutions to be effective: (i) sensible political decision making, with explicit and continuous support from social partners, political leaders and private-sector role-players; and (ii) feasible challenge-oriented policy goals that lie within the realm of executive agency capabilities (Fernaz and Countinho, 2019).

6.8 Lessons learned: Implications for South Africa and the Global South

On the reform of the international investment regime, the critical question worth noting is what are we reforming and for what purpose. Moreover, the question of whether South–South investment models are more efficient compared to the North–South traditional BIT model is interesting and controversial. There is push back by countries from the Global North as their preference is maintaining the status quo. Worth noting is that arbitration cases triggered South Africa’s decision to terminate its BITs and withdraw from the ICSID. Despite withdrawal from ICSID, South Africa continues its effort to lobby countries of the Global South to transform the international investment regime. The UNCTAD (2014) acknowledges four strategic approaches that are apparent: (i) maintaining the status quo, (ii) disengaging from the system, (iii) introducing selective adjustments, and (iv) undertaking systematic reform. At this juncture, a reform of treaty practice is inevitable as the Global South are calling for a more responsible, inclusive, balanced, beneficial and sustainable investment oriented policy approach.

Peterson (2007) estimates that the average cost of hiring ICSID arbitrators is close to US\$500 000, with fees for legal counsel possibly running into millions of dollars. Ofodile (2011) argues that investment law is also an area where asymmetries of information are profound, as many countries in Africa lack relevant knowledge and expertise, thus increasing the uncertainty and cost associated with investment arbitration. During the 2005 AU Summit, the Executive Council of the AU made the following statement: “We call on all international organisations to support African countries to review their investment policies and identify more focused and targeted investment promotion activities.”

From a developing country perspective, the criticism levelled at the ICSID represents real or perceived threats with the potential to inhibit the right of a host country to regulate investment policy in the public interest. This research reveals that by adopting a disruptive innovative approach, South Africa found itself facing both risks and opportunities. On the risk side, South Africa was confronted with a global backlash that had the potential of it being excluded from AGOA. The country also suffered declining influence and reputational damage internationally, with investor confidence declining.

Among the issues raised as concerns for investors are the clause on expropriation and the alleged protectionist approach taken by South Africa, including preferential procurement and Broad Based Black Economic Empowerment. The provision for expropriation is articulated in Article 25(3) of the South African constitution, which stipulates that the amount of compensation and the time and manner of payment must be just and equitable.

Furthermore, the provision reflects an equitable balance between the public interest and the interests of those affected, having regard for all relevant circumstances, including:

- The current use of the property
- The history of the acquisition and use of the property
- The market value of the property
- The extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property, and
- The purpose of expropriation.

In the broader context, South Africa's decision to terminate its BITs and introduce domestic legislation was not done out of malicious intent, as critics would like to make us believe. Regarding the government's responses to criticism on the introduction of the Protection of Investment Act, one legal response indicated that foreign investors' concerns about the policy included Broad-Based Black Economic Empowerment, corruption, public procurement processes and currency volatility. Legal experts indicated that by terminating the BITs, South Africa was creating a trend and setting a legal precedent by challenging the old-fashioned treaty practice.

International institutions such as UNCTAD have responded to the call for reform of global treaty practice by introducing annual guidebooks for policy-makers, culminating in the subsequent revision of treaty provisions to be aligned with SDGs and CSR. It therefore stands to reason that South Africa's action was in congruence with global trends and developments in transforming treaty practice.

With the changing policy imperatives globally, South Africa's voice was among those calling for the transformation of global governance institutions. Thus, this became an opportune moment for South Africa to be included in setting the agenda for Africa and the Global South, elevating their voices at the negotiating table of the WTO, the United Nations, BRICS, the G20 and other multilateral institutions by becoming a game changer in treaty practice.

Without a doubt, South Africa represented the Global South and used its position to transform the global investment architecture, which for the longest time had been skewed towards the Global North. One of the government officials highlighted that the 1962 OECD Draft Convention on Foreign Property Rights endorsed a one-directional approach of protecting foreign investment while being silent on promoting the host country's right to regulate investment policy in the public interest. From a strategic and policy perspective, as well as following a rational choice theoretical framework, South Africa was pursuing its national interests and, in all fairness, acted within its constitutional mandate. At the level of case law, the country created a precedent, as other countries followed and emulated its stance and position. For instance, in 2017, Tanzania enacted the National Wealth and Resource Act aimed at creating a conducive and friendly environment for investors and harmonising dispute resolution.

A number of countries across the Global South are pursuing policies in the public interest, to the extent that international law ought to be aligned with national legislative frameworks. A bold policy shift towards South–South cooperation has contributed to the introduction of a new system of investment law. For instance, the 2016 Nigeria–Morocco provision includes the right to regulate, stipulating as follows: “The host state has the right

to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development and with other legitimate, social and economic policy objectives.”

Another lesson learned in South Africa’s termination of the BITs was signalling to the world that the Global South’s position and posture on an investor–state dispute resolution mechanism was based on the supporting principles of accountability, transparency and reciprocity. The international policy debate has served to reinforce South Africa’s position; and it has been proven through action that policy change is within reach and achievable, provided the continent speaks with one voice about the reform of treaty practice.

The fundamental challenge facing the global investment regime is finding a balance between private interests and public goods. To that extent, Von Moltke (2000) points out that an appropriate IIR could help meet the public policy challenges that this distorted pattern of investment represents.

6.9 Conclusion

At face value, the term “bilateral” is simple and straightforward, implying mutual engagement on various issues of common interest ranging from diplomatic and strategic to political, economic and other spheres of life. However, when investment and treaties are added to the equation, the rules of engagement become multidimensional, thus requiring international law to interpret and set norms and standards to regulate state behaviour regarding the commitments made by contracting parties before, during and after BITs are negotiated, signed and terminated.

While addressing the Economic Club of Chicago in April 1999, former British prime minister Tony Blair declared: “By the new doctrine of the international community, it is believed there is an explicit recognition that, today more than ever before, we are mutually dependent, that national interest is to a significant extent governed by international collaboration.”

Bringing the situation close to home, in the 2025 State of the Nation Address, President Ramaphosa characterised the changing global environment as follows:

It is a world of both interdependence and competition, cooperation and conflict. It is a multipolar world in which new countries are emerging to play a greater role in global affairs. We are seeing intensifying competition over trade and technology, and influence of global institutions. There are global fundamental shifts underway that affect every aspect of human life. From the growing impact of climate change to rapid advances in artificial intelligence, geopolitical tensions and violent conflict. In the face of these challenges, we are witnessing the rise of nationalism and protectionism, the pursuit of narrow interests and the decline of common cause. This is the world that we as a developing economy must now navigate.

Put differently, the unpredictable and complex nature of the behaviour of state actors in world affairs is often dictated by their national interests and the wave of uncertainty in world affairs in the twentieth century. Having said that, it is prudent to explore and unpack the phenomenon of BITs from the structural, historical, institutional, contextual and philosophical perspectives with a view to answering the following questions:

- How did South Africa get here, in relation to its journey in the BIT universe?

- Within the changing BIT universe, what does the future hold for South Africa and the other countries of the Global South?
- Does the policy shift towards South–South cooperation and investment mean the end of the North–South BIT model?

While searching for a global investment regime that seeks to balance private interests and public goods, the literature review and public discourse on BITs provide divergent views. Such divergent views and the lack of consensus necessitate developing a common understanding of treaty practice by asking these epistemological and ontological questions:

- Whose agenda is being served and prioritised in treaty practice?
- Whose rules, norms and standards are applied?
- Which language prevails in treaty provisions?
- What is the future of BITs?

Generally, many developing countries signed their first BIT from a weak negotiating position and, in most instances, the traditional BITs involved minimal negotiations, consultations and preparations before they were signed. When asked about the South African government's decision to terminate BITs, one government representative indicated that it should be made clear that most of the BITs that South Africa signed in 1994 were reaching their termination date. In principle, he indicated that if the BITs had not been terminated, they would have been extended to yet another 10 to 20 years – a situation that the country could not afford at the time. Regarding the substantive and procedural matters related to BITs, the VCLT stipulates that contracted parties are allowed to terminate their agreements by mutual consent at any given time.

The ECA (2016) suggests that for decades, international investment policies have been drafted, dominated and largely accorded developed countries the rights and asymmetric power to control and manipulate the rules of engagement.

Going forward, such approaches and practices ought to be challenged to ensure that investments reflect the needs of developing countries as well as respect of their sovereign right to formulate policies that address their immediate needs and socioeconomic issues. The future outlook of BITs is at the crossroads, as both the host countries and the home countries are between a rock and a hard place, given that investments are no longer driven by profit maximisation but CSR, accountability, human rights, sustainability and equality are required.

There is a greater expectation that, going forward, BITs and other related investment agreements need to address the impacts of climate change. In pursuant to addressing global challenges, countries in the Global North and the Global South are equally expected to ensure that future investment policies are cognisant of e-commerce (digitalisation), sustainability, market access, and implementation of the SDGs and AfCFTA. Thus, South Africa's approach to terminate its BITs is considered both disruptive and innovative, pressing the reset button on old and traditional investment treaties, thus transforming the IIR. Chang (2008) argues that history is on the side of regulators, indicating that most of today's rich countries (Finland, Japan, South Korea and the US) regulated foreign investment when they were on the receiving end.

While South Africa is considered an emerging economy, it is often credited for punching beyond its weight and therefore the termination of BITs has also made the country a significant role-player in the Global South. Furthermore, South Africa is contributing

towards the transformation of global governance that allows developing countries to regulate investment policies that address public policy choices and are geared towards a public goods approach, such as improving public infrastructure and inculcating a culture of CSR.

Freeman (2009) posits that in addition to robbing developing countries of the ability to regulate FDI in ways that may be beneficial to their long-term development goals, BITs may entail a significant opportunity cost insofar as they undermine efforts to strengthen private property rights in LDCs. Thus, Freeman (2009) advises that instead of negotiating investor rights with rich countries, LDC governments should invest their scarce political capital into a sustained campaign to improve their indigenous institutions. In the long run, developing a strategy of attracting investment requires a concerted effort to build domestic institutions, fighting corruption, and create a positive image of being a reliable and creditworthy host that is open to business and is investor friendly.

The lack of a unified and common approach when negotiating investment treaties will continue to create fragmentation across the Global South. In a more nuanced and intentional way, Babeiya (2011) makes an appeal to countries of the Global South by saying: “Increased interaction among nations and people across the globe does not seem to provide an easy way through which African countries can pursue an isolationist strategy.”

As Babeiya (2011) suggests, the excessive discretionary powers of foreign investors need to be looked at from a wider perspective that includes the country’s policy-making processes. South Africa’s presidency of the G20 in November 2025 hold special significance for the achievement of the National Development Vision 2030. Thus, South

Africa should ensure maximum synergy and continuity by aligning its presidency to promoting a Global South agenda that endeavours to support alternative development finance and investment in infrastructure projects through the New Development Bank.

6.10 Summary of findings

This study argues that South Africa stands at a strategic crossroads, as the policy shift towards South–South investment cooperation provides a timely opportunity to elevate a disruptive innovative approach in treaty practice. It underscores the Global South’s perspective in rejecting the asymmetric treaty network embedded in the traditional North–South BIT model by moving towards South–South investment cooperation. To that extent, South Africa’s action has propelled a movement towards the termination, renegotiation and replacement of BITs with domestic regulations that address national interests such as investment in climate adaptation and resilience strategies. South Africa’s termination of BITs have sparked a political controversy and global backlash due to the rising number of investor–state dispute cases (currently 1,257), prompting strategic alignment towards South–South investment cooperation.

The findings also show that the strategic move towards South–South investment cooperation reflects developing economies’ commitment to embrace horizontal partnerships and mutual exchange, a shift away from the top-down, asymmetric treaty network. The research also reveals that unlike the traditional North–South investment cooperation, the move towards South–South investment cooperation is geared towards models that promote peer-to-peer and respectful (win-win) solutions.

Regarding the lessons learned and best practices, South Africa has demonstrated that a disruptive and innovative treaty approach is possible where the right to regulate in the public interest should be embedded locally (Act of Parliament, communication with stakeholders and strategic partners) to ensure that solutions are not imported but are initiated locally and adopted globally. Previous BIT models provided copy-and-paste solutions. Thus, this study argues that the ongoing transformation of the international investment rule-making system presents a critical opportunity for developing countries to actively shape treaty reforms and global governance, ensuring that investment practices of the future reflect the development priorities of host countries, including building cross-border trade links with neighbouring countries and reshaping South–South investment cooperation. With the expansion of new BRICS members (Saudi Arabia, Egypt, the United Arab Emirates (UAE), Iran and Ethiopia) that joined the group on Monday 1 January 2024, there is a window of opportunity for countries of the Global South, including South Africa to leverage South-South investment cooperation and to increase FDI financing for infrastructure projects.

CHAPTER 7

POLICY IMPLICATIONS AND FUTURE RESEARCH

In the future, international investment agreements will not be driven anymore by BITs, but rather by regionalism, thus allowing for agreements comprising more countries together, including the European Union, the Association of Southeast Asia Nations and the North American Free Trade Agreement.

– UNCTAD (2019)

7.1 Introduction

This concluding chapter sets out this study's contribution to the field of knowledge. Throughout the study, it becomes evident that the phenomenon of BITs is complex and controversial, and its emergence as the foundation of the IIR has resulted in divergent views and perspectives. Essentially, the study reveals that the BIT universe is changing radically, to the extent that since the 2000s both host and home countries aligned or terminated their BIT models to respond to new challenges.

While the premise of this study is the policy shift from traditional North–South to new South–South investment models, it is evident that the policy shift is embedded in all BIT models, including the US BIT models of 1994 and 2004, the 2012 SADC BIT model and the Netherlands' 2018 model. The traditional and old North–South investment models have served their purpose and are no longer suitable to address current socioeconomic challenges. To date, pressure has been mounting and therefore international institutions such as the OECD and UNCTAD are monitoring treaty practice and acknowledge the need for amendments as the new trajectory requires aligning investment treaty policies with the impacts of climate change.

Considering that any policy or strategy has unintended consequences, a BIT is not different from other development related policies. Peterson (2004) argues that it is worth noting that contemporary treaty provisions offer innovative solutions allowing for the transfer of monies and for some protection from war and civil disturbances or uncertainty. Gray and Gills (2016) describe South–South investment corporation as a movement intended to “challenge the Northern-dominated political and economic system and, from the 1950s to the present, has been through a series of starts and stops, surges and retreats”. This suggests that the South–South investment agreements in themselves are not a panacea for all the problems confronting South Africa and the other countries of the Global South.

7.2 Policy implications

One of the weaknesses of post-apartheid South Africa has been the need to attract FDI. Consequently, the country hastily and blindly signed BITs without considering domestic interests. This has had far-reaching implications, as trade and investment provisions often constrain state capacity to regulate and formulate policies that promote public policy interest.

While it is often characterised as a country that punches beyond its weight in global affairs, South Africa’s history and journey in the BIT universe have been shaped and influenced by the dichotomy of ever-changing geopolitical dynamics and domestic interests. During the 30th anniversary of the WTO, President Ramaphosa maintained South Africa’s policy position and calls for the transformation of the global governance, stating the following:

Over the past thirty years, the WTO has worked to ensure a level playing field in global trade that is free, predictable and governed by a rules-based system. The 30th anniversary of the establishment of the WTO takes place in a challenging and uncertain time. We are seeing unilateral and protectionist measures being implemented by some advanced economies that are outside the agreed-upon multilateral framework. It is incumbent upon us all to ensure that the multilateral system is strengthened or we risk the encroachment of a global trade regime based on power dynamics.

President Trump's increasing rhetoric to increase tariffs against China, other countries of the Global North and countries of the Global South has far-reaching policy implications for the future of the IIR. All these developments are clear indications of the return to protectionism and reversal of global gains. Thus, in the short to medium term, the future of trade and investment faces existential threats.

Considering the challenges in the rapidly changing global environment (volatility, unpredictability and uncertainty), including risks and vulnerabilities, policy-making capabilities in both the host country and the home country require acknowledgement that there are no permanent friends or permanent enemies in politics. South Africa's decision to terminate its BITs and withdraw from the ICDIS should not be viewed from the perspective of creating enemies, but rather from the perspective of pursuing national interests.

UNCTAD (2000) acknowledges that the right to regulate for development is rare. Thus, the widespread failure to reflect development as a key objective of an investment treaty is a compelling reason for countries of the Global South to speak with one voice in the

policy shift to an investment regime that considers the right to regulate investment policies in the public interest.

Boyce (2017) posits that South Africa's termination of BITs is a schizophrenic policy approach that scares away investors. From Boyce's perspective, the Protection of Investment Act represents a missed opportunity for the country to develop a holistic investment protection policy based on reciprocity, and thus it fails as a viable alternative to BITs. However, Adekele (2015) cautions that given that South Africa's BITs with other African countries are still in place (see Annexure 1), the country finds itself in a situation where investors from countries that have BITs with South Africa can opt for international arbitration instead of domestic dispute settlement. This suggests that South Africa runs the risk of being exposed to too many simultaneous platforms of dispute settlement. To mitigate the risk, South Africa has created a more level playing field where a foreign investor that has an investment dispute with the government will have to use a domestic dispute settlement mechanism such as a domestic court and/or arbitration process. Conscious of the need to protect and promote the rights enshrined in the constitution, the Protection of Investment Act articulates the following objective in its preamble: "To provide for the legislative protection of investors and the protection and promotion of investment to achieve a balance of rights and obligations that apply to all investors."

As shown throughout this study, there is a continuous process of lesson learning and lesson sharing, as shown in the application of various theoretical perspectives on policy change. As Kapeller and Scholz-Wackerle (2016) argue, an institutional perspective emphasises a dynamic and developmental approach to policymaking that focuses on a system's ability to evolve and adapt to new circumstances.

Key findings reveal that the policy shift from North–South to South–South investment cooperation is embedded in the following three key areas:

- 1) Power (asymmetric relations)
- 2) Knowledge sharing, and
- 3) Learning (application of disruptive innovation technologies in policymaking, forecasting and early warning).

If done effectively, the implementation of the AfCFTA will foster a shift towards the structural transformation of the African economy and reshape its position within the IIR. Regarding the reform of the IIR, UNCTAD proposes that the following policy options be considered.



Source: ©UNCTAD.

Figure 10: UNCTAD 10 IIA reform options

Source: UNCTAD 2022

The analysis and discussions on international investment treaties have often followed a normative approach rather than a functional approach. For instance, the provisions of

traditional BITs have often made it difficult to reach consensus between stakeholders in relation to the promotion and protection of investment, resulting in bureaucratic impediments and institutional bottlenecks.

Gazzini (2014) observes that the preamble of a treaty is an integral part of it and must be looked at to elucidate the purpose of the treaty with a view to reaching a balanced interpretation. However, not all provisions have been deemed worthy of inclusion in BITs and therefore the involvement of key stakeholders such as government officials, chief trade negotiators, foreign investors, think tanks, civil society organisations and policy-makers is crucial in developing an effective bottom-up approach to address administrative and substantive procedures in the review of BITs.

As shown in the case of South Africa, innovative and careful drafting of the Protection of Investment Act was a victory for regulating policies in the public interest. However, such efforts were met with a global backlash, including the threat to remove the country from AGOA, which would expose it to financial loss, disinvestment and reputational damage. Pursuant to the review of investment law and reforms of treaty practice at the regional and continental levels, the SADC BIT model and the PAIC reaffirm two key positions:

- 1) Insisting on a balance between the regulatory interest of a host country and foreign investors' legitimate expectations of investment protection.
- 2) Encouraging dispute resolution, with the host country seeking to resolve the dispute through negotiations and consultations.

When adopting a policy shift geared towards a South–South investment model, the following recommendations are suggested for South Africa and the Global South:

- Undertake policy research to test the effectiveness of investment, trade and industrial policies on promoting environmentally sustainable goals, CSR and impact investments.
- Review and renew commitments to achieve regional economic integration through the AfCFTA, NEPAD and the BRICS New Development Bank.
- Ensure that investment treaties are not only innovative and disruptive, but also fit for purpose to address new challenges of the twenty-first century, such as deliberately developing sectoral and regional value chains to match the growing demand for investment opportunities.
- Collaborate with Global South and development finance institutions to identify strategic investment opportunities that are aligned to national, regional and continental needs.
- Develop investment models geared and tailored-made to individual countries or regional circumstances, and promote infrastructure development, re-industrialisation and intra-regional trade.
- Review the legal and regulatory frameworks, and develop early warning systems to better manage external shocks (risks, vulnerabilities and opportunities) and capital outflows.
- Foster public–private partnership coordination mechanisms embedded in people-to-people and business-to-business networks to boost infrastructure development.

7.3 Future research perspectives

In terms of future research, it is worth pursuing the question of where to invest at a time of global turbulence and uncertainty. A comparative analysis of the experience of North–

South versus South–South BITs models is recommended for further studies. Furthermore, a nuanced research is warranted to further explore the evolving complexity of investment rulemaking that is geared towards promoting South–South cooperation and mutual learning in digital trade and e-government.

In translating the policy shift from a traditional North–South investment model to a South–South investment model into practice, Singh (2015) suggests the following: “The ongoing backlash against the current IIAs regime calls for policy solutions, which not merely strike a good balance between public and private interest in principle but can be translated into workable practice.”

As a strategic country of the Global South, South Africa received global backlash when implementing policies to redress past inequalities. Nonetheless, the country continues to play a significant role in the reform of the BIT universe, including the reform of the ICSID and development finance institutions.

Worth noting is that while South Africa is not a signatory to the ICSID, it continues to play a significant role in influencing policy direction towards host state rights in order to regulate and re-balance rights and obligations between investors and host countries. Chen (2017) postulates that while the institutional and regulatory reform model may not accomplish everything advocated by developing countries, its adoption would significantly advance these countries’ objectives while serving the overlapping interests of capital-exporting countries.

Below Nooyi eloquently illustrates the characterisation of the reform of investment treaties and implications for South Africa and the Global South in relation to future research on

international investment agreements, particularly through the analogy of how the hand functions:

If the twenty-first century global economy is a hand, Asia is its thumb – strong, powerful and ready to assert itself as a major player on the global stage. Europe is the index finger – the cradle of democracy and Western civilisation and the basis for most of the global commercial and business laws; North America, the United States in particular, is the middle finger – the longest finger – which stands out and anchors most functions that the hand performs; South America is the ring finger – symbolises love, passion and the sensuous beats of the mambo, samba and tango; and Africa is the little finger – it has failed to catch up with other regions, and yet, when it gets hurt, the whole hand is in pain.

South Africa, representing the small finger (Africa), should painstakingly use its soft power and position as a BRICS Plus member and the incoming president of the G20 in 2025 to call on the G7, UNCTAD and related multilateral financial institutions to support the African Agenda and ensure that debt-distressed African, Caribbean, Small Island States and all the countries of the Global South (emerging economies) obtain the requisite debt relief. South Africa should remain resolute and exert pressure on the other countries of the Global South to transform the IIR, including AfCFTA's new investment protocols.

In addition, the country should champion efforts that are intentional in ensuring that future investment policies are linked with individual countries' development needs, particularly leveraging new regional and international trade and investment relations, as well as addressing the impact of climate change on the vulnerable members of society.

7.4 Conclusion

While considering the inherent political risk and policy uncertainty in volatile environments, investors from developed countries considered placing legal obligations on BITs and taking out investment insurance in order to safeguard their returns when investing abroad. Peterson (2004) cautions governments ascending to investment treaties to be aware that these agreements may serve to internationalise disputes. Such disputes may arise between regulators and foreign investors in sensitive sectors, including the media, electricity, water, financial services and environmental regulations. Thus, in an effort to challenge expanding government interference, Peterson (2004) posits that foreign investors are turning to investment treaties with increasing frequency. In mitigating the risks that limit developing countries in regulating international investment for public policy interest, there has been a trend towards “innovative disruption” and rational choice policymaking. This has resulted in the termination, reviewing and re-negotiation of BITs models to cover a wide range of issues (such as national security, environmental protection and sustainable development), which previously were not considered in the traditional BITs models.

Pohl (2018) cautions that certain types of investments are considered to be detrimental, as they may affect domestic entrepreneurship, lead to social disruption and impact the host country’s financial stability. In the interest of South Africa and the other countries of the Global South, this study identifies the need for a more robust and rigorous social impact assessment of BITs before future investment agreements are ratified, as well as challenging dominant global narratives that continue to perpetuate and entrench asymmetric North–South policy preferences that hinder the equitable distribution of

resources, accountability and sustainability. The efforts of countries of the Global South, including South Africa, to transform the governance of global financial institutions to become equitable has been met with global pushback. Such struggle to democratise treaty practice should not alienate the most vulnerable members of society, as they are agents of the much-needed change.

A comparative assessment of the policy shift was deemed prudent and will essentially contribute to scholarly work on understanding the unfolding and unprecedented treaty reforms, the changing geostrategic and geopolitical environment in the post-Covid-19 era, and the general policy dynamics in home and host countries. Of significance is understanding the trajectory of IIAs and their potential impact for South Africa and the other countries of the Global South, as stipulated in the 2004 Pretoria Declaration of Social and Economic Rights and the 2019 Concept Note of the United Nations Office for South–South Cooperation and AU Commission (see Annexure 2).

In a more nuanced way, this study identifies the need for a multidisciplinary approach to comprehensively explore South–South BIT practices, as these countries collectively and individually contribute to shaping and transforming rulemaking and the governance of the IIR to ensure that there is equity, fairness and transparency in treaty practice.

The findings of this research are considered relevant and will further contribute to IR, IPE scholarship and policymaking by providing risk, vulnerability and opportunity assessments for future investments. Furthermore, it will contribute to future research to understand the role and position of countries of the Global South in setting the global agenda. It is worth noting that countries of the Global South are not monolithic and have the sovereign right to regulate investment policies that will impact promoting

environmental sustainable goals and infrastructure development in their own local environment.

Instead of standing on the periphery and claiming marginalisation, it is in South Africa and the Global South's interest to transform the governance of IIAs and treaty practice to their own advantage and for future generations. At the strategic and policy levels, South Africa should use its signatory powers to the AfCFTA and positioning as a game changer and influencer of disruptive innovative treaty reform in the form of the Protection of Investment Act to rally like-minded countries such as India, Brazil, Indonesia and Tanzania. South Africa should endeavour to build future South–South investment models premised on accountability, reciprocity and investment decision making based on consensus, confidence and capacity building.

The findings of this study show that the policy shift from North–South to South–South investment cooperation has been occurring on a large scale. However, this should not be seen as completely discarding investments from the Global North, but rather as giving countries of the Global South a greater voice in setting the agenda and levelling the playing field by supplementing, complementing and fostering strategic South–South partnerships with a view to augmenting alternative development finance and regulating policies in the public interest.

On addressing issues of norms and rules governing international investments, there should be continuous information exchange on the costs and benefits of signing any investment agreement. In hindsight, treaty practice should ensure that when countries of the Global South (such as South Africa) negotiate, sign and terminate BITs, their aspirations are guided by post-Covid-19 public policy choices. Despite facing the triple

challenges of poverty, unemployment and inequality domestically, South Africa has used lessons learned from the policy shift away from the traditional North–South investment model to South–South investment cooperation. This is reflected by its strategic role, influence and global positioning in global affairs to champion the Global South agenda of transforming global governance, including withdrawing from the ICSID.

Such policy choices should be geared towards a public goods approach embedded in the following:

- Embracing disruptive innovation technologies to ensure that forecasting and scenario planning identify impediments and constraints in advance
- Addressing and mitigating the unintended consequences of policymaking, and
- Providing impact investment solutions that are congruent with national security.

Despite the circumstances in which South Africa finds itself in the short, medium and long term, and the policy choices it makes, South Africa is the architect of its own future. Now more than ever, the potential for a truly equitable and transformative IIR and treaty practice is within reach, requiring all the stakeholders to ensure that future investment policies intentionally and purposefully embrace disruptive technologies and build capacity across all institutions.

The study finds that South Africa's termination of BITs and the promulgation of the Protection of Investment Act are both disruptive and innovative. It argues that the future viability of BIT models, whether North–South or South–South, will continue to be contested unless they are designed to strike a balance between choice and necessity.

This entails considering the interests of foreign investors while respecting the host country's responsibility to regulate investment policies in the public interest.

Annexure 1: South Africa's Treaty Network – BITs

NO.	SHORT TITLE ▲	STATUS ▲	PARTIES ▲	DATE OF SIGNATURE ▼	DATE OF ENTRY INTO FORCE ▲	TEXT
1	South Africa - Zimbabwe BIT (2009)	In force	Zimbabwe	27/11/2009	15/09/2010	Full text: en
2	Ethiopia - South Africa BIT (2008)	Signed (not in force)	Ethiopia	18/03/2008		Full text: en
3	South Africa - Sudan BIT (2007)	Signed (not in force)	Sudan	07/11/2007		Full text: en
4	Guinea - South Africa BIT (2007)	Signed (not in force)	Guinea	25/09/2007		Full text: en fr
5	Madagascar - South Africa BIT (2006)	Signed (not in force)	Madagascar	13/12/2006		Full text: fr en
6	Congo - South Africa BIT (2005)	Signed (not in force)	Congo	01/12/2005		Full text: en fr
7	Kuwait - South Africa BIT (2005)	Signed (not in force)	Kuwait	26/09/2005		Full text: en ar
8	South Africa - United Republic of Tanzania BIT (2005)	Signed (not in force)	Tanzania, United Republic of	22/09/2005		Full text: en
9	Gabon - South Africa BIT (2005)	Signed (not in force)	Gabon	02/08/2005		Full text: en
10	Angola - South Africa BIT (2005)	Signed (not in force)	Angola	17/02/2005		Full text: en pt
11	Israel - South Africa BIT (2004)	Signed (not in force)	Israel	20/10/2004		Full text: en
12	Congo, Democratic Republic of the - South Africa BIT (2004)	Signed (not in force)	Congo, Democratic Republic of the	31/08/2004		Full text: en fr

13	Equatorial Guinea - South Africa BIT (2004)	Signed (not in force)	Equatorial Guinea	17/02/2004		Full text: en es
14	Qatar - South Africa BIT (2003)	Signed (not in force)	Qatar	21/10/2003		Full text: en
15	South Africa - Yemen BIT (2002)	Signed (not in force)	Yemen	28/01/2003		Full text: en ar
16	Libya - South Africa BIT (2002)	Signed (not in force)	Libya	14/06/2002		Full text: en ar
17	South Africa - Tunisia BIT (2002)	Signed (not in force)	Tunisia	28/02/2002		Full text: ar en
18	Rwanda - South Africa BIT (2000)	Signed (not in force)	Rwanda	19/10/2000		Full text: en
19	Algeria - South Africa BIT (2000)	Signed (not in force)	Algeria	24/09/2000		Full text: fr
20	South Africa - Turkey BIT (2000)	Signed (not in force)	Türkiye	23/06/2000		Full text: en tr
21	South Africa - Uganda BIT (2000)	Signed (not in force)	Uganda	08/05/2000		Full text: en
22	Nigeria - South Africa BIT (2000)	In force	Nigeria	29/04/2000	27/07/2005	Full text: en
23	Czech Republic - South Africa BIT (1998)	In force	Czechia	14/12/1998	17/09/1999	Full text: en cs
24	Russian Federation - South Africa BIT (1998)	In force	Russian Federation	23/11/1998	12/04/2000	Full text: ru en
25	Greece - South Africa BIT (1998)	Terminated	Greece	19/11/1998	06/09/2001	Full text: en el

26	Chile - South Africa BIT (1998)	Signed (not in force)	Chile	12/11/1998		Full text: en es
27	Egypt - South Africa BIT (1998)	Signed (not in force)	Egypt	28/10/1998		Full text: en
28	South Africa - Spain BIT (1998)	Terminated	Spain	30/09/1998	23/12/1999	Full text: es
29	Finland - South Africa BIT (1998)	In force	Finland	14/09/1998	03/10/1999	Full text: en fi
30	BLEU (Belgium-Luxembourg Economic Union) - South Africa BIT (1998)	Terminated	BLEU (Belgium-Luxembourg Economic Union)	14/08/1998	14/03/2003	Full text: fr en nl
31	Argentina - South Africa BIT (1998)	Terminated	Argentina	23/07/1998	01/01/2001	Full text: es en
32	Ghana - South Africa BIT (1998)	Signed (not in force)	Ghana	09/07/1998		Full text: en
33	Senegal - South Africa BIT (1998)	In force	Senegal	19/06/1998	29/12/2010	Full text: en fr
34	South Africa - Sweden BIT (1998)	In force	Sweden	25/05/1998	01/01/1999	Full text: en sv
35	Mauritius - South Africa BIT (1998)	In force	Mauritius	17/02/1998	23/10/1998	Full text: en
36	China - South Africa BIT (1997)	In force	China	30/12/1997	01/04/1998	Full text: en zh
37	Iran, Islamic Republic of - South Africa BIT (1997)	In force	Iran, Islamic Republic of	03/11/1997	05/03/2002	Full text: en
38	Italy - South Africa BIT (1997)	Terminated	Italy	09/06/1997	16/03/1999	Full text: it en

39	Mozambique - South Africa BIT (1997)	Signed (not in force)	Mozambique	06/05/1997		Full text: en pt
40	Austria - South Africa BIT (1996)	Terminated	Austria	28/11/1996	01/01/1998	Full text: de en
41	Denmark - South Africa BIT (1996)	Terminated	Denmark	22/02/1996	23/04/1997	Full text: en
42	Cuba - South Africa BIT (1995)	In force	Cuba	08/12/1995	07/04/1997	Full text: en es fr
43	Canada - South Africa BIT (1995)	Signed (not in force)	Canada	27/11/1995		Full text: en
44	France - South Africa BIT (1995)	Terminated	France	11/10/1995	22/06/1997	Full text: fr en
45	Germany - South Africa BIT (1995)	Terminated	Germany	11/09/1995	10/04/1998	Full text: en de
46	Korea, Republic of - South Africa BIT (1995)	In force	Korea, Republic of	07/07/1995	28/06/1997	Full text: en ko
47	South Africa - Switzerland BIT (1995)	Terminated	Switzerland	27/06/1995	30/11/1997	Full text: fr en
48	Netherlands - South Africa BIT (1995)	Terminated	Netherlands	09/05/1995	01/05/1999	Full text: en nl
49	Mali - South Africa BIT	Signed (not in force)	Mali	04/03/1995		Full text: fr
50	South Africa - United Kingdom BIT (1994)	Terminated	United Kingdom	20/09/1994	27/05/1998	Full text: en

Source: UNCTAD (2024). International Investment Navigator

Annexure 2: Pretoria Declaration of Economic and Social Rights 2004



Pretoria Declaration of Economic and Social Rights 2004.pdf

Annexure 3: Concept Note of South–South Cooperation



Concept_Note_The_Role_of_South-South_Cooperation 2019 Madagascar.pdf

BIBLIOGRAPHY

- Aakbar, N., Botchwey, K., Stein, H. and Stiglitz, J.E. (eds). 2012. *Good growth and governance in Africa: Rethinking development strategies*. Oxford: Oxford University Press.
- Abbott, F.M. and Snidal, D. 2000. Hard and soft law in international governance. *International Organization*, 54(3):421–456.
- Abs, H. 1957. The safety of capital. In: J. Daniel (ed.). *Private Investment: The Key to International Industrial Development*. Report of the San Francisco Conference, 14–18 October 1957. Sponsored by Time-Life International and Stanford Research Institute, New York: McGraw-Hill.
- Adda, J. and Cooper, R. 2003. *Dynamic economics: Quantitative methods and applications*. Cambridge, MA: MIT Press.
- Addaney, M., Jarbandhan, D.B. and Dumenu, W.K. (eds). 2023. *Climate change in Africa: Adaptation, resilience and policy innovations*. London: Palgrave Macmillan.
- Adekele, F. 2015. Benchmarking South Africa's Foreign Direct Investment Policy: African perspectives. *Policy Insights*, 13. Johannesburg: South Africa Institute of International Affairs.
- Africa Regional Integration Index. 2019. Conference of Ministers, Marrakech, Morocco, 23 March 2019. Economic Commission for Africa. <https://repository.uneca.org/entities/publication/90789759-66ee-4606-a3a1-d63438e7deb2> [Accessed 24. 09.2024]
- Afunowi, O.A. 2023. Multi-level climate change adaptation governance in Lagos Nigeria and the Western Cape in South Africa. In: M.A. Addaney, D.B. Jarbanhan and W.K. Dumenu (eds). *Climate change in Africa: Adaptation, resilience and policy innovations*. London: Palgrave Macmillan.
- Agbo-Ejeh, C. 2023. Multilateral and Bilateral Trade Agreements at the Service of Common Interest. World Trade Institute Working Paper, Universitat Bern, Bern.

Akinkugbe, O.D. 2021. Africanisation and the reform of international investment law. *Case Western Reserve Journal of International Law*, 53(1):7–32.

Alasuutari, P. 1995. *Researching Culture: Qualitative Method and Cultural Studies*. London: Sage Publications.

Alden, C. and Wu, Y-S. (eds). 2021. *South Africa–China relations: A partnership of paradoxes*. London: Palgrave Macmillan.

Alesina, A. and Giuliano, P. 2015. Culture and institutions. *Journal of Economic Literature*, 53(4):894–944.

Alesina, A., Yann, A., Pierre, C. and Giuliano, P. 2015. Family values and the regulation of labour. *Journal of the European Economic Association*, 13(4):599–630.

Alfaro, L., Chanda, A., Kalemli-Ozcan, S. and Sayek, S. 2004. Foreign direct investment and economic growth: The role of local financial markets. *Journal of International Economics*, 64(1):89–112.

Alle, T. and Peinhardt, C. 2010. Delegating differences: Bilateral investment treaties and bargaining over dispute resolution provisions. *International Studies Quarterly*, 54(1):1–26.

Alle, T. and Peinhardt, C. 2011. Contingent credibility: The impact of treaty violations on foreign direct investment. *International Organization*, 63(3):401–432.

Alle, T. and Peinhardt, C. 2014. Evaluating three explanations for the design of bilateral investment treaties. *World Politics*, 66(1):47–87.

Alschner, W. 2013. Americanisation of the BIT universe: The influence of friendship, commerce and navigation (FCN) treaties on model investment treaty law. *Goettigen Journal of International Law*, 5(2):455–486.

Alschner, W. 2014. Regionalism and overlap in investment treaty law: Towards consolidation or contraction? *Journal of International Economic Law*, 17(2):271–298.

Alschner, W. 2020. Ensuring correctness or promoting consistency? Tracking policy priorities in investment arbitration through large-scale citation analysis. In: O.K. Foucault,

D. Behn, D. and M. Langford (eds). *Empirical perspectives on investment treaty arbitration*. Cambridge: Cambridge University Press.

Alschner, W. and Skougaverskiy, D. 2016a. Convergence and divergence in investment treaty universe – Scoping the potential for multilateral consolidation. *Trade, Law and Development*, 8(2):331–362.

Alschner, W. and Skougaverskiy, D. 2016b. Mapping the universe of international investment agreements. *Journal of International Economic Law*, 9(8):561–588.

Alschner, W., Elsig, M. and Polano, R. 2021. Introducing the Electronic Database of Investment Treaties (EDIT). The genesis of a new database and its use. *World Trade Review*, 20:73–94.

Alshahrani, S.H. 2021. Why should we know about the origins of international investment law? *International Journal of Legal Information*, 48(3):122–131.

Alvarez, J. and Khamsi, K. 2009. The Argentine crisis and foreign investors. A glimpse into the heart of the investment regime. In: K. Sauvant (ed.). *Yearbook on international investment law and policy 2008/2009*. New York: Oxford University Press.

African Union. 2005. Decision on trade facilitation. Doc.EX.CL/188 Executive Council Seventh Ordinary Session, 28 June–2 July 2005.

Ansari, S.S. and Krop, P. 2013. Incumbent performance in the face of a radical innovation: Towards a framework for incumbent challenger dynamics. *Research Policy*, 41(8):1357–1374.

Arcuri, A. 2017. The great asymmetry and the rule of law in international investment arbitration. *SSRN Electronic Journal*. DOI:10.2139/ssrn.31252808.

Assink, M. 2006. Inhibitors of disruptive innovation capability: A conceptual model. *European Journal of Innovation Management*, 9(2):215–233.

Aust, A. 2007. *Modern treaty law and practice*. Cambridge: Cambridge University Press.

Ayres, C.E. 1996. *The theory of economic progress*. UMKC internet edition. [www:https://cas.umkc.edu/econ/Institutional/Readings/Ayres/tep/TEP.html](http://www.cas.umkc.edu/econ/Institutional/Readings/Ayres/tep/TEP.html) [Accessed: 03.02.2022].

Asian Development Bank. 2021. International Investment Agreement Toolkit: A comparative approach. <https://www.adb.org/terms-use#openness> [Accessed 11.04.2022].

Babeiya, E. 2011. Trade unions and democratisation in Tanzania. End of an era? *Journal of Politics and Law*, 4(1):123–131.

Babbie, E. 2007. *The practice of social research*. Belmont, CA: Thomson.

Babbie, E. and Mouton, J. 2006. *The practice of social research*. Oxford: Oxford University Press.

Badenhorst, C. 2007. *Research writing. Breaking the barriers*. Pretoria: Van Schaik Publishers.

Baker, P. 2024. Using multilateral instruments to preserve a bilateral system. *Journal of International Economic Law*, 27(4):611–617.

Bandelj, N., Mahutga, M. and Shorette, K. 2015. Signalling demand for foreign investment: Post socialist countries in the global bilateral investment treaty network. *Europe-Asia Studies*, 67(6):870–892

Bandera, E. 2009. Bilateral investment treaties encouraging foreign direct investment: Zimbabwe–South Africa. BIPPA as a case study. LLM thesis, University of Pretoria, Pretoria.

Batselé, F. 2023. “The Start of a Regime : The First Generation of Western European Bilateral Investment Treaties (1959-1989).” Brussels, Belgium ; Ghent, Belgium: Université Libre de Bruxelles. Faculté de Droit et de Criminologie ; Ghent University. Faculty of Law and Criminology.

Bellak, C. 2015. Economic Impact of Investment Agreements. Department of Economics Working Paper, Series No 2000. <https://research.wu.ac.at/en/publications/economic-impact-of-investment-agreements-3> [Accessed 12.11.2021].

- Bennet, C. and Howlett, M. 1992. The lessons of learning. Reconciling theories of policy learning and policy change. *Policy Sciences*, 25(3):275–294.
- Bergstein, C.F., Horst, T. and Moran, T.H. 1978. American multinationals and American interests. Washington, DC: Brookings Institution.
- Bergstein, F.M., Thomas, H. and Theodore, H.M. 1978. *American multinationals and American interests*. Washington, DC: Brookings Institution.
- Bhattacharya, S.K. and Bhattacharya, N. 2006. Free Trade Agreement between People's Republic of China and India: Likely Impact and Its Implications to Asian Economic Community. Discussion Paper No. 59, ADB Institute, Asian Development Bank (ADB).
- Bhogal, P. and Sharma, M.S. 2017. India and global trade governance: Re-defining its national interest. *Rising Powers Quarterly*, 2(3):125–145.
- Blake, D.J. 2013. Thinking ahead: Government time horizons and the legalisation of international investment agreements. *International Organisations*, 67(4):797–827.
- Blair, T. 1999. Speech to the Economic Club of Chicago on 22 April 1999. <http://www.britishpoliticalspeech.org/speech-archive/htm?speech=279> [Accessed: 18.10.2021].
- Blair, T. 2001. A moment to seize. Let us reorder this world around us. *The Guardian*, 02 October 2001. <https://www.theguardian.com/politics/2001/oct/02/labourconference.labour7> [Accessed: 18.07.2023].
- Bodea, C. and Ye, F. 2017. Bilateral investment treaties (BITs): The global investment regime and human rights. *British Journal of Political Science*, October: 1–34.
- Bonnitcha, J. 2014. Substantive protection under investment treaties. *Substantive protection under investment treaties: A legal and economic analysis*. Cambridge: Cambridge University Press.

Bonnitcha, J. 2016. Foreign investment, development and governance: What international investment can learn from the empirical literature on investment. *Journal of International Dispute Settlement*, 7:31–54.

Bonnitcha, J., Poulsen, L.N.S. and Waibel, M. 2017. *The political economy of the investment treaty regime*. Oxford: Oxford University Press.

Boon, K. 2022. Theorising investor responsibilities. *St John's Law Review*, 95(2):253–284.

Boon, K. E. 2023. Balancing rights and duties of hosts and guests under international law: The case study of investment law. *Open Edition Journals* 50(656).. <https://journals.openedition.org/1/cea/16227> [Accessed 08.03.2024].

Borchard, E. 1951. *State insolvency and foreign bondholders. General principles*. Yale, CT: Yale University Press.

Bovaird, T. and Luffer, E. 2009. Understanding public management and governance. *Public Management and Governance*, 2:3–13.

Boyce, G.M. 2017. An examination of whether the Protection of Investment Act represents a successful alternative to bilateral investment treaties. LLM dissertation. University of Pretoria, Pretoria.

Bradlow, D.D. and Sidiropolous. E. 2020. *Values, interest and power. South African foreign policy in uncertain times*. Pretoria: Pretoria University Press.

Brantlinger, P. *Fictions of state*. Ithaca, NY: Cornell University Press.

Brewer, T.L. and Young, S. 1995. The multilateral agenda for foreign direct investment: Problems, principles and priorities for negotiations at the OECD and WTO. *World Competition Law and Economic Review*, 18(4):67–83.

Britannica dictionary. 2023. <https://www.britannica/dictionary/eb/brosela> [Accessed 17.04.2023].

Broude, T. 2013. Investment and trade: “Lottie and Lisa” of international economic law? In: R. Echandi and P. Sauve (eds). *Prospects in international economic law and policy*. Cambridge: Cambridge University Press.

Brown, C. and Miles, K. 2011. *Evolution in investment treaty law and arbitration*. Cambridge: Cambridge University Press.

Brower, C.H. 2008. Obstacles and pathways to consideration of the public interest in investment treaty disputes. In: K.P. Sauvant (ed.). *Yearbook on international investment law and policy 2008–2009*. Oxford: Oxford University Press.

Buckley, P.J., Clegg, L.J., Cross, A.R., Liu, X., Voss, H. and Zheng, P. 2007. The determinants of Chinese outward foreign direct investment. *Journal of International Business Studies*, 38(4):499–518.

Burger, S. 2023. China, South Africa to strengthen new energy investment, cooperation. *Creamer Media’s Engineering News*, 13 June. <https://www.engineeringnews.co.za/article/chinasouthafrica-to-strengthen-new-energy-investmentscooperation-2023-06-13> [Accessed 17.06.2023].

Bush, P.D. 1987. Theory of institutional change. *Journal of Economic Issues*, 21(3):107–116.

Buthe, T. and Milner, H.V. 2008. The politics of foreign direct investment into developing countries: Increasing FDI through international trade agreements. *American Journal of Political Science*, 52(4):741–762.

Buthe, T. and Milner, H.V. 2009. Bilateral investment treaties and foreign direct investment: A political analysis. In: K.P. Sauvant and L.E. Sachs (eds). *The effect of treaties on foreign direct investment: Bilateral investment treaties, double taxation treaties and investment flows*. Oxford: Oxford University Press.

Buttler, N. and Subedi, S. 2017. The future of international investment regulation: Towards a world investment organisation? *Neth International Law Review*, 64:43–72.

Caffrey, P. and Farmer, A. 2014. Adaptation and governance. <https://pdf.usaid.gov/pdf=docs/PA00k67X.PDF> [Accessed 18.09.2021].

Cannizaro, E. (ed.). 2011. *The law of treaties beyond the Vienna Convention*. Oxford: Oxford University Press.

Carim, X. 2013a. South Africa and Bilateral Investment Treaties. Paper presented at the South African Institute of International Affairs Conference on “How should foreign investments in South and Southern Africa be regulated and protected?” Sandton, 06 September 2013.

Carim, X. 2013b. Perspectives on topical foreign direct investment issues: Lessons from South Africa’s BITs review. <https://www.econstor.eu/bitstream/10419/253943/1/fdi-perspectives-no109.pdf> [Accessed 25-11-2013].

Cavalla, G. 2011. *Imperfect cosmopolis: Studies in the history of international legal theory and cosmopolitan ideas*. Cardiff: University of Wales Press.

Cavallar, G. 2023. Dynamic cosmopolis: The “Westphalia World Order” and beyond. In: H. Williams, D. Boucher, P. Sutch, D. Reidy and A. Koutsoukis (eds). *The Palgrave handbook of international political theory*. London: Palgrave Macmillan.

Centre for Conflict Resolution (CCR) and Department of Trade and Industry. 2014. South Africa, Africa and international investment agreements. Policy Advisory Group Seminar, Devon Valley, Stellenbosch. www.ccr.org.za [Accessed 26.10.2021].

Chadler, A.D. and Mazlish, B. 2005. *Leviathans: Multinational corporations and the new global history*. Cambridge: Cambridge University Press.

Chayes, A. and Chayes, A.H. 1993a. On compliance. *International Organizations*, 47(2):175–205.

Chayes, A. and Chayes, A.H. 1993b. *The new sovereignty: Compliance with international regulatory agreements*. Cambridge, MA: Harvard University Press.

Chen, A. 2006. Should the four great safeguards in Sino-foreign BITs be hastily disbanded? Comments on provisions concerning dispute settlement in model US and Canada BITs. *The Journal of World Investment and Trade*, 7(6):899–933.

Chen, P. 2016. Alternative policies after the financial crisis. New thinking from complex evolutionary economics. In: H. Schwardt, C. Grabner and T. Henrich (eds). *Policy implications of recent advances in evolutionary and institutional economics. Essays in honour of Wolfram Elsner*. London and New York: Routledge Taylor & Francis Group.

Chevry, J. 2015. Convergence of international trade and investment law in practice: How should investor–state arbitral tribunals engage with trade norms? Doctor of Laws thesis, European University Institute, Florence.

Chi, M. and Li, Z. 2021. China's foreign investment complain mechanism: A new beginning of foreign investment governance reform? Columbia FDI Perspectives No. 308, Columbia Center on Sustainable Investment,. 28 June 28. <https://csi-columbia.edu/content/Columbia-fdi-perspectives> [Accessed 09.11.2022].

Christensen, C. 1997. *The innovator's dilemma (management of innovation and change)*. Cambridge, MA: Harvard University Press.

Christensen, C. 2009. *The innovator's prescription: A disruptive solution for health care*. New York: McGraw-Hill.

Christensen, C.M., McDonald, R., Altman, E.J. and Palmer, E.J. 2018. Disruptive innovation: An intellectual history and directions for future research. *Journal of Management Studies*, 55(7):1044–1078.

Chung, C., Chang, L. and Zhang, Y. 1995. The role of foreign direct investment in China's post-1978 economic development. *World Development*, 23:691–703.

Cho, S. and Kurtz, J. 2014. Converging divergences: A common law of international trade and investment. Research paper. Chicago, IL: Chicago-Kent College of Law.

Cohen, S. 2007. *Multinational corporations and foreign direct investment: Avoiding simplicity, embracing complexity*. New York: Oxford University Press.

Collis, J. and Hussey, R. 2003. *Business research: A practical guide for undergraduate and postgraduate students*. London: Palgrave MacMillan.

Commons. J. 1931. Institutional economics. *American Economic Review*, 21:648–657.

- Cotula, L. and Schoder, M. 2017. *Community perspectives in investor–state arbitration*. London: International Institute for the Environment and Development (IIED) Land, Investment and Rights Series.
- Counts, C. 2013. Disinvestment was just one weapon in battle against apartheid. *The New York Times*, 27 January.
- Cox, R.W. 1996. *Approaches to world order*. Cambridge, MA: University of Cambridge Press.
- Creswell, J.W. and Miller, D. 2000. Determining validity in qualitative inquiry. *Theory into Practice*, 39(3):1–7.
- Creswell, J.W. and Poth, C.N. 2017. *Qualitative inquiry and research design: Choosing among five approaches*. London: Sage Publications.
- Croucamp, P.A. and Malan, L.P. 2011. Political risk assessment of South Africa with reference to the public discourse of the nationalisation of mines. *African Journal of Public Affairs*, 4(2):150–165.
- Daele, K. 2013. Challenge and disqualification of arbitration. *Arbitration International*, 29(1):127–146.
- Daele, K. 2014. Recent challenges to enforcement in the investment treaty field. 26th Annual ITA Workshop, Modern Enforcement of Arbitral Awards: “Show Me the Money”. www.mishcon.com [Accessed 28.12.2021].
- Dai, S. 2016. Innovation and national systems of innovation policies. In: C. Grabaer, T. Heinrich and H. Schwardt (eds). *Policy implications of recent advances in evolutionary and institutional economics*. London and New York: Routledge Taylor & Francis Group.
- Danneels, E. 2004. Disruptive technology reconsidered. A critique and research agenda. *Journal of Product Innovation Management*, 21(4):246–258.
- Darnal, A. 2024. Moving from unequal to win-win partnerships. Global South experts turn the tables. <https://stimson.org/2024/moving-from-unequal-to-win-win-partnerships/> [Accessed 12.10.2023].

De Gregorio, J., Lee, J.W. and Borensztein, M.E. 1994. How does foreign direct investment affect economic growth? *Journal of International Economics*, 45(1):145–135.

Denscombe, M. 2002. *Ground rules for good research. Ten-point guide for social researchers*. Philadelphia, PA: Open University Press.

Department of Trade and Industry (dti). 2009. Bilateral Investment Treaty Policy Framework: A Government Position Paper. Pretoria: dti.

Desborders, R. 2016. A granular approach to the effects of bilateral investment treaties and regional trade investment agreements on foreign direct investment. <https://aric.adb-pdf-events-paper-rodolfo-desborders-pdf> [Accessed 23.10.2022].

De Vos, A., Biggs, R., Preiser, R., Clements, H. and Maciejewski, K. (eds). *The Routledge handbook of research methods for social ecological system*. New York: Francis and Taylor.

Diehl, A. 2012. *The core standard of international investment protection: Fair and equitable treatment*. New York: Aspen Publishers.

Djeffal, C. 2013. Commentaries on the law of treaties: A review essay reflecting on the genre of commentaries. *The European Journal of International Law*, 24(4):1223–1238.

DiMaggio, P.J. and Powell, W.W. 1983. The iron cage revisited: Institutional isomorphism and collective rationality. *American Sociology Review*, 48(2):147–160.

DiMaggio, P.J. and Powell, W.W. 1991. Introduction. In: W.W. Powell and P.J. DiMaggio (eds). *The new institutionalism in organizational analysis*. Chicago, Ill: University of Chicago Press.

DiMascio, N. and Pauwelyn, J. 2008. Non-discrimination in trade and investment treaties: Worlds apart or two sides of the same coin? *American Journal of International Law*, 102(1):48–89.

Disenyana, T. and Sagoni, Z. 2014. Trade and investment opportunities in Africa. Pretoria: Export Credit Insurance Corporation of South Africa.

- Disierto, D. 2014. Public policy in international investment in trade law: Community expectations and functional decision making. *Florida Journal International Law*, 26(51):54–55.
- Dixit, A. 2009. Governance institutions and economic activity. *American Economic Review*, 99(1):5–24.
- Dolzer, R. and Margete. S. 1995. *Bilateral investment treaties*. Oxford: Oxford University Press.
- Dolzer, R. and Schreuner, C. 2012. *Principles of international investment law*. Oxford: Oxford University Press.
- Dolzer, R. and Stevens, M. 1995. *Bilateral investment treaties*. The Hague: Martinus Nijhoff Publishers.
- Douglas, Z. 2009. *The international law of investment claims*. Cambridge, MA: Cambridge University Press.
- Dubin, R. 1970. Theory building. *Philosophy and Phenomenological Research*, 1(2):1–4.
- Duchhardt, H. 2014. The Peace of Westphalia: A European peace. In: O. Asbach and P. Schroden (eds). *The Ashagate research companion to the Thirty Years' War*. London: Taylor & Francis.
- Dunlop, C.A. and Radaelli, C.M. 2012. Systematising policy learning: From monolith to dimensions. *Political Studies*, 61(3):599–619.
- Dunning, J.H. 1993. Governments and multinational enterprises: From confrontation to cooperation. In: L. Eden and E. Potter (eds). *Multinationals in the global political economy*. London: Palgrave Macmillan.
- Dunning, J. and Lundan, S.M. 2008. *Multinational enterprises and the global economy*. 2nd ed. Cheltenham, UK and Northampton, MA: Edward Elgar.
- Easterly, W. 2001. The political economy of growth without development: A case study of Pakistan. Paper for the Analytical Narratives of Growth Project, Kennedy School of Government, Harvard University and Development Research Group, World Bank.

Economic Commission of Africa (ECA). 2022. Addressing poverty and vulnerability in Africa during the COVID-19 pandemic. Economic Report on Africa. <http://www.uneca.org> [Accessed 12.01.2025].

Economic Intelligence Unit. 2020. Covid-19 and migrant remittances: a hidden crisis looming? London. <https://www.eiu.com/n/campaigns/covid-migrant-remittances> [Accessed 23.08.2023].

Egger, P. and Merlo, V. 2007. The impact of bilateral investment treaties on FDI dynamics. *The World Economy*, 30(10):1536–1549.

Egger, P. and Pfaffermayr, M. 2004. The impact of bilateral investment treaties on foreign direct investment. *Journal of Comparative Economics*, 32(4):788–804.

Egyir, D.K. and Xavier, F. 2010. Investment law reform: A handbook for development practioners. Washington DC, World Bank. <https://documents.worldbank.org/curated/en306631474483143823> [Accessed 12.08.2021].

Eisenhardt, K.M. 1989. Building theories from case study research. *The Academy of Management Review*, 14(4):532–550.

Elkins, A. and Glasson, J. 2009. *Social research methods: Qualitative and quantitative approaches*. 6th ed. London: Taylor & Francis.

Elkins, Z., Guzman, A. and Simmons, B. 2006. Competing for capital: The diffusion of bilateral investment treaties 1960–2000. Berkeley. CA: Berkeley Program in Law and Economics, University of California Berkeley. <http://scholarship.org/uc/item/0bp87871> [Accessed 23.03.2023].

Elsner, W. 2001. Interactive economic policy: Toward a cooperative policy approach for a negotiated economy. *Journal of Economic Issues*, 35(1):61–83.

Elsner, W. 2005. Real-world economics today: New complexity, co-ordination and policy. *Review of Social Economy*, 63(1):19–53.

Elsner, W. 2015. Policy Implications of Economic Complexity and Complexity Economics: Towards a Systematic, Long-Run, Adaptive and Interactive Policy Conception. MPRA Working Paper No. 63252.

Elsner, W., Heinrich, T. and Schwardt, H. 2015. *The microeconomics of complex economics: Evolutionary, institutional, neoclassical and complexity perspectives*. Amsterdam: Academic Press.

Enchandi. R. 2011. What do developing countries expect from the international investment regime? In: J,E,K. Alvarez, K. Sauvart, K. Ahmed and G. Vizcaino (eds). *The evolving international investment regime*. Oxford: Oxford University Press.

Enchandi, R, and Sauve, P. (eds). 2013. *Prospects in international law and policy*. Bern: World Trade Institute.

Encarnation, D.J. and Wells, J.R. 1985. *Sovereignty en garde: Negotiating with foreign investors*. 39 *International Organization*, 47.

Environmental System Research Institute. 2018. A data hub for the Sustainable Development Goals: Research excise connects data at regional, national and global levels to get results. *Arch News*, 40(2):1–12.

Etymology dictionary. 2023.

https://www.etymonline.com/word/hostility#etymonline_v_14489 [Accessed 26.03.2023].

Ewoh, A.I.E. 1997. Africa and the new world order. *East African Geographical Review*, 19(1):57–68.

Fargamel, J. 2025. Diplomatic relations and capitulations. <https://heritage.bnf.fr/bibliothequesorient/en/capitulations#echelles-du-levant-0> [Accessed 07.07.2025]

Faturous, A.A. 1971. Standard investment agreement (draft translation). *International Law Association Report*, 54:7–18.

Flemes, D. 2007. Conceptualising Regional Power in International Relations: Lessons from the South Africa Case. GIGA Working Paper No. 53.

Footer, M.E. 2009. BITs and pieces: Social and environmental protection in the regulation of foreign investment. *Journal of International Law*, 33:42–46.

Footer, M.E. 2013. International investment law and trade: The relationship that never went away. In: F. Baetes (ed.). *Investment law within international law: Integration perspectives*. Cambridge, MA: Cambridge University Press.

Forum on China–Africa Cooperation. 2004. Addis Ababa Action Plan 2004–2006.

Forum on China–Africa Cooperation. 2007. Beijing Action Plan 2007–2009.

Frank, A.G. 1998. *Re-Orient: Global economy in the Asian age*. CA: California University Press.

Frieden, J.A. and Rogowski, R. 1996. The impact of the international economy on national policies: An analytical overview. In: R.O. Keohane, and H.V. Milner (eds). *Internationalisation and domestic politics*. Cambridge, MA: Cambridge University Press.

Freeman, N. 2009. The international investor rights regime: Domestic sources of commitment and compliance. DPhil dissertation, University of Georgia, Athens (US).

Friedman, M. and Verhoosel, G. 2003. Global litigation-arbitration over BIT claims. *Journal of International Economic Law*, 6(2):1–25.

Forere, M.A. 2018. New Developments IN International Investment Law: A Need for Multilateral Treaty? Pioneer in Peer Reviewed Open Access online Law Publications PER/PELJ (21) <http://dx.doi.org/10.17159/1727-3781/2018/v21i0a3282> [Accessed 16 November 2023].

Froman, M.B. 2014. *The strategic logic of trade. New rules of the road for the global market*. New York: Foreign Affairs Publishers.

Fukasaku, K. 2000. Special and preferential treatment for developing countries: Helping those who helped themselves. In: S.M. Mushed (ed.). *Globalization, marginalization and development*. London and New York: Routledge.

Fukuyama, F. 1991. The next South Africa. *The National Interest*, 24(Summer):13–28. www.jstor.org/stable/42894743 [Accessed 24.04.2022].

Furstenberg, K. 2016. Evolutionary institutionalism: New perspective. *Politics and the Life Sciences*, 35(1):48–60.

G20. 2016. G20 Guiding Principles for Global Investment Policymaking. G20 Information Centre. <https://www.g20.utoronto.ca/2016/160710-trade-annex3.html> [Accessed 16.09.2023]

Gallagher, N. 2009. *Chinese investment treaties: Policies and practice*. Oxford: Oxford University Press.

Gal-Or, N. 2013. Global trade law. *Academic Foresights*, 7(January–March):1–5.

Games, D. 2004. *The experience of South African firms doing business in Africa. A preliminary survey and analysis*. Johannesburg: South African Institute of International Affairs.

Garcia, C.G. 2004. All the other dirty little secrets: Investment treaties, Latin America and the necessary evil of investor–state arbitration. *Florida Journal of International Law*, 16(2):76–94.

Garcia-Bolivar, O.E. 2004. G3 Agreement: A comparison of its investment chapter with the emerging international law of foreign investment. *Law and Business Review of the Americas*, 10(4):112–145.

Gathi, J.T. 2019. Understanding Tanzania’s termination of BITs with the Netherlands in context. <https://www.afronomicslaw.org/print/pdf/node/843> [Accessed 07.09.2023].

Gazzini, T. 2014a. States and foreign investment: A law of the treaties perspective. In: S. Lalani and R.P. Lazo (eds). *The role of the state in investor–state arbitration*. Leiden: Brill.

Gazzini, T. 2014b. Bilateral investment treaties and sustainable development. *Journal of World Investment and Trade*, 15(5-6):929–963.

Gbomagba, M., Afinowi, O.L. and Kumi, N. 2023. Climate change adaptation governance in Africa: The legal and institutional frameworks. In: M. Addaney, D.B. Jarbandhan and W.K. Dumenu (eds). *Climate change in Africa*. London: Palgrave Macmillan.

Gelb. S. 2006. Macroeconomic in post-apartheid South Africa: Real growth versus financial stability. In: R. French-Davis (ed.). *Seeking growth under financial volatility*. London: Palgrave Macmillan.

George, A. and Bennet, A. 2005. *Case studies and theory development in the social sciences*. Boston, MA: MIT Press.

Gilbert, C. 2003. The disruption opportunity. *MIT Sloan Management Review*, 44(4). <https://sloanreview.mit.edu/article/the-disruption-opportunity> [Accessed 10.06.2023].

Ginsburg, T. and MacAdams, R.H. 2004. Adjudicating in anarchy: An expressive theory of international dispute resolution. *William and Mary Law Review*, 45(40):1229–1245.

Group of 20. 2016. Guiding Principles for Global Investment Policy Making. <http://www.oecd.org/daf/inv/invstment-policy/G20-Guiding-Principles-for-Global-Investment-Policymaking.pdf> [Accessed 13.06.2023].

Gordon, K. and Pohl, J. 2015. *Investment Treaties over time – Treaty practice and interpretation in a changing world*. OECD Working Papers on International Investment. Paris: OECD Publishing.

Gordon, K., Pohl. J. and Bouchard. M. 2014. *Investment treaty law, sustainable development and responsible business conduct: A fact-finding survey*. OECD Working Papers on International Investment. Paris: OECD Publishing.

Govindarajan, V. and Kopalle, P.K. 2006. The usefulness of measuring disruptiveness of innovations ex-post in making ex-ante predictions. *Journal of Product Innovation Management*, 23(1):12–18.

Grabner, C., Henrich, T. and Schwardt H. (eds). 2016. *Policy implications of recent advances in evolutionary and institutional economics. Essays in honour of Wolfram Elsner*. London and New York: Routledge Taylor & Francis Group.

- Gray, K. and Gill, B.K. 2016. South–South cooperation and the rise of the Global South. *Third World Quarterly*, 37(4):557–574.
- Greener, I. 2002. Understanding NHS reform, the policy-transfer, social-learning and path-dependency perspectives. *Governance*, 15(2):161–183.
- Gregor, S. 2006. The nature of theory in information systems. *Quarterly of Management Information Systems*, 30(3):611–642.
- Guest, G.N., Mark, K.M., Macqueen, E., Mack, N. and Woodson, C. 2005. Qualitative research methods: A data collector's field guide. <http://www.fhi.org> [Accessed 16.06.2019].
- Gumede, W. 2014. *The BRICS alliance: Challenges and opportunities for South Africa and Africa*. Shifting Power Working Paper Series. Amsterdam: Transnational Institute.
- Guzman, A.T. 1998a. Why LDCs sign treaties that hurt them: Explaining the popularity of bilateral investment treaties. *Virginia Journal of International Law*, 38(4):639–688.
- Guzman, A.T. 1998b. Explaining the popularity of bilateral investment treaties: Why LDCs sign treaties that hurt them. *Virginia Journal of Law*, 38(639):639–670.
- Guzman, A.T. 2007. *How international law works: A rational choice theory*. Oxford: Oxford University Press.
- Haftel, Y.Z. 2013. A delayed ratification. The domestic fate of bilateral investment treaties. *International Organisations*, 67(2):355–387.
- Hallward-Driemeyer, M. 2003. Do bilateral investment treaties attract FDI? Only a BIT and they could bite. World Bank Policy Research Paper WPS 3121M. Washington, DC: World Bank.
- Hansen, H. and Rand, J. 2006. On the causal links between FDI and growth in developing countries. *The World Economy*, 29(1):21–41.
- Hart, C. 2001. *Doing a literature search: A comprehensive guide for social science*. London: Sage Publications.

Haskel, J. and Westlake, S. 2017. *Capitalism without capital. The rise of the intangible economy*. New York: Princeton University Press.

Hayden, F. G. 2016. Using the social fabric matrix to strengthen the analysis and modeling of complex system for original institutional economics. In: C. Grabner, T. Henrich and H. Schwandt (eds). *Policy implications of recent advances in evolutionary and institutional economics. Essays in honour of Wolfram Elsner*. London and New York: Routledge Taylor & Francis Group.

Hedge, A. 2005. *Perceptions of Redistribution. Report on Exploratory Qualitative Research*. Center for Analysis of Social Exclusion (CASE) Paper No. 96. London: London School of Economics and Political Science.
<https://sticerd.lse.ac.uk/dps/case/cp/CASEpaper96.pdf> [Accessed 17.08.2019].

Henkin L. 1995. Human rights and state sovereignty. *Georgia Journal of International Comparative Law*, 25:31–35.

Henkin, L. 1997. *How nations behave: Law and foreign policy*. New York: Council of Foreign Relations.

Hennink, M.M., Hutter, I. and Bailey, A. 2020. *Qualitative research methods*. 2nd ed. Los Angeles, CA: Sage.

Heshmati, A. and Tausch, A. 2018. The effects of globalisation on the environment. *UKH Journal of Social Sciences*, 2(1):25–40.

Heshmati, A. 2018. *Introduction to determinants of economic growth in Africa*. Singapore: Springer.

Hisch, H. 2008. Interactions between investment and non-investment obligations. In: P. Muchlinski, F. Ortino and C. Schreuer (eds). *The Oxford handbook of international investment law*. Oxford: Oxford University Press.

Hirsch, M. 2008. *Conflicting obligations in international investment law: Investment tribunals' perspective*. New York: Bloomsbury Publishing.

- Hirst, P. 1979. The global economy: Myth and realities. *International Affairs*, 73(3):409–425.
- Hollis, D.B. (ed.) 2012. *The Oxford guide to treaties*. Oxford: Oxford University Press.
- Howse, R. and Trebilock, M. 1995. *Public goals and private means*. Toronto: University of Toronto Press.
- Howelett, M. and Cashmore, B. 2009. The dependant variable problem in the study of policy change: Understanding policy change as a methodological problem. *Journal of Comparative Policy Analysis: Research and Practice*, 11(1):33–46.
- Hsieh, H.F. and Shannon, S.E. 2005. Three approaches to qualitative content analysis. *Qualitative Health Research*, 15(9):1277–1288.
- Hudleston, S. 2025. The future of work – A flicker of a silver lining. *Curiosity Magazine*. Johannesburg: University of the Witwatersrand.
- Hunter, R. 2010. Strategic suggestion on using China’s bilateral investment treaties to protect outbound investment. *Corporate Legal Affairs*, 40–48
- Imas, M.L. and Rist, R.C. 2009. *The road to results: Designing and conducting effective development evaluation*. Washington D.C: World Bank.
- International Development Research Centre (IDRC). (2008). *Qualitative data analysis*. Ottawa: IDRC. http://www.idrc.ca/en/ev-1653-201-1-DO_TOPIC.html [Accessed: 30.05.2019].
- International Institute for Sustainable Development (IISD). 2017. Assessing the impact of investment treaties: Overview of the evidence. Canada: IISD. www.isd.org [Accessed 28.10.2021].
- International Labour Organization (ILO). 2005. *Baseline study of labour practices on large construction sites in the United Republic of Tanzania*. Working Paper No. 225. Geneva: ILO.
- International Monetary Fund (IMF). 2022. *Regional Economic Outlook for sub-Saharan Africa: Living on the edge*. Washington, DC: IMF Publication Services.

Institute for Global Dialogue (IGD). 2017. *Situating the future of BRICS in changing global dynamics*. Proceedings of a symposium hosted by the IGD in association with the University of South Africa and South African BRICS Think Tank. Pretoria: IGD.

Inyamu, T. 2022. *Applying theories for information systems research*. New York: Routledge.

Isike, C. 2023. Introduction: Theorizing Africa's international relations. *African and Asian Studies*, 22(1):2–7.

Jackson, J.H. 2008. Sovereignty: Outdated concept or new approaches. In: W. Shan, P. Simons and D. Singh (eds). *Redefining sovereignty in international economic law*. Georgetown, WA: Hart Publishing.

Jackson, J.K. 2017. The Committee on Foreign Investment in the US. Congressional Research Service. [www.https://fas.org/sqp/crs/natsec/RL33388.pdf](https://fas.org/sqp/crs/natsec/RL33388.pdf) [Accessed 28.09.2022].

Jandhyala, S., Henisz, W. and Mansfield, E. 2011. Three waves of BITs: The global diffusion of foreign investment policy. *Journal of Conflict Resolution*, 55(6):1047–1073.

Jiangzhong, G. 2021. Ambassador's speech at the Gordon Institute of Business Science, University of Pretoria, on 21 March.

[www.http://fmprc.gov.cn.eng/wjb/zwjg/zwbd/t808586.htm](http://fmprc.gov.cn.eng/wjb/zwjg/zwbd/t808586.htm) [Accessed 19.11.2023].

Johnson, B.R. and Christensen, L.B. 2007. *Educational research. Qualitative, quantitative and mixed approaches*. Los Angeles, CA: Sage Publications.

Kalantaryan, S., and McMahon, S. 2020. Covid-19 and Remittances in Africa. European Commission, JRC Technical Report. Luxembourg: Publications Office of the European Union,

Kamau, N. 2020. Investment law and treaty reform in Africa: Fragments and fragmentation. *African Journal of International Economic Law*, 1(Fall):201–230.

- Kanyane, M. 2023. BRICS governance and ethics architecture: Challenge and prospects. In: F. April, M. Kanyane, Y.D. Davids and K. Chetty (eds). *The BRICS in Africa promoting development*. Cape Town: Human Science Research Council.
- Kaplan, S. and Zingales, L. 1997. Do investment-cash flow sensitivities provide useful measures of financing constraints. *Quarterly Journal of Economics*, 112(1):159–215.
- Kapp, K.W. 1977. Environment and technology: New frontiers for the social and natural sciences. *Journal of Economic Issues*, 11:527–540.
- Kassicieh, S.K., Kirchhoff, B.A., Walsh, S.T. and McWhorter, P.J. 2002. The role of small firms in the transfer of disruptive technologies. *Technovation*, 22(11):667–674.
- Kearny, D. and Dalton, R.E. 1970. The treaty of treaties. *American Journal of International Law*, 64(495):495–561. <http://untreaty.un.org/cod/avl/ha/vclt.html> [Accessed 28.11.2023].
- Kelliher, F. 2005. Interpretivism and the pursuit of research legitimization: An integrated approach to single case design. *The Electronic Journal of Business Research Methods*, 3(2):123–132.
- Kemp, W.A. and Krumm, R (eds). *Restoring European security: From managing relations to principled cooperation*. Vienna: Frederich Ebert Stiftung.
- Kemp, W.A. 2022. *Security through cooperation. To the same end*. Routledge New Diplomacy Studies. London and New York: Routledge.
- Keppeler, J. and Grabner, C. 2015. New perspectives on institutionalist pattern modelling systemism, complexity and agent-based modelling. *Journal of Economic Issues*, 49(2):433–440.
- Keppeler, J. and Scholz-Wackerle, M. 2016. Evolutionary political economy and the complexity of economic policy: Power, knowledge and learning. In: C. Grabner, T. Heinrich and H. Schwardt (eds). *Policy implications of recent advances in evolutionary and institutional economics*. London and New York: Routledge.

Kerner, A. 2009. Why should I belief you? The costs and consequences of bilateral investment treaties. *International Studies Quarterly*, 53(1):73–102.

Kidane, W. 2018. Contemporary international investment law trends and Africa's dilemma in the draft Pan-African Investment Code. *The George Washington International Law Review*, 50(3):523–579.

King, G., Keohane, R. and Verba, S. 1994. *Designing social inquiry: Scientific inference in qualitative research*. Princeton: Princeton University Press.

Kirayoglu, S. 2014. *The bilateral investment treaty: Its origins and effects*. Gainesville, FL: Florida State University.

Kishoiyian, B. 1993. The utility of bilateral investment treaties in the formulation of customary international law. *Northwestern Journal of International Law and Business*, 14:327–348.

Klaaren, J. and Schneiderman, D. 2009. Investor-State Arbitration and South Africa's Bilateral Investment Treaty Policy Framework Review. Mandela Institute, School of Law, Johannesburg, University of the Witwatersrand.

Klaaren, J. and Halim, D. 2020. Foreign policy under the constitution of South Africa. In: D.D. Bradlow and E. Sidiropoulos (eds). *Values, interests and power: South African foreign policy in uncertain times*. Pretoria: University of Pretoria Press.

Klabbers. J. 1996. The concept of treaty in international law. *International and Comparative Law Quarterly*, 47(1): 240–241.

Kleinschmidt, J. 2018. Differentiation theory and the Global South as a metageography of international relations. *Alternatives*, 43(2):59–80.

Kobi, S.J. 1979. Political risk: A review and reconsideration. *Journal of International Business Studies*, 10(1):67–80.

Kobin, S.T. 1979. *Political risk: A review and reconsideration*. Cambridge, MA: Massachusetts Institute of Technology.

Kogan, M. 2005. The implementation game. In: Gornitzka, M., Kogan, M. and Amaral, A. (eds). *Reform and change in higher education. Analysing policy implementation*. Dordrecht: Springer.

Kollamparambil, U. 2016. *Bilateral investment treaties and investor state disputes*. Working Paper No. 589. Cape Town: Economic Research Southern Africa.

Konseiga, A. 2005. *Regional integration beyond the traditional trade benefits: Labor mobility contribution*. Berlin: Peter Lan.

Krasner, S. 1982. Structural causes and regime consequences: Regimes as intervening variables. *International Organisations*, 36(2):185–205.

Krasner, S. 1999. *Sovereignty: Organized hypocrisy*. Princeton, NJ: Princeton University Press.

Krasner, S. 2006. Structural causes and regime consequences: Regimes as intervening variables. In: B. Simmons and R. Stenberg (eds). *International law and international relations*. New York: Cambridge University Press.

Krasner, S.D. 1983. *International regimes*. Ithaca, NY: Cornell University Press.

Kumar, R. 2014. *Research methodology. A step-by-step guide for beginners*. London: Sage Publications.

Kumaraswamy, A., Garud, R. and Ansari, S. 2018. Perspectives on disruptive innovations. *Journal of Management Studies*, 55(7):1025–1042.

Lafferty, W. and Howden, E. 2013. Environmental policy integration: Towards an analytical framework. *Environmental Politics*, 12:1–12.

Lamb, N. 2015. How some countries became “special”: Developing countries and the construction of difference in multilateral treaty law making? *Journal of International Economic Law*, 18(4):743–771.

Lavranos, N. 2013. The new EU investment treaties: Convergence towards the NAFTA model as the new plurilateral model BIT text. https://papers.ssrn.com/so13/papers.cfm?abstract_id=2241455 [Accessed 12.04.2022].

- Lee, R.M. 2000. *Unobtrusive methods in social research*. Buckingham: Open University Press.
- Leedy, P.D. and Ormond, J.E. 2005. *Practical research. Planning and design*. Englewood Cliffs, NJ: Prentice Hall.
- Leifer, R., McDermott, C.M., O' Connor, G.C., Peters, L.S., Rice, M.P. and Veryzer, R.W. 2000. *Radical innovation. How mature companies can outsmart upstarts*. Boston, MA: Harvard Business School.
- Lejour, A. and Salfi, M. 2015. *The regional impact of bilateral investment treaties on foreign direct investment*. CPB Discussion Paper No. 298. The Hague: CPB Netherlands Bureau of Economic Policy.
- Leipziger, D. and Dodev, V. 2016. *Disruptive technologies and their implications for economic policy: Some preliminary observations*. Washington, DC: Institute for International Economic Policy, George Washington University.
- Leo, B. 2010. *Where are the BITs? How US bilateral investment treaties with Africa can promote development*. New York: Center for Global Development. www.cgdev.org/content/publications/details/1424333 [Accessed 26.10.2022].
- Li, S. and Zhao, L. 2021. Bilateral investment treaties and foreign direct investment: Evidence from emerging market firms. *Research in International Business and Finance*, 58. <https://doi.org/10.1016/j.ribaf.2021.101480> [Accessed 28.09.2023].
- Lile, S., Ansari, S.S. and Urmetzer, F. 2022. Rethinking disruptive innovation: Unravelling theoretical controversies and charting new research frontiers. *Innovation, Organization and Management*, 17(1):1–23.
- Lin, Y.J. 2019. Balancing and sovereignty in international law: Reviewing convergences and divergences in international investment law and trade law. DPhil thesis, University of Leicester, Leicester.
- Lijphart, A. 1971. Comparative politics and the comparative method. *The American Political Science Review*, 65(3):682–693.

Lipson, C. 1985. *Standing guard: Protecting foreign capital in the nineteenth and twentieth centuries*. Berkeley, CA: University of California Press.

Lobero, R. 2012. The international law framework: An analysis of African treaty practice. PhD thesis, University of Glasgow, Glasgow.

Lou, Y. 2001. Towards a cooperative view of MNC-host government relations: Building blocks and performance implications. *Journal of International Business Studies*, 32:401–419.

Lowe, V. 2007. *Changing dimensions of international investment law*. Faculty of Law Legal Studies Research Paper Series, Working Paper No. 4. Oxford: Oxford University Press.

Lubambo De Melo, M.V. 2019. Entry of foreign investments: Convergence of international trade and investment law. DPhil thesis, University College of London. London.

MacFeely, S. 2016. The continuing evolution of official statistics: Some challenges and opportunities. *Journal of Official Statistics*, 32(4):789–810.

Maes, M. 2010. Reclaiming the public interest in Europe's international investment policy: Will the future EU BITs be any better than the 1 200 existing BITs of EU member states? <http://www.iisd.org/itn/2010/09/23/reclaiming-the-public-interest-in-europe-s-international> [Accessed 13.12.2023].

Malik, M. 2010. South–South bilateral investment treaties: The same old story? IV Annual Forum for Developing Countries Investment Negotiations, 27–29 October, New Delhi.

Manger, M.S. and Peinhardt. C. 2017. Learning and the precision of international investment agreements. *International Interactions*, 43(6):920–940.

Mann, H. 203. Reconceptualising international investment law: Its role in sustainable development. *Lewis and Clark Law Review*, 17(2):522–543.

Manyika, J., Chui, M., Bughin, J., Dobbs, R., Bisson, P. and Marrs, A. 2013. *Disruptive technologies: Advances that will transform life, business and the global economy*. New York: McKinsey Global Institute.

- Marying, P. 2014. *Qualitative content analysis – Theoretical foundation, basic procedures and software solutions*. Cologne: Gesis Klagenfurt.
- Mathew, E.E. and Adewale, A.R. 2017. The odyssey of South African multinational corporations (MNCs) and their impact on the Southern African Development Community (SADC). *African Journal of Business Management*, 11(23):686–703.
- Masamba, M. 2014. Africa and bilateral investment treaties: To BIT or not? <http://www.polity.org.za/article/Africa-and-bilateral-investment-treaties-to-bit-or-not-2017-07-23> [Accessed 12.11.2023].
- Maykut, P. and Morehouse, R. 1994. *Beginning qualitative research: A philosophic and practical guide*. London: Falmer Press.
- Mbegue, M.M. and Schacherer, S. 2017a. The “Africanisation: of international investment regime. *Journal of World Investment and Trade*, 18(1):414–448.
- Mbegue, M.M. and Scharcherer, S. 2017b. Special Issue: Africa and the reform of the international investment regime. *Journal of World Investment and Trade*, 18(1):371–378.
- Mbeque, M.M. and Schacherer, S. 2018. Africa and rethinking of international investment law. In: Roberts, A. (ed.). *Comparative international law*. New York: Oxford University Press.
- McMillan, J.H. and Schumacher, S. 2000. *Research in education: A conceptual introduction*. 5th edition. New York: Allyn and Bacon.
- Merriam, S.B. 1998. *Qualitative research and case study applications in education*. San Francisco, CA: Jossey-Bass.
- Merriam, S.B. 2000. *Qualitative research in practice: Examples for discussion and analysis*. San Francisco, CA: Jossey-Bass.
- Meyer, K.E. 2001. Institutions, transaction costs and entry model choice in Eastern Europe. *Journal of International Business Studies*, 32(1):357–367.

- Meyer, T. 2016. Shifting sands: Power uncertainty and the form of international legal cooperation. *European Journal of International Law*, 27(1):161–185. <https://doi.org/10.1093/ejil/chw005> [Accessed 09.08.2023].
- Meyer, T. and Guzman, A.T. 2010. International soft law. *The Journal of Legal Analysis*, 2(1):171–225 <https://ssrn.com/abstract=1353444> [Accessed 11.07.2023].
- Miles, K. 2013. *The origins of international investment law: Empire, environment and the safeguard of capital*. Cambridge, CA: Cambridge University Press.
- Mills, A.J., Durepos, G. and Wiebe, E. (eds). 2011. *Encyclopaedia of case study research*. Thousand Oaks, CA: Sage Publications.
- Mohanty, G. and Bakos, A. 2023. *The depoliticization of investment disputes – How deep does the “rabbit hole” go?* WTI Working Paper No. 09/2023. Bern: World Trade Institute.
- Mondi, L. 2020. South Africa and African continental economic integration in the 2020s. In: D.D. Bradlow and E. Sidiropoulos (eds). *Values, interest and power. South African foreign policy in uncertain times*. Pretoria: University of Pretoria Press.
- Mouton, J. 2011. *How to succeed in your master's and doctoral studies*. Pretoria: Van Schaik Publishers.
- Muchlinski, P. 2010. Trends in international investment: Calls for reforms of model bilateral investment treaties in Norway, South Africa and United States. *Yearbook on International Investment Law and Policy 2009–2010*. New York: Oxford University Press.
- Muchlinski, P. 2010a. Limited liability and multilateral enterprises: A case of reform? *Cambridge Journal of Economics*, 34(5):915–928.
- Muchlinski, P. 2010b. The COMESA Common Investment Area: Substantive standards and procedural problems in dispute settlement. Paper No. 11/2010. <https://ssrn.com/abstract=1698209> [Accessed 12.09.2022].
- Nagy, D., Shcuessler, J. and Dubisnky, A. 2016. Defining and identifying disruptive innovation. *Industrial Marketing Management*, 57(1):119–126.

Narlikar, A. 2005. *The World Trade Organization. A very short introduction*. New York: Oxford University Press.

Ngang, C.C. 2022. *The right to development in Africa*. Chicago, Ill: Haymarket Books.

North, D.C. 1990. A transaction cost theory of politics. *Journal of Theoretical Politics*, 2(4):335–367.

Neuman, W.L. 2000. *Social research methods: Qualitative and quantitative approaches*. Boston, MA: Allyn and Bacon.

Neuman, W.L. (2011) *Social Research Methods: Qualitative and Quantitative Approaches*. 7th Edition, Pearson, Boston.

Neuman, W.L. (2011) *Social Research Methods: Qualitative and Quantitative Approaches*. 8th Edition, Pearson, Boston.

Neumayer, E. and Spess, L. 2005. Do bilateral investment treaties increase foreign direct investment to developing countries? *World Development*, 3(1):31–49.

Newcombe, A. and Paradell, L. 2009. Law and practice of investment treaties. *Amsterdam Law Forum*, 2(3):103–107.

Nilsen, P. 2015. Making sense of implementation theories, models and frameworks. *Implementation Science*, 10(53):2–13.

Nooyi, I. 2005. Graduation remarks at the Columbia University Business School, 19 May. <http://www.businessweek.com/stories/2005-05-19/indra-nooyis-graduation-remarks> [Accessed 18.11.2023].

Novik, A. and Gaukrodger, D. 2023. Investment treaties and climate change. Informal inter-governmental meeting. Draft agenda. Paris: OECD. [https://one.oecd.org/document/DAF/INV/TRI/WD\(2023\)1/en/pdf](https://one.oecd.org/document/DAF/INV/TRI/WD(2023)1/en/pdf) [Accessed 11.10.2022].

Nyang, C.C. 2022. *The right to development in Africa*. Chicago, Ill: Haymarket Books.

OECD. 2008. *International investment law. Understanding concepts and tracking inventions*. Paris:

OECD. <https://www.oecd.org/daf/inv/internationalinvestmentagreements/40471468.pdf>
[Accessed 30.07.2022].

Ofodile, U.E. 2011. Africa–China agreements: Trends, tricks and traps – Implications for broader Africa–South economic cooperation. Paper presented at the Trade Policies Research Forum, Trade Policy Training Center in Africa, 8–9 August, Arusha, Tanzania.

Ofodile, U.E. 2013. Africa–China bilateral investment treaties. A critique. *Journal of International Law*, 35(1):133–206.

Okeke, T. 2021. Bilateral investment treaties: Periphery sovereignty and the foreign investment legal regime. <http://uchicagogate.com/articles/2021/12/21/bilateral-investment-treaties-periphery-sovereignty-and-foreign-investment-legal-regime/>
[Accessed 04.03.2023].

O’Leary, Z. 2005. *Researching real world problems: A guide to methods of inquiry*. London: Sage Publications.

Olmedo, J.G. 2020. Recalibrating the international investment regime through narrowed jurisdiction. *International and Comparative Law Quarterly*, 69(2):301–334.

Onditi, F., Ben-Nun G., D’Alessandro C. and Levey, Z. 2019. *Contemporary Africa and the foreseeable world order*. London: Rowman and Littlefield Publishing Group.

Ostry, S. 1997. *A new regime for foreign direct investment*. Washington, DC: Group of Thirty Publishers.

Ouguerouz, F. 2005. *African charter on human and people’s right: A comprehensive agenda for human dignity and sustainable development in Africa*. The Hague: Kluwer Law International.

Patel, I. Minister Speech during the release of the dtic Industrial Policy and Strategy Review. 08 May 2024. <http://www.thedtic.gov.za/wp-content/uploads/dtic-industrial-policy-review.pdf> [Accessed 08.07.2025]

Patton, M.Q. 2015. *Qualitative research and evaluation methods: Integrating theory and practice*. 4th edition. Thousand Oaks, CA: Sage Publications.

- Pauwelyn, J. 2015. At the edge of chaos? Foreign investment law as a complex adaptive system. How it emerged and how it can be reformed. *Foreign Investment Law Journal*, 29(2):372–418.
- Perrone, N.M. 2013. The international investment regime and foreign investors right: Another view of a popular story. DPhil thesis, London School of Economics, London.
- Peterson, L.E. 2004. *Bilateral investment treaties and development policy making*. Manitoba: International Institute for Sustainable Development. <http://www.iisd.org> [Accessed 28.11.2022].
- Peterson, L.E. 2006. *South Africa's bilateral investment treaties: Implications for development and human rights*. Berlin: Frederich Ebert Stiftung.
- Peterson, L.E. 2007. Bilateral investment treaties. Implications for sustainable development and options for regulation. Berlin: Frederich Ebert Stiftung. www.fes.de/globalisation [Accessed 11.09.2021].
- Picciotto, S. 1998. Linkages in international investment regulation: The antinomies of the draft Multilateral Agreement on Investment. *University of Pennsylvania Journal of International Economic Law*, 19(3):731–768.
- Pidduck, T.M. 2019. Tax research methodology for unrested legislation: An exemplar for the tax scholar. *South African Journal of Accounting Research*, 33(3):205–219.
- Piero Foresti Laura de Carli & Others vs The Republic of South Africa, ICSID Case No. ARB(AF)07/01.
- Polanyi, K. 1944. *The great transformation*. Boston, MA: Beacon Press.
- Polanyi, K. 2001. *The great transformation: The political and economic origins of our time*. Boston, MA: Beacon Press.
- Pohl, J. 2018. *Societal benefits and costs of international investment agreements*. OECD Working Papers on International Investment. Paris: OECD.

Pohl, J., Mashigo, K. and Nohen, A. 2012. Dispute settlement provisions in international investment agreements: A large sample survey. OECD Working Paper on International Investment No. 2012/2. Paris: OECD.

Poulsen, L. 2010a. The significance of South–South BIT for the international investment regime: A qualitative analysis. *Northwestern Journal of International Law and Business*, 30(1):101–130.

Poulsen, L. 2010b. The importance of BITs for foreign direct investment and political risk: Revisiting the evidence. In: K.P. Sauvant (ed.). *Yearbook on International Investment Law and Policy 2009–2010*. New York: Oxford University Press.

Poulsen, L. 2011. Sacrificing sovereignty by chance: Investment treaties. Developing countries and bounded rationality. PhD thesis, London School of Economics and Political Science, London.

Poulsen, L., Bonnitcha, J. and Yackee, J.W. 2015. Transatlantic investment treaty protection. In: D. Hamilton and J. Pelkmans (eds). *Rule-makers or rule-takers? Exploring the Transatlantic Trade and Investment Partnership*. New York: Rowman and Littlefield.

Poulsen, L.N.S. 2015. *Bounded rationality and economic diplomacy: The politics of investment treaties in developing countries*. Cambridge, MA: Cambridge University Press.

Poulsen, L.N.S. 2019. Beyond credible commitments (investment) treaties as focal points. *International Studies Quarterly*, 64(1):26–34.

Ramaphosa, M.C. 2023. State of the Nation Address (SoNA), 9 February 2023. <https://www.gov.za/SONA2025> [Accessed 23 February 2025]

Ramaphosa, M.C. 2024. State of the Nation Address (SoNA), 8 February 2024. <https://www.gov.za/SONA2025> [Accessed 10 March 2025]

Ramaphosa, M.C. President Cyril Ramaphosa: 30th Anniversary of World Trade Organisation, Presidency.

<https://www.gov.za/news/speeches/president-cyril-ramaphosa-30th-anniversary-world-trade-organisation-10-apr-2025> [Accessed 15 April 2025]

Ramazzoti, P. 2016. *Themes in an institutional theory of economic policy*. Working Paper No. 81. Rome: Macerate University.

Randal, W. 2009. Chief Director, Trade Policy and Negotiation, DTI. *Nothing Sacred: “Developing Countries and the Future of International investment Treaties”*, Keynote Address at the Third Annual Forum of developing Countries Investment Negotiators 9-11 November 2009, Quito, Ecuador. The conference was co-organised by the International Institute for Sustainable Development (IISD), the South Centre and the Government of Ecuador. The agenda and background materials for the Forum are found on the IISD website, www.iisd.org. [Accessed 12 March 2024].

Rand Merchant Bank (RMB). 2024. Where to Invest in Africa Report. <https://www.rmb.co.za/campaign/where-to-invest-in-africa> [Accessed 19.09.2024].

Raynor, M. 2011. *The innovators’ manifesto deliberate disruption for transformational growth*. New York: Gown Publishing.

Rising, D. 2023. Everyone’s is talking about the Global South. But what is it? <https://apnews.com/article/what-is-global-south-9fa68c8c60061e88869f2270d98b> [Accessed 12.01.2024].

Roberts, A. 2010. Power and persuasion in investment treaty interpretation: The dual role of states. *American Journal of International Law*, 104(2):179–225.

Roberts, A. 2013. Clash of paradigms: Actors and analogies shaping the investment treaty system. *American Journal of International Law*, 107(1):45–95.

Roberts, A., Moraes, H.C., and Ferguson, V. 2019. Towards a Geoeconomic Order in International Trade and Investment. *Journal of International Economic Law*, 22(4): 655-676.

Robinson, P. 1998. Criteria to test the development friendliness of international investment agreements. *Transnational Corporations*, 7(1):83–89.

Rodrik, D. 2017. *Straight talk on trade: Ideas for a sane world economy*. Princeton, NJ: Princeton University Press.

Rodrik, D. 2021a. Why globalisation fuel populism: Economics, culture and the rise of right-wing populism. *Annual Review of Economics*, 13(1):133–170.

Rodrik, D. 2021b. *A primer on trade and inequality*. The IFS Deaton Review. London: Institute for Fiscal Studies (IFS).

Rose, C. and Dozen A. 1996. Propositions on private property, public rights and the new takings legislations. *Washington and Lee Law Review*, 53:265–299.

Rose-Innes, C. 2020. The reform of institutions of global economic governance. In: D.D. Bradlow and E. Sidiropoulos (eds). *Values, interest and power. South African foreign policy in uncertain times*. Pretoria: University of Pretoria Press.

Rudd, K. 2016. *UN 2030. Rebuilding order in a fragmented world*. New York: International Peace Institute.

Ruggie, J.G. 2010. Report of the Special Representative of the UN Secretary-General on the Issue of Human Rights and Transnational Organisations and Other Business. A/HRC/1113. <https://digitallibrary.un.org/record/705860?v=pdf> [Accessed 10.06.2020]

Saliu, H.A. and Lipede, A.A. 2000. Africa, new world order and the lessons of Zaire. *International Studies*, 37(2):115–128.

Schneiderman, D. 2010. Constitutionalizing Economic Globalization: Investment Rules and Democray's Promise. *University of Toronto Law Journal*, 60 (3): 893-904

Schmidt, G.M. and Druehl, C.T. 2008. When is disruptive innovation disruptive? *Journal of Product Innovation Management*, 25(1):347–369.

Schumpeter, J.A. 1942. Business cycles: A theoretical, historical and statistical analysis of the capitalist process. *Journal of the royal Statistical Society*, 104(2):177–180.

Sachs, L.E., Johnson, L.J. and Coleman, J. 2019. *Yearbook on International Investment Law and Policy 2019*. New York: Oxford University Press.

SADC (Southern African Development Community). 2006. *Cooperation on investment: Protocol on finance and investment*. Maseru: SADC.

SADC. 2012. *Model investment treaty template with comments*. Gaborone: SADC.
www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Templates-Final.pdf
[Accessed 10.06.2020].

Salacuse J. 2005. BIT by BIT: The growth of bilateral investment treaties and their impact on foreign direct investment in developing countries. *International Law*, 46(68):78–92.

Salacuse, J. 2010a. The emerging global regime for investment. *Harvard International Law Journal*, 51(1):1–16.

Salacuse, J. 2010b. *The law of investment treaties*. New York: Oxford University Press.

Salucuse, J. and Sullivan, N. 2005a. Do BIT really matter: An evaluation of bilateral investment treaties and their grand bargain. *Harvard International Law Journal*, 46(1):67–130.

Salause, J. and Sullivan, N. 2005b. Do BITs really bite? An evaluation of bilateral investment treaties and the grand bargain. *Harvard International Law Journal*, 46(68):67–130.

Santiago, M. 2009. *State liability in investment treaty arbitration: Global constitutional and administrative law in the BIT generation*. Oxford: Hart Publishing.

Saunders, R.S. and Caramento, A. 2018. An extractive developmental state in Southern Africa? The case of Zambia and Zimbabwe. *Third World Quarterly*, 39(6):1166–1190.

Sauvant, K.P. and Sachs, L.F. (eds). 2009. *The effect of treaties on foreign direct investment: Bilateral investment treaties, double taxation treaties and investment flows*. New York: Oxford University Press.

Sauve, P.1994. A first look at investment in the final act of the Uruguay Round. *Journal of World Trade*, 28(5):5–16.

Sauve, P. 1995(a). Market access through market presence. Paper presented at the Annual Meeting of the Canadian Economics Association, 3 June, Montreal.

Sauve, P. 1995(b). Assessing the General Agreement on Trade in Services – Half full or half empty? *Journal of World Trade*, 29(4):121–145.

Scerri, M. 2018. *Systems of innovation and economic theory – A genealogical approach*. Institute for Economic Research on Innovation (IERI) Working Paper No. 0001. Pretoria: Tshwane University of Technology.

Schernikau, L. and Smith, W.H. 2023. *The unpopular about electricity and the future of energy*. Berlin: Energiea Publishing.

Schill, S. 2016. In defense of international law. In: M. Bungenberg, C. Hermann, M. Krajewski and J.P. Terhechte (eds). *European Yearbook of International Economic Law*. New York: Springer.

Schneiderman, D. 2008. *Constitutionalising Economic Globalisation: Investment Rules and Democracy's Promise*. Cambridge, Cambridge University Press.

Schoeman, M. 2003. South Africa as an emerging middle power. In: J. Daniel, A. Habib and R. Southall (eds). *State of the nation*. Pretoria: Human Science Research Council.

Scholz-Wackerle, M. 2013. *The foundations of evolutionary institutional economics*. London: Taylor & Francis.

Schreuer, C., Malintoppi, L., Reinisch, A. and Sinclair, A. 2009. *The ICSID Convention: A commentary*. Cambridge: Cambridge University Press.

Schwardt, H., Grabner, C., Henrich, T., Cordes, C. and Schwesinger, G. 2016. Economic complexity and trade-offs in policy decisions. In: H. Schwardt, C. Grabner and T. Henrich (eds). *Policy implications of recent advances in evolutionary and institutional economics. Essays in honour of Wolfram Elsner*. London and New York: Routledge Taylor & Francis Group.

Sharma, M.S. and Bhogal, P. 2017. India and global trade governance: Re-defining its national interest. *Rising Powers Quarterly*, 2(3):125–145.

Sheffer, M. W. 2011. Bilateral investment treaties: A friend or foe to human rights. *Denver Journal of International Law & Policy*, 39(3):483–501.

- Shihata, I. 1986. Towards a greater depolicisation of investment disputes: The roles of ICSID and MIGA. ICSID review. *Foreign Investment Law Journal*, 1(1):1–25.
- Shihata, I. 1994. Recent trends relating to entry of foreign direct investment – ICSID review. *Foreign Investment Law Journal*, 9(1):47–70.
- Shoba, M and Mlambo, V.H. 2024. A constructivist analysis of the bilateral relations between South Africa and China. *Cogent Social Sciences*, 10(1):1–14.
- Silverman, D. 2022. *Qualitative research*. London: Sage Publications.
- Simma, B. 2012. Reciprocity. In: R. Wolfrum (ed.). *The Max Planck encyclopaedia of public international law*. Exford: Oxford University Press.
<http://apil.outlaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1461?prd=EPIL> [Accessed 12.1.2023].
- Simmons, B.A. 2000. International law and state behaviour: Commitment and compliance in international monetary affairs. *American Political Science Review*, 94(4):819–836.
- Singh, K. *Commentary on transformation of the international investment agreement regime: A BRICS perspective*. Geneva: UNCTAD.
- South Africa. 2015. Protection of Investment Act 22 of 2015.
<https://dti.gov.za/gazettes/39514.pdf> [Accessed 11.09.2023].
- South African National Planning Commission. 2011. *National Development Plan 2030: Our Future – Make It Work*. Pretoria: National Planning Commission.
- Staley, E. 1935. *War and the private investor: A study in the relations of international politics and international private investment*. New York: Doubleday, Doran & Company.
- Steenhuis, H.J. and Pretorius, L. 2017. The additive manufacturing innovation: A range of implications. *Journal of Manufacturing Technology Management*, 28(1):122–143.
- Steinmo, S. 2001. The new institutionalism: New perspectives. *Politics and the Life Sciences*, 35(3):48–60.

Stephenson, K.L. 2015. Chinese foreign direct investment in the Caribbean. <https://www.semanticscholar.org/author/Kimberly-L-Stephenson/119199862> [Accessed 12.09.2022].

Strezhnev, A. 2016. Detecting bias in international investment arbitration. Paper presented at the 57th Annual Convention of the International Studies Association, 16–19 March, Atlanta, Georgia. https://scholar.harvard.edu/files/astrezhnev/files/are_arbitrators_bias.pdf?m=14595244 [Accessed 17.09.2022].

Strezhnev, A. 2018. Essays on causal inference and the international investment regime. DPhil thesis, Harvard University, Cambridge.

Sornarajah. M. 1986. State responsibility and bilateral investment treaties. *Journal of World Trade Law*, 20(79):79–98.

Sornarajah. M. 2004. *International law of foreign investment*. New York: Cambridge University Press.

Sornarajah, M. 2021. *The international law on foreign investment*. 5th edition. Cambridge, MA: Cambridge University Press.

Stoll, P.T. 2011. The WTO as a club: Rethinking reciprocity and common interest. In: F. Ulrich, G. Rudolf and E.K. Daniel (eds). *From bilateralism to community interest essays in honour of Judge Brunno Simma*. New York: Oxford University Press.

Sturgeon, J.I. 2016. The political economy of industrial policy. In: C. Grabner, H. Henrich and T. Schwardt (eds). *Policy implications of recent advances in evolutionary and institutional economics. Essays in honour of Wolfram Elsner*. London and New York: Routledge Taylor & Francis Group.

Tandon, Y. 2015. *Trade is war. The West's war against the world*. London: OR Books.

Termeer, C., Dewulf, A. and Biesbroek, G. 2017. Transformational change: Governance interventions for climate change adaptation from a continuous change perspective. *Journal of Environmental Planning and Management*, 60(4):558–576.

Terreblanche, S. 2003a. *A history of inequality in South Africa, 1652–2002*. Durban: University of KwaZulu-Natal.

Terreblanche, S. 2003b. *A perspective on South Africa's development problems ten years after 1994*. Stellenbosch: Stellenbosch University Press.

Tieku, T.K. 2022. A new research agenda for Africa's international relations. *African Affairs*, 121(484):487–499.

Tobi, J. and Rose-Ackerman, S. 2005. Foreign direct investment and the business environment in developing countries: The impact of bilateral investment treaties. Research Paper No. 293. Yale, CT: Yale Law School Center for Law Economics and Public Policy.

United Nations (UN). 1969. Vienna Conventions on the Law of Treaties. Treaty Series. New York: United Nations.

UN. 1986. Declaration on the Right to Development. Resolution. A/ 41/128 adopted by the UN General Assembly on 04 December 1986.

UN. 1999. African Ministerial Declaration on UNCTAD X and Africa's development challenges, Algiers, 9–10 September. <https://digitallibrary.un.org/record/278618?ln=en> [Accessed 30.09.2023].

UN Conference on Trade and Development (UNCTAD). 1998. *Bilateral investment treaties in the mid-1990s*. New York: UN.

UNCTAD. 2000. *Bilateral investment treaties 1959–1999*. New York: UN.

UNCTAD. 2005a. *South-South cooperation in international investment agreements*. UNCTAD Series on International Investment Policies for Development. New York and Geneva: UNCTAD.

UNCTAD. 2005b. *Investor-state disputes arising from investment treaties. A review*. UNCTAD Series on International Investment Policies for Development. New York and Geneva: UNCTAD.

UNCTAD. 2007. *Bilateral investment treaties 1995–2006. Trends in investment rule making*. New York and Geneva: UN.

UNCTAD. 2010a. *Economic Development in Africa Report*. New York: UN.

UNCTAD. 2010b. *Strengthening productive capacities: A South-South agenda*. New York and Geneva: UN.

UNCTAD. 2013. *Global Value Chains. Investment and Trade for Development. World Investment Report*. Geneva: UN.

UNCTAD. 2014. *World Investment Report. Investing in the SDGs – An Action Plan*. Geneva: UN.

UNCTAD. 2014. *The impact of international investment agreement on foreign direct investment: An overview of empirical studies 1998–2014*. IAA Issue Note. New York and Geneva: UN.

UNCTAD and World Bank. 1994. *Liberalising international transactions in services: A handbook*. Sales No. E.94II.A11. New York: UNCTAD

UN Economic Commission for Africa. 2017. *Investment policies and bilateral investment treaties in Africa. Implications for regional integration*. Addis Ababa: UN.

Van Aaken, A., and Kurtz, J. 2019. Beyond Rational choice. International Trade law and the Behavioural Political Economy of Protectionism. *Journal of International Economic Law*. 22(4): 601-628

Vandavelde. K. 1992. *United States investment treaties: Policy and practice*. The Hague: Kluwer Law International.

Vandavelde, K.J. 2010. *Bilateral investment treaties: History, policy and interpretation*. New York: Oxford University Press.

Veblen, T.B. 1970. *The theory of the leisure class*. New York: Macmillan.

Vicuna, F.O. 2014. Of contracts and treaties in the global market. In: Planck, M. (ed.). *Yearbook of United Nations Law Online*. New York: Brill.

- Viner, J. 1951. *International economics studies*. Glencoe, Ill: Free Press.
- Volman, D. 1993. Africa and the new world order. *The Journal of Modern African Studies*, 31(1):1–30.
- Von Moltke, K. 2000. An international investment regime? Issues of sustainability. Manitoba: International Institute for Sustainable Development (IISD) Publications.
- Von Moltke, K. 2004. *A model international investment agreement for the promotion of sustainable development*. Manitoba: IISD Publications.
- Wacker, J.G. 2004. A theory of formal conceptual definitions. Developing theory building measurement instrument. *Journal of Operations Management*, 22(6):629–650.
- Walde, T. 2004. Investment arbitration under the Energy Charter Treaty: An overview of selected key issues based on recent litigation experience. In: N. Horn and S. Kroll (eds). *Arbitrating foreign investment dispute*. The Hague: Kluwer Law International.
- Waldron, J. 2012. *The rule of law and the measure of property*. Cambridge: Cambridge University Press.
- Walsh, S.T, Kirkchoff, B.A. and Newbert, S. 2003. Differentiating market strategies for disruptive technologies. *IEEE Transactions on Engineering Management*, 49(4):341–351.
- Wang, G. 2010. International investment law: An appraisal from the perspective of the New Haven School of International Law. *Asia Pacific Law Review*, 8(2):19–44.
- Weeks, M.R. 2015. Is disruption theory wearing new clothes or just naked? Analysing recent critiques of disruptive innovation theory. *Innovation, Management, Policy and Practice*, 17(40):417–428.
- World Bank. 2010. *Doing Business Indicators 2010–2020*. Washington, DC: World Bank Group Publishing.
- World Bank. 2010. *Investment law reform. A handbook for development practitioners*. Washington, DC: Investment Climate Advisory Services of the World Bank Group.

World Bank. 2018. *Global Investment Competitiveness Report 2017/2018. Foreign Investor Perspectives and Policy Implications*. Washington, DC: World Bank Group Publishing.

World Bank. 2020a. *Tracking SDG 7. The Energy Progress Report*. Washington, DC: Investment Climate Advisory Services of the World Bank Group.

World Bank. 2020b. *The African Continental Free Trade Area: Economic and distributional effects*. Washington, DC: World Bank Group Publishing.

World Benchmarking Alliance (WBA). 2020. *The impact of multinationals in developing countries. A framework for benchmarking*. Amsterdam: WBA Publishing.
www.worldbenchmarkingalliance.org [Accessed 04.02.2024].

World Trade Organization (WTO). 2024. *The GATT years: from Havana to Marrakesh*.
http://www.wto.org/English/thewto_what_is_e/tif_e/fact4_e.htm [Accessed 12.02.2024].

Xiaiohui, Y. 2023. The establishment of the African Continental Free Trade Area and its impact on China–Africa economic and trade cooperation. *Journal of WTO and China*, 13(3):115–127.

Yackee, J.W. 2007a. *Do BITs really work? Revisiting the empirical link between investment treaties and FDI*. Legal Research Paper Series, Paper No. 1054. Madison, WI: University of Wisconsin Law School.

Yackee, J.W. 2007b. *Sacrificing sovereignty: Bilateral investment treaties, international arbitration and the quest for capital*. DPhil dissertation, University of North Carolina, Chapel Hill.

Yackee, J.W. 2008. Bilateral investment treaties, credible commitment and the rule of (international) law: Do BITs promote foreign direct investment? *Law and Society Review*, 42(4):805–832.

Yackee, J.W. 2010. Do bilateral investment treaties promote foreign direct investment? Some hints from alternative evidence. *Virginia Journal of International Law*, 51(1):397–442.

Yin, L. 2023. Strengthening the BRICS financial cooperation mechanism: Promoting pragmatic development. In: F.Y. April, M. Kanyane, Y.D. Davids and K. Chetty (eds). *The BRICS in Africa promoting development?* Cape Town: Human Science Research Council.

Yin, R. 2010. *Qualitative research from start to finish*. New York: Guilford Press.

Yin, R. K. 1994. Discovering the future of the case study. Method evaluation research. *Evaluation Practice*, 15(3):283–290.

Yu, D. and Chieh, H.C. 2008. A reflective review of disruptive innovation theory. Portland International Center for Management of Engineering and Technology (PICMET), Proceedings 405: 27–31 July, Cape Town, South Africa.

Zhang, S. 2021. China and the investment treaty regime: Rule taker or rule maker? In: M. Mohan and C. Brown (eds). *The Asian turn in foreign investment*. New York: Cambridge University Press.

Zondi, S. 2018. Decolonizing international relations and its theory: A critical conceptual mediation. *Politkon*, 45(1):16–31.