A Legal Analysis of the impact of Ghana's International Investment Agreements on the State's Regulatory Autonomy

By

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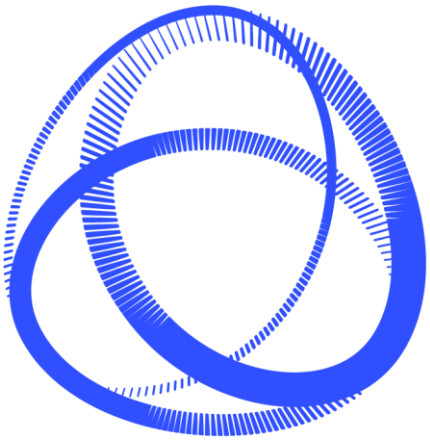

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Abstract

"Whereof what's past is prologue; what to come, in yours and my discharge".
William Shakespeare. Antonio to Sebastian, *The Tempest*

Commentators suggest Antonio meant that by virtue of all that had led up to that moment, the past had set the stage for their next act, as a prologue does in a play, and that the script is henceforth in their hands[1]. This thesis, similarly, aims to redefine sovereignty in Ghana by showing that attaining political sovereignty merely set the scene for the route to the attainment of true sovereignty, particularly regulatory autonomy.

The Investment Treaty Regime has been described as 'what may be the most potent (and, for many, the weirdest) regime underpinning economic globalisation'.[2] Traditionally, the components of a regime are 'the principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations'.[3] Commentators state that the modern Investment Treaty Regime has three main components, 'firstly investment treaties, secondly the set of treaties, rules, and institutions governing investment treaty arbitration, and thirdly the decisions of the arbitral tribunals that apply and interpret the investment treaties'.[4]

This thesis focuses primarily on the investment treaties and how their provisions impact upon the regulatory autonomy and sovereignty of Host States that have signed up to old-style bilateral investment treaties (BITs), using Ghana as a Case Study. By examining the BITs to which Ghana is signatory, the cases that have been brought against Ghana by foreign investors and the manner in which other states, both from the Global South and the Global North have tried to mitigate against the erosion of their regulatory autonomy, this thesis proposes a solution that will empower Ghana (and potentially other developing country Host States) in its bid to redefine its sovereignty by reclaiming its regulatory autonomy.

[1] "In their discharge"
[2] Lauge Poulsen, 'The Investment Treaty Regime' in Jon Pevehouse and Leonard Seabrooke (eds), *The Oxford Handbook of International Political Economy* (Forth 2021) 16
[3] Stephen D. Krasner, *Power, the State, and Sovereignty: Essays on International Relations* (Routledge 2009) 113
[4] Lauge Poulsen, 'The Investment Treaty Regime' in Jon Pevehouse and Leonard Seabrooke (eds), *The Oxford Handbook of International Political Economy* (Forth 2021) 3

Dedication

This thesis is dedicated with love to my dear parents, Kwatei and Charlotte, and particularly to my wonderful mother, Charlotte Scheck Shang-Simpson, fondly known as Ewuraba Soroto, who modelled for me hard work and Godliness and who gave me the courage, confidence, and space to chart my own course in life. You will remain forever in my heart.

Thank you for always believing in me, and for being the wind beneath my wings – always!

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All opinions and errors remain my own.

Declaration

I certify that the thesis I have presented for examination for the PhD degree of the Canterbury Christ Church University is solely my own work other than where I have clearly indicated that it is the work of others. The copyright of this thesis rests with the author. Quotation from it is permitted, provided that full acknowledgement is made.

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Guide for the Reader

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Thank you for your attention.

Abbreviations

AAA	African Arbitration Academy
AAA Model BIT	African Arbitration Academy Model BIT
ACIA	African Common Investment Area
ADR	Alternative Dispute Resolution
AEC	African Economic Community
AfAA	African Arbitration Association
AfCFTA	African Continental Free Trade Area Agreement
AfDB	African Development Bank
AIC	Arab Investment Court
AIM	Annual Investment Meeting
ALSF	African Legal Support Facility
AMU	Arab Maghreb Union
ANZ-ASEAN	Australia-New Zealand and Association of Southeast Asian Nations
ASA	American Sociological Association
ASEAN	Association of Southeast Asian Nations
ASEAN CIA	ASEAN Comprehensive Investment Agreement
AU	African Union
BEE	Broad-based Economic Empowerment
BIT(s)	Bilateral Investment Treaty (Treaties)
CBD	Convention on Biological Diversity
CCIA	COMESA Common Investment Area
CDA	Critical Discourse Analysis
CEN-SAD	Community of the Sahel-Saharan States
CEO	Chief Executive Officer
CERDS	Charter of Economic Rights and Duties of States
CETA	Canada-EU Comprehensive and Economic Trade Agreement
CIL	Customary International Law
COMESA	Common Market for Eastern and Southern Africa
CSR	Corporate Social Responsibility
CUSFTA	Canada-US Free Trade Agreement
CUSMA	Canada-U.S.-Mexico Agreement
EAC	East African Community
ECA	Economic Commission for Africa
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
EU	European Union
EVFTA	EU Vietnam FTA
FAF	Financial Assistance Fund
FAT	Fair Administrative Treatment
FCN	Friendship, Commerce and Navigation
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FIP	Finance and Investment Protocol
FPS	Full Protection and Security
Free SHS	Free Senior High School
FTA	Free Trade Agreement
G7	Group of Seven
G77	Group of 77

GA	General Assembly
GAFICS	Ghana Association of Former International Civil Servants
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
Ghana-China Agreement	Agreement between the Government of the People's Republic of China and the Government of the Republic of Ghana Concerning the Encouragement and Reciprocal Protection of Investments
GHS	Ghana Cedi
GIPC	Ghana Investment Promotion Centre
GIPC Act	Ghana Investment Promotion Centre Act 2013
GTCL	Ghana Telecommunications Company Limited
Havana Charter	Havana Charter for an International Trade Organization
HIPCs	Heavily Indebted Poor Countries
IADB	Inter-American Development Bank
ICJ	International Court of Justice
ICS	Investment Court System
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFI(s)	International Financial Institution(s)
IGAD	Inter-Governmental Authority on Development
IIA	International Investment Agreement
IIAR	International Investment Agreement Regime
IIL	International Investment Law
IISD	International Institute for Sustainable Development
ILA	International Law Association
ILC	International Law Commission
ILF	International Legal Framework
IMF	International Monetary Fund
IR	International Relations
ISDS	Investor State Dispute Settlement
ITA	Investment Treaty Arbitration
ITLOS	International Tribunal for the Law of the Sea
ITR	Investment Treaty Regime
LCIA	London Court of International Arbitration
LDCs	Least Developed Countries
LEAP	Livelihood Empowerment Against Poverty
MAI	Multilateral Agreement on Investment
Mauritius Convention	Convention on Transparency in Treaty-based Investor-State Arbitration
MC12	WTO's 12th Ministerial Conference
MFN	Most-Favoured-Nation
MIGA Convention	Convention Establishing the Multilateral Investment Guarantee Agency
MNEs	Multinational Enterprises
MST	Minimum Standard of Treatment
NAFTA	North America Free Trade Agreement between the US, Canada and Mexico

New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
NGO	Non-Governmental Organisation
NIEO	New International Economic Order
NT	National Treatment
OAS	Organization of American States
ODA	Overseas Development Aid
OECD	Organisation for Economic Co-operation and Development
UNCITRAL	United Nations Commission on International Trade Law
OPEC	Organization of the Petroleum Exporting Countries
PAIC	Pan African Investment Code
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PPP	Public-Private Partnerships
PRI	Political Risk Insurance
RA	Regulatory Autonomy
RECs	Regional Economic Communities
RIA	Regional Investment Agreement
RIC	Regional Investment Court
SA	South Africa
SADC	Southern African Development Community
SDGs	Sustainable Development Goals
SRSG	Special Representative of the Secretary-General
TFTA	Tripartite Free Trade Area
TIPs	Treaties with Investment Provisions
T-MEC	Tratado entre Mexico, Estados Unidos y Canada
TPP	Trans-Pacific Partnership
TRIMS	Agreement on Trade-Related Investment Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TTIP	US-EU Transatlantic Trade and Investment Partnership
TWAIL	Third World Approaches to International Law
UK	United Kingdom
UN	United Nations
UNASUR	Union of South American Nations
UNCTAD	United Nations Conference on Trade and Development
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNGPs	UN Guiding Principles on Business and Human Rights
USA	United States of America
USMCA	United States-Mexico-Canada Agreement
VCLT	Vienna Convention on the Law of Treaties
WB	World Bank
WG III	Working Group III of UNCITRAL
WG III Advisory Centre	The Advisory Centre proposal by UNCITRAL Working Group III
WIR	World Investment Report
WTO	World Trade Organisation

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Chapter One: An Introduction to the International Investment Law Regime

1. INTRODUCTION

The purpose of this chapter is to set the scene for this thesis and to explain how the Investment Treaty Regime (ITR) which forms part of the International Investment Law Regime and the International Investment Agreements (IIAs) that are generated as part of that regime, are intertwined with the regulatory autonomy (RA) and sovereignty of Host States, using Ghana as a Case Study. To quote Anghie, "Sovereignty has always been a controversial topic in International Law"[5] and this author would posit that the same could be said for the concept of Regulatory Autonomy.

The concept of "Sovereignty" as referred to in this thesis, is founded upon the argument so eloquently set out by Anghie in his seminal work[6], that colonialism and neo-colonialism cannot be divorced from international law, since many of the basic doctrines of international law, not least the doctrine of sovereignty, were forged by the erstwhile colonial powers in an attempt to present a legal system that could be showcased as a panacea to end colonialism, although the reality is that the colonial origins of international law resulted in the creation of a set of structures that have simply re-invented themselves in various guises throughout the history of international law. Thus, this thesis does not subscribe to a conventional definition of sovereignty as that would perpetuate the attempts to disregard the historical (colonial) dimension of sovereignty. This thesis argues that the inequalities that were inherent in the period of colonialism, persist in different forms to date and so to pretend that sovereignty attributed to so-called Third World states is the same as the sovereignty enjoyed by the former colonial powers is disingenuous. This is because, whilst European states were 'sovereign and equal'[7], the formal acquisition of sovereignty by erstwhile colonised peoples, never actually translated into the real power that those 'new states'[8] had hoped for and thus the most accurate description of it would be as a form of self-rule that tended to 'reproduce and reinstate the inequalities and power disparities that had characterised formal colonialism'.[9] To quote Anghie in summary, 'Third World sovereignty is distinctive and rendered uniquely vulnerable and dependent by international law'.[10]

The other concept at the heart of this thesis, that of Regulatory Autonomy, can be described as the ability of a State to decide what their regulatory objectives are, which of these objectives to pursue in the public interest, and the level at which to pursue those aims.[11] It is the 'scope of [a] state's power to regulate in the public interest, within the normative context of an applicable investment protection treaty'[12] which is interrogated at length in this thesis, because whilst the author accepts that there will be a measure of concession by states of their regulatory autonomy within the context of signing up to investment treaties for FDI, the level of concession of regulatory autonomy will only be acceptable to the state if this is offset by the expected FDI benefits. This chapter will also show what the implications of the underlying norms of the ITR are to Host States generally, and to Ghana in particular. This chapter is divided into eight sections. The first section sets out a historical analysis of the international ITR and the sovereignty of Host States, whilst the second section deals with the Research Aims of this thesis. The third and fourth sections outline the Rationale for undertaking this research and the Research Question, whilst the fifth section introduces the Methodology of this thesis. The sixth section explains why Ghana has been chosen as a Case Study for this thesis and makes

[5] Antony Anghie, 'Rethinking sovereignty in international law' (2009) Annual Review of Law and Social Science 5.1 291
[6] Antony Anghie, *Imperialism, sovereignty and the making of international law* (Cambridge University Press 2007) 7, 199
[7] Ibid 5
[8] Ibid 7
[9] Ibid 199
[10] Ibid 6
[11] Joshua Paine, 'Autonomy to Set the Level of Regulatory Protection in International Investment Law'(2021) 70 ICLQ 697, 698
[12] Klara Polackova Van der Ploeg, 'Protection of Regulatory Autonomy and Investor Obligations: Latest Trends in Investment Treaty Design' (2018) 51 International Lawyer 109

recommendations for next steps along this journey, whilst the seventh section sets out the contribution of this thesis to research and knowledge development. The eighth and final section of this chapter, summarises the content and import of this chapter, and provides a preview to the contents of Chapter Two.

1.1 THE INVESTMENT TREATY REGIME AND THE SOVEREIGNTY OF HOST STATES

The Investment Treaty Regime has been described by one commentator as 'what may be the most potent (and, for many, the weirdest) regime underpinning economic globalisation'.[13] This section provides an explanation of how the ITR links in with IIAs, RA, sovereignty and its implications for Host States, bearing in mind that IIAs have historically been asymmetrically constructed to concentrate on the protection of foreign investors and their investments. As described by Krasner, traditionally speaking, the components of a regime are 'the principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations'.[14] Additionally, Bonnitcha, Poulsen and Waibel, in their innovative and inter-disciplinary treatment of the topic of the political economy of the investment treaty regime,[15] point out that Krasner's definition encompasses formal arrangements such as international organizations and treaties as well as more informal arrangements such as shared norms and principles amongst arbitrators and arbitral tribunals. The point is also made that the reference to 'actors' above includes States as well as non-state actors, with both foreign investors as well as members of civil society qualifying as non-state actors.

The modern ITR has been described as having three main components, 'firstly investment treaties, secondly the set of treaties, rules, and institutions governing investment treaty arbitration, and thirdly the decisions of the arbitral tribunals that apply and interpret the investment treaties'.[16] This thesis will begin with a focus on the first component, namely investment treaties, examining the inherited colonial bias that underpins their provisions and how as a result, these provisions impact upon the sovereignty of Host States that have signed up to Bilateral Investment Treaties (BITs), which are a type of IIA, with a focus on Ghana. This thesis will then examine the decisions of the arbitral tribunals that are called upon to apply and interpret the provisions of these investment treaties. This is because it is only due to the construction of the provisions of the old-generation BITs in existence that arbitral tribunals are able to apply expansive interpretations to those provisions. It therefore makes logical sense that any attempt to rectify the problem should start from the source of the problem, namely the provisions of the old-generation BITs. Old-generation IIAs (of which BITs are a subset) have been described by UNCTAD[17] as those IIAs signed between 1959 and 2011, with New-generation IIAs described as those signed in 2012-2022.[18] Roberts also states that BITs can roughly be divided into two generations, namely those from the 1900's with strong investor protections, and the second generation of BITs that came into effect in the mid-2000's after a recalibration aimed at striking a better balance between investor protection and state sovereignty.[19] As Coleman points out, the hallmarks of the old-generation treaties are an inclusion of vague and far-reaching obligations for states, no reference to investor responsibilities (not even in non-binding terms) or obligations, and a dearth of provisions seeking to meaningfully reaffirm and protect the ability of states to regulate

[13] Lauge Poulsen, 'The Investment Treaty Regime' in Jon Pevehouse and Leonard Seabrooke (eds), *The Oxford Handbook of International Political Economy* (Forth 2021) 16
[14] Stephen D. Krasner, *Power, the State, and Sovereignty: Essays on International Relations* (Routledge 2009) 113
[15] Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen, and Michael Waibel, *The political economy of the investment treaty regime* (Oxford University Press 2017)
[16] Poulsen (n 1) 3
[17] UNCTAD is the UN Trade and Development (UNCTAD), an intergovernmental organization within the United Nations Secretariat that promotes the interests of developing countries in world trade. See Home (unctad.org) accessed on 31.08.2024.
[18] Trends in the investment treaty regime and a reform toolbox for the energy transition, IIA Issues Note, No. 2, 2023 (unctad.org) 3 accessed on 31.08.2024.
[19] Anthea Roberts, 'Investment treaties: The reform matrix' (2018): 191-196, 191.

without having to pay compensation for adoption or enforcement of legitimate regulatory measures. Additionally, there are usually no effective environmental, human rights, gender, health, labour, and other public interest provisions to protect host states' regulatory space in these agreements, as a result of which respondent host state find themselves hostage to costly investor-state dispute settlement (ISDS) proceedings and claims challenging public interest measures that they wish to implement to the benefit of their citizens.[20]

Although there are several types of investment treaties[21] that make up the first component of the ITR, this thesis focuses mainly on IIAs, of which BITs are a subsection. BITs are investment treaties between two states that have as their primary (or oftentimes only) subject matter, the protection of foreign investments. It is noteworthy that if indeed the primary aim of BITs is the protection of foreign investments, then it follows that the party in a position to invest, (i.e., the investor from capital-exporting country), is the only party that in reality is in a position to benefit from the so-called "reciprocal" clauses of the treaty. The Host State, usually a developing country, is not only unable to take advantage of these so-called "reciprocal" investment protection clauses, but also has obligations under the treaty that restrict its regulatory autonomy and by extension, its sovereignty.[22] As Krasner states, 'in international politics … power is what matters'.[23] Additionally, as Thucydides famously said to the Athenians, '…you know as well we do that right, as the world goes, is only in question between equals in power, … the strong do what they can and the weak suffer what they must.'[24] This power imbalance in investment treaties has its roots in the imperialist historical background to the ITR, and this will be elaborated upon in the next section.

1.1.1 THE IMPERIALIST HISTORICAL BACKGROUND TO THE INVESTMENT TREATY REGIME

An understanding of the imperialist historical background to the Investment Treaty Regime, is critical to a proper comprehension of the nuances in this area. As stated by Anghie, the principle that international law trumps municipal law in the event of conflict between the two, has its roots in colonisation, imperialism, and neo-colonialism.[25] Since pre-colonial times, Africa has played a significant part in International Trade and Investment, as have Asia, the Middle East, and other parts of the world.[26] During the Slave Trade, Africans were traded as chattels by the more powerful Western States. Thus, although they were a significant part of the system of international trade, Africans were not willing participants in these transactions and had neither rights nor sovereignty at the time. After the abolition of the Slave Trade, the countries from whence the former slave owners originated, scrambled to partition the African continent amongst themselves, colonising the areas they had partitioned. After achieving political independence, the leaders of the newly independent African States made their voices heard and their presence felt at the United Nations, where they were recognised as true participants in the arena of International Trade and Investment for the first time.[27] Whereas in the 18th and 19th centuries, an investment did not need protection, because it was made

[20] Jesse Coleman,'Briefing Note: Modern Provisions in Investment Treaties.' *Columbia Center on Sustainable Investment* (2022) 1

[21] For example, the 1991 Energy Charter Treaty (ECT), Investment chapters (such as Chapter Eleven) of Preferential Trade Agreements such as the North American Free Trade Agreement (NAFTA) and the Friendship, Commerce and Navigation (FCN) treaties signed by the USA during the Cold War, all of which focus primarily on investment protection, although they involve more parties and issues.

[22] Yao Graham, 'BITs a challenge to regional integration in Africa' (Third World Resurgence, No. 290/291 October/November 2014) BITs a challenge to regional integration in Africa (twn.my)accessed 15 May 2023

[23] Krasner (n 6) 21.

[24] Thucydides. The Peloponnesian War, London, J.M. Dent: New York, E.P. Dutton 1910. The Athenians offer the Melians an ultimatum: surrender and pay tribute to Athens or be destroyed. The Athenians do not wish to waste time arguing over the morality of the situation, because in practice might makes right – or, in their own words, "the strong do what they can and the weak suffer what they must". http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0200%3Abook%3D5%3Achapter%3D89%3Asection%3D1 accessed on 15 May 2023

[25] Antony Anghie, *Imperialism, Sovereignty, and the Making of international Law* (Vol. 37 Cambridge University Press, 2007) 209.

[26] Cynthia Clark Northrup et al., *Encyclopaedia of World Trade: From Ancient Times to the Present* (Vol. 1. Routledge, 2015)

[27] Ahmed Mahiou, 'Declaration on the establishment of a New International Economic Order' (2011) United Nations Audiovisual Library of International Law; See also the Declaration on the Establishment of a New Economic Order, G.A. Res. 3201(SVI), U.N. GAOR, 6th Special Session 29th plenary mtg U.N. DOC. A/RES/3201(S-VI) (May 1, 1974), reprinted in 13 I.L.M. 715 (1974)

in the context of colonial expansion and was protected under the imperialist system, the former colonial powers now had to negotiate terms with their former colonies in order to protect their investments. These investments were situated in states where the new leaders, for the most part, did not look kindly upon their former colonial masters.[28] This particularly reflects the situation on the continent of Africa south of the Sahara. [29] This thesis will show that although political independence had the semblance of sovereignty, in reality this was not true (economic) sovereignty.

Additionally, this thesis will evidence that after colonies gained their independence, the former colonial powers realised that they needed to develop a system of law to protect their investments in their erstwhile colonies, since they could no longer rely on the coercive use of military force in protection of their nationals, better known as gun-boat diplomacy.[30] Gun-boat diplomacy had been practised in the past to bring pressure to bear on less powerful entities in order to obtain advantageous commercial policies for the nationals of the more powerful states.[31] After independence, the former colonial powers could not rely on their position as powerful colonial masters to protect their investments. The newly independent African States were very protective of their newly acquired sovereignty and were suspicious of foreign investment which they regarded as a form of neo-colonialism because it meant their former colonial masters would still have control of large swathes of their new economies, potentially undermining their sovereignty.[32] They were therefore unwilling to open their economies to new foreign investments and created a hostile environment for existing investments by often expropriating foreign-owned assets[33] and by electing to produce their own goods and services rather than importing these from abroad. In a bid to curb such assertions of sovereignty by developing states, developed countries relied upon established principles of international laws that worked against the ability of developing states to rely upon their rights of expropriation in the public interest. In response, the developing countries, realising that they now had the advantage of a numerical majority, went to the UN General Assembly to state their case for a right to expropriate property without the need to pay fair market value.[34] On 1 May 1974, the UN General Assembly adopted the Declaration of the New International Economic Order (NIEO) allowing States full permanent sovereignty over their natural resources and economies. In addition, the Declaration allowed 'the right of nationalisation or transfer of ownership to its nationals'.[35]

The main objectives of the NIEO as set out in the Declaration were:

1. Developing countries must be entitled to regulate and control the activities of multi-national corporations operating within their territory.
2. They must be free to nationalise foreign property on conditions favourable to them.

[28] Muthucumaraswamy Sornarajah,'The international law on foreign investment' (Cambridge University Press, 2021) 28.
[29] Antony G. Hopkins, 'Property Rights and Empire Building: Britain's annexation of Lagos, 1861' (1980) 40 Journal of Economic History, 777, 788. Points out that notions of collective ownership of property which were widely prevalent in colonial legal systems, were replaced by European notions of individual property & freedom of contract, to suit the British Governor, the English residents and the new 'civilized' African Christian middle classes.
[30] Andrew Graham-Yooll, *Imperial Skirmishes: War and Gunboat Diplomacy in Latin America*, vol. 2 (Signal Books 2002)
[31] Lori Damrosch and David J. Scheffer (eds.), *Law and Force in the New International Order* (Routledge, 2019)
[32] Karl Joachim, 'International Investment Arbitration: A Threat to State Sovereignty?' *in Wenhua Shan, Penelope Simons and Dalvinder Singh (eds), Redefining Sovereignty in International Economic Law* (Hart Publishing, 2008)
[33]Permanent Sovereignty Over Natural Resources Report of the Secretary General, UN Doc. A/9716 (1974). Jeswald W. Salacuse & Nicholas P. Sullivan, 'Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46 HARV. INT'L L.J. 67, 75
[34] Margot E. Salomon, 'From NIEO to Now and the Unfinishable Story of Economic Justice' (2014) International & Comparative Law Quarterly 62.1 31; Muthucumaraswamy Sornarajah, 'The Return of the NIEO and the Retreat of Neo-liberal International Law' (2014) International Law and Developing Countries Brill Nijhoff 32
[35] Declaration on the Establishment of a New Economic Order, G.A. Res. 3201(SVI), U.N. GAOR, 6th Special Sess., 2229th plen. mtg., U.N. DOC. A/RES/3201(S-VI) (May 1, 1974), reprinted in 13 I.L.M. 715 (1974).

3. They must be free to set up associations of primary commodities and producers similar to OPEC[36]. All other countries must recognise this right and refrain from taking economic, military, or political measures calculated to restrict this right.
4. International Trade should be based on the need to ensure stable, equitable and remunerative prices for raw materials, generalised non-reciprocal tariff preferences, as well as the transfer of technology to developing countries via economic and technical assistance with no 'strings'.[37]

The Charter of Economic Rights and Duties of States (CERDS) which flowed from this Declaration was adopted by the General Assembly on 12 December 1974[38] and stated that the amount of any compensation to be paid would fall to be determined by the national law of the expropriating state rather than by international law. To circumvent the CERDS, the former colonial powers began to explore BITs with individual developing states to stave off the threat of having their investments expropriated with no recourse to [their] international law for compensation.[39] The first BITs were entered into by Germany with Pakistan in 1959[40], followed by Malaysia in 1960[41] and then Greece in 1961[42]. Being fiercely protective of their hard-won sovereignty, it seems counter-intuitive that developing states would willingly sign up to treaties containing provisions that severely curbed their regulatory autonomy.[43] The BITs of developed countries had almost identical protectionist provisions, as is clear from the Model UK[44] and Model USA[45] BITs. Because they were designed to protect the investments of investors from the more powerful nations, now mostly situated in their former colonies, the signatories were usually a developed and a developing country. Ghana's first BIT was concluded in 1989, and Ghana continued to sign up to BITs steadily through the 1990's and 2000's. All the BITs that Ghana is signatory to, are old-style BITs, the provisions of which makes Ghana susceptible to the risk of foreign investors initiating disputes via International Arbitration in the future. The UNCTAD[46] Investment Policy Hub states that there are over 2828 BITs in existence, out of which 2220 are in force, and that with regards to Treaties with Investment Provisions (TIPs), there are 442 in existence with 366 in force.[47] As Yao Graham remarks, the broad effect of these BITs can be summed up as a 'restriction on policy space as a quid pro quo for expected investment inflows'.[48] He also warns that the extreme imbalance in terms of rights and obligations, usually in favour of the investor and to the detriment of the State, poses a danger not only to the regulatory space of African states, but to

[36] Organisation of Petroleum Exporting Countries - https://www.opec.org/opec_web/en/ accessed 09.09.2023.
[37] Declaration on the Establishment of a New Economic Order, G.A. Res. 3201(SVI), U.N. GAOR, 6th Special Sess., 29th plen. mtg., U.N. DOC. A/RES/3201(S-VI) (May 1, 1974), reprinted in 13 I.L.M. 715 (1974).
[38] Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), U.N. GAOR, 29th Sess., 2315th plen. mtg., U.N. Doc. A/RES/3281(XXIX) (Dec. 12, 1974), reprinted in 14 I.L.M. 251 (1975).
[39] Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff Publishers 1995); Adeoye Akinsanya, 'International Protection of Direct Foreign Investments in the Third World' (1987) 36 INT'L & Comp. L.Q. 58; Muthucumaraswamy Sornarajah, 'State Responsibility and Bilateral Investment Treaties' (1986) 20 J. World. Trade L 79
[40] Muhammad Khalid and Tansif Ur Rehman, 'Investment Protection Under Bilateral Investment Treaties of Pakistan' (2020) 11 no. 4 International Journal of Asian Business and Information Management (IJABIM) 44. See also Ingo Venzke and Philipp Günther, 'International Investment Protection Made in Germany? On the Domestic and Foreign Policy Dynamics behind the First BITs' (2022) 33 Issue 4 European Journal of International Law 1183. https://doi.org/10.1093/ejil/chac066
[41] Germany | International Investment Agreements Navigator | UNCTAD Investment Policy Hub accessed 04.09.2024
[42] Germany | International Investment Agreements Navigator | UNCTAD Investment Policy Hub accessed on 04.08.2024
[43] Andrew T. Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 Va J Int'l L 639, 644
[44] UK Model BIT (2008)en (unctad.org) accessed on 09.09.2023.
[45] Microsoft Word - BIT text for ACIEP Meeting (unctad.org)USA 2012 Model BIT accessed on 09.09.2023. See also TREATY BETWEEN (unctad.org) USA 2004 Model BIT accessed on 09.09.2023.
[46] The United Nations Conference on Trade and Development https://unctad.org/ accessed 14.09.2023.
[47] International Investment Agreements Navigator | UNCTAD Investment Policy Hub accessed 14.09.2023. In 2019, the UNCTAD Investment Policy Hub reported that there were 2897 BITs in existence, out of which 2338 were in force.
[48] Yao Graham, 'BITs a challenge to regional integration in Africa' (Third World Resurgence, No. 290/291 October/November 2014) BITs a challenge to regional integration in Africa (twn.my)accessed 15 May 2023.

their plans for regional and continental integration.[49]Following on from this era, shortly after the achievement of political independence by previously colonised peoples, there was a period when the same states who previously spurned the advances of the Western States, began to compete for Foreign Direct Investment (FDI) from their former colonial masters and their allies for reasons that will be explained later in this thesis. FDI was obtained via IIAs, and in particular, BITs. According to the so-called "reciprocal" provisions, each signatory to the BIT agreed to allow investors from the other signatory state, certain concessions in exchange for Investment. In reality the only real beneficiaries of these "reciprocal" BIT clauses were the investors from the more powerful states since the developing states were not in a position financially to invest anywhere.[50] As Dagbanja has pointed out, the fact that the more powerful states have always been described as capital-exporting states, makes it clear that the developing states that entered into these agreements were capital-importing states and did not have the financial capacity to invest abroad.[51] Therefore the so-called "bilateral" or "reciprocal" nature of these agreements were and remain merely illusory as far as the capital-importing states are concerned. To compound the problem, these old-style BITs contain substantive provisions that have turned out to be potentially harmful to the interests of the Host developing states. The construction of these BITs, which have been described by some commentators as instruments of neo-colonialism,[52] have allowed Arbitral Tribunals to expansively interpret the provisions contained therein, arriving at conclusions detrimental to the interests of Host States. These expansive interpretations restrict the regulatory space of developing states and by extension, their sovereignty.

The next section of this thesis will discuss the intricacies of the ITR and its effect on regulatory autonomy and sovereignty, exploring the potential pitfalls in the problematic provisions contained in the BITs presently in existence in Ghana, such as the 'most-favoured-nation', 'national treatment', 'fair and equitable treatment', 'expropriation', 'repatriation of profits' and 'full protection and security for the investment' standards. These problematic provisions are discussed in detail in Chapter Four.

1.1.2 ASYMMETRY OF THE INVESTMENT TREATY REGIME AND ITS EFFECT ON REGULATORY AUTONOMY

This section examines how regulatory sovereignty is affected by the asymmetry of the ITR as it pertains to the provisions of investment treaties and also to the decisions of arbitral tribunals, which are two of the main components of the ITR.[53] Academics and policy makers have often argued about the standards of investment protection afforded to foreign investors and the challenge that the ITR poses

[49] Yao Graham, 'BITs a challenge to regional integration in Africa' (Third World Resurgence, No. 290/291 October/November 2014) BITs a challenge to regional integration in Africa (twn.my)accessed 15 May 2023

[50] Lorenzo Cotula, '(Dis) integration in global resource governance: Extractivism, human rights, and investment treaties' (2020) Journal of International Economic Law 23.2 431, 452. See also Lorenzo Cotula, 'Between Hope and Critique: Human Rights, Social Justice and (Re)Imagining International Law from the Bottom Up' 48 Georgia Journal of International and Comparative Law 2 473. See also James Gathii, James, and Sergio Puig, 'Introduction to the symposium on investor responsibility: the next frontier in international investment law' (2019) American Journal of International Law 113 1-3.

[51] Dominic Npoanlari Dagbanja,'The Limitation on Sovereign Regulatory Autonomy and Internationalization of Investment Protection by Treaty: An African Perspective' (2016) Journal of African Law 60.1 56, 75-76, 80.

[52] Kwame Nkrumah, 'Neo-colonialism: The last stage of imperialism' (Panaf Books 1974/2004), in Dominic Npoanlari Dagbanja, *The Investment Treaty Regime and Public Interest Regulation in Africa* (Oxford University Press, 2022) 5.

[53] Lauge Poulsen, 'The Investment Treaty Regime' in Jon Pevehouse and Leonard Seabrooke (eds), *The Oxford Handbook of International Political Economy* (Forth 2021) 3

to the regulatory autonomy of Host States.[54] In proposing solutions to this challenge, existing scholarship has focused mainly on the problems that arise after a foreign investor has instigated arbitration proceedings against a Host state for an alleged breach of one of the problematic provisions which form the bedrock of the old-style BITs.[55]

It has recently also been argued that the state's power to enter into such treaties in the first place, under the powers conferred upon them by their national constitutions should come under scrutiny in this debate.[56] This thesis will argue, from a practitioner's viewpoint, that the problem originates from the initial choice of provisions agreed upon by the negotiators representing the Host State during the negotiation and drafting stages. This is because as noted, the main aim of BITs has historically been the protection of the investment of foreign investors and the clauses proffered by the more powerful Home States reflect this aim. This has historically resulted in a Host State's freedom to regulate in the interest of its citizens in areas such as development, human rights and the environment being deemed secondary to the main aim of the BIT.

The provisions most often cited by foreign investors in arbitral claims as having been breached by Host States (whilst attempting to regulate in the interests of their citizens) are the 'most-favoured-nation', 'national treatment', 'fair and equitable treatment', 'expropriation', 'repatriation of profits' and 'full protection and security for the investment' standards of treatment, which will be discussed in more detail below.

Firstly, the most-favoured-nation (MFN) provision is a standard that is external to the treaty and is invoked when the Host State's treatment of the investor is compared to the manner in which other investors are treated under other treaties. The best standard on offer is identified by the investor and by Arbitral Tribunals as the standard that should be offered to the Claimant foreign investor.

Secondly, the national treatment (NT) provision is a standard that states that nationals of Host States should not be treated better than foreign investors "in like circumstances". Prior to 1965, many Host States, particularly Latin American countries, argued that foreigners must be treated utilising the same standards as those accorded to the nationals of the Host State.[57] Capital-exporting countries objected to this, arguing that their investors should be treated in accordance with an international minimum standard, thus invoking international scrutiny of the treatment of investors by the Host State. The inclusion of the NT provision in BITs is problematic because Host States then run the risk of being unable to use an economically or sociologically valid reason for discrimination in favour of their nationals as a justification for their actions and policies. It has been suggested that this is inherently unfair because most developed states used such discriminatory policies to underpin their own development at the outset and are now denying those opportunities to the developing Host Countries.[58]

Thirdly, the Fair and Equitable Treatment (FET) provision comprises a standard that obliges the Host State to accord fair and equitable treatment to the investments of foreigners. This FET standard is

[54] Florencia Montal, Carly Potz-Nielsen, and Jane Lawrence Sumner, 'What states want: Estimating ideal points from international investment treaty content' (2020) Journal of Peace Research 57.6 679-691; See also Tomer Broude, Yoram Haftel, and Alexander Thompson, 'Who cares about regulatory space in BITs? A comparative international approach' in *Hebrew University of Jerusalem Legal Research Paper Forthcoming* (2016) 16-41; See also Thibaud Bodson, *Economic Globalisation and States' Regulatory Space*. Diss. Freie Universitaet Berlin Germany (2020)

[55] Willem Assies, 'David versus Goliath in Cochabamba: Water Rights, Neoliberalism, and the Revival of Social Protest in Bolivia' (2003) 30(3) Latin American Perspectives 14

[56] Dominic Npoanlari Dagbanja, *The Investment Treaty Regime and Public Interest Regulation in Africa* (Oxford University Press, 2022)

[57] Denise Manning-Cabrol, 'The imminent death of the Calvo clause and the rebirth of the Calvo principle: Equality of foreign and national investors' (1994) Law & Pol'y Int'l Bus., 26, 1169; Percy Bordwell, 'Calvo and the Calvo Doctrine' (1906) Green Bag, 18, 377

[58] Ha-Joon Chang, '23 Kicking away the ladder-globalisation and economic development in historical perspective1' (2003) The Handbook of Globalisation 385

however not properly defined in most BITs and as a result, this provision lends itself to expansive arbitral interpretation and is a favourite of aggrieved investors.[59] When arbitrated upon, the FET standard has sometimes been equated to an autonomous standard additional to the protection afforded to investments under general international law[60] and other times, equated to the customary international minimum standard of treatment.[61] As a result of how "elastic" this standard is, it may be applied to any form of regulation that affects foreign investments adversely, whether intentionally or unintentionally. It cannot be in the best interests of citizens that their government cannot freely regulate, no matter how compelling the reason, simply because such a change would affect the value of a foreign investor's investment. This is clearly a restriction on the regulatory autonomy and sovereignty of a state and FET has actually been described as the principle which 'has the potential to reach further into the traditional *domaine reserve* of the host state than any one of the other rules.'[62] A commentator has described International Investment Law (IIL) - and this thesis would argue, therefore, by extension, FET, since it is such a core concept of IIL- as 'a manifestation of a new type of international law that deeply intertwines with the national regulatory spheres.'[63] By virtue of the fact that arbitral decisions arising from cases premised on alleged breaches of FET provisions have the potential to affect both Host States and their citizens in an unparalleled manner, a commentator has suggested that 'innovative thinking' should be employed, so that this power can be 'harnessed in a way that is most beneficial for the widest range of actors'.[64] This thesis aims to introduce a solution based on such innovative thinking, to assist Host States to reclaim their regulatory autonomy.

Fourthly, an investor alleging direct or indirect expropriation will result in a Host State being ordered to pay compensation (usually an undisclosed amount) to the investor if the Host State is found to have expropriated their investments directly or indirectly. Examples of indirect takings have been cited as impairment or deprivation of management, control, or economic value, total or partial compulsory sale, and confiscatory taxation, as a result of which some commentators have argued that Arbitral Tribunals determining indirect expropriation claims should employ a proportionality analysis, but should do so 'deferentially', in a manner that takes more account of the needs of Host States.[65]

With regards to another 'staple' provision, that relating to the repatriation of profits, since the main objective of all foreign investors is to make profits and then repatriate the profits back to their home states (or wherever they desire), any actions by the Host State resulting in a frustration of this primary aim will result in the investor actively exploring grounds upon which to initiate arbitral proceedings for compensation. This is unless the Host State has negotiated the incorporation of specific provisions to safeguard itself. An example of a specific provision to protect itself would be a provision stating that the right to repatriation of profits may be restricted in exceptional economic or financial

[59] Jeswald W Salacuse, *The law of investment treaties* (OUP Oxford, 2015) 218

[60] Salacuse (n 28) 226-228; *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12) paragraphs 345 and 361 of Award. Case Details | ICSID (worldbank.org) accessed on 14.09.2023.

[61] Salacuse (n 28) 222-223; *Alex Genin and others v. Republic of Estonia* (ICSID Case No. ARB/99/2), paragraph 367. Case Details | ICSID (worldbank.org) accessed on 14.09.2023.

[62] Rudolf Dolzer, 'The Impact of International Investment Treaties on Domestic Administrative Law' (2004-2005) 37 NYU J Intl L & Pol 953, 964; See also Stephan W Schill, 'Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law' in Stephan W Schill (ed) *International investment law and comparative public law* (Oxford University Press, 2010) 151

[63] Velimir Zivkovic, 'Fair and Equitable Treatment between the International and National Rule of Law' (2019) 20 J World Investment & Trade 513, 552

[64] Ibid

[65] Caroline Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration' (2012) 15 J Int'l Econ L 223

circumstances.[66] Without such precise drafting, the Host State is constantly in danger of being found guilty of a breach of one or more of these BIT provisions by arbitral tribunals.

Finally, another standard commonly prayed in aid by investors relates to full protection and security for the investment (FPS). Although this standard was originally intended to apply solely to the protection of physical aspects of a foreigner's investment, it has been expanded in arbitral decisions to include the protection of foreign investors and their investments from injuries that were not physical,[67] as in *Biwater Gauff Ltd v. Tanzania*, where the Tribunal ruled that FPS 'implies a State's guarantee of stability in a secure environment, physical, commercial and legal'.[68] The challenge here is that these provisions serve to potentially undermine the ability of Host States to make new laws or to amend or repeal existing laws in response to changing political, economic or social conditions. Since most older BITs have a provision stating that disputes arising from the BIT must be resolved by international arbitration, foreign investors can then initiate proceedings before arbitral tribunals[69] which apply expansive interpretations to the provisions, usually to the detriment of the Host State.

The crux of the problem, as discussed, is that due to the way the standards of treatment provisions in old-generation BITs have been drafted, tribunals are able to expansively interpret the provisions of the BITs to the detriment of Host States. To pre-empt this situation, some states have chosen to remove international arbitration provisions from their BITs[70] and others have chosen to terminate their investment treaties.[71] As a consequence of the existence of these standards of treatment provisions in the old-generation BITs, Ghana has had cases brought against it before arbitral tribunals by investors praying in aid some of the provisions described as problematic in this thesis. The next section describes the Research Aims of this thesis and how this thesis contributes towards knowledge development in this area of law.

1.2 THE RESEARCH AIMS

Following on from the contextualising of this thesis in relation to the ITR, this section will introduce the three Research Aims of this thesis. These are:

a) Firstly, to critically examine the existing International Investment Legal Framework in order to determine whether it is 'fit for purpose' particularly where the regulatory autonomy of Host States is concerned. This is addressed in Chapter Four.

b) Secondly, to provide a Case Study of an African country, Ghana, to evidence the problem by critically examining potential and actual problems embedded in the old-generation BITs to which Ghana is a signatory party, and to explore potential solutions to redress the problems and safeguard Ghana's regulatory autonomy and sovereignty. This is addressed in Chapter Five.

[66] Some UK treaties contain such provisions. E.g., UK-Jamaica BIT states that repatriation of profits are subject to the right of each Contracting Party in exceptional balance of payments difficulties and for a limited period to exercise equitably and in good faith powers conferred by its laws… download (unctad.org) accessed on 09.09.2023.

[67] *Siemens A.G. v. Argentine Republic* (ICSID Case No. ARB/02/8), paragraph 303, which was subsequently the subject of annulment proceedings and discontinued. Case Details | ICSID (worldbank.org) accessed 14.09.2023.

[68] *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), paragraph 729. Case Details | ICSID (worldbank.org) accessed 14.09.2023.

[69] Paul Peters, 'Dispute Settlement Arrangements in Investment Treaties' (1991)22 Netherlands Yearbook of International Law 91

[70] Leon Trakman and D. Musalyeyan, 'Caveat Investor - Where Do Things Stand Now?' (January 1, 2018) in C L Lim, Alternative Visions of The International Law on Foreign Investment (Cambridge, 2016) Ch 3, UNSW Law Research Paper No. 18-13, Available at SSRN: https://ssrn.com/abstract=3127967 or http://dx.doi.org/10.2139/ssrn.3127967

[71] Indonesia and South Africa announced that they would not exercise the option of extending their treaties but would terminate them when they expired. See also Martin Khor, *Investment Treaties: Views and Experiences from Developing Countries* (South Centre, 2015)

c) Thirdly, to provide recommendations based on the findings from the Case Study, by conducting a comparative analysis of the drafting and negotiating practices in other parts of the African Continent and in the Global North. This is dealt with in Chapter Six.

Thus, this thesis aims to suggest potential solutions to the problem that Ghana faces of having signed up to BITs incorporating clauses that are potentially extremely harmful to her regulatory autonomy.[72] As an additional contribution to knowledge development, the findings and conclusions in this thesis could help with the search for a solution to the legitimacy crisis facing the ISDS system presently being deliberated under the auspices of Working Group III of UNCITRAL (WG III).[73] This will be done by critically evaluating one of the proposed solutions put forward by WG III, namely the formation of a Multilateral Advisory Centre[74] for states members, with an emphasis on developing states, and also evaluating the Draft Provisions on procedural and cross-cutting issues produced by WG III, in particular Draft Provision 12, relating to the Right to Regulate.[75] This thesis is therefore both contemporary and timely.

The next section will examine the Rationale for undertaking the research in this thesis and how that ties in with the African Union's Agenda 2063[76] and the economic ambitions of Ghana.

1.3 THE RATIONALE FOR UNDERTAKING THIS RESEARCH

There are problematic issues surrounding BITs entered into by developing states generally and Ghana is no exception. This research undertakes a critical examination of these problematic issues and proposes a way forward in respect of how BITs are negotiated and drafted by Ghana, in a bid to mitigate against these problems. Thus, the underpinning rationale of this thesis is to chart a course for better Investment Treaty Policy decisions by Ghana (and by extension, potentially other developing Host States) and to equip the government with the requisite legal tools to negotiate and draft BITs that protect their regulatory autonomy and are more evenly balanced in respect of the rights and obligations of both foreign investors and Host States. The problems that have motivated the development of this thesis arise from the asymmetrical provisions of BITs, usually entered into between a more powerful capital-exporting state and a less powerful developing capital-importing state hoping to benefit from inflows into their country of Foreign Direct Investment (FDI) from foreign investors. Unfortunately, these BITs are usually drafted in such a manner as to incorporate clauses that whilst on the face of it are symmetrical, have the potential of constraining and eroding the regulatory space of developing Host States.[77] As a result of the vague composition of these clauses, international Arbitral Tribunals which have been given jurisdiction over disputes arising from most BITs under the Investor State Dispute Settlement (ISDS) provisions in the BITs, have routinely elected

[72] Ghana is not alone in this regard. Several other developing states have done the same, unfortunately. See Andrew T. Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 Va J Int'l L 639

[73] UNCITRAL Working Group III; Working Group III: Investor-State Dispute Settlement Reform | United Nations Commission On International Trade Law accessed on 09.09.2023.

[74] https://undocs.org/A/CN.9/WG.III/WP.168 accessed on 1st June 2020. At its 36th session, WG III heard proposals for the establishment of a Multilateral Advisory Centre.

[75] https://documents-dds-ny.un.org/doc/UNDOC/LTD/V23/060/62/PDF/V2306062.pdf?OpenElement accessed on 19.11.2023.

[76] Agenda 2063 | African Union (au.int) accessed on 15.09.2023.

[77] Chrispas Nyombi and Tom Mortimer, 'Tackling the legitimacy crisis in international investment law through progressive treaty-making practices'(2017) International Arbitration Law Review *5* 162; See also Lorenzo Cotula, 'Do Investment Treaties Unduly Constrain Regulatory Space?' (2014) Questions of International Law 9, 19; Susan D. Frank, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham L. Rev, 1521; Charles N. Brower, Charles H. Brower II and Jeremy K. Sharpe, 'The Coming Crisis in the Global Adjudication System' (2003) 19 Arb. Int'l 415. See also Suzanne A. Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13 Journal of International Economic Law 1037, 1040; See also Titi Aikaterini, *The Right to Regulate in International Investment Law* (Hart Publishing, 2014)

to utilise an expansive interpretations of these clauses, often to the detriment of the regulatory autonomy of Host States, which are usually less powerful developing states.

Furthermore, this thesis examines the actual and potential legal implications of the investment protection standards in the BITs that Ghana is signatory to in relation to Ghana's ability to regulate for the public interest of its citizens. This thesis also identifies the tools that Ghana needs to robustly negotiate and draft BITs that are "fit for purpose" and examines how these tools could assist Ghana in redefining and reclaiming economic sovereignty in line with the African Union (AU)'s Agenda 2063. This will mitigate against any express or implicit challenges to Ghana's ability to exert regulatory autonomy over its investment regulation, in a regime where decades of inherited colonial bias have tended to enable Arbitral Tribunals to employ a wide interpretation of provisions in favour of foreign investors.

The AU's Agenda 2063, a strategic framework devised by African leaders, has been described as 'Africa's blueprint and Masterplan for transforming the continent into the global powerhouse of the future'.[78] Because it aims to deliver on Africa's agenda for sustainable development, it is highly relevant to this thesis, as are its Goals and Priority Areas[79] that are aligned with the UN's Sustainable Development Goals[80] because it could potentially assist African states in reclaiming their regulatory autonomy.

Table One: AU Agenda 2063 Goals & Priorities mirrored by UN 2030 Agenda for SDGs

AU Agenda 2063 Goal(s)	AU Agenda 2063 Priority Areas	UN 2030 Agenda for Sustainable Development
A high standard of living, quality of life and well-being for all citizens.	Incomes, jobs, and decent work [Ending] Poverty, inequality, and hunger. Social security and protection, including persons with disabilities. Modern, affordable, and liveable habitats and quality basic services	1. End poverty in all its forms everywhere in the world 2. End hunger, achieve food security and improved nutrition and promote sustainable agriculture. 8. Promote sustained, inclusive. and sustainable economic growth, full and productive employment, and decent work for all. 11. Make cities and human settlements inclusive, safe, resilient, and sustainable.

The manner in which the AU actively promotes sustainable development as part of its legal architecture has been noted by Ekhator, who states that 'this is exemplified in article 3(j) of the Constitutive Act of the AU and hence one of the major aims of the AU is the promotion of sustainable development on the continent.'[81] The manner in which BITs are negotiated and drafted has serious implications for Africa's ability to achieve the AU's Agenda 2063. Most of the BITs to which African States are signatory are based on Model BITs prepared by states from the Global North such as the UK, Canada, and the USA.[82] These template BITs were accepted by African countries and other developing countries without any evidence that these developing countries undertook proper or any consideration to ascertain whether or not they were "fit for purpose".[83] A relevant rhetorical question posed by one commentator is:

[78] https://au.int/agenda2063/overview accessed on 21st April 2020
[79] https://au.int/agenda2063/sdgs accessed on 21st April 2020
[80] https://www.undp.org/content/undp/en/home/sustainable-development-goals.html accessed on 23rd April 2020
[81] Eghosa Ekhator, 'Sustainable development and the African Union legal order' in Olufemi Amao, Michèle Olivier and Konstantinos D. Magliveras (eds), *The Emergent African Union Law: Conceptualization, Delimitation, and Application* (Oxford University Press, 2021) Ch 18
[82] Kenneth J. Vandevelde, U.S. International Investment Agreements (January 2009). Thomas Jefferson School of Law Research Paper No. 3022255, Available at SSRN: https://ssrn.com/abstract=3022255
[83] Poulsen, Lauge N. Skovgaard. *Sacrificing sovereignty by chance: investment treaties, developing countries, and bounded rationality*. Diss. London School of Economics and Political Science, 2011.

> Could it be that African and other developing countries lack sufficient capacity in negotiating 'investment' treaties that address their development needs or that they were so desperate for FDI that they did not have time to prudently analyse the practical and legal implications of such BITs?[84]

This thesis posits that the acquisition of innovative negotiating and drafting skills by representatives of developing states is central to the ability of African developing states to obtain the best possible BIT terms for their states, which would in turn protect their regulatory autonomy and assist in the achievement of the AU Agenda 2063. The ability to negotiate more favourable terms and ensure that these terms are included in the final text of the BIT is germane to the solution that will be investigated in this thesis. That makes this thesis both contemporary and significant because such skills are crucial and central to the ability of a state to assert its sovereignty. For the purposes of this analysis, such approaches as are already in existence in this arena will be evaluated for any benefit that they might bring to the debate. To that end, this thesis also examines what other solutions might have been considered in the ITR discourse when dealing with the issue of assisting developing states in drafting and negotiating IIAs. There are several funds and organisations in existence that aim to provide legal and financial assistance on a regional and multilateral basis, and they will be considered for the purposes of comparison in Chapter Six.

In summary, this thesis suggests that notwithstanding the problems articulated in the introduction, there may be a potential solution that could work effectively to eliminate or at least mitigate against the pitfalls identified in the existing old-generation BITs. This thesis will examine the case for and articulate the proposed solutions. The next section of this chapter explores the Research Question to be tackled in this thesis, crafting a Research Question and three sub-questions that will assist in providing potential solutions to the problem of how Ghana can protect its regulatory autonomy and by so doing redefine its sovereignty.

1.4 THE RESEARCH QUESTION

The research question in this thesis is premised on the fact that due to the asymmetrical nature of the IIAs (in particular, the BITs) to which Ghana is presently signatory to, there is a potential problem of a further erosion of Ghana's regulatory autonomy once cases are brought against Ghana before Arbitral Tribunals under the ISDS regime which all the BITs to which Ghana is signatory allows investors to do. This would then enable Arbitral Tribunals to expansively interpret the BIT provisions, resulting in a Regulatory Chill as the government refrains from taking regulatory actions that are for the benefit of their citizens, for fear of falling foul of the skewed provisions of BITs and appearing before an International Arbitral Tribunal as a respondent. The contribution of this thesis to knowledge development stems from an examination of what the prevailing position in Ghana is with regards to the protection of Ghana's regulatory autonomy and the presentation of a proposed solution to the perceived looming problem referred to above.

What is the solution to the potential problem of the further erosion of Ghana's Regulatory Autonomy due to the types of provisions of contained in Ghana's old-generation BITs arising from inherited colonial bias?

This Research question will be dealt with based on answers to these three inter-related key questions:

[84] Chidede Talkmore, 'Chapter Fifteen Decolonising Investment Regimes for Development Purposes in Contemporary Africa' (2019) Grid-locked African Economic Sovereignty: Decolonising the Neo-Imperial Socio-Economic and Legal Force-fields in the 21st Century 395, 400

a) In what way has the regulatory autonomy of Ghana been undermined because of the provisions contained in these IIAs?
b) What steps has the Government taken to protect the country from ISDS actions by foreign investors and the expansive interpretation by arbitral tribunals, both of which can stifle and erode regulatory autonomy?
c) How might examples of responses of other countries to perceived infringements on their regulatory autonomy inform the way Ghana approaches this looming problem?

The next section provides a preview of the Methodology to be utilised in this thesis to answer the Research question.

1.5 INTRODUCTION TO THE METHODOLOGY OF THIS THESIS

The methodologies that will be utilised in this thesis are set out in detail in Chapter Three. This thesis will be conducting an examination of the existing policy and legal frameworks surrounding BIT drafting and negotiation as they pertain to the regulatory autonomy of Host States. This thesis will aim to identify any problematic aspects of the current practice of BIT negotiation and drafting in Host States, particularly Ghana, and the legal and historical basis for the existence of such practices. In so doing, this thesis will excavate and examine the history of BITs, how they came into existence and the impact that inherited colonial bias has had upon current practice which is now perceived as the norm. This thesis relies on a combination of lenses to fully examine the problems and provide a workable set of recommendations for their resolution. Since it is analysing the current problematic aspects of the law and the BITs as they stand, this thesis will be examining current problems through a positivist lens, as that methodology allows for the examination of the lex lata. To reveal the impact of this inherited colonial bias, which is the root of the problems relating to the impact of BIT provisions on the RA of Host States, this thesis examines the problems of Ghana's old-generation BITs through a TWAIL[85] lens which relies on historical facts to shed light on contemporary issues. The potential solution that will be proposed in this thesis will be drawn from a comparative analysis of solutions utilised by states in both the Global North and the Global South. The methodologies that will be utilised in this thesis to arrive at the final set of recommendations are firstly a positivist methodology, followed by a TWAIL[86] historical approach to examine the impact of this historical colonial bias on current practices and policy in the present ITR.

Following on from that initial contextualisation, this thesis will examine and analyse ways in which these problems can be mitigated in Ghana's current old-generation BITs. To mitigate these problems, this thesis proposes the creation of a Team of Specialists tasked primarily with the (re)negotiation and drafting of IIAs. Such (re)negotiation and drafting are aimed at protecting Ghana's regulatory autonomy and enabling the state to attain true economic sovereignty. It is envisaged that the creation of such a team of Specialists is a solution that will assist in the decolonisation of the present practices of the ITR to reduce and eventually eradicate the asymmetric nature of the ITR which presently focusses primarily on the protection of the investor's investment, with scant attention given to the protection of the regulatory autonomy of Host States. This biased focus is a legacy of the elevated status of the investor under the customary rules of diplomatic protection of foreign investors by their Home States. This thesis aims via the design of a team of Specialists utilising an innovative set of tools, to rectify this asymmetrical imbalance in the provisions of the old-generation BITs. This will in turn protect Ghana from regulatory chill by affording the government the autonomy to regulate in the public interest without the fear of foreign investors claiming a breach of BIT provisions in order to initiate an international arbitration against the State. This thesis will subsequently utilise a

[85] Third World Approaches to International Law. See TWAIL (criticallegalthinking.com) accessed 15.09.2023.
[86] Third World Approaches to International Law. See TWAIL (criticallegalthinking.com) accessed 15.09.2023.

comparative analytical approach when examining other available solutions in order to produce the best result for Ghana, which other Host States might wish to emulate. It has been stated that '…comparative law can reveal-more vividly than the study of a single legal system, the relationship between law and political and moral values'[87] and this is very relevant when considering the historical and political bias which lies behind the present composition of the old-generation BITs which proliferate the ITR, and which comprise the vast majority of BITs to which Ghana is signatory.

Whilst critiquing Zwiegert and Kotz, Jonathan Hill concedes that 'the argument that comparative law is incapable of generating objective standards of criticism does not mean that it has no role to play in the field of law reform'[88] and it is therefore valid that this thesis uses comparative law to arrive at a conclusion which provides a proposed solution to the problem of the lack of regulatory autonomy due to asymmetric BITs in the ITR which could well result in law reform. Zwiegert and Kotz[89] state that the comparative lawyer, when considering what role comparative law can play in the process of reforming the law, must determine 'which solution is best suited here and now to the national society as it is'.[90] This sentiment reflects the manner in which this thesis deals with the quest for a proposed solution that is relevant to the conundrum of the erosion of regulatory autonomy in Host States such as Ghana. Chapter Three will conclude with all these strands being woven together into a coherent whole. The next section provides a preview of the organisation of the argument in this thesis and explains why Ghana has been chosen as a Case Study.

1.6 ORGANISATION OF THE ARGUMENT – Why Ghana has been chosen as a Case Study

Ghana has been chosen as a Case Study for this thesis because although Ghana may be perceived as having escaped relatively unscathed from the scale of arbitral disputes and expensive arbitral decisions suffered by other developing states, the potential for arbitral challenges to Ghana via the ISDS mechanism in the old-style BITs to which Ghana is a signatory, remains high. A case in point is that presently Ghana has two cases pending it before two separate Arbitral Tribunals, instituted by the same claimant, the Beijing Everyway Traffic & Lighting Tech. Co. Ltd, details of which will be examined later in this thesis.

Additionally, Ghana has been lauded as one of the most stable economies in Africa, with such plaudits as 'over the years, the attractiveness of Ghana as a reliable investment country has increased',[91] with the result that several multinational corporations and foreign Investors are keen to invest in the country. Alongside these headlines, are other headlines that tell a different story. Bloomberg states inter alia, that 'The West African country was a magnet for foreign investment, pitching itself as business-friendly and politically stable. Now it offers a cautionary tale'.[92] Regardless of these contradictory headlines, the reality in-country is that the Ghana Investment Promotion Centre (GIPC) on its website, continues to invite investors to 'Grow in Ghana, grow with Ghana'[93] and is undertaking on-going collaboration with foreign investors.[94] Regardless of the veracity or otherwise of news headlines, the core reality is that Ghana's investment treaties in force still incorporate old-generation BIT provisions that leave the country vulnerable to challenges by foreign investors and make it potentially difficult for the government to freely exercise regulatory autonomy in the interests of its

[87] Jonathan Hill, 'Comparative Law, Law Reform and Legal Theory' (1989) 9 Oxford J Legal Stud 101, 114
[88] Jonathan Hill, 'Comparative Law, Law Reform and Legal Theory' (1989) 9 Oxford J Legal Stud 101, 105
[89] Karl Zweigert and Hein Kotz, *An Introduction to Comparative Law* (Tony Weir tr, 2nd edn, Oxford University Press, 1987)
[90] Karl Zweigert and Hein Kotz, *An Introduction to Comparative Law* (Tony Weir tr, 2nd edn, Oxford University Press, 1987)
[91] List of foreign companies in Ghana 2019/2020 - YEN.COM.GH accessed on 09.09.2023.
[92] Ghana's Economic Crisis Is Big Warning Sign For Global Investors - Bloomberg accessed 09.09.2023. See also Why Ghana Went From Hero to Zero for Investors: QuickTake - Bloomberg accessed on 09.09.2023.
[93] Home - GIPC accessed 09.09.2023.
[94] Ghana engages Japanese investors in Ghana - GIPC accessed 09.09.2023.

citizens. It is therefore imperative to explore avenues through which Ghana may protect its regulatory autonomy, thus redefining its sovereignty.

This thesis has evident contribution to knowledge development and could also contribute to the discourse taking place at an international level at UNCITRAL WG III, in relation to the procedural and cross-cutting issues being debated under the auspices of the debate on the possible reform of the investor-State dispute settlement mechanism (ISDS). Additionally, this thesis has practical reach beyond Ghana, given the extensive discourse around the regulatory autonomy of developing states on the African continent and the developing world generally, and the varied efforts of developing states to reform their relationship with foreign investors in particular and with the International ITR in general.[95] It may well be that other developing states will decide to use this thesis as a 'template' or 'road-map' as to how best to tackle their own potential problems in relation to the erosion of their regulatory autonomy and lack of real economic sovereignty.

This thesis is presented in six substantive chapters and a concluding chapter. Chapter One has set out the historical background to this thesis, commencing with the involvement of Africans at the heart of International Trade and Investment at the outset in empires, then as unwilling participants during the slave trade. It also explains how the provisions of old-generation BITs that focus on the protection of the rights of investors and the obligations of Host States, with no corresponding investor obligations toward the Host States is merely symptomatic of the neo-colonialist nature of these BITs. These provisions are then expansively interpreted by arbitral tribunals under the ISDS regime, constraining the regulatory autonomy of Host States. This thesis posits that the root of problems can be identified from the negotiation and drafting stage and should be tackled at that point, because it is too late to rectify the problem by the time parties appear before an arbitral tribunal. This chapter is important as it shows the historical reasons for inherited bias towards the rights of foreign investors through the carving out of customary law rules by powerful states from the Global North long before states from the Global South had an opportunity to provide an input into states-practice under developing opinio juris.

Chapter Two examines the existing literature relating to the research question. It commences with a brief discourse about the origins of International Law, starting with Adam Smith[96] and Emmerich de Vattel[97] and culminates in the Slave Trade and the movement against "gunboat diplomacy" that eventually resulted in the beginnings of the international investment regime.[98] The chapter examines the actions of the newly independent African countries, their role in the UN, why they were so enthused and supportive of both the New York Convention[99] and the ICSID[100] Convention and their subsequent race to sign up to as many BITs as possible. It conducts a thematic review from the beginning of the 1990's, commencing with the hostility of the Latin American countries to the

[95] See subsequent examples in this thesis referencing actions taken by Brazil, India, South Africa, Nigeria, Morocco, for example.
[96] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Volume 1, Oxford: Clarendon Press, 1869)
[97] Emer De Vattel, *The Law of Nations* (GGJ and J. Robinson; and Whieldon and Butterworth 1793)
[98] A Graham-Yooll, *Imperial skirmishes: war and gunboat diplomacy in Latin America* (Volume 2, Signal Books 2002); See also Paul Peters and Nico Schrijver, 'Latin America and International Regulation of Foreign Investment: Changing Perceptions' (1992) 39 N.I.L.R. 368; Douglas M. Johnston, *The Historical Foundations of World Order: The Tower and the Arena (*Leiden: Martinus Nijhoff, 2008*)* 636; Kate Miles*, The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital* (Part 1, CUP, 2013)
[99] New York Convention - Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 21 UST 2517, 330 UNTS 3; ICSID Convention - Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature 18 March 1965, 575 UNTS 159. The New York Convention provides pro-arbitration rules governing the enforceability of international commercial arbitration agreements generally and greatly restricts the grounds upon which a domestic court can refuse to recognise and enforce a covered award. The ICSID Convention institutionalises a set of arbitral rules and procedures for resolving investor-state disputes specifically; state parties to the ICSID Convention agree to recognise and enforce ICSID awards as if they were final domestic judgments. For commentary see Albert van den Berg*, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Boston: Kluwer Law and Taxation, 1981); Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague; Boston: Kluwer Law International, 1999) 966
[100] ICSID – International Centre for Settlement of Investment Disputes. https://icsid.worldbank.org/ accessed 15.09.2023.

international investment regime which they perceived as being imposed by the West and being in contravention to the Calvo principles on national sovereignty.[101] It continues by exploring themes ranging from sustainable development, environmental protection, legislative drafting of BITs, Multilateralism versus Domestic initiatives, and Regional Economic Initiatives such as the Pan African Investment Court. The chapter reviews commentary for and against BITs and the attendant ISDS regime arising from the clauses in the old-generation BITs. This thesis argues that Ghana would benefit from provisions in its IIAs that are "fit for purpose" enabling the government to attract the required FDI and protect investments without a detrimental effect on its regulatory autonomy.

Chapter Three sets out the doctrinal methodology that this thesis will utilise, namely documentary analysis and exploratory research, together with comparative analysis when comparing initiatives undertaken by jurisdictions both in the Global South and the Global North to mitigate the effect of an asymmetrical Investment Treaty Regime.[102] This thesis also has a socio-legal element, since the provisions of the old-generation BITs presently in force in Ghana allow international arbitral tribunals to expansively interpret the provisions, resulting in awards that adversely affect civil society and burdening developing states with crippling debt by way of high monetary compensation awarded to foreign investors. The additional socio-legal element is the concept of Regulatory Chill, which arises because Host States are so concerned about the possibility of the institution by foreign investors of arbitral proceedings based on a perceived breach of provisions in the BITs that they tend to shy away from implementing policies that would be beneficial to their citizens. This means that in reality the Host State no longer has regulatory autonomy. Qualitative analysis rather than quantitative analysis will be employed, which is more suited to this research, and the reasons for this choice will be explained in Chapter Three. The author concedes that there may be other seemingly relevant research methods that could have been utilised and explains the decision not to utilise those other methods.

Chapter Four identifies and critically examines the law regulating and governing BITs and the enforcement of Awards arising from proceedings instituted under the auspices of these BITs. This chapter represents a preliminary step in the examination of the Research Question about the erosion of Ghana's RA and the setting out of the argument of the thesis by explaining what the current International Legal Framework relating to IIAs is. This chapter also identifies the problems in this area and shows the inherent weaknesses in the framework. Before these problems can be examined, an overview of the law must be undertaken because there is a proliferation of sources, which this chapter seeks to harmonise in order to provide in a comprehensive picture of the substantive law presently in force.

Chapter Five uses Ghana as a Case Study to examine the problems that have been identified earlier in this thesis. Some of the cases brought against Ghana by foreign investors will be examined in this chapter to demonstrate the impact of the provisions of Ghana's old-generation BIT on its RA and its economic sovereignty. The chapter concludes by setting out findings which will then be examined in Chapter Six.

In Chapter Six, the findings from the Case Study and an examination of instruments produced by RECs and selected countries will inform the recommendations proposed in this thesis. The aim is to find a potential solution to the research question aimed at resolving the problem that forms the rationale of this thesis. The recommendations are tested against comparable solutions or proposals already in existence, such as the UNCITRAL WG III Advisory Centre proposal. Additionally, Chapter Six conducts

[101] The Calvo Doctrine, named after the Argentine scholar, Carlos Calvo, is based upon the idea of equal treatment between nationals and foreigners and thus proposed that foreign investment disputes had to be resolved through national adjudication and by applying national law; see Christoph Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' (2005) 4 The Law & Practice of International Courts and Tribunals 1; See also Omar E. García-Bolívar, 'Sovereignty vs. Investment Protection: Back to Calvo?' (2009) 24(2) ICSID Review 464

[102] This thesis will examine the reactions of South Africa, Tanzania and Mozambique representing the Global South, and the USA, Canada and Mexico, representing the Global North.

a critical evaluation of these recommendations to ascertain whether they are "fit for purpose" in an African setting. This thesis then considers whether Ghana is ready to implement the potential solution arrived at and evaluates what internal and external stumbling blocks there might be. As an additional ode to the originality of this thesis, an outline Model BIT that could redress and mitigate the issue of the erosion of Ghana's regulatory autonomy is produced as an Annex. This outline Model BIT is based on an analysis of innovative IIAs such as the Pan African Investment Code (PAIC) and the new African Arbitration Academy (AAA) Model BIT through the lens of TWAIL scholarship.

Chapter Seven concludes with an analysis of what the implications of this thesis are and how pivotal the proposed solution could be for Ghana, allowing Ghana to finally attain meaningful sovereignty and protect its regulatory autonomy. It also proposes areas of future research to build upon this thesis.

The next section will explain how the examination by this thesis of the problems that Ghana faces in relation to its BITs presently in existence, and the provision of possible solutions to the problem of the erosion of its regulatory autonomy will contribute to knowledge development in the ITR arena.

1.7 THE CONTRIBUTION OF THIS THESIS TO RESEARCH & KNOWLEDGE DEVELOPMENT

There is a plethora of literature in existence about the problems, such as the erosion of RA, arising from the asymmetrical construction of BITs entered into by developing states. These states usually rely heavily on their natural resources for revenue in the form of foreign exchange and so feel compelled to sign BITs in their quest for FDI.[103] There is, however, at present, no body of literature that sets out a targeted solution that deals with the root of the problem, since the literature has so far focussed on the inevitable results when the Host States find themselves cited as respondents before Arbitral Tribunals. To quote Gaithii, 'current reforms treat the symptoms but not the cause of this disenchantment with international investment law'.[104] As one of the developing states referred to earlier, Ghana relies heavily on its natural resources of oil and gas, bauxite, gold, and diamonds[105] for revenue in the form of foreign exchange. Research has proven that most challenges before arbitral tribunals arise from investments in the type of natural resources that Ghana relies on.[106] It is therefore not unrealistic to anticipate that there is a potential that Ghana will face challenges to its RA and sovereignty from foreign investors utilising provisions under the old-generation BITs which remain in force. The reality of this potential problem is borne out by the previous cases brought against Ghana as well as the two cases now pending under the China-Ghana BIT[107] which are based on the same facts but have been brought before two different tribunals. This thesis will introduce a plausible solution to the problem of the way IIAs are presently negotiated in Ghana by personnel from the Attorney-General's department in conjunction with individuals from various Ministries without a properly consistent or joined-up approach.[108] As a result, Ghana lacks the structural source of negotiating power that would give it the required advantage in negotiations. In addition to a lack of political and economic capacity by virtue of its position in the Global South, Ghana also lacks bureaucratic capacity, which has been defined as 'the degree to which states have implemented Weberian-type bureaucratic

[103] Andrew T. Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 Va J Int'l L 639, 660

[104] James Gathii and Sergio Puig, 'Introduction to the symposium on investor responsibility: the next frontier in international investment law' (2019) American Journal of International Law 113 1

[105] https://resourcegovernance.org/our-work/country/ghana accessed on 09.09.2023

[106] Gloria M. Alvarez, Mélanie Riofrio Piché, and Felipe V. Sperandio, eds. *International Arbitration in Latin America: Energy and Natural Resources Disputes* (Kluwer Law International BV, 2021) Chapter One. See also Lorenzo Cotula, '(Dis) integration in Global Resource Governance: Extractivism, Human Rights, and Investment Treaties' (2020) Journal of International Economic Law 23.2 431, 452

[107] download (unctad.org) Ghana-China BIT accessed on 09.09.2023.

[108] Samuel KB Asante, 'The perspectives of African countries on international commercial arbitration' (1993) Leiden Journal of International Law 6, no.2 331, 353

structures',[109] and which research has indicated may assist states to attain their own preference in international negotiations, either by extracting favourable concessions from the other party, or the ability to reshape the preferences of those with whom they are negotiating.[110] This lack of negotiating power has contributed greatly to the challenges that have arisen globally in relation to the provisions of the BITs in existence, not least because the BITs contain ISDS provisions that allow foreign investors to bring claims against Host States before International Arbitration Tribunals which interpret the clauses of these BITs expansively to the detriment of the Host State.

Thus, a solution to this problem would be a significant practical contribution to the process of protecting Ghana's RA and redefining Ghana's sovereignty as well as being an immense original contribution to knowledge development.

1.8 CONCLUSION

This Chapter has placed the ITR in context as it pertains to this thesis, introduced the Research Aims of this thesis as well as the rationale for undertaking this research, and set out the Research Question which this thesis aims to answer. Additionally, this Chapter has introduced the methodology to be utilised in this thesis, which will be dealt with in more detail in Chapter Three. The reader has also been provided with an explanation of why Ghana was chosen as a Case Study, together with a preview of the organisation of the arguments in this thesis. Finally, this chapter provides an indication of the significant contribution to knowledge development that the potential solutions and recommendations of this thesis will make. The next chapter will examine the scholarly literature in existence relating to the Research Question, highlighting the problematic aspects of the ITR as it pertains to Host States from the Global South and proposing a solution for the resolution of these problematic norms. The examination of the scholarly literature available will explore the various innovative provisions already being utilised in various fora that assist other Host States to protecttheir regulatory autonomy and implement policies that promote sustainable development goals.

[109] Tarald Gulseth Berge and Øyvind Stiansen. 'Bureaucratic Capacity and Preference Attainment in International Economic Negotiations' (2023) The Review of International Organizations 18.3: 467, 470

[110] Tarald Gulseth Berge and Øyvind Stiansen. 'Bureaucratic Capacity and Preference Attainment in International Economic Negotiations' (2023) The Review of International Organizations 18.3: 467, 471

Chapter Two: Literature Review

2. INTRODUCTION

This chapter examines the existing literature relating to the Research Question. It concludes by pointing out the perceived gap in the existing literature and indicating the original contribution that this thesis will make to that existing pool of literature by advancing a solution and developing scholarship in this area. This thesis argues that Ghana would benefit from BIT provisions that are 'fit for purpose', namely provisions that enable the state to attract the required FDI and protect its investments, but not to the detriment of the RA of the state.

The first part of this chapter is divided into seven sections, each of which explores an important issue in the existing literature on areas pertaining to the research question in this thesis, which is:

What is the solution to the potential problem of the further erosion of Ghana's Regulatory Autonomy due to the types of provisions of contained in Ghana's old-generation BITs arising from inherited colonial bias?

2.1 MAIN ISSUES REVIEWED IN THE EXISTING LITERATURE

There are several key issues that have been discussed in the existing literature relating to the problems surrounding the issue of states from the Global South attempting to exert RA over their affairs and being thwarted by the provisions of the old-generation BITs to which they are signatory. There are several reasons for this state of affairs, and these are discussed in the sub-sections below.

2.1.1 THE POULSEN THESIS ON THE PROLIFERATION OF BITS AND ITS EFFECT ON THE REGULATORY AUTONOMY OF HOST STATES

This sub-section examines one of the main issues relating to BITs in the existing literature. Comments by Poulsen provide a good backdrop by explaining that since BITs were originally intended as legal instruments to promote and protect investments from rich capital exporting states to developing states, they were typically negotiated and entered into between developing and developed countries (North-South BITs).[111] In the recent past, however, there has been a surge of BITs signed between developing countries (South-South BITs),[112] with some scholars suggesting that this now makes up about 40 percent of the global network of BITs.[113] Research provides evidence that many of these South-South BITs were facilitated by UNCTAD[114] during conferences organised for this reason, usually sponsored countries from the Global North such as Germany, Switzerland, or France.[115] In light of the initial intention behind BITs, namely the protection of investments emanating from rich capital exporting countries, it would be useful to ascertain the reason behind the rise of South-South BITs and whether these BITs incorporate distinctly different provisions. The answer to this question, which is answered in Poulsen's research referenced in this section, is relevant to this thesis which aims to propose a unique solution to this problem of the erosion of Ghana's regulatory autonomy. Such a solution could later be emulated in other African Host States.

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[111] Lauge Skovgaard Poulsen, 'The Politics of South-South Bilateral Investment Treaties' in T. Broude, M. Busch, and A. Porges, (eds), *The Politics of International Economic Law: Risk and Opportunity in Crisis* (Cambridge University Press 2009) Available at SSRN: https://ssrn.com/abstract=1674825

[112] UNCTAD, 'South-South Cooperation in International Investment Agreements' Series on Issues in International Investment Policies for Development (2005)

[113] Lauge Skovgaard Poulsen, 'The Politics of South-South Bilateral Investment Treaties' in T. Broude, M. Busch, and A. Porges, (eds), *The Politics of International Economic Law: Risk and Opportunity in Crisis* (Cambridge University Press 2009) Available at SSRN: https://ssrn.com/abstract=1674825

[114] The United Nations Conference on Trade and Development

[115] UNCTAD, Progress report: Work undertaken within UNCTAD's work programme on international investment agreements between the 10th Conference of UNCTAD, Bangkok, February 2000 and July 2002 (New York: United Nations, 2002); See also Olof Karsegard, Pedro Bravo, and Hubert Blom, UNCTAD work programme on capacity building in developing countries on issues in international investment agreements: Final in-depth evaluation report (New York: United Nations, 2006)

A comprehensive quantitative analysis of investment provisions conducted by Poulsen, utilising 300 BITs entered into by 100 countries over a twelve-year period[116] showed that in treaties signed by two developing countries (i.e. South-South BITs), the National Treatment (NT) provisions (the point of which is to oblige host states not to discriminate, de jure or de facto, between foreign investors and similarly situated national investors)[117] tended to be either absent or more restricted. The research also noted that transfer clauses in South-South BITs tended to impose more restrictions upon the ability of foreign investors to repatriate their funds. Perhaps predictably and unsurprisingly, developed countries have always favoured the inclusion of NT clauses in their BITs as a way of ensuring what they regard as a 'level the playing field'[118] between their investors and the domestic companies of Host (developing) states. Developing states on the other hand, have sought to either substantially limit or if possible, exclude this provision in order to give their own nationals a chance to compete without being disadvantaged by the advantages that the foreign investors have.[119] Poulsen argues that it is therefore incorrect for Dolzer and Schreuer to state that 'a review of BITs signed among developing countries does not reveal significant differences with agreements concluded with developed states',[120] or that '(…) treaties concluded between developing countries have in substance remained very similar to those concluded by capital-exporting countries.'[121]

Whereas Poulsen's findings on this point seem to reveal that developing countries when negotiating on a South-South basis, successfully pursue terms that potentially allow them more regulatory space than in their North-South BIT negotiations, a deeper analysis, taking into account Most Favoured Nation (MFN) provisions, reveals a different story, and one that underlines the need to have a team of Specialists in Ghana, which will be one of the solutions to be proposed in this thesis. As a general rule, MFN provisions affect all matters falling within the scope of the BIT.[122] Additionally, decisions of several Arbitral Tribunals in this area have made it clear that contracting parties may 'import' substantive provisions from other BITs entered into by either contracting party using the MFN provision.[123] The implications of this 'importation' are that even if a 'recalibrated' BIT between two developing countries has no NT provision, there is a distinct possibility that an arbitral tribunal may decide that the MFN clause in another BIT obliges the parties to extend NT regardless, so far as there is an NT clause included in one other BIT to which one of them is a signatory.[124] In reality therefore, even though these South-South BITs may seem on the face of it to be more progressive and beneficial to the signatories, in practice, foreign investors could potentially rely on BITs with more favourable provisions, should a dispute go before a tribunal. This situation raises an obvious question as to why developing countries have often negotiated to provide more flexibility to host states in BITs signed with each other without ensuring that their new-found 'policy-space' is not cancelled out by the MFN clauses in treaties that they have previously signed and that remain in existence? If it transpires that

[116]Lauge Skovgaard Poulsen, 'The Politics of South-South Bilateral Investment Treaties' in T. Broude, M. Busch, and A. Porges (eds), *The Politics of International Economic Law: Risk and Opportunity in Crisis* (Cambridge University Press 2009) Available at SSRN: https://ssrn.com/abstract=1674825. This analysis was based on an investigation from 1994 to 2006 analysed according to a set of quantitative indicators of investment provisions.

[117] Rudolf Dolzer and Christoph Schreuer, *Principles of international investment law* (Oxford University Press, 2012); See also Newcombe, Andrew Paul, and Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (Kluwer Law International BV, 2009)

[118] Lauge Skovgaard Poulsen, 'The Politics of South-South Bilateral Investment Treaties' in T. Broude, M. Busch, and A. Porges (eds), *The Politics of International Economic Law: Risk and Opportunity in Crisis* (Cambridge University Press 2009) Available at SSRN: https://ssrn.com/abstract=1674825

[119] Jeswald W Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 International Lawyer 655, 668

[120]Rudolf Dolzer and Christoph Schreuer, *Principles of international investment law* (Oxford University Press, 2012) 21

[121]Rudolf Dolzer and Christoph Schreuer, *Principles of international investment law* (Oxford University Press, 2012) 9-10

[122] OECD, 'Most-favoured-nation treatment in international investment law' OECD working paper (2004); See also Rudolf Dolzer and Christoph Schreuer, *Principles of international investment law* (Oxford University Press, 2012) 186

[123]*Bayindir v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para. 231-2, the tribunal held that the MFN provision allowed the investor to invoke a fair and equitable treatment clause from another BIT; See also *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, par. 103-4. See also *CME v. Czech Republic*, UNCITRAL case, Final Award, 14 March 2003, 9 ICSID Reports 264 (2003), where the tribunal argued that the investor could rely on an expropriation provision from another BIT to determine the standard of compensation.

[124] UNCTAD, Bilateral Investment Treaties 1995-2006: Trends in Investment Rule Making (New York: United Nations, 2007), 33.

the more limited substantive provisions in South-South BITs have little, if any, relevance for the legal rights granted to foreign investors in practise, is there in reality any point in limiting them in the first place?[125] Sifting through the possible explanations, Poulsen posits an explanation that may seem on the face of it, arrogant or derogatory, but the plethora of not-for-attribution evidence that his research provides in support of this premise, would seem to support the posited explanation that many developing countries may have simply failed to realize the full implications of MFN provisions and signed up to BITs without appreciating the true nature and scope of the documents to which they were appending their signatures.[126]

Some of the examples of Poulsen's non-attributable quotes make for very uncomfortable and sombre reading, but taken as a whole, they underscore the premise of this thesis, namely that at the core of the problem of the erosion of RA, is appropriate negotiation and drafting of BITs by Host State such that their own interests are properly reflected in these BITs. As shown by Alschner and Skougarevskiy in the examples of Mauritius and Cameroun, properly negotiated and drafted BITs[127] allow developing states to 'punch above their weight' and secure for their countries and their citizens, BITs with strong provisions that will give their governments a better chance to resolve the challenges that developing Host States face with an asymmetrical ISDS regime if a case ends up before an arbitral tribunal. This will in turn ensure the protection of their RA.

The following non-attributable quotes which go to the heart of the importance of Host States having a strong negotiating stance and expertise, are examples of responses provided to researchers by former BIT negotiators from various African states.[128]

Firstly, in response to why the MFN provision hadn't been adjusted to accommodate the different standards in the country's other BITs, a former BIT-negotiator said: 'We didn't have a consistent approach because there wasn't an understanding that consistency was required. (…) No-one seemed to realise the implications of the MFN provision'.[129]

Another BIT negotiator, referring to the speed at which many South-South BITs were signed, stated: 'In all these mini-conferences, UNCTAD would actively promote BITs to be signed amongst the participants - often within as little as a few hours - and I couldn't see that any serious considerations were given by the countries whatsoever'.[130]

Yet another example reads as follows:

> 'While workshops held by various *international* organisations might help somewhat in upgrading developing countries' negotiating capacity, they haven't solved the problem. There is still not a very good understanding of what is implied by the different provisions, so even if negotiators from the developing world take their job seriously, they are often not entirely aware of what they are doing'.[131]

[125] Lauge Skovgaard Poulsen, 'The Politics of South-South Bilateral Investment Treaties' in T. Broude, M. Busch, and A. Porges, eds, *The Politics of International Economic Law: Risk and Opportunity in Crisis* (Cambridge University Press 2009) Available at SSRN: https://ssrn.com/abstract=1674825

[126] Lauge N Skovgaard Poulsen, Sacrificing sovereignty by chance: investment treaties, developing countries, and bounded rationality (Diss. London School of Economics and Political Science, 2011)

[127] Wolfgang Alschner and Dmitriy Skougarevskiy, 'Rule-takers or rule-makers? A new look at African bilateral investment treaty practice' (2016) TDM Special Issue on Int'l Arbitration involving Commercial and Investment Disputes in Africa 18

[128] Lauge Skovgaard Poulsen, 'The Politics of South-South Bilateral Investment Treaties' in T. Broude, M. Busch, and A. Porges, eds, *The Politics of International Economic Law: Risk and Opportunity in Crisis* (Cambridge University Press 2009) Available at SSRN: https://ssrn.com/abstract=1674825.

[129] Ibid

[130] Ibid

[131] Ibid. Italics mine.

It can be concluded from these not-for-attribution interviews that a lack of legal expertise and relevant experience has resulted in developing countries signing up to BITs which had considerably more "teeth" than the representatives of the states appreciated, which is directly relevant to this thesis.

Some commentators in analysing the reasons why developing countries signed up to BITs, concluded that 'different motivations have guided BIT signing over time' and that it is important to understand the drivers of adopting a certain course of action before one can properly assess its impact. This is particularly important where there could be a wide range of motivational factors driving these decisions.[132]

In their 2013 work on BITs and Bounded Rational Learning[133], Poulsen and Aisbett concluded that developing countries had behaved 'predictably irrationally' in the international investment regime and that those countries which had yet to experience their first BIT claim seemed to suffer from an 'optimism bias'. Whilst refraining from offering a general theory as to why developing countries signed BITs in the first place, the authors by using a bounded rationality approach, suggested that government actors were perhaps not as careful as they could have been in the process of using BITs as an attempt to attract capital, which corroborates the earlier conclusions in this chapter in relation to the not-for-attribution quotes. The issue of whether negotiators with greater expertise might have made different decisions is left largely unexplored in this article, and this author would suggest that this underlines the view taken in this thesis, namely that expertise is critical, hence the proposed suggestion of a team of Specialists at the negotiating tables.

Poulsen when undertaking further research into the theory of Bounded Rationality, uses South Africa (SA) as a Case Study and posits a three-step diffusion-process. He posits that firstly, developing country governments began adopting BITs policy blueprints which they were led to believe would attract foreign investment because they were readily available, secondly that they overestimated the economic benefits of BITs without doing their own due diligence to understand the power they were giving away to third parties, and finally, it was only until a country was itself the respondent in a claim that it realised how powerful the BITs were, at which point, in the SA Case Study, the government took steps to review their position and take steps to protect their regulatory autonomy. In a similar vein to his not-for-attribution statements referred to earlier in this thesis, a senior SA official stated, 'it was not until we got sued, we truly realized that we should have had red flags up when signing these treaties'.[134]

2.1.2 THE IMPACT OF EUROCENTRIC WESTPHALIAN BIAS ON THE DEVELOPMENT OF INTERNATIONAL LAW AND ON THE DIPLOMATIC PROTECTIONS FOR FOREIGN ALIENS

The views of scholars espousing a Eurocentric Westphalian bias in respect of the development of international law can be identified as the cornerstone of the evolution of those provisions in BITs relating to the protection of foreign investment. The norms surrounding the status of legal aliens and the protections afforded to them originate from as far back as the 18th century writers in this area. Thought leaders in the field of international law at the time believed that foreign nationals were

[132] Srividya Jandhyala, Witold J. Henisz, and Edward D. Mansfield, 'Three waves of BITs: The global diffusion of foreign investment policy' *Journal of Conflict Resolution* 55.6 (2011): 1047-1073, 1068

[133] Lauge N. Skovgaard Poulsen and Emma Aisbett, 'When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning' (2013) 65 World Pol 273, 301

[134] Lauge N. Skovgaard Poulsen, 'Bounded rationality and the diffusion of modern investment treaties.' *International Studies Quarterly* 58.1 (2014) 1-14, 11

entitled to have their rights protected under customary international law (CIL). Emmerich Vattel, a great proponent of this idea, stated in 1758 that:

> Whoever uses a citizen ill, indirectly offends the State, which is bound to protect this citizen; and the sovereign of the latter should avenge his wrongs, punish the aggressor, and if possible, oblige him to make full reparation, since otherwise the citizen would not obtain the great end of the civil association, which is, safety.[135]

Whilst agreeing that states had the right to determine the conditions upon which foreigners were allowed into their territory, Vattel posited that once they satisfied the conditions and were allowed in, the state was under an obligation to protect the foreigner in the same way as its own nationals.[136] This viewpoint permeates the ITR but unfortunately the expanded version that has now become the norm in BITs has been translated into BIT provisions which oblige Host States (usually poorer developing States) to confer a higher degree of protection upon foreign investors than they would confer on their own nationals. The manner in which International Law arrived at this expanded version will be explored in existing literature later in this thesis through a historical lens.

Vattel, in his opus "The Law of Nations or the Principles of Natural Law", traced the origins of the phrase "the Law of Nations", through the modern Masters, crediting Baron de Wolf with being seized of the real meaning of "the Law of Nations". He believed that Wolf finally understood the import of the fact that the Law of Nature could not just be applied to States in the same way that it was applied to humans, but that there was a distinction to be made before it could properly apply to States. Vattel concludes that a Nation or State is 'a society of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength.'[137][138] This quote from Vattel, 'A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom', seems to indicate that in his view, sovereign states are deemed equal, regardless of their size or how much power each wields,[139] which is not reflected in the asymmetrical actions of Western capital-exporting states during BIT negotiations. Encouraging commercial relationships between nations, Vattel states that each nation is at liberty to choose who they decide to enter into commercial relationships with, and what sort of treaties and contracts they enter into. Thus 'the obligation of trading with other nations is in itself an imperfect obligation and gives them only an imperfect right; so that, in cases where the commerce would be detrimental, that obligation is entirely void'. [140] He further states that they are also at liberty to decide what provisions they insert in their treaties and for how long they choose to be bound by such provisions as they enter into, making the point that it is usually better not to sign up to an open-ended agreement, since future situations may mean that the terms might then become too onerous for one or other party. In summary, 'A nation may confine a treaty to the grant of only a precarious right — reserving to herself the liberty of revoking it at pleasure'.[141] This advice is highly relevant since this thesis entreats Host States to ensure that the provisions of the IIAs and BITs which they sign are "fit for purpose" and do not unduly constrain their sovereignty and their regulatory powers.

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[135] Emer De Vattel and Joseph Chitty, *The law of nations: or, Principles of the law of nature, applied to the conduct and affairs of nations and sovereigns* (PH Nicklin & T. Johnson 1835)

[136] Emer De Vattel and Joseph Chitty, *The law of nations: or, Principles of the law of nature, applied to the conduct and affairs of nations and sovereigns* (PH Nicklin & T. Johnson 1835)

[137] Emer De Vattel and Joseph Chitty, *The law of nations: or, Principles of the law of nature, applied to the conduct and affairs of nations and sovereigns* (PH Nicklin & T. Johnson 1835) Preliminaries liv

[139] Emer De Vattel and Joseph Chitty, *The law of nations: or, Principles of the law of nature, applied to the conduct and affairs of nations and sovereigns* (PH Nicklin & T. Johnson 1835) lxiii

[140] Emer De Vattel and Joseph Chitty, *The law of nations: or, Principles of the law of nature, applied to the conduct and affairs of nations and sovereigns* (PH Nicklin & T. Johnson 1835) 145

[141] Emer De Vattel and Joseph Chitty, *The law of nations: or, Principles of the law of nature, applied to the conduct and affairs of nations and sovereigns* (PH Nicklin & T. Johnson 1835)145

Additionally, Vattel states that sovereignty is the most precious of all the possessions of a nation and should be respected by other nations, stating that independence affords each nation 'a right to be governed as they think proper',[142] without interference in its government by another nation. This is of particular importance in respect of this thesis' aim of redefining the sovereignty of Host States with particular reference to their Regulatory Autonomy. The principle that any unfair treatment by a host state of a foreigner and their property should be regarded as an injury to the home state, was the cornerstone of the thinking of the legal scholars of that era and this belief was reflected in the actions of home states referred to as 'gunboat diplomacy'.[143] This mindset of Western states persists to the present day and can be discerned in the provisions of BITs which prioritize the protection of foreign investments over the regulatory autonomy of Host States. A related argument of that era by Neufeld was that international law had a general obligation to protect the rights of aliens to travel and to trade.[144] Scott and Kelsey state that Grotius, another early scholar, argued that foreigners should not be subjected to discrimination at any time, and that the notion of 'a common right' was one that pertained to all persons, whether or not they were foreigners:

> For if under such circumstances a single people is excluded, a wrong is done to it. Thus, if foreigners are anywhere permitted to hunt, fish, snare birds, or gather pearls, to inherit by will, or sell property, and even to contract marriages in case there is no scarcity of women, such rights cannot be denied to one people alone, except on account of previous wrongdoing.[145]

Thus, these early legal scholars laid the foundations for the emergence of diplomatic protection as a way of protecting foreign investment. Building upon these foundations, the theory of diplomatic protection gradually came to mean that injury to a state's national was equivalent to an injury to the state itself, and for that reason the injured state was entitled to claim compensation from the responsible state. This principle was confirmed in 2006 in the International Law Commission (ILC)'s Articles on Diplomatic Protection, that states:

> Diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.[146]

Diplomatic protection is still used as a key principle to protect the rights of foreign nationals, the underlying premise being that the home state holds the right to make a claim against the host state for an injury to its home national. States were keen to use diplomatic protection well into the 19th century and as evidenced by Eagleton and Dunn in the case of the Mavrommatis Palestine Concessions, where the Permanent Court of International Justice (PCIJ) confirmed that the state

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[142] Emer De Vattel and Joseph Chitty, *The law of nations: or, Principles of the law of nature, applied to the conduct and affairs of nations and sovereigns* (PH Nicklin & T. Johnson 1835) 155

[143] See generally, Andrew Graham-Yooll, *Imperial skirmishes: war and gunboat diplomacy in Latin America* vol. 2 (Signal Books 2002); See also Paul Peters and Nico Schrijver, 'Latin America and International Regulation of Foreign Investment: Changing Perceptions' (1992) 39 N.I.L.R. 368; See also Douglas M. Johnston, *The Historical Foundations of World Order: The Tower and the Arena* (Leiden: Martinus Nijhoff, 2008) 636; See Kate Miles, *The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital (*CUP, 2013*)*

[144] Hans Neufeld, *The International Protection of Private Creditors from the Treaties of Westphalia to the Congress of Vienna 1648–1815* (Leiden: Sijthoff 1971)

[145] Neff SC, ed. *Hugo Grotius on the Law of War and Peace: Student Edition*. Cambridge University Press; 2012 See-https://www.cambridge.org/core/books/hugo-grotius-on-the-law-of-war-and-peace/of-things-which-belong-to-men-in-common/9127224B15D16A8FC30F789E82560256 accessed on 23.07.2024

[146] Article 1 of the International Law Commission's (ILC's) Articles on Diplomatic Protection adopted by the ILC's at its 58th session, in Report of the International Law Commission, UN GAOR, 61st Sess., Supp. No.10, UN Doc A/61/10 (2006) 16

reserved the right to use diplomatic protection on behalf of its nationals.[147] The PCIJ underlined what had by then become a fundamental principle of international law when it stated that:

> It is an elementary principle of international law that a state is entitled to protect its subjects, when injured by acts contrary to international law committed by another state, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law.[148]

The Eurocentric nature of International Law described to above, can also be perceived from the expectations of merchants from the western world, as described by Adam Smith. He points out that anyone (merchant) who puts his money towards some form of industry in a country, does so primarily to obtain a profit and therefore is most likely to employ his money in support of the industry from which he anticipates he will gain the greatest value.[149] Smith then extends this theme of 'profit first' to the international sphere, when he makes the additional point that 'the interest of a nation in its commercial relations to foreign nations is, like that of a merchant with regard to the different people with whom he deals, to buy as cheap and to sell as dear as possible'.[150] The inference here is that no trader would bother to enter into a transaction with a foreign country unless there was a profit to be made. On the face of it, this is not problematic. However, as he states not only was the idea of the maintenance of their monopoly the 'raison d'etre' of Great Britain's dominion over her colonies[151] but in addition, colonial powers sought to enter into treaties with their former colonies in the hope and expectation that these former colonies would continue to favour them in trade such that:

> Instead of turbulent and factious subjects, [to] become our most faithful, affectionate, and generous allies; and the same sort of parental affection on the one side, and filial respect on the other, might revive between Great Britain and her colonies, which used to subsist between those of ancient Greece and the mother city from which they descended.[152]

In his view, merchants were 'an order of men, *whose interest is never exactly the same with that of the public*, who have generally an interest to deceive and even to oppress the public, and who accordingly have, upon many occasions, both deceived and oppressed it'.[153] Smith's words are eerily prescient, reflecting the current actions of investors towards Host States. Although there is no direct correlation between the merchants in Smith's day and present-day investors, the fact that merchants at the time were recognised as being solely motivated by their own interests which were different from the interests of the public, resonates. This seems to be an early recognition of the dichotomy between merchant priorities and the priorities of the public, a dichotomy which persists to this date, whereby the interests of foreign investors are prioritised over the interests of the state wishing to exercise regulatory autonomy on behalf of the interests of their citizens.

[147] See generally C. Eagleton, *Responsibility of States in International Law* (New York: New York University Press, 1928); See also F.S. Dunn, *The Protection of Nationals: A Study in the Application of International Law* (Baltimore: The Johns Hopkins Press, 1932)
[148] The PCIJ affirmed the principle in the Mavrommatis Palestine Concessions (1924) PCIJ Ser. A, No.2, 12; in Cosmas Ukachukwu Ikegwuruka. Immigration Control, Citizenship, the Interplay of Sovereignty and the Vicissitudes of the Hostile Environment in the United Kingdom. International Journal of Law and Society. Special Issue: Immigration Control, Citizenship, the Interplay of Sovereignty and the Vicissitudes of the Hostile Environment. Vol. 3, No. 2, 2020, pp. 47-59, 48. doi: 10.11648/j.ijls.20200302.12.
[149] Adam Smith, *The wealth of nations*. (first published 1776, Aegitas 2016) 330
[150] Ibid 337
[151] Ibid 459
[152] Ibid Adam Smith The Wealth of Nations.14.01.21.pdf 460
[153] Ibid 179 (Italics mine)

Next, this thesis will explore how this initial Eurocentric view of International Law was challenged by other voices in the existing literature which proposed a more balanced approach to International Law and International Investment Law, through the lens of non-Eurocentric commentators.

2.1.3 NON-EUROCENTRIC APPROACHES TO INTERNATIONAL LAW: REDEFINING "CIVILIZING MISSION"

Whereas hitherto the dominant narrative in this area of International Law was the Eurocentric narrative, non-European academics have widened the discussion, making for a more balanced debate. W.E. Burghardt Du Bois challenged the role that history played in settling a Eurocentric narrative in this field. Through a combination of scientific analysis, oral tradition and cultural norms, du Bois has proven that the Eurocentric historical narrative is not the whole truth merely because it is in written form and has been repeated ad infinitum. As Du Bois states, 'I shall try not to exaggerate this thread of African history in the development of the world, but I shall insist equally that it be not ignored!!'[154] By asking the question – 'Don't you understand that the past *is* the present; that without what *was*, nothing *is*?',[155] Du Bois makes the point that without a proper understanding of what has gone before, it is not truly possible to understand the present. His contribution successfully raised the case for the re-examination of hitherto established norms which were totally Eurocentric in nature. This thesis will properly situate the debate in time by going back as far as the fifteenth century. As a starting point, Cohen, a fifteenth century author, writes of the trade in gold, slaves, ostrich feathers, precious stones and gum that took place between Portugal and black Africa around 1441. He evidences the fact that this trade continued and gathered pace till the late 1500s, when the French Hugenots involved themselves in that trade route. British merchants under the reigns of Queen Mary and Queen Elizabeth also became interested, fighting off the monopoly of Portugal and Spain, with the British trade increasing between 1561 and 1571. In fact, the first Englishman of note to engage in trade along that route was John Hawkins, who was knighted by Queen Elizabeth and appointed as Treasurer to the Navy and granted a coat of arms made up of a 'demi-Moor in his proper colours, bound and captive'[156] in appreciation for the lucrative trade in slaves that he opened up to Englishmen. Thus, Africans were clearly involved in international trade as merchants before the slave trade and before the western Eurocentric narrative was invented and given prominence and pre-eminence.

As further proof that the Eurocentric narrative is incomplete and incorrect, there is evidence showing that prior to the 15th century, African and Asiatic civilizations far outstripped that of Europe and that even before that, there had been the rise and fall of several civilizations outside Europe. According to du Bois, in the 15th century, the empire of Songhay for instance, had a governmental structure with territory spanning two-thirds the size of the USA and educational institutions like the University of Sankore, as well as commercial links with Spain, Italy and the Roman Empire.[157] In the 17th century, it became clear that although trade in African Gold, which continued to pour into Europe was profitable, what was needed even more was human labour to raise sugar and tobacco in the West Indies and North America. After the end of the Civil War in England in 1660, England turned its full attention to the immense benefits to be reaped from the slave trade for cheap labour for her sugar and tobacco plantations. The Royal Africa Company for instance, transported an average of 5000 slaves a year between 1680 and 1686,[158] Bristol shipped 160,950 slaves to sugar plantations in the first 9 years of

[154] William Edward Burghardt Du Bois, *The World and Africa: An Inquiry into the Part which Africa Has Played in World History* (1946; reprint, New York: International Publishers, 1996)1
[155] William Edward Burghardt Du Bois, *The World and Africa: An Inquiry into the Part which Africa Has Played in World History* (1946; reprint, New York: International Publishers, 1996) 50 Italics mine.
[156] Chapman Cohen, *Christianity, Slavery & Labour* (London: Pioneer Press, 1931, issued for The Secular Society Limited)
[157] William Edward Burghardt Du Bois, *The World and Africa: An Inquiry into the Part which Africa Has Played in World History* (1946; reprint, New York: International Publishers, 1996) 28
[158] Ibid, 34.

this 'free trade',[159] and Liverpool netted a clear profit of £300,000 a year in the late 18th century.[160] Since the slave traders were well represented in both Houses of Parliament, there was no chance that this immoral trade would be declared illegal by lawmakers. The East India Company eventually seemed to show remorse when it admitted to a Select Committee that '…we think the vast fortunes acquired in the inland trade have been obtained by a scene of the most tyrannic and oppressive conduct that was ever known in any age or country' [161] although that did not prevent the proceeds of these crimes from being invested in banks, companies and new institutions like the British stock exchange.[162] As Du Bois states, 'Nothing which happened to man in modern times has been more significant than the buying and selling of human beings out of Africa into America from 1441 to 1870'.[163] England eventually abolished the Slave Trade, not because of Christian values, (although the Methodists, Quakers and Baptists did revolt),[164] but mostly because the triumph of the revolting slaves in Haiti threatened the whole slave system of the West Indies and America. At around the same time, the British government pivoted into the role of a colonial owner of much of Africa, making them now in control of the main sources of raw materials for industrial expansion, with vast stores of cash from the slave trade ready to take advantage of financial and manufacturing opportunities. This was the beginning of the re-invention of the true history of Africa and also of the Eurocentric narrative that continues till this day. As Du Bois puts it, '…although author and chief supporter of modern slavery, Gt Britain could hold up her head and, by suppressing a slavery now becoming unprofitable, lead world philanthropy as the great emancipator of the slave!'[165]

The reasoning behind the Eurocentric version of International Law, which has been the dominant narrative for several decades, is well articulated by du Bois when he states that 'Education was so arranged that the young learned not necessarily the truth, but that aspect and interpretation of the truth which the rulers of the world wished them to know and follow'.[166] Jones noted in 2006 that not much had changed in the education of International Relations (IR) since 1946[167] and Anne-Marie Slaughter argues that not much has changed in the educational sphere as it relates to International Law either.[168] In the volume 'Decolonizing International Relations', the stated aim of Jones and his fellow authors was to 'expose enduring suppressions in the historical record, to break out of long-fostered habits of distorted Eurocentric thought'.[169] The irony, not lost on Jones and other commentators, was that the roots of a discipline that claimed by virtue of the use of the descriptor "International", to be relevant to all states and all peoples, could actually be traced to a time at the height of imperialism, when the powers that be in Europe were occupying vast swathes of the world as colonizers. This is ironic because imperialism is the very antithesis of universal international recognition[170] and is characterized by its theme of the exclusion of peoples, relations and doctrines that are perceived as "other" or in some way inferior to the imperialist view of the world. Saurin argues that the world order remains determined largely by imperialism, including neo-colonial political views and that the 'assumptions, concepts and language of inquiry in IR remain infused with

[159] Ibid,34
[160] William Edward Burghardt Du Bois, *The World and Africa: An Inquiry into the Part which Africa Has Played in World History* (1946; reprint, New York: International Publishers, 1996) 35
[161] William Howitt, *Colonization and Christianity* (London: Longman, Orme, Brown, Green & Longmans 1838) 262
[162] William Edward Burghardt Du Bois, *The World and Africa: An Inquiry into the Part which Africa Has Played in World History* (1946; reprint, New York: International Publishers, 1996)35
[163] Ibid, 28.
[164] Ibid,35
[165] Ibid,42
[166] Ibid, 24.
[167] Branwen Gruffydd Jones (ed), *Decolonizing international relations* (Rowman & Littlefield, 2006)
[168] The two disciplines have always been interconnected in complex ways. Examples can be found in Anne-Marie Slaughter 'International Law and International Relations Theory: A Dual Agenda' ((1993) American Journal of International Law 87 no.2 205, and Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge: Cambridge University Press, 2004). For connections between the two disciplines relating to the issue of colonialism, see Siba N, Zatioula Grovogui, *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law* (Minneapolis: University of Minnesota Press, 1996); See also Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge: Cambridge University Press, 2002)
[169]Branwen Gruffydd Jones (ed), *Decolonizing international relations* (Rowman & Littlefield, 2006) 1
[170] Branwen Gruffydd Jones (ed), *Decolonizing international relations (*Rowman & Littlefield, 2006) 2

imperial and colonial reasoning', rendering the necessity to decolonize IR as urgent as ever.[171] This thesis would argue that the same could be said of International Law and thus makes this examination of the historical context of International Law very timely and relevant. As Aldon Morris states in an article derived from his 2021 American Sociological Association (ASA) Presidential address:

> American and European states remain complicit in ensuring global white supremacy through the actions of governmental bodies, including the G7, which promotes the interests of "advanced white countries" while claiming to protect the interests of "less developed colored countries" without providing them a seat at the decision-making table.[172]

Edward Said states of the pervasive and generally unquestioned beliefs of Europeans and European Institutions of that era, that 'there was virtual unanimity that subject races should be ruled, that they are subject races, and that one race deserves and has consistently earned the right to be considered the race whose main mission is to expand beyond its own domain'.[173] In the views of that era, the race that was blatantly considered superior was the white or European race and this thesis shows that an examination of the institutions of International Law make it clear that this manner of thinking persists, although in a more subtle manner than heretofore. As Jones states in his introduction, there are a myriad of ways in which the unequal power relations of the International Order are mystified in everyday life and the volume seeks to contribute to 'a better understanding of IR, history, and world order by confronting the colonial heritage that modern IR has failed to shed'.[174] This colonial heritage that modern IR has failed to shed, mirrors the situation in International Law and International Investment Law, in that an examination of the provisions of BITs reveal an identical inherent colonial and Eurocentric bias. This thesis therefore invites a reconsideration of those established norms that have directly influenced the relationship between western capital-exporting states and Host developing states in the International Investment Regime. Eurocentric bias has undoubtedly impacted the development of the law in this area, which is clear when the development of the legal concepts such as BITs and the role of arbitral tribunals in this area are evaluated through a historical lens.

Miles underlines this point when arguing that 'the content and form of foreign investment protection law cannot be separated from its socio-political environment'.[175] This is because the context in which the principles of the so-called 'modern international investment law' were shaped and developed was one of 'exploitation and imperialism', which persists the form of a set of rules that protect only the foreign investor, perpetuating a state of "otherness" in respect of Host States, with the result that these Host States were and still are unable to utilise the skewed rules of international investment law to deal with the harm that inflicted upon them by the activities of foreign investors.[176]As one reviewer intuitively states[177], Tzouvala's book[178], which focuses attention 'on the West's notorious legacies and international lawyers' complicity in evading them' is certain to draw a positive reception from stakeholders, particularly at this time in history when:

> Western states face renewed demands for reparation for their historical responsibilities and contribution to looming global challenges—such as unprecedented displacements of persons,

[171] Julian Saurin, 'International Relations as the Imperial Illusion; or the Need to Decolonize IR' in Branwen Gruffydd Jones (ed), *Decolonizing international relations (*Rowman & Littlefield, 2006) 23, 24
[172] Aldon Morris, 'Alternative view of modernity: The subaltern speaks' (2022) American Sociological Review 87.1
[173] Edward W. Said, 'Secular interpretation, the geographical element, and the methodology of imperialism' (1994) After colonialism. Princeton University Press 21, 30
[174] Branwen Gruffydd Jones (ed), *Decolonizing international relations (*Rowman & Littlefield, 2006) 5
[175] Kate Miles, 'International Investment Law: Origins, Imperialism and Conceptualizing the Environment' (2010) 21 Colorado Journal of International Environmental Law and Policy 1, 44
[176] Ibid. 45
[177] Jose E. Alvarez, 'Capitalism as Civilisation A History of International Law' (April 2023) American Journal Of International Law vol. 117 364–371, 371
[178] Ntina Tzouvala, *Capitalism as civilisation: a history of international law*. Vol. 142. (Cambridge University Press 2020)

stark threats to global health, deepening economic disparities, and exceptional threats to the planet's environmental health (particularly but not only through climate change).

Anghie, whose work will be more fully critiqued subsequently in this chapter, clearly shows that colonialism is not confined to theoretical doctrines of International Law but is a 'pervasive' and 'foundational'[179] aspect of International Law, distinguishing between civilized and uncivilized, developing and developed, along the same lines as in colonial times, with International Law continually reinventing itself, using new techniques that have the same colonial undertones.

Furthermore, as Halperin states, theories about the events, structures and processes that define and keep occurring in the international arena have been based in the main on the history of Europe and its role in the global arena since the sixteenth century.[180] Critiquing the foundational myths of Eurocentric history she argues that by focusing on the real history of Europe as opposed to the widely accepted myths, the perspective that becomes visible is 'the anatomy of social power throughout the world; its relationship to different developmental outcomes and how it has evolved over time locally, transnationally and cross regionally…'[181] It is this alternative perspective that this thesis seeks to present as a foundational element of its argument that the Eurocentric view previously presented as the true hegemonic perspective is flawed and incorrect and therefore International Law (and by extension International Investment Law) must be reimagined, and sovereignty redefined. This will be further examined in the following subsections by analysing the concept of "Good Governance" as well as the underlying reality of the UN Charter.

2.1.4 NON-EUROCENTRIC APPROACHES TO INTERNATIONAL LAW – THE REDEFINING OF "GOOD GOVERNANCE"

Beyond this Westphalian bias, the regulatory autonomy of Host States in the Global South has been further undermined by concepts such as "Good Governance". This Eurocentric construct acquired a great deal of prominence in the field of International Law in the 1990s but which has subsequently been unmasked is the term "Good Governance".[182] Anghie argues that while the project of "Good Governance" has been heralded as a new advance in the development of International Law, in reality it has a very old lineage going as far back as the sixteenth century, when International Law started devising various doctrines and technologies, the sole aim of which were to shape and reform the government of non-European states into something that suited the interests of the more powerful European states. This project of "reform" over the centuries, has involved the elements of the furtherance of commerce and the advancement of civilization (for those uncivilized 'others'), which have always been the principal justifications for the colonial projects. The reality is that International Law has lent itself to the aim of creating governments in non-European states that would aid European commercial expansion into colonies, under the cloak of "civilizing and developing the backward natives" as far back as Francisco de Vitoria's description of the Indians in such an inferior and inadequate manner as to provide justification under International Law for the Spanish who invaded them in the sixteenth century.[183]

Under nineteenth century International Law, a distinction was made between so-called civilized states, which were perceived as sovereign legal personalities, and non-civilized states which were not

[179] Antony Anghie, 'The evolution of international law: Colonial and postcolonial realities' (2006) Third World Quarterly 27.5 739.
[180] Sandra Halperin, 'International Relations theory and the hegemony of Western conceptions of modernity' in Branwen Gruffydd Jones (ed), *Decolonizing international relations (*Rowman & Littlefield, 2006) 43, 44
[181] Sandra Halperin, 'International Relations theory and the hegemony of Western conceptions of modernity' in Branwen Gruffydd Jones (ed), *Decolonizing international relations (*Rowman & Littlefield, 2006) 43, 60
[182] Antony Anghie, 'Decolonizing the Concept of 'Good Governance' in B. Gruffydd Jones (*ed.), Decolonizing International Relations, (*Rowman and Littlefield, Lanham, MD 2006)
[183] "Although the aborigines in question are … not wholly unintelligent, yet they are little short of that condition, and so are unfit to found or administer a lawful State up to the standard required by human and civil claims. Accordingly, they have no proper laws nor magistrates, and are not even capable of controlling their family affairs" – Vitoria, De Indis, 161 paragraph 407

proper members of the "family of nations" and who could therefore be exploited under the guise of "assistance". Commerce was of such great importance to the European invaders that it was linked to governance in a way that enabled European trading companies like the East India Company, Dutch East Indies Company, Imperial East Africa Company and British South Africa Company – all of whom sought to make profits from the exploitation of native peoples and their territories – to control and govern territories with the blessing of their governments, such as the British Crown. Thus, the whole purpose of "governance" for the non-Europeans, was to secure the expansion of European commerce. As Westlake[184] describes it – 'The inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied'.[185] After the abolition of slavery (for other than altruistic reasons, as Du Bois so eloquently articulated), the European states met at the Berlin Conference to divide up the spoils of Africa, again cloaked in altruism. As remarked by Bismarck, the imperial government was guided by the conviction that all the governments invited share the wish to 'bring the natives of Africa within the pale of civilization by opening up the interior of that continent to commerce'.[186] This juxtaposition of commercial gain for European powers with a civilizing mission towards non-Europeans can be traced from Vittoria's naturalism, through Westlake's positivism, to the pragmatism of the League of Nations mandate.[187] One result of this neo-colonial rhetoric whereby the commercial interests of European powers are masqueraded as humanitarian interests, is that the resources of non-European peoples were characterized as belonging to the exploitative International Community, citing the "right to trade" as legal justification for their entry into non-European societies, and requiring the non-European societies by force, if necessary, to comply with this "right to trade". Another result was the disintegration of previously established native institutions, ways of life and the social formulations that had ordered the lives of the non-European peoples before they were invaded by Europeans and their economies integrated into the economies of the more powerful states under the guise of "rule of law" for commercial gain for the more powerful states.[188] Anghie argues that this latest "Good Governance" project, particularly in the manner promoted by powerful International Financial Institutions (IFIs), such as the World Bank (WB) and the International Monetary Fund (IMF), as between the "developed" and "developing" worlds, simply replicates the "civilizing mission" of colonialism. The genius of this latest disguise lies in linking it with Human Rights and presenting the premise that 'the problem of addressing international justice can be achieved largely through the project of Good Governance',[189] thus justifying the actions of the more powerful states as 'liberating the oppressed peoples of the third world from local dictators'.[190] In this way, the WB, which as a development agency, is not allowed to interfere in the political affairs of a state[191] is able to involve itself into a whole range of issues including legal reform in African and other non-European states by claiming that its initiatives complement and promote Human Rights. In a WB publication, it states:

> It helps its client countries build better governance. This assistance in improving the efficacy and integrity of public sector institutions from banking regulation to government auditing functions to the court system has an important, although indirect, impact on creating the

[184] John Westlake, *Chapters on the Principles of International Law* (Cambridge: Cambridge University Press 1894) 141
[185] John Westlake. *Chapters on the Principles of International Law* (Cambridge: Cambridge University Press 1894) 141
[186] Cited in Mark F. Lindley, *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (London: Longmans, Green and Co., 1926: reprint, New York: Negro Universities Press, 1969) 332
[187] Antony Anghie, 'Decolonizing the Concept of Good Governance' *in B. Gruffydd Jones, (ed.), Decolonizing International Relations, (*Rowman and Littlefield, Lanham, MD 2006) 109, 124
[188] "The main object of colonial policy during the Liberal experiment was the promotion of commerce. This required direct administration on Western principles, allowing free play within the law to economic forces" (Furnivall, *Progress and Welfare in Southeast Asia*, 21).
[189]Antony Anghie, 'Decolonizing the Concept of "Good Governance"' in B. Gruffydd Jones, *(ed), Decolonizing International Relations, (*Rowman and Littlefield, Lanham, MD 2006) 109, 116.
[190] Nira Wickramasinghe, 'From Human Rights to Good Governance: The Aid Regime in the 1990s'. (1996) The New World Order. "In this new approach, the aim is nothing less than to change the world-system by reforming the fundamental institutions of the recipient state".
[191] The Bank's involvement in governance issues raises complex questions as to how this could possibly be justified in terms of its Articles of Agreement, which state inter alia that "the Bank shall not interfere in the political affairs of any member" (Art IV.10).

> structural environment in which citizens can pursue and continue to strengthen all areas of human rights.[192]

This again shows how cleverly the project of "Good Governance" is employed in this neo-colonial narrative. Following on from the discussion on "Good Governance" as portrayed by the IFIs, some writers ask the pertinent question 'who governs and for whom?'[193] Overseas Development Assistance (ODA), another way in which foreign aid is sometimes described, has been dissected in some detail by some commentators[194] who state that 'the issue is not whether aid contributes directly to the development process but its role in promoting and ensuring the adoption of neo-liberal free market reforms'.[195] Petras and Veltmeyer argue that if "aid" is really a catalyst of anything, it is a catalyst for regression, and not for development, as has been portrayed by both neo-liberals and self-styled "truly confident" social liberals.[196] They conclude that "aid" although portrayed as promoting good policies, actually serves as an aid to imperialism, (whether by design or not), and the social cost of such manipulative practices is often borne primarily by the inhabitants of developing countries.[197] These commentators conclude by stating that an essay by Pronk[198] which seeks to paint foreign aid to developing countries as a catalyst to aid, 'at best provides a limited and flawed perspective on the dynamics of foreign aid, and at worst, helps obfuscate the real issues involved'.[199] Additionally, authors have queried whether there is any evidence proving a clear link between foreign aid and (under) development in Africa and linked to that, whether foreign aid has succeeded in making Africa better or rather undermined progress?[200] Some authors have also concluded that 'The evidence as to whether BITs actually succeed in attracting capital is unclear on this point'.[201] Whilst not reaching a definite conclusion, one author proposes an alternative account of economic development, which questions the centrality of trade and trade policy, and instead emphasizes the critical role that innovative domestic institutions which depart from the prevailing orthodoxy can play.[202] In this alternate universe, poor countries would be encouraged to experiment with institutional arrangements in a way that would leave room for them to 'devise their own, possibly divergent, solutions to the developmental bottlenecks that they face'.[203] As Rodrick concludes:

> But once one views the trade regime--and the governance challenges it poses--from a developmental perspective, it becomes clear that the developing country governments and many of the Northern NGOs share the same goals: *policy autonomy to pursue one's own values*

[192] World Bank Document accessed on 29.05.2023. Anthony Gaeta; See also Marina Vasilara, *Development and human rights: the role of the World Bank (English).* Washington, D.C.: World Bank Group http://documents.worldbank.org/curated/en/820031468767358922/Development-and-human-rights-the-role-of-the-World-Bank, 11

[193] James Petras and H. Veltemeyer, *Age of reverse aid: neo-liberalism as a catalyst for regression* (Oxford: Blackwell 2004) 71

[194] Ibid 64

[195] Ibid 64

[196] See Joanne Salop, 'Reducing Poverty: Spreading the Word' (1992) Finance and Development 2-2. Most analysts take the view that this regression of socio-economic conditions is directly attributable to the neoliberal policies of structural adjustment promoted by the World Bank. The solution – from the point of view of the World Bank's 'friendly critics' such as the scholars associated with UNDP and UNICEF – is a 'redesign of these policies' to reflect this 'new understanding' or the creation of a social investment fund, a new poverty-targeted social policy, or a social net to 'protect the most vulnerable groups' – those likely to be most deeply hurt and unable to defend themselves from the inevitably negative effects of the structural adjustment process. See also Daniel A Morales-Gómez, ed. *Transnational Social Policies: The New Development Challenges of Globalization* (IDRC 1999) who calls for research to help respond to the question "What kind of Social-Policy reform is required for what kind of society?"

[197] James Petras and H. Veltemeyer, *Age of reverse aid: neo-liberalism as a catalyst for regression* (Oxford: Blackwell 2004) 64

[198] Jan P Pronk, *Catalysing Development? A Debate on Aid* (John Wiley & Sons 2009)

[199] James Petras and H. Veltemeyer, *Age of reverse aid: neo-liberalism as a catalyst for regression* (Oxford: Blackwell 2004) 73

[200] Nathan Andrews, 'Foreign aid and development in Africa: What the literature says and what the reality Is' (2009) Journal of African Studies and Development 1.1 8

[201] Zachary Elkins, Andrew T. Guzman, and Beth A. Simmons (2006) 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000' *International Organization* 60(4): 811, 843

[202] Dani Rodrik, The global governance of trade: as if development really mattered. (2001) Vol. 58. New York: UNDP 2

[203] Ibid

> *and priorities, poverty alleviation, and human development in an environmentally sustainable manner.*[204]

Others state that the only way effective impact will be achieved is if donors start with a proper understanding of the culture of the people that such aid seeks to help and that the only way development aid will make a real difference is if the people who development aid targets are properly involved in the decision-making process.[205] Additionally, as stated by Sen, 'the notion of development cannot be conceptually delinked from legal and judicial arrangements'.[206] These sentiments align with the position of this thesis, namely that Ghana requires a solution that will redefine its sovereignty in a positive, meaningful and innovative manner whilst providing a solution that is 'fit for purpose' for the country and its citizens. Further literature surrounding this issue is examined later in this chapter.

2.1.5 NON-EUROCENTRIC APPROACHES TO INTERNATIONAL LAW – THE REDEFINING OF "THE UN CHARTER"

The UN Charter is another case in point. To quote Dianne Otto:

> The apparently inclusive gesture of the opening lines of the UN Charter, 'we, the peoples of the world' is deeply exclusionary in practice. Experience that is incommensurable with, and disruptive of, European hegemony is marginalized and disciplined by the processes of government of the postcolonial modern nation-state.[207]

Otto examines the foundation of the old international order that was given a new lease of life when the UN was established in 1945 by tracing the manner in which the UN is actually committed to an 'imperialist-designed state-based conception of the international community', based on a Eurocentric foundation which rather than being inclusive, actually frustrates the participation, and limits the power, of non-European states.[208] One of the stated fundamental purposes of this new UN regime was their apparent commitment to ending colonialism and the promotion of self-determination and the right of all peoples to equal rights. In reality, the UN Charter and these new ideals, were a reflection of Eurocentric history re-inventing itself, and not an International Law reflecting the will of all the peoples of the world, despite the claims of universality. An example of this Eurocentricity, argues Otto, is the manner in which the Great Powers[209] assumed permanent membership of the most powerful organ of the UN, namely the Security Council allocating to themselves the individual power to veto any Security Council decision. By acquiescing to this European domination of world affairs the UN structure showed that it was willing to defer to the *de facto* power arrangements already agreed between the Great Powers as the primary method of "policing" world peace.[210]

Eurocentricity under the guise of International Law is also apparent when one examines the criteria needed to become a member of the UN community and to obtain full international citizenship and sovereign legal personality. An entity must first qualify as a state using criteria which mirrors customary International Law as found in the 1933 Montevideo Convention on the Rights and Duties

[204] Ibid 47 (Italics mine)
[205] David Satterthwaite, 'Reducing Urban Poverty: Constraints on the Effectiveness of Aid Agencies and Development Banks and Some Suggestions for Change' (2001) Environment & Urbanization 13:1 137
[206] Amartya Sen, 'What is the role of legal and judicial reform in the development process?' (2006) The World Bank Legal Review, Volume 2: Law, Equity and Development. Brill Nijhoff. 33, 38
[207] Dianne Otto, 'Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference' (1996) 5 Soc & Legal Stud 337, 360
[208] Dianne Otto, 'Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference' (1996) 5 Soc & Legal Stud 337, 338
[209] The United States, United Kingdom, France, Soviet Union and China post-1949
[210] Dianne Otto, 'Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference' (1996) 5 Soc & Legal Stud 337, 340

of States.[211] The four criteria that the Convention mandates, just so happen to be measured against European standards and viewpoints. Two of the criteria, (namely a population and a defined territory), meant that in order to qualify, the newly decolonised states had to maintain the colonially determined subdivisions imposed by the colonial powers, irrespective of precolonial identities and organisation. This was mandated by the legal principle of *uti possidetis juris* (unalterability of colonial frontiers) which enforced the unities of territory and peoples that had been designed by the imperial powers, a consequence of which was that self-determination was denied to peoples who lived in areas within or straddling colonial borders.[212] Naya and Nanda point out that many of the civil conflicts being waged in Africa today, have their roots in these imposed boundaries and the brutality and lack of consent involved in the total disregard for what societies that existed prior to the "civilizing mission" of the European colonists. Thus, what seems on the face of it to be an objective requirement of statehood, in reality just repeats the founding violence of colonialism by inscribing it in a new legal narrative by retrospectively re-legitimising its imperialist outcomes, in what Jacques Derrida refers to as the 'mystical foundation of authority'.[213]

Between 1945 and 1989 the demographics of the UN underwent a significant change in its membership as a result of decolonization, as a result of which the developing states were now a majority. Realizing that they had numerical advantage, a united and determined lobby of newly decolonized states, calling themselves the Group of 77 (G77), attempted to challenge Europe's continuing global economic domination by attempting to promote more egalitarian and democratic law-making processes through the UN General Assembly (GA) in the early 1970s, by way of the New International Economic Order (NIEO).[214] The ultimate aim of the G77 was to dismantle the international legal order that had legitimised colonialism and imperialism and by so doing, end western domination of the world economy which continued in spite of the fact that most former colonies had attained their political independence.[215] The 1974 Charter of Economic Rights and Duties of States (CERDS) (GA Res. 3281 [XXIX]), was one of the founding instruments of the NIEO. CERDS endorsed many of the established principles of international law relating to economic matters and also underlined the sovereign equality of all member states. This is because the underlying thrust of the Third World countries was a rejection of the European dualism that sought to separate legalism from morality and a desire to bring an ethical framework to International Law.[216] Western States were fiercely opposed to the equitable legal principles in the areas of trade and economic cooperation[217] which CERDS tried to promote and the upshot of this was that the consensus by which a new blueprint for global economic cooperation by the GA was adopted in 1990, made no reference to the NIEO.[218] As Mohammed Bedjaoui, at the time the President of the International Court of Justice (ICJ), observed in 1985: 'This classic international law thus consisted of a set of rules with a geographical bias (it was

[211] Montevideo Convention, 'Montevideo Convention on the Rights and Duties of States' (1993) League of Nations Treaty Series 165 19
[212] M.G. Keladharan Nayar, 'Self-Determination beyond the Colonial Context: Biafra in Retrospect' (1975) Texas International Law Journal 10 321 and Ved P. Nanda, 'Self-Determination under International Law: Validity of Claims to Secede' (1981) Case Western Reserve Journal of International Law 13 257
[213] Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' (1990) Cardozo Law Review 11 921
[214] M. Salomon, 'From NIEO to Now and the Unfinished Story of Economic Justice' (2013) 62 ICLQ 31; M. Sornarjah, 'The Return of the NIEO and the Retreat of Neoliberal International Law', in S. Buyan (ed), *International Law and Developing Countries: Essays in Honour of Kamal Hossein* (2014) 32; R. Gordon, 'The Dawn of a New, New International Economic Order' (2009) 72 Law and Contemporary Problems 131; Nils Gilman, 'The new international economic order: A reintroduction' (Spring 2015 University of Pennsylvania Press) Humanity: An International Journal of Human Rights, Humanitarianism, and Development Vol 6.1 1
[215] Dianne Otto, 'Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference' (1996) 5 Soc & Legal Stud 337, 344
[216] Dianne Otto, 'Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference' (1996) 5 Soc & Legal Stud 337, 346
[217] These proposals included non-discrimination on the basis of political, economic and social differences between states; non-coercion in the form of colonialism, neo-colonialism and all forms of foreign domination; and collective economic security including conducting economic affairs in a way that respects the interests of other states and affirmative action in relation to developing states. See Dianne Otto, 'Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference' (1996) 5 Soc & Legal Stud 337, 346
[218] Russel L. Barsh, 'A Special Session of UN General Assembly Rethinks the Economic Rights and Duties of States' (1991) American Journal of International Law 85 192

a European law), a religious-ethical inspiration (it was a Christian law), an economic motivation (it was a mercantilist law) and political aims (it was an imperialist law)'.[219] Thus, this "new law" in reality has its foundations in the violence of European imperialism, and it is not law based on the consent of all - or even a majority – of countries globally.[220] Circling back to the NIEO, although Franck[221] concludes that the NIEO ultimately failed, Simmonds and Bin Cheng maintain that the principles established by the early resolutions of the NIEO did influence some subsequent initiatives dealing with the transfer of technology, health, the control of transnational corporations, environmental protection, disarmament, energy, the resources of the sea and food production,[222]as well as some soft law principles now recognised by the ICJ.[223] As Chatterjee points out, one of the main drivers of CERDS, namely the issue of expropriation or nationalization of property owned by foreigners in decolonized states and the matter of compensation, was never resolved.[224]

This thesis argues that this unfortunate legacy has survived to influence the provisions of BITs to the present day, in the guise of expropriation (and other) clauses that restrict the RA of Host States. Furthermore, as Anghie states, it is only through studying the complex relationship between race and International Law, that one can clearly see how these cleverly re-imagined initiatives simply replicate the old colonial institutions and scaffolding.[225] By viewing International Law through a non-Eurocentric historical lens, Fenwick shows that through the centuries, the governance of non-European societies has constantly been shaped by imperial European states and international institutions, whose actions have been enabled and sanctioned by International Law for the benefit of imperial powers.[226] Having now situated the real history of Africa in its proper place, where once it had been abstracted by Eurocentric historic narrative, it is clear how the thread of colonialism and neo-colonialism fuelled by European commercial interests runs through the narrative and all the actions of the European powers towards other less powerful non-European humans, regardless of the labels under which their initiatives masquerade, such as "civilizing", "rule of law", or "good governance".

Building upon the efforts of these earlier critical thinkers, this thesis continues to critically examine the relationship and linkages between International Law, colonialism, and imperialism, with a view to proposing a solution which will assist Ghana (and potentially other African States thereafter) to rid itself of the shackles of asymmetric IIAs and take meaningful steps towards regulatory autonomy and redefining its sovereignty. In this way, this thesis situates securely into this area of scholarship. The original contribution that this thesis makes and how it situates in the wider literature is discussed later in the chapter. Next, this thesis proceeds to analyse the relationship between the International Investment Law regime and Multinational Corporations, Foreign Investors and Arbitral Tribunals.

[219] Mohammed Bedjaoui, 'Expediency in the Decisions of the International Court of Justice'(2000) British Year book of international law 71.1 1. Cited by Dianne Otto, 'Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference' (1996) 5 Soc & Legal Stud 337, 339

[220] Dianne Otto, 'Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference' (1996) 5 Soc & Legal Stud 337, 339

[221] Thomas Franck, 'Lessons of the Failure of the NIEO', paper presented at the Canadian Confederation of International Law, Annual Conference, 17 October 1986; S.K. Chatterjee, 'The Charter of Economic Rights and Duties of States: An Evaluation after 15 years', (1991) International and Comparative Law Quarterly 40 669

[222]Kenneth R Simmonds, 'International Law and the New International Economic Order', 67-76 in Bin Cheng (ed) *International Law: Teaching and Practice (*London: Stevens 1982)

[223] Christine M Chinkin, 'The Challenge of Soft Law' (1989) International and Comparative Law Quarterly 3, 850

[224] S.K. Chatterjee, (1991) 'The Charter of Economic Rights and Duties of States: An Evaluation after 15 years' (1991) International and Comparative Law Quarterly 40 669

[225] Antony Anghie, 'Decolonizing the Concept of "Good Governance"', in Gruffydd Jones, B.(ed), *Decolonizing International Relations, (*Rowman and Littlefield, Lanham*, MD* 2006) 109, 126.

[226] Charles G. Fenwick, *Wardship in International Law* (Washington D.C.: US Government Printing Office, 1919); See also Alpheus H. Snow, *The Question of Aborigines in the Law and Practice of Nations* (New York: G.P. Putnam's Sons, 1921); See James C Hales, 'The Reform and Extension of the Mandate System. A Legal Solution of the Colonial Problem' (1940) Transactions of the Grotius Society 26 153

2.1.6 INTERNATIONAL INVESTMENT LAW AND ITS RELATIONSHIP WITH MULTINATIONAL CORPORATIONS, FOREIGN INVESTORS AND ARBITRAL TRIBUNALS

In this sub-section, the literature that points out the impact of history on this strand of international law, namely International Investment Law, is critically examined, showing the impact of historic bias on the law and how this undermines the ability of host states to regulate in the interests of their citizens, and in effect, curbing their sovereignty. Sornarajah examines this topic from the viewpoint of a person seeking to 'establish the foundations of the law clearly in the international law rules on state responsibility and dispute resolution, rather than approach it with the central focus on investment treaties and arbitration'[227] as other authors have done. He is forthright in his assertion that any criticism levelled at his work on the grounds that it focusses too much on the North-South divide is misplaced, since developing countries still bear the brunt of the inequalities of the International Law. He therefore advocates that to attempt to 'sanitise the law from the asymmetries is to participate in the old positivist game of hiding the reality that private power has no role in shaping the principles of international law'.[228] He refuses to do this, and his stance is borne out in the way he impeccably traces the historical underpinnings of the international law on foreign investment. As an Academic[229] affiliated with the Division on Investment and Enterprise at UNCTAD,[230] Sornarajah provides a unique insight into the field of International Investment Law. Agreeing with Stiglitz[231] that the 'massive proliferation'[232] of BITs in the 1990s can be attributed to a combination of factors, he lists these as (a) a signalling function indicating that the Host State was open to foreign investment and the protections afforded to foreign investors; (b) a giving in to pressure, advice or just convenience; and (c) the emergence of neo-liberalism as the accepted economic wisdom of that era.[233]

As previously evidenced, the history of Foreign Investment started from the eighteenth and nineteenth centuries, when investment was usually made as part of colonial expansion. Since the imperial system ensured that capital flows were protected within this system, there was no need for colonial powers to develop a system of international law to protect their foreign investments. With the ending of colonialism, the forces of nationalism in the newly independent states were set free and their leaders proceeded not only to agitate for the ending of the economic stranglehold of the former colonizers on their economies, but also for a NIEO, under the auspices of the General Assembly of the UN, aimed at ensuring fairness to developing countries in respect of trade, as well as allowing them to have more control in the process of foreign investment in their economies. Unfortunately, this burgeoning ability by developing states to harness their collective numerical influence to shaping the law did not last. Towards the end of the twentieth century, there was a dramatic shift in policy due to the fact that there were so few banks from the developed world willing to lend money to developing states. This dearth of lending opportunities, together with the rise of free market economics emanating from the USA and the UK as well as a perception that the liberal attitudes of states like China, Hong Kong and Singapore to foreign investment was the reason for their rapid development (which was only part of the story, as it turns out), gave other developing countries the impetus to follow their example. The result was that developing countries started to compete with each other for foreign investment, which they saw as their only route to economic emancipation and development. Pressures from international financial institutions like the World Bank who stoked the belief that unless foreign investment was adequately protected (by BITs) there would be no flows of

[227] Muthucumaraswamy Sornarajah, *The international law on foreign investment* (Cambridge university press, 2010)xv
[228]Muthucumaraswamy Sornarajah, *The international law on foreign investment* (Cambridge university press, 2021)xx
[229] Lauterpacht Centre for International Law at Cambridge University, National University of Singapore, Harvard Law School, Centre for Transnational Legal Studies, London, Osgoode Hall Law School, Toronto, Centre for Petroleum & Natural Resources Law, Dundee.
[230] United Nations Conference on Trade and Development
[231] Joseph E Stiglitz, *The roaring nineties: a new history of the world's most prosperous decade* (WW Norton & Company, 2004)
[232] Muthucumaraswamy Sornarajah, *The international law on foreign investment* (Cambridge university press, 2017) 204
[233] Ibid 205-207.

foreign investment into a Host State,[234] fuelled this competition amongst developing states and explains why their attitude to foreign investment seemed to have changed so dramatically since the heady days of the NIEO.

Reflecting upon the usual provisions to be found in BITs, and in particular the Dispute Resolution clauses directing that disputes arising out of BITs must be dealt with by International Arbitrators, Sornarajah cites the example of *AAPL v. Sri Lanka*,[235] a case that showed how effective old-style BITs were at conferring jurisdiction on international arbitral tribunals and in providing relief to the foreign investor. In his view, there has been too rapid a movement in favour of the protection of the rights of the foreign investor with not enough consideration given to the regulatory interests of Host countries. He contends that the unsurprising backlash has already begun, coming mostly from NGOs, and developing Host Countries, but interestingly and unexpectedly, also from the developed countries, whose attitude changed when they began to be at the receiving end of cases from foreign investors[236] who demonstrated that in their view, creative strategies were a tool that they were free to use and would use indiscriminately. It is extremely relevant to this thesis that the response of the developed countries to the actions of Investors in bringing cases against them came in the form of new Model Treaties from the USA[237] and Canada[238] which sought to achieve a balance by introducing new defences. Norway's Model Treaty, [239] the Association of South-East Asian Nations (ASEAN) Agreement on Investment[240] and the Canadian Model BIT,[241] (which aims to deal with environmental concerns) are further examples of attempts by developed states to balance the objectives of Host State's regulatory autonomy against the aim of the foreign investor to protect their investments.

This underlines the premise of this thesis, that the answer to the issue of problematic BIT provisions, lies in coming up with a solution that is "fit for purpose" for a developing Host State.

Van Harten also describes Investment Treaty Arbitration (ITA) as 'an important legal and institutional piece of the neoliberal puzzle' which 'imposes exceptionally powerful legal and economic constraints on governments and, by extension, on democratic choice, in order to protect the assets of multinational firms from regulation'.[242] By tracing the history of ITA from colonial times, he shows how the 'international' character of investment disputes stems from colonial and post-colonial wrangling emanating from the desire of foreigners to control assets and resources belonging to Third World countries.[243] As he points out, it is no coincidence that the sudden proliferation of BITs in the late 1980s and early 1990s took place around the time that the Washington Consensus[244] was being promoted by the Global North, resulting in large numbers of treaties being concluded between several developing countries and 12 major capital-exporting countries.[245] He also makes the point that what is clear with hindsight is that by joining the ITA regime, a host of developing countries were

[234] Ibid 29.
[235] *Asian Agricultural Products Ltd v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/87/3*, 4 I.C.S.I.D. Rep. 246 (1990).
[236] See the explosion of litigation under NAFTA and also the first USA case before ICSID that is not a NAFTA case in 2021.
[237] Microsoft Word - BIT text for ACIEP Meeting (unctad.org) accessed on 03.09.2022. See Fact Sheet - FACT SHEET: Model Bilateral Investment Treaty | United States Trade Representative (ustr.gov) accessed on 03.09.2022
[238] download (unctad.org) Canada Model BIT 2021 accessed on 03.09.2022.
[239] Norway Model BIT (2007)en (unctad.org) (shelved) accessed on 03.09.2022.
[240] download (unctad.org) ASEAN (Association of South-East Asian Nations), Hong Kong, China SAR BIT accessed on 03.09.2022
[241] download (unctad.org) Canada Model BIT 2021 accessed on 03.09.2022.
[242] Gus Van Harten, 'Five Justifications for Investment Treaties: A Critical Discussion' (2010) 2 Trade L & Dev 19 24
[243] Gus Van Harten, *Investment Treaty Arbitration and Public Law*, (Oxford University Press Inc. New York 2007) 14; AA Fatouros, 'International Law and the Third World' (1964) 50 Virg L Review 783.
[244] See https://www.intelligenteconomist.com/washington-consensus/ accessed on 03.09.2022.
[245] Gus Van Harten, 'Five Justifications for Investment Treaties: A Critical Discussion' (2010) 2 Trade L & Dev 19, 24. Those treaty networks remain the core of the system in that they generated roughly 90% of known investor claims from ten of the 12 major capital exporting countries, namely the U.S., U.K., Germany, France, the Netherlands, Hong Kong, Switzerland, Japan, Spain, Belgium, Canada, and Italy. The 12 are listed in order of total FDI outward stock for 2008 as reported in UNCTAD, World Investment Report 2009, 251-54 (New York and Geneva, United Nations, 2009). There were no investor claims relating to Hong Kong or Japan.

inadvertently endorsing International Arbitration as a 'governing arrangement to regulate and discipline their governments on behalf of foreign investors (but not vice versa) more directly and more comprehensively than any international adjudicative regime since the colonial era'.[246]

Furthermore, Van Harten accurately points out the fact that ITA is unique in the public law arena insofar as it uses the model of private arbitration instead of a tenured judiciary to conclusively decide what governments, legislatures, courts and public administrators are allowed to do in the exercise of their regulatory powers in their own countries under the law.[247] The decisions of these private arbitrators are for the most part, final and not subject to review or appeal. Whilst acknowledging that his point of view may be seen as controversial, he states that the ISDS system is inherently flawed and the arbitrators may be perceived as biased because they are untenured and because the only party able to bring claims under this system is the foreign investors, and therefore the arbitrators may be suspected of interpreting investment treaties broadly (to the detriment of sovereign states with budgetary constraints) in order to make the system even more appealing to potential claimants and thus increase their chances of further lucrative appointment as arbitrators.[248] He further points out that the current ITA system is at odds with principles of judicial accountability, transparency, coherence of awards and with the principles of independence of both the Arbitrators and the governments in the Host Countries.[249] The fact that since the late 1990's the ISDS system has enabled foreign investors to file hundreds of claims against Host States (usually developing countries), resulting in numerous awards and orders being made against the Host States, has prompted debate amongst commentators about the policy implications of investment treaties upon the regulatory space of Host States, and raised concerns about the legitimacy, fairness and independence of arbitral tribunals.[250]

In this often polarised debate, arbitrators like Jan Paulsson are adamant that the ISDS system offers a 'neutral and impartial forum in which to resolve investor-state disputes as a basis for protecting foreign-owned assets and ensuring the Rule of Law',[251] whilst commentators like Nathalie Bernasconi-Osterwalder, Olivia Chung and Ibironke Odumosu maintain that the system is weighted in favour of investors and capital-exporting states to the detriment of Host States, especially governments in developing countries.[252] Basing his research on a study of a systematic content analysis of all publicly available decisions dealing with jurisdictional matters in the 140 cases available in the public arena under investment treaties until May 2010,[253] Van Harten concludes that whilst his results could be described as tentative and conditional, they could not be explained away as chance or random and therefore it behoved policy makers to re-consider the aim of investment treaties and how well investment arbitration served this aim of fairly and adequately representing the various interests before them. Above all, he concluded that his findings highlighted the fact that whilst there was not enough evidence to support actual bias, perceptions of bias, arising from an analysis of certain aspects

[246] Gus Van Harten, 'Five Justifications for Investment Treaties: A Critical Discussion' (2010) 2 Trade L & Dev 19, 26.
[247] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007)vii
[248] Ibid.vii
[249] Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50 Osgoode Hall L J 211.
[250] Jose Augusto Fontoura Costa, 'Comparing WTO Panelists and ICSID Arbitrators: the Creation of International Legal Fields' (2011) 1:4 Onati Socio-Legal Series 3; See also Catherine A Rogers, 'The Vocation of the International Arbitrator'(2005) 20:5 Am U Int'l L Rev 957 1006
[251] Jan Paulsson, *Denial of Justice in International Law* (Cambridge, UK: Cambridge University Press, 2005) 265; See also Thomas W Walde, 'The Present State of Research Carried Out by the English-Speaking Section of the Centre for Studies and Research' in Phillipe Kahn & Thomas W Wilde (eds), *New Aspects of International Investment Law* (The Hague: Hague Academy of International Law, 2007); and Charles N Brower & Stephan W Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9:2 Chicago J Int'l L 471.
[252] Nathalie Bernasconi-Osterwalder, 'Who Wins and Who Loses in Investment Arbitration? Are Investors and Host States on a Level Playing Field? The Lauder/Czech Republic Legacy' (2005) 6:1 J World Inv't & Trade 69; See generally, Olivia Chung, 'The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration' (2007) 47:4 Va J Int'l L 953; See also Ibironke T Odumosu, 'The Antinomies of the (Continued) Relevance of ICSID to the Third World' (2007) 8:2 San Diego Int'1 LJ 345.
[253] Mark A Hall & Ronald F Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96:1 Cal L Rev 63.

of arbitrator decision-making, were credible in the absence of the usual safeguards which would have been in place had the cases been heard before judges (Judicial Independence).[254] In the second part of the study referred to earlier, Van Harten focused on two sets of actors that arbitrators appear dependant on, by virtue of the way the system operates. These are foreign investors (prospective claimants) and major capital-exporting states. Prospective claimants are obviously very influential, as they are the only ones able to initiate cases in the ISDS eco-system.[255] Major capital-exporting states are also very influential by virtue of their role in negotiating investment treaties and also due to the influence they wield in organisations where these states choose or nominate the officials[256] responsible for appointing persons to act as arbitrators on Panels when parties cannot agree on an arbitrator.[257] With the caveat that the study never set out to be the 'final word' on whether or not there is bias in the ISDS system,[258] and acknowledging its limitations, Van Harten concludes that:

> The findings provide a perspective on how arbitrators are able to, and may in fact, shift the rules according to who is suing whom and may even be incentivised to do so as a result of their unique status compared to other adjudicators who decide similar types of disputes.[259]

His view based on the study is that whilst there was only 'tentative evidence…of systemic bias' at present, it underlined the importance of the tested and tried institutional safeguards of 'judicial independence, such as secure tenure, a set amount of remuneration not dependent on the length or frequency of cases, objective methods of case assignment, and prohibitions on issue conflicts and outside counsel work',[260] all of which would go a long way towards reducing the risk of bias, both real and perceived, in the ISDS system. Such institutional safeguards, he believed, would eradicate the real concern felt by users of the system about the presence of potential bias.[261]

Additionally, Van Harten makes it clear that in his opinion, Arbitral Tribunals have over the years become too powerful. To redress this perceived problem, he proposes the establishment of an International Investment Court to replace the system of private arbitration and suggests that an independent Appellate body be established for the existing international investment arbitration systems. Although he also recommends that governments must exercise greater care when considering entry into the ISDS system and/or, exercise greater care in the maintenance or renewal of existing treaties, and that they should consider options for reform, he does not go as far as to state exactly HOW this greater care could be exercised either at entry level or at the renewal / renegotiation stage, nor does he specify which options for reform governments should consider. This thesis will propose a solution which could be the essential missing link in the existing literature.

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[254] Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50 Osgoode Hall L J 211, 250.
[255] Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration' (2016) 53 Osgoode Hall L J 540, 544.
[256] In bodies such as the International Centre for the Settlement of Investment Disputes (ICSID), or the Permanent Court of Justice (PCJ)
[257] Gus Van Harten, 'Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law' in Stephan Schill (ed), *International Investment Law and Comparative Public Law* (New York: Oxford University Press, 2010) 627.
[258] Gregory C Sisk & Michael Heise, 'Judges and Ideology: Public and Academic Debates About Statistical Measures' (2005) 99:2 Nw UL Rev 743, 794; David E Bloom, 'Empirical Models of Arbitrator Behavior under Conventional Arbitration' (1986) 68:4 Rev Econ & Statistics 578.
[259] Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration' (2016) 53 Osgoode Hall L J 540, 575.
[260] Ibid 576.
[261] Ibid 576.

In the next section, this thesis will undertake an examination of International Law through the critical lens of a body of work known as TWAIL, which is an acronym for "Third World Approaches to International Law".[262]

2.1.7 INTERNATIONAL LAW THROUGH THE CRITICAL LENS OF TWAIL

In the late 1990's a group of graduate students in North America and a new branch of critical legal thinkers expanded the debate on International Law further by launching a project under the banner of "Third World Approaches to International Law" (TWAIL).[263] TWAIL has since spread far beyond its North American origins, encompassing a network of scholars and scholar-practitioners spanning the globe. This 'loose and heterogenous polycentric network of scholars', as described by James Gathii,[264] have continued to expand and re-shape the concept of TWAIL, providing a continuing critique of both the scholarship and the politics of international law. These TWAIL scholars aim to highlight the extent to which international law and international financial institutions have given legitimacy to the marginalisation and domination of the peoples of the third world or non-European states and peoples. They also attempt to set out a roadmap of how these challenges can be overcome. One of the original scholars in this school, Anghie points out that even though states initially primarily dealt with disputes relating to a host state's allegedly unfair treatment of foreign citizens and their property through political means and forceful "gunboat diplomacy", ad hoc commissions and arbitral tribunals also had a place in this arena prior to the 20th century.[265] The idea of commissions and arbitral tribunals can be traced back to the 1794 Treaty of Amity, Commerce and Navigation[266] and for example, Legum and Stuyt refer to the commission for dispute resolution between British and US nationals formed during the American Revolution.[267] Another commentator, Brownlie records the fact that several arbitral tribunals were established to settle disputes between foreign nationals and host states during the mid-19th to early 20th century,[268] and Dolzer notes that those commissions handled the claims before them using the diplomatic protection model.[269] In situating and explaining TWAIL, Anghie states that it is important to understand the past before looking towards the future[270] and that to him, TWAIL is not a fixed and established set of rules or methodology, but a political project. For Anghie the underlying questions for TWAIL 1 scholarship are firstly, 'How can international law be used to further the interests of the peoples of the Third World?' and secondly, 'How does a particular rule or legal regime empower or disempower people in the Third World?'[271] Whilst conceding that these questions themselves provoke further questions such as the identity of the person asking the questions and who the peoples of the [so-called] Third World are, he is content that they are the correct questions, as they point to the political dimensions of TWAIL, which in turn ensures that TWAIL can be seen, not so much as a fixed methodology, but as an analytical tool to help us explore these important issues, regardless of whether we are studying environmental law, or international law or foreign investment

[262] Mutua, Makau. 'What is TWAIL?' *Proceedings of the ASIL Annual Meeting*. Vol. 94 (Cambridge University Press, 2000)
[263] Fred E. Snyer & Surakirat Sathirathai (eds), *Third World Attitudes Toward International Law: An Introduction* (BRILL 1987)
[264] James Thuo Gathii, 'The Agenda of Third World Approaches to International Law (TWAIL)' in Jeffrey Dunoff and Mark Pollack (eds) *International Legal Theory: Foundations and Frontiers* (Cambridge University Press 2019)
[265] See generally, A Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2005)
[266] Also known as the Jay Treaty between Great Britain and United States, November 19, 1794, 52 Cons. T.S. 243, it entered into force on October 28, 1795.
[267] B. Legum, 'The innovation of investor-state arbitration under NAFTA' (2002) 43 Harv. J. Int'l L. 531. The Jay Commissions issued over 500 awards. See A.M. Stuyt, *Survey of International Arbitrations, 1794-1989*, 3rd edn (Dordrecht: Martinus Nijhoff Publishers, 1990), 2; See also D.M. Johnston, *The Historical Foundations of World Order: The Tower and the Arena* (Leiden: Martinus Nijhoff, 2008), 636.
[268] James Crawford and Ian Brownlie, *Brownlie's principles of public international law* (Oxford University Press, USA, 2019); See also J.H. Ralston, *International Arbitration, from Athens to Locarno* (London: OUP, 1972)
[269] R. Dolzer, 'Mixed Claims Commissions' (1992) Encyclopaedia of Public International Law Vol.III 438.
[270] Antony Anghie, 'TWAIL: Past and future' (2008) International Community Law Review 10.4 479.
[271] Ibid 479.

or international financial institutions. He also elucidates his and his TWAIL colleagues' continuous commitment to international law despite its perceived shortcomings, stating that the task, perhaps, 'is not that of achieving consistency and resolving paradox but rather, choosing which paradoxes and tensions to engage with in our personal and professional lives'.[272]

Another TWAIL scholar, Chimni, talks about TWAIL from the perspective of Indian scholarship[273] where he begins by bemoaning the dearth of critical legal scholarship within the ranks of the legal profession at the time, in 2011. From the Indian perspective, he states that the two reasons which gave rise to TWAIL scholarship were the desire to challenge the narrative emanating from western scholars to the effect that International Law was a product of European Christian civilization, and an imperative to reform the process and structure of International Law such that it would respond to the needs and concerns of peoples of the Third World and more particularly to the needs of Indian people, even before India gained her independence.[274] He reflects that the scholar Anand maintained in his earlier writings that the language of International Law was familiar to India from the earliest times, many years before independence and in fact that figures like Hugo Grotius borrowed concepts from the doctrines and practices of Asian states.[275] In articulating the meaning of TWAIL, Chimni posits that TWAIL scholars are 'united in their opposition to the politics of empire'[276] and quotes authors like Mohsen al Attar and Rebekah Thompson who describe TWAIL as 'an alternative narrative of international law that has developed in opposition to the realities of domination and subordination prevalent in the international legal apparatus…, united in its rejection of what its champions regard as an unjust relationship between the Third World and international law'.[277] TWAIL scholars are united by the deep desire they have to help in establishing a 'truly universal international law that goes to promote a just global order'.[278] Eloquently describing the ability of international law to provide a cloak of legitimacy for ideas in a bid to make them appear as the 'norm', he states:

> [D]ominant social forces in society maintain their domination not through the use of force but through having their worldview accepted as natural by those over whom domination is exercised. . .. The language of the law has always played in the scheme of things, a significant role in legitimizing dominant ideas for its discourse tends to be associated with rationality, neutrality, objectivity, and justice.[279]

Looking at TWAIL through a 'generational lens', Chimni credited the first generation of TWAIL scholars (referred to as TWAIL I)[280] with having contributed greatly to the understanding of contemporary international law by 'defining and articulating the attitude of the newly independent states to international law'.[281] These "founding fathers" not only documented the contribution of third world communities to the evolution and development of international law, thus helping to jettison the myth that international law was somehow "invented" in the West, but they also underlined the reality of

[272] Antony Anghie and B.S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflict' in Steven R. Ratner and Anne-Marie Slaughter (eds), *The Methods of International Law* (2004)
[273] B S Chimni, 'The World of TWAIL: Introduction to the Special Issue' (2011) 3 Trade L & Dev, 14.
[274] Bandyopadhyay, Pramathanath. 'International law and custom in ancient India' (1920). Cited by B S Chimni in, 'The World of TWAIL: Introduction to the Special Issue' (2011) 3 Trade L & Dev
[275] B S Chimni, 'The World of TWAIL: Introduction to the Special Issue' (2011) 3 Trade L & Dev,17.
[276] Ibid 17.
[277] Al Attar, Mohsen, and Rebekah Thompson. 'How the Multi-Level Democratisation of International Law-Making Can Effect Popular Aspirations Towards Self-Determination' (2011) Trade L. & Dev. 3 65.
[278] B S Chimni, 'The World of TWAIL: Introduction to the Special Issue' (2011) 3 Trade L & Dev, 18.
[279] Bhupinder S. Chimni, 'Third World Approaches to International Law: A Manifesto' in Antony Anghie et al. (eds.), *The Third World and International Order: Law, Politics and Globalization* (Brill Nijhoff 2003) 47, 60. Cited by Odumosu, Ibironke. "Challenges for the (Present/) Future of third World Approaches to International Law' (2008) International Community Law Review 10.4 467, 471.
[280] These include R. P. Anand, M Bedjaoui, T. E. Elias, G Abi-Saab, S. P. Sinha, Nagendra Singh, J. J. G. Syatauw, and Chris Weeramantry. See B S Chimni, 'The World of TWAIL: Introduction to the Special Issue' (2011) 3 Trade L & Dev,18.
[281] B S Chimni, 'The World of TWAIL: Introduction to the Special Issue' (2011) 3 Trade L & Dev, 18.

the sovereignty of the vast swathe of newly-independent peoples, whilst simultaneously recognising that they had to find a way of working within the international law regime using the "one state one vote formula" in the UN General Assembly to make their desire for the restructuring of contemporary international relations and law heard, since a complete rejection of the rules of international law was not a feasible option. Describing TWAIL as 'not so much a method as a political grouping or strategic engagement with international law, defined by a commonality of concerns',[282] academics Eslava and Pahuja additionally explain that these 'concerns' are the attempts of TWAIL scholars to attune the operation of international law to persons and topics that have traditionally been positioned at the receiving end of international law - usually seen as the 'others of international law',[283] all of which ties in with Anghie's concept of it as a Political Project. They point out the fact that the original TWAIL scholars originated from the Global South and as 'children of the post-colony' born either in ex-colonies or part of their diasporas, they could clearly see the effects of the binaries such as 'Civilised/Barbarian, Believer/Infidel, White/Black or Advanced/Primitive' which served to both underpin and legitimise the spread of international law and its jurisdiction that took place from the sixteenth to the nineteenth centuries, which was the period of time during the process of colonisation and the expansion of colonial rule.[284] These pre-colonial binaries have different names in modern contemporary terminology, such as the dualities of Developed/Developing, Centre/Periphery, Advanced/Emerging, Rich/Poor states,[285] but the reality is that international law remains consistently conceptually Eurocentric at its core, not least because all these concepts are firmly rooted in the political, cultural and economic history of Europe, not in the histories of the "other".

Eslava and Pahuja state that by their actions in excavating the distortions of international law, both historically and conceptually, TWAIL scholars have succeeded in forging out a unique juridical and political space which enables discourse about issues that have accompanied the expansion of the international legal order, such as political economy, the cultural practices of differentiation and the excessive exploitation of natural resources, to name but a few. The TWAIL contribution to international legal scholarship therefore, whilst not hesitating to point out the way in which issues of material distribution and imbalances of power play out in the structuring of international legal concepts, categories, norms and doctrines since colonial times, is not restricted to a concern only with issues affecting the Global South, but rather argues for the improvement of international law for the benefit of the whole world, by advancing a reformist agenda that argues for the improvement of international law more generally. In summary, they define TWAIL as a 'virtual site from which scholars and activists, from the South and the North, can work both to resist and to reform international law'.[286] Karin Mickelson, Makau Mutua and Obiora Chinedu Okafor, to name but a few TWAIL scholars, make a very important contribution to the revitalisation of questions about justice in the international legal order because for them, the solution is not to abandon international law because of its (obvious) shortcomings, but to systematically oppose the negative aspects of international law whilst simultaneously looking to reform and reconstruct the world order that the international normative project has created.[287]

[282] Luis Eslava and Sundhya Pahuja, 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International' (2012) Verfassung und Recht in Übersee / Law and Politics in Africa, Asia, and Latin America, Vol. 45, No. 2 195.
[283] See generally, Anne Orford, (ed). *International law and its others*. (Cambridge University Press, 2006)
[284] Luis Eslava and Sundhya Pahuja, Beyond the (Post)Colonial: TWAIL and the Everyday Life of International: Verfassung und Recht in Übersee / Law and Politics in Africa, Asia, and Latin America (2012) Vol. 45, No. 2 195, 196.
[285] Jennifer Beard, *The political economy of desire: International law, development and the nation state* (Routledge, 2007) 2.
[286] Luis Eslava and Sundhya Pahuja, Beyond the (Post)Colonial: TWAIL and the Everyday Life of International: Verfassung und Recht in Übersee / Law and Politics in Africa, Asia, and Latin America, 2012, Vol. 45, No. 2 (2012) 195, 199.
[287] See, generally, B. S. Chimni, 'A Just World under Law: A View from the South, (2006-2007) American University International Law Review 22 199; B. S. Chimni, The Past, Present and Future of International Law: A Critical Third World Approach' (2007) Melbourne Journal

Pahuja and Eslava continue the argument by making linkages between what may seem lofty international law and the everyday lives of people in the Global South, citing as examples the regulatory work done by biometric scanners at international frontiers in the fight against terrorism and the control of illegal migration, the extensive use of ID cards and water meters as a rationale for the measurement of development projects, or even the targeted use of mobile phone technology for the integration of small farmers into the global trading system. Using these mundane examples, they make the point that we clearly cannot limit our excavation of the roots and tendrils of international law to only those arenas that self-identify as "international". They conclude by encouraging the 'political international lawyer', to start 'seeing the international in those places that usually escape our attention and yet regulate our lives' in the hope that by so doing, she will recognise and take advantage of new opportunities which resist the ideal of 'the international' as it materialises in everyday lives.[288] In particular, this exhortation is directed at the "governed", by which they mean the billions of people subjected every day to developmental interventions in the Global South, those whom Chatteijee dubs 'most of the world'.[289]

Furthermore, Gathii points out that TWAIL is a movement spanning several decades and so it is neither helpful nor accurate to attempt to pigeonhole the ethos of TWAIL in terms of TWAIL 1 or TWAIL II, since the TWAIL scholars of the different eras were concerned about different things. For example, whilst the TWAIL scholars of the 1950's and 1960's were concerned with the promise of decolonisation and statehood, those of the 1997 moment were more concerned with post-cold war liberal triumphalism. They both shared the same aims of seeking to 're-tell, re-write and re-configure international law'[290] by debunking myths relating to its Westphalian origins and ensuring that the Third World's perspectives are given their correct weight. This has been done by 'rejecting Eurocentric accounts of International Law that fail to account for the history of subordinated groups within it' as well 'its current consequences such as those related to climate change, poverty and other forms of violence'.[291] As Gathii states, TWAIL is best described as an 'oppositional and transformative set of commitments and ideas for rethinking the international legal order'.[292] Gathii also describes TWAIL scholars as providing an ongoing critique not only of the scholarship of International Law, but also the politics surrounding it. TWAIL scholars also delve into how and how extensively International Law has succeeded in legitimising the marginalisation and domination of the peoples of the third world, whilst making this marginalisation and domination seem like the 'norm' in global discourse. TWAIL scholars also posit suggestions about how these challenges can be overcome by the people it affects worldwide. This goes to the core of what TWAIL scholars perceive their job to be. Another way in which this particular school of academics believe that international law has succeeded in legitimising the marginalisation and domination of the third world is in the use of language, whereby liberal politics

of International Law 8 (2) 499; Karin Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (1998) Wisconsin International Law Journal 16 (2) 353; Karin Mickelson, 'Taking Stock of TWAIL Histories' (2008) International Community Law Review 10 355; Makau Mutua, 'What Is TWAIL?', ASIL Proceedings of the 94th Annual Meeting, Washington D.C., April 5-8, 2000; Obiora Chinedu Okafor, 'Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective' (2005) Osgoode Hall Law Review 43 1-2 171; Amr Shalakany , 'Arbitration and the Third World: A Plea for Reassessing the Bias under the Specter of Neoliberalism' (2000) Harvard International Law Journal 41 (2) 419.

[288] Luis Eslava and Sundhya Pahuja, Beyond the (Post)Colonial: TWAIL and the Everyday Life of International: Verfassung und Recht in Übersee / Law and Politics in Africa, Asia, and Latin America, 2012, Vol. 45, No. 2 (2012) 195, 220.

[289] Partha Chatterjee, *The Politics of the Governed: Reflections on Politics in Most of the World*, (Columbia University Press 2006)

[290] James Thuo Gathii, The Agenda of Third World Approaches to International Law (TWAIL) (December 20, 2018) 2. Forthcoming in Jeffrey Dunoff and Mark Pollack (eds) *International Legal Theory: Foundations and Frontiers*, (Cambridge University Press 2019), Available at SSRN: https://ssrn.com/abstract=3304767

[291] Ibid 2.

[292] James Thuo Gathii, The Agenda of Third World Approaches to International Law (TWAIL). In: Dunoff JL, Pollack MA, eds. *International Legal Theory: Foundations and Frontiers*. (Cambridge University Press; 2022)153. DOI: https://doi.org/10.1017/9781108551878.007

and seemingly-inoffensive words like sovereign equality, self-determination, human rights, and equality have been used to mask the economic hierarchy in the world and the subordination between the wealthy and not so wealthy nations[293], thus perpetuating the legacy of colonial conquest and European imperialism.[294] Gathii also points out that 'international law has the effect of entrenching asymmetrical power relationships between the former colonies and former colonial powers'[295] for example in the area of trade, investment, development, and human rights, where the international legal regimes were crafted by the Europeans at a time when the Third World Countries were not in a position to participate in the decision-making. These legal regimes have nevertheless been portrayed and projected as "Universal Ideals and Goals" when in reality they have always been more beneficial to the former colonial powers and moreover are often applied in ways that work out to the detriment of third world peoples and countries. The unique value of the TWAIL approach is underlined by Mohsen al Attar who states that whilst 'movements are known to collapse just as quickly as they form, … it is testament to TWAIL's significance that, twenty years on, it is still gaining momentum'.[296]

Okafor and Mutua in separate papers, argue that the present position of African States is directly linked to the fact of the imposition of the 'state' by colonial rulers, which has greatly contributed to the differences and animosities that continue to cause conflicts and wars in Africa to this day.[297] According to Gathii, 'a central question for TWAIL is how to *defang international law of its imperialist and exploitative biases against the global South* in general and Africa in particular'.[298] In searching for an answer to his own question, he argues that TWAIL isn't simply a search for a 'new, truthful, post-imperial international law' but rather a recognition that the task of achieving a more equitable and fair system for the poorest people on the planet is a complicated endeavour and one that, whether we like it or not, is shaped by International Law and the institutional apparatuses that prop it up. Gathii sums up his explanation of the Agenda of Third World Approaches to International Law by positing that TWAIL offers up one of the 'better lenses through which to examine and understand this more complicated analysis of global wealth and poverty that implicates the elites of the(se) poor countries as part of the global capitalist class as it does those from the older empires and those from countries like India and China'.[299] Whilst Gathii admirably sets out the TWAIL Agenda and shows that Third World countries within the International Law arena now have to contend not only with their old colonial masters in a different guise as 'equals' in BITs, but also have to contend with countries like India and China, whose hegemonic actions using their newly acquired economic success make them unable to speak on behalf other Third World states with integrity, he does not provide any solutions. He does not suggest a way that Third World countries might be able to find their way out of this situation. In a similar vein Mohsen al Attar, in his very interesting critique of TWAIL, describing it as 'a Paradox within a Paradox', concludes by stating that 'Like the international legal regime it critiques, I

[293] See Martii Koskenniemmi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2006)544.
[294]James Thuo Gathii, 'Neo-Liberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy' (1999) 98 MICH. L. REV. 1996-2055
[295] Ibid 1996
[296] Moshen al Attar, 'TWAIL: a paradox within a paradox' (2020) International Community Law Review 22, no. 2 163.
[297] See generally Obiora Okafor, *Re-Defining Legitimate Statehood: International Law and State Fragmentation in Africa*. vol. 36. (BRILL, 2021). See also Makau Mutua in *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113 (1995), refers to his provocative thesis about redrawing the map of Africa because of the colonial illegitimacy of current borders is yet another example of seeing international legal history as relevant to and constitutive of the present rather than as a relic of the past.
[298] James Thuo Gathii, The Agenda of Third World Approaches to International Law (TWAIL) (December 20, 2018). Forthcoming in Jeffrey Dunoff and Mark Pollack (eds) *International Legal Theory: Foundations and Frontiers*, (Cambridge University Press 2019), Available at SSRN: https://ssrn.com/abstract=3304767 Italics mine.
[299]James Thuo Gathii, The Agenda of Third World Approaches to International Law (TWAIL) (December 20, 2018). Forthcoming in Jeffrey Dunoff and Mark Pollack (eds) *International Legal Theory: Foundations and Frontiers*, (Cambridge University Press 2019), Available at SSRN: https://ssrn.com/abstract=3304767; See also M. Sornarajah, The Unworkability of "Balanced Treaties" and the Importance of Diversity of Approach Among the BRICS, 112 AJIL UNBOUND 223-227 (2018) (arguing that China has emerged as a newly hegemonic actor in international investment in a way that undermines its traditional role as champion for the Third World.)

am forced to conclude that, at this stage, TWAIL has little more than paradoxes to offer. But, oh, what succulent paradoxes they are'.[300]

Additionally, Koskenniemi, a scholar and lawyer described by Jouannet as one who uniquely 'has progressed without ever appearing constrained by any of the frontiers that often limit academic thought'[301] and who 'genuinely seems based at the intersection between the three great traditions of the Anglo-Saxon, the German and the French',[302] argues that at the core of international law can be found deep-rooted concepts and distinctions that clearly point to 'European experiences and conceptualizations'[303] thus ensuring that regardless of the fact that postcolonialism seems to now be the new ethos of international law, the position remains that 'Europe rules as the silent referent of historical knowledge'[304] and therefore it is Europe's version of international law's past that holds sway in present-day official narrative, and also seeks to inform international law's future narrative, whilst also defining the political global economy of the present and the future.It is clear from the above that there is a significant gap in the literature, in that there is a dearth of scholarship specifically examining the importance of and need to have Specialist Teams based in Host developing countries. Most of the academic commentary is based on western economic policies and social policies but does not focus on the African perspective and what African states like Ghana can do to protect themselves, their economic aspirations, and their RA from the entrenched institutionalized bias of the ITR. Additionally, there is a gap with regards to the importance of the skill of negotiation and drafting of IIAs by African (and other developing) states. This thesis, using Ghana as a Case Study, aims to build upon the work of those scholars whose ideas have been highlighted in this section, by proposing a way in which Ghana and perhaps other developing countries in the future can navigate their way out of this situation to protect their RA and redefine sovereignty for themselves. The discussion in this Chapter which exposes the Eurocentric imperialist bias of these international constructs, aligns with the research question and the three inter-related key questions in Chapter One and leads to a discussion of the RA versus Investor Rights conundrum.

2.2 CONUNDRUM of INVESTOR RIGHTS v. REGULATORY AUTONOMY of HOST STATES

This section examines the conundrum of the rights of foreign investors versus the autonomous right of a Host State to regulate freely in the interests of its citizens in existing literature. As shown in earlier discussions, Africa has always played a significant role in International Law whether inadvertently by being forcibly coerced into this arena through the slave trade and then as colonies, or after achieving political sovereignty, through having a continued involvement in International Law although not as equal participants, up until the present day, where in the role of mostly Host States parties in IIAs, African States bear the brunt of asymmetrical agreements which have been perceived as stifling the regulatory autonomy of governments. For decades after achieving political sovereignty, developing countries sought FDI using the tools at their disposal, namely their rich natural resources. Enchandi and Newson[305] point out the conundrum faced by resource-rich countries when they state that these countries run the risk of attracting so much natural-resource-seeking investment that there was the probability that progress in other areas of their economy may be stifled. Collier suggests that other side-effects may be that intensive land use and extractive activities relating to the natural resources could have a negative environmental impact on the developing country, especially when

[300] Moshen al Attar,'TWAIL: a paradox within a paradox' (2020) International Community Law Review 22, no. 2 163, 196.
[301] Martti Koskenniemi, *The Politics of International Law* (Hart Publishing, 2011)17
[302] Ibid
[303] Martti Koskenniemi, 'Histories of international law: dealing with eurocentrism' (2011) 19.19 Rechtsgeschichte 152-176, 155
[304] Ibid
[305] Roberto Echandi and Maree Newson, 'The influence of international investment patterns in international economic law rulemaking: a preliminary sketch' (2014) Journal of International Economic Law 17.4 847.

the resources are non-renewable.[306] There is also the possibility of macroeconomic challenges, when these industries do not result in significant (or any) job creation or technology transfer for the resource-rich country.[307] A compounding effect is that in most countries, natural resources are considered as part of the national heritage, leading to politically sensitive debates as to what constitutes a fair distribution between both parties, of the gains obtained from the resources of the newly decolonised Host State, using FDI from Investors. Enchandi describes natural-resource seeking FDI as 'probably the most complex type of investment',[308] requiring careful management in order to maximise its benefits to the resource-rich developing country. And yet, due to the perceived necessity for FDI, this type of investment has historically been the first type that most developing countries have received, usually by way of a BIT, whose asymmetrical provisions end up exacerbating the existing weaknesses of the political and legal system of the Host Country and worsening the ability of the Host Country to extricate itself from the grip of economic neo-colonialism.[309]

Enchandi describes four reasons why Investors seek to invest in other countries, attributed to the British economist Dunning,[310] but for the purposes of this paper, the natural-resource-seeking investment is the most relevant. Stating how important the protection of their natural resources was to African and Asian newly independent states, Lorenzo Cotula[311] makes the point that although there has recently been an increase in market-seeking and efficiency-seeking investments[312] in some developing states, 'the protection of natural-resource investments remains an important concern in investment treaty-making'.[313] Given how important the protection of their natural resources was to developing states, one would have expected that Host states would take great care to ensure that the provisions of IIAs and BITs protected their natural resources and by extension, their RA. The reality however was that the proliferation of BITs entered into by newly independent states in the decades after independence, were usually on the basis of templates provided by the capital-exporting countries, which the Host States were content to sign in exchange for FDI. As Cotula points out, investment protection in international law debates has continued since the first International Centre for Settlement of Investment Disputes (ICSID) decision in an investor-state dispute about a shrimp farming investment in 1990.[314] According to the 2016 UNCTAD World Investment Report (2016 WIR),[315] investors brought over 700 arbitrations to protect their business interests contracted based on treaties, mostly to the detriment of Host States.

As elucidated by Van der Ploeg, investment treaties 'inherently curtail host states' regulatory space' as these treaties impose very wide-ranging obligations on host states aimed at benefiting qualifying

[306] Paul Collier, 'The Political Economy of Natural Resources' (2010) 77 Social Research 1105
[307] Ibid 1105
[308] Roberto Echandi and Maree Newson, 'The influence of international investment patterns in international economic law rulemaking: a preliminary sketch' (2014) Journal of International Economic Law 17.4 847, 854.
[309] It is therefore not surprising that the origin of nationalist movements in most developing countries and the call for a New International Economic Order (NIEO) stemmed from the idea of assertion of national sovereignty over the control of natural resources. See generally Roberto Echandi and Maree Newson, 'The influence of international investment patterns in international economic law rulemaking: a preliminary sketch' (2014) Journal of International Economic Law 17.4 847.
[310] Dunning explains four basic motives for FDI: (1) natural resource-seeking investment, that is where direct investment is required to access natural resources; (2) market-seeking investment, where the investor's intent is to penetrate markets in order to sell goods and/or services; (3) efficiency-seeking investment, where the investment takes place to use a given country as a platform to export somewhere else and to become more efficient in international production; and (4) strategic asset-seeking investment, where the firm invests because of its desire to have access to assets that are "strategic" to its positioning in the market, such as acquisition of brands, human resources, distribution networks, etc. See John H. Dunning, John H and Sarianna M. Lundan, *Multinational enterprises and the global economy* (Edward Elgar Publishing, 2008)
[311] Lorenzo Cotula, 'Investment treaties, natural resources and regulatory space: Technical issues and political choices in international investment law' in Celine Tan and Julio Faundez (eds) *Natural Resources and Sustainable Development* (Edward Elgar Publishing, 2017)8,9.
[312] Ibid 9.
[313] Ibid 9.
[314] *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, 4 I.C.S.I.D. Rep. 245, 30 I.L.M. 577 (1990).
[315] World Investment Report 2016 | UNCTAD, 101, 104 accessed 24.09.2022.

foreign investors. The result is that many regulatory actions that would have legally been within the purview of the state could now potentially be deemed a violation of applicable investment treaties, for which the host state may be held responsible and liable to pay potentially crippling financial compensation to the 'wronged' foreign investors.[316]

The crux of the matter is 'the elemental tension between investment guarantees and a conflicting public interest which the host state aspires to protect'.[317] One example of this 'elemental tension' can be found in the arbitral decision handed down in the ICSID case of *Gabriel Resources v. Romania* where the foreign investors, Gabriel Canada and Gabriel Jersey, alleged that the refusal of the Romanian government, several Romanian government authorities and the Romanian Parliament to approve a highly controversial U.S. $2 billion mining project because of its anticipated environmental and societal impacts, amounted to a violation of the fair and equitable treatment standard guaranteed under the applicable investment treaties and instituted a case at ICSID to recover losses allegedly incurred as a result. The Arbitral Tribunal in an Award dispatched to the parties on 8 March 2024, unanimously rejected Romania's objections to the Tribunal's jurisdiction and by a majority, rejected Gabriel's claims on the merits under the Canada-Romania BIT and under the UK-Romania BIT, ordering the Claimants to reimburse Respondent for the costs of the arbitration proceedings together with simple interest and to Romania for a portion of its legal costs with simple interest from the date of the Award and until full payment.[318]

Whilst it is true that host states concede a portion of their regulatory autonomy by signing up to Investment Treaties, there is an increasing clamour in existing literature for the need for 'an interpretation of key investment protection standards that better protects the ability of States to determine and implement their own regulatory priorities, including levels of protection'.[319]

Paine, for example, sets out the case for

> a partial reorientation of investment law, in which non-discriminatory measures that pursue a permissible regulatory aim, including at a particular level, should not amount to a breach of a treaty where a State uses the means that involve the least possible restriction of the competing interests protected by relevant investment treaty obligations.[320]

Although the discussion relating to the 'Right to Regulate' and 'Regulatory Chill' is still evolving, a study by Titi suggests that although new generation investment treaties are making attempts to protect the regulatory space of Host States, the unsatisfactory interpretations by some Arbitral Tribunals of some treaty exceptions, including general exceptions for the protection of public welfare objectives, indicate that 'even when states introduce the right to regulate in their treaties, arbitral tribunals are not certain to give it effect'.[321] This could point to a need for better drafting of treaty exceptions and interpretive guidance, as posited by this thesis, or, as Titi believes, the need

[316] Klara Polackova Van der Ploeg, 'Protection of Regulatory Autonomy and Investor Obligations: Latest Trends in Investment Treaty Design' (2018) 51 Int'l Law 109
[317] Ibid
[318] See Case Details | ICSID (worldbank.org) accessed on 14.09.2024. Other notable recent arbitral decisions are the *Philip Morris* tobacco packaging cases, in which the tobacco giant challenged, unsuccessfully, the Australian and Uruguayan measures on tobacco packaging. See Jarrod Hepburn and Luke Nottage, 'A Procedural Win for Public Health Measures: Philip Morris Asia Ltd v. Commonwealth of Australia, PCA Case No. 2012–12, Award on Jurisdiction and Admissibility, 17 December 2015 (Karl-Heinz Böckstiegel, Gabrielle Kaufmann-Kohler, Donald M. McRae)' (2017) *The Journal of World Investment & Trade* 18, no. 2 307-319. See also, Case Details | ICSID (worldbank.org) accessed on 14.09.2024.
[319] Joshua Paine, 'Autonomy to set the level of regulatory protection in international investment law.' (2021) *International & Comparative Law Quarterly* 70, no. 3 697, 736
[320] Ibid 697
[321] Catharine Titi, 'The Right to Regulate in International Investment Law (Revisited)' (2022) International and Comparative Law Research Center. Available at SSRN: https://ssrn.com/abstract=4058447 96

for 'a more rigorous screening of adjudicators to ensure they are competent to interpret and apply an international treaty'.[322] The solution may well be a combination of the two, or something else, as research into this area progresses.

This issue of the tension between protecting the rights of foreign investors and protecting the regulatory autonomy of Host States is therefore a live and current issue and a potential problem facing Ghana and other developing Host States.

The next section of this thesis will examine some suggested solutions in existing literature aimed at protecting the RA of Host States, ranging from a Pan African Investment Court to a curb on the powers of Multinational Corporations with a focus on CSR and Investor Responsibilities.

2.3 SUGGESTED SOLUTIONS TO THE PROBLEM OF A LACK OF REGULATORY AUTONOMY IN HOST DEVELOPING STATES

Various scholars have outlined different potential solutions to the perceived problem of a lack of RA in Host Developing States and made a case for each of these potential solutions in existing literature. The next part of this chapter is divided into five sections, each of which explores an important issue in the existing literature on areas pertaining to the conundrum of Investor Rights versus the RA of Host States, exploring possible solutions to the lack of regulatory autonomy in Host developing States in the existing body of literature. These suggested solutions are discussed in the sub-sections below.

2.3.1 A CASE FOR A PAN AFRICAN INVESTMENT COURT

Nyombi in setting out a case for a Regional Investment Court (RIC) for Africa,[323] argues that States, in the legitimate exercise of their national sovereignty, are the trustees of the interests of their citizens once this power has been bestowed upon the government through the democratic processes.[324] He concedes however, that even though the government is free to accede to IIAs with dispute resolution clauses binding them to the medium of ISDS, the reality is that without the wholehearted support of the public, these initiatives tend to be problematic, as evidenced in the manner in which ISDS initially came into existence with the assistance of Latin American States.[325] The groundswell of opposition to ISDS in recent years has come not only from the developing world but also from the developed world. Suzanne Spears evidenced this by showcasing the proliferation of multilateral and bilateral agreements which include clauses no longer committing the States Parties to ISDS dispute resolution but to dispute resolution via a mechanism that supports national policy.[326] Before recommending the institution of an RIC for Africa, Nyombi examined the investment and regulatory landscape in Africa, referencing the UNCTAD 2016 World Investment Report[327] which stated that FDI flows into Africa were down seven percent from 2014 but that trends showed these were likely to rise again in the coming decades.[328] The 2016 WIR also indicated that most FDI inflows were from developed economies outside Africa, although there was some intra-regional investment from South Africa, Kenya and Nigeria.[329] Examining the steps towards regional integration in Africa to date, starting with the African

[322] Ibid 97
[323] Chrispas Nyombi, 'A Case for a Regional Investment Court for Africa' (2018) 43 NC J Int'l L 66
[324] James Crawford, Democracy and the Body of International Law, in Gregory H. Fox & Brad R. Roth (eds) *Democratic Governance and International Law* (Cambridge University Press 2000)
[325] Paul Peters & Nico Schrijver, 'Latin America and International Regulation of Foreign Investment: Changing Perceptions' (1992), 39 Neth. Int'l. L. Rev. 355, 368; Douglas M. Johnston, *The Historical Foundations of World Order: The Tower and the Arena*, 636 (Martinus Nijhoff Publishing 2008); See also Kate Miles, *The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital* (Cambridge University Press 2013)
[326] Suzanne A Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements,* (2010) Journal of International Economic Law 13.4 1037, 1040; See also Catharine Titi, *The right to regulate in international investment law*. Vol. 10. (Bloomsbury Publishing, 2014)
[327] https://unctad.org/system/files/official-document/wir2016_en.pdf accessed 24.09.2022.
[328] World Investment Report 2016 | UNCTAD, 42 - accessed 24.09.2022.
[329] World Investment Report 2016 | UNCTAD, accessed 24.09.2022.

Economic Community (AEC),[330] he explains that as part of regional integration in Africa, some of the RECs have made tentative efforts towards a Regional Regulatory Framework by signing agreements and developing model laws containing various investment protection standards of varying degrees of efficacy and innovation.[331] Highlighting the innovative aspects of the COMESA Common Investment Area (CCIA)[332], South African Development Community (SADC),[333] Economic Community of West African States (ECOWAS) Supplementary Act on the Common Investment Rules for the Community[334] and the East African Community (EAC) Model Investment Code,[335] he concludes that although African countries, since attaining political independence, have pursued policies aimed at supporting their goal of self-determination and economic independence,[336] these have not been successful. He argues that a Pan African Investment Agreement, incorporating some of the more forward-looking provisions of the CCIA and the SADC Model BITs, could, if pursued, with the support of a RIC, result in a 'paradigm shift in international investment policy, which would set African countries on a path to self-determination in international investment law and create an opportunity for sustainable socio-economic development [on the continent]'.[337] Subsequently in his 2018 work, Nyombi rebrands his original idea of a RIC for Africa, introducing the idea of a Pan African Investment Court. The driving force behind the idea of a Pan African Investment Court would seem to be the various developments in the International Investment Dispute Resolution arena worldwide and in particular, the criticisms faced by the ISDS. The three reasons he cites as the basis of these criticisms are the increase in the number of ISDS cases, the effect these cases have on the regulatory powers of host states and the inconsistency in interpretation of IIAs by arbitral tribunals.[338]

In respect of the exponential increase in ISDS, whilst most of these claims have been made against developing countries,[339]there has also been an increase in claims brought by investors against EU countries under intra-EU BITs which may explain the EU's support for an Investment Court System to replace the present system of arbitral tribunals proliferating the ISDS regime.[340] Whilst the proposal in the EU's 2015 paper was described as "embryonic" by some commentators,[341] the EU have now made their support of a standing First Instance and Appeal Investment Court with full-time judges,

[330] The mandate of the AEC is to establish mutual economic development amongst African States through the creation of customs unions, free trade areas, a central bank, a single market, a common currency, all cumulating in an economic and monetary union. *See* The Abuja Treaty: Treaty establishing the African Economic Community, Art. 4, Jun. 3, 1991, TRT/AEC/1001 [hereinafter Abuja Treaty]; African Union, *Decision on the Report of the High Level African Trade Committee (HATC) on Trade Issues, Doc.* Assembly/AU/11(XXIV) (Feb. 16, 2015) [hereinafter HATC]; U.N. Conference on Trade and Development, *The Continental Free Trade Area: Making it work for Africa,* Policy Brief No.44, (Dec. 2015) [hereinafter The Continental Free Trade Area].

[331] U.N. Economic Commission for Africa, *Investment Policies and Bilateral Investment Treaties Landscape in Africa: Implications for Regional Integration, IX,* (Feb. 2016).

[332] Investment Agreement for the COMESA Common Investment Area, COMESA, arts. 15, 17, 19, May 23, 2007 [hereinafter COMESA]. Articles 15 (transfer of assets), 17 (national treatment) and 19 (Most Favoured Nation). In the preamble to the CCIA, Member States express a conviction that the measure, "shall contribute towards the realisation of the Common Market and the achievement of sustainable development in the region."

[333] Treaty of the Southern African Development Community art. 5(1)(a), Aug. 17, 1992, 32 I.L.M. 116 [hereinafter SADC Treaty]; The objectives of the SADC are *inter alia* to "achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa and support the socially disadvantaged through regional integration." *See also* Southern African Development Community Protocol on Finance and Investment art. 2, para 1, Aug. 13, 2006.

[334] Supplementary Act *A/SA.3/12/08* Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS, enacted by the ECOWAS Authority on Dec. 12, 2008.

[335] *See* East African Community, *East African Community Model Investment Code,* 8 (July 2006)

[336] Chrispas Nyombi, 'A Case for a Regional Investment Court for Africa' (2018) 43 NC J Int'l L 66, 108

[337] Ibid

[338] Chrispas Nyombi, 'Towards a New World Economic Order: Proposal for a Pan-African Investment Court' in Emilia Onyema (ed) *Rethinking the Role of African National Courts in Arbitration* (Wolters Kluwer Law & Business. 2018)

[339] Most of the claims have been against countries in Africa, Eastern Europe, Central Asia and South America

[340] European Commission Conceptual paper, Investment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court, published on the 5 May 2015. See also https://hsfnotes.com/arbitration/2015/09/18/european-commission-publishes-draft-investment-chapter-for-the-ttip-including-investment-protection-provisions-and-the-establishment-of-an-international-investment-court/ accessed on 26.04.2021 and a blog post on the May 2015 publication here https://hsfnotes.com/publicinternationallaw/2015/05/19/eu-commission-issues-concept-paper-on-isds-in-the-ttip-and-beyond-proposals-for-profound-reform/ accessed on 26.04.2021.

[341] https://hsfnotes.com/publicinternationallaw/2015/05/19/eu-commission-issues-concept-paper-on-isds-in-the-ttip-and-beyond-proposals-for-profound-reform/ accessed on 26.04.2021.

abundantly clear in the ongoing UNCITRAL Working Group III in respect of ISDS Reform.[342] Dr Nyombi also refers to a non-paper delivered in April 2016 by five[343] EU states, proposing an alternative to the present ISDS system.[344] As a non-paper, the proposal was of no legal effect, but it was still important and an indication of the thinking of those countries on the ISDS regime, adding another relevant voice to the deliberations.[345] It is therefore clear that the impetus towards a Pan-African Investment Centre has parallels with the reform agenda of the EU in relation to an Investment Court System (ICS).

Additionally, Nyombi states that the "chilling" effect that these cases have upon the regulatory powers of Host States has made it difficult not only for governments to discharge their civic responsibilities but has also caused them to desist from reversing potentially damaging decisions taken by previous corrupt regimes due to a fear of reprisals from foreign investors.[346] He states that investors routinely bring claims under the FET provision, which is to be found in most first-generation IIAs, as a result of which states are reluctant to undertake actions which are necessary to assist in the furtherance of a social, economic and political reform agenda that would benefit their country, more often than not, following a period of conflict.[347] Cotula[348] points out that whereas investor-state arbitrations in the 1960's and 1970's were routinely brought on the basis of direct expropriation and nationalization of industries, challenges taken before arbitral tribunals in the recent decades have been in relation to the legality of public regulation, which has a distinctly "chilling" effect on government's regulatory powers.[349] Nyombi's final reason, namely the inconsistency in interpretation of IIAs by arbitral tribunals, is a problem often cited by commentators.[350] The former Singaporean Attorney General, subsequently Chief Justice, Sundaresh Menon, in his keynote speech at the International Council for Commercial Arbitration congress in 2012, he argued that many Arbitral Tribunals have interpreted the substantive law beyond the original intention of the parties to the IIAs, which he believed brought into question whether or not investment arbitrators were truly independent.[351] The classic case to demonstrate this situation of inconsistency is that of the Czech Republic and Ronald Lauder where, in decisions mere days apart, a UNCITRAL tribunal dismissed a case on its merits, whereas an ICSID tribunal ordered the Czech Republic to pay USD 270million plus interest to Mr Lauder[352] on the same

[342] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/selection_and_appointment_eu_and_ms_comments.pdf

[343] The five countries were Austria, Finland, France, Germany and the Netherlands

[344] Non-Paper 'Intra-EU Investment Treaties: Non-paper from Austria, Finland, France, Germany and the Netherlands' dated 7 April 2016. For commentary, *see* Vanessa Naish & Elizabeth Reeves 'The future of ISDS in the EU: leaked non-paper reveals proposal for EU-wide investment agreement' Herbert Smith Freehills LLP, 31 May 2016.

[345] https://hsfnotes.com/publicinternationallaw/2016/05/31/the-future-of-isds-in-the-eu-leaked-non-paper-reveals-proposal-for-eu-wide-investment-agreement/ accessed on 26.04.2021.

[346] For example, following the fall of the Mubarak government, an Egyptian court queried and reversed the sale of land by a former tourism minister to a foreign investor for a price below its market value. *See Hussain Sajwani, DAMAC Park Avenue for Real Estate Development S.A.E., and DAMAC Gamsha Bay for Development S.A.E. v Arab Republic of Egypt*, ICSID Case No. ARB/11/16; *see* also Jarrod *Hepburn* and Luke E *Peterson*, Panels Elected in ICSID Matters involving Moldova, Egypt, and the Central African Republic, *IA Reporter* (12 January 2012)

[347] *LESI SpA and ASTALDI SpA* v. *République Algérienne Démocratique et Populaire*, ICSID Case No ARB/05/3, Award (12 November 2008); *Lundin Tunisia BV* v. *Republic of Tunisia*, ICSID Case No ARB/12/30, Award (22 December 2015). Also, *Asa International SpA* v. *Arab Republic of Egypt*, ICSID Case No ARB/13/23 (Registered 13 September 2013); *Ampal-American Israel Corp. and others* v. *Arab Republic of Egypt*, ICSID Case No. ARB/12/11. See also Al Jazeera Media Network v. Arab Republic of Egypt (ICSID Case No. ARB/16/1); Champion Holding Company, James Tarrick Wahba, John Byron Wahba and others v. Arab Republic of Egypt (ICSID Case No. ARB/16/2)

[348] Lorenzo Cotula, 'Investment treaties, natural resources and regulatory space: Technical issues and political choices in international investment law' in Celine Tan and Julio Faundez (eds) *Natural Resources and Sustainable Development* (Edward Elgar Publishing, 2017) 10

[349] For example, affirmative action to redress historical injustice (Piero Foresti Laura de Carli and others v. Republic of South Africa [2007]) ICSID Case No. ARB(AF)/07/1. See also Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe (ICSID Case No. ARB/05/6); Bernhard von Pezold and others v. Republic of Zimbabwe (ICSID Case No. ARB/10/15); Vestey Group Ltd v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/06/4) relating to controversial programmes to redistribute land.

[350] Isabelle Buffard, James Crawford, Alain Pellet and Stephan Wittich (eds*), International law between universalism and fragmentation: festschrift in honour of Gerhard Hafner* (BRILL, 2008), 116.

[351] Sundaresh Menon (2012) Keynote Speech at the International Council for Commercial Arbitration. https://www.arbitration-icca.org/icca-singapore-2012 accessed 26.04.2021.

[352] An American businessman Ronald Lauder brought an investor-state claim against the Czech Republic under the US-Czech Republic BIT (1991) under the United Nations Commission on International Trade Law (UNCITRAL) Rules. However, having structured his investment in TV Nova (a broadcasting firm), through a Dutch investment vehicle, the investor made another claim against the Czech Republic under the Netherlands-Czech Republic BIT (1991) under the ICSID mechanism.

facts. This case has been described by some as 'the ultimate fiasco in investment arbitration'.[353] The options, Nyombi concludes, are either to stick to the current ISDS system and tinker with it or to do away with ISDS completely and replace it with a court system on the basis that matters of National Public Policy should not be dealt with in the arena of private arbitration, a point made very forcefully by other commentators.[354] In support of the court option, Nyombi prays in aid the EU proposals as noted above, as well as the Arab Investment Court (AIC),[355] which has over thirty years of jurisprudence backing its decisions up. Nyombi concludes that a Pan-African Investment Court would help to stem the unpredictability of Awards that occurs at present because there are no precedents to follow and that a stable Pan African Investment Court would also increase legitimacy as there would now be a proper Appeal mechanism in place.

2.3.2 A CASE FOR THE TERMINATION OR RE-CALIBRATION OF INVESTMENT TREATIES

Cotula examines the rapidly extending network of IIAs and the impact of the rise of investor-state arbitration on developing states. He argues that 'normative provisions of investment treaties and arbitral decisions have far-reaching implications for countries' regulatory space, necessitating careful thinking about states and communities' engagement with foreign investment in natural resources sectors'.[356] The range of solutions suggested to reform this problem range from the termination of investment treaties by Host States such as Indonesia[357] and South Africa[358] to a 'recalibration'[359] of the language used in the provisions, to reflect the shifting priorities of the Host States in favour of their responsibilities to their citizens.[360] Examples of 'recalibration' include the provisions of the 2019 ASEAN[361] Comprehensive Investment Agreement (ACIA), the 2007 COMESA[362] Investment Agreement,[363] the 2012 SADC[364] Model Investment Treaty, the 2015 Angola-Brazil Investment Facilitation and Cooperation Agreement and the 2015 Brazil-Mozambique Investment Facilitation and Cooperation Agreement.[365] There are some agreements that specifically promote a wider set of policy goals, such as in the area of sustainable development,[366] some that restrict fair and equitable treatment clauses to the minimum standard applicable under customary international law,[367] others

[353] Isabelle Buffard, James Crawford, Alain Pellet and Stephan Wittich, (eds*), International law between universalism and fragmentation: festschrift in honour of Gerhard Hafner* (BRILL, 2008), 116.

[354] Gus Van Harten, 'A case for an international investment court' (2008) Society of International Economic Law (SIEL) Inaugural Conference; See also Gus van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2008)

[355] The Unified Agreement was signed on 26 November 1980 in Amman, Jordan, and entered into force on 7 September 1981. See Walid Ben Hamida, 'The development of the Arab Investment Court's case law: new decisions rendered by the Arab Investment Court' (2014) International Journal of Arab Arbitration 6, 12; See also John Gaffney, 'The EU proposal for an Investment Court System: what lessons can be learned from the Arab Investment Court?'(2016) No. 181. Columbia FDI Perspectives

[356] Lorenzo Cotula, 'Investment treaties, natural resources and regulatory space: Technical issues and political choices in international investment law' in Celine Tan and Julio Faundez (eds) *Natural Resources and Sustainable Development* (Edward Elgar Publishing, 2017) 3

[357] Abdulkadir Jailani, 'Indonesia's perspective on review of international investment agreements' in Kinda Mohamadieh, Anna Bernardo and Lean Ka-Min (eds)*Views and Experiences from Developing Countries* (South Centre 2015) 215.

[358] Xavier Carim, 'International Investment Agreements and Africa's structural transformation: A perspective from South Africa' in Kinda Mohamadieh, Anna Bernardo and Lean Ka-Min (eds)*Views and Experiences from Developing Countries* (South Centre 2015) 127

[359] José E Alvarez, 'Why are We "Re-Calibrating" Our Investment Treaties?'(2010) World Arbitration and Mediation Review 4.2 143

[360] Wolfgang Alschner and Dmitriy Skougarevskiy, 'Rule-takers or rule-makers? A new look at African bilateral investment treaty practice' (2016) TDM Special Issue on Int'l Arbitration involving Commercial and Investment Disputes in Africa (Forthcoming) 11,12

[361] Association of Southeast Asian Nations. Edited ACIA-2.pdf (asean.org) accessed 24.09.2022.

[362] Common Market for Eastern and Southern Africa

[363] For example, Art 22(1) reads;

Subject to the requirement that such measures are not applied in an manner which would constitute a means of arbitrary or unjustifiable discrimination between investors where like conditions prevail, or a disguised restriction on investment flows, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures:

(a) designed and applied to protect national security and public morals;
(b) designed and applied to protect human, animal or plant life or health;
(c) designed and applied to protect the environment; or
(d) any other measures as may from time to time be determined by a Member State, subject to approval by the [COMESA Common Investment Area] Committee.

[364] Southern African Development Community

[365] Both of these emphasize investment facilitation and exclude investor-state arbitration.

[366] See Cameroon-Canada BIT 2014

[367] See Art.5 of the 2008 Rwanda-USA BIT; See Art.6(c) of the 2009 ASEAN-Australia-New Zealand FTA

that omit FET altogether[368] and yet others that require tribunals to consider a country's level of development when applying FET.[369] Additionally, developing states signed up to template BITs which were geared towards investment protection, investors have brought over 700 arbitrations to protect their business interests[370], and this trajectory continues. These treaty-based disputes do not only deal with nationalisation of assets, as was the case in the 1970's and 1980's but now cover a broad range of policy areas such as South Africa wishing to undertake affirmative action to redress historic injustices,[371] programmes to redistribute land in Zimbabwe,[372] taxation, public health and environmental protection, further fuelling the belief that investment treaties constrain policy space unduly.

Furthermore, Van Harten, Olivet, Pia and Eberhardt question the dispute settlement mechanisms,[373] while Franck and Waibel debate the 'backlash' or 'legitimacy crisis',[374] with the resultant calls for reform from various quarters.[375] It is this tangled and polarised discussion that this thesis seeks to shed light upon, with a view to ultimately finding a solution that works fairly for both developing Host states and capital-exporting developed states. Cotula argues that his findings indicate that IIAs, both old-style and 'recalibrated' types, can have potentially far-reaching implications for regulatory space, and therefore must be pursued only after very careful consideration. In his view, politicians have to tread a fine line between preserving regulatory space and the promotion of investment funds for their countries, requiring careful thought, and perhaps some more democratic oversight,[376] e.g., from parliament. For all the reasons set out above, this thesis is particularly timely because even though steps have clearly already been taken on several fronts both within and outside the Continent to either terminate the offending BITs or 'recalibrate' them, there is no overarching consensus as to what the best way of solving this problem of constrictive regulatory space and this thesis aims to propose a solution that could bridge this gap.

2.3.3 A CASE FOR POLITICAL RISK INSURANCE (PRI)

Celine Tan, commenting on political risk insurance (PRI), shows how the fact that an investor has the protection of PRI can significantly alter the dynamics in the international, domestic, political and economic arenas between the investor, the regulatory and administrative authorities of the Host state and the communities which have a stake in the natural resources which form the subject of the Agreement.[377] She makes the valid point that since they are not parties to nor beneficiaries of PRI contracts, and had no input into the design of the project and certainly no recourse to compensation

[368] See the Angola-Brazil and Brazil-Mozambique Investment Facilitation and Cooperation Agreements
[369] See Art.14(3) of the COMESA Investment Agreement. Provisions of this type are quite rare, and it is not yet clear how Arbitral Tribunals will apply them.
[370] UNCTAD Report 2016 - 101, 104
[371] Piero Foresti Laura de Carli and Others v Republic of South Africa ICSID Award Case No ARB(AF)(07/1; Piero Foresti Laura de Carli and Others v Republic of South Africa ICSID Award Case No ARB(AF)(07/1
[372] Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe (ICSID Case No. ARB/05/6); Bernhard von Pezold and others v. Republic of Zimbabwe (ICSID Case No. ARB/10/15); Vestey Group Ltd v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/06/4)
[373] Gus van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2008); See also https://www.iisd.org/system/files/publications/investment_treaties_why_they_matter_sd.pdf, accessed on 03.05.2021; See also Cecilia Olivet and Pia Eberhardt, 'Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom' (2012) Transnational Institute 27; See also Eberhardt, Pia, and Cecilia Olivet, 'Profiting from Injustice: Tracing the Rise of Investment Arbitration Industry' (2016) Rethinking Bilateral Investment Treaties 243
[374] Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2004) Fordham L. Rev. 73 1521; See also, Michael Waibel (ed), *The backlash against investment arbitration: perceptions and reality* (Kluwer Law International BV, 2010)
[375] See https://unctad.org/meeting/expert-meeting-transformation-international-investment-agreement-regime-path-ahead, accessed on 03.05.2021. See also https://uncitral.un.org/en/working_groups/3/investor-state, accessed on 03.05.2021
[376] Lorenzo Cotula, 'Investment treaties, natural resources and regulatory space: Technical issues and political choices in international investment law' in Celine Tan and Julio Faundez (eds) *Natural Resources and Sustainable Development* (Edward Elgar Publishing, 2017)
[377] Celine Tan and Julio Faúndez, (eds) *Natural Resources and Sustainable Development: International Economic Law Perspectives* (Edward Elgar Publishing, 2017) 3

if things go wrong, local communities can end up bearing the social, economic and environmental brunt of an investment project that does not go according to plan.[378] She concludes by pointing out that not only do PRI arrangements impact upon all aspects of foreign investment (international & domestic law, policy and regulation), but they also serve as an 'informal regime of surveillance over host state governmental practice', thus constraining the regulatory space of host states. An example of this is the narrative in International Investment circles surrounding the Bolivian nationalisation of its gas. Although this nationalisation resulted in a significant increase in state revenue and provided funds for poverty reduction programmes, it still received negative evaluations across the board internationally. Haarstad uses this example to shine the light on investment climate evaluations which prioritise the short-term interests of private investors and only reward policy models that satisfy those interests. He argues that as a result, the 'architecture of investment climate surveillance' tends to constrain the regulatory space and actions of governments in the global South by promoting a discourse of 'investment climate' to create strong disincentives for non-orthodox policy by these governments, regardless of the fact that these non-orthodox policies result in gains for the citizens of these Host states.[379] Whilst conceding that creating incentives for investors can sometimes be in the interests of development, he posits that the challenge to democracy arises when a situation emerges whereby 'agents of investment climate surveillance can narrow the policy space for governments while themselves remaining unaccountable to democratic governance structures'[380]

It is clearly important to keep in mind this potential new asymmetrical challenge posed to Host States when considering a possible solution to the Research Question. The next sub-section examines the possibility of the incorporation of sustainable development provisions as a potential solution to the crisis of regulatory autonomy caused by the old-style BITs presently in force in Ghana.

2.3.4 A CASE FOR SUSTAINABLE DEVELOPMENT PROVISIONS

As previously noted, through the medium of International Investor-State Arbitration, foreign investors are now able to directly challenge measures that Host States introduce in a bid to protect the interests of their citizens in a wide range of areas including the area of sustainable development. There however does not seem to be any way of predicting whether tribunals will respect state policy or not. In fact, the constant 'see-sawing' between the public interest of promoting (sustainable) development on the one hand and the rights of the foreign investor caused Yannick Radi to describe the international investment law regime as 'arguably schizophrenic'.[381] Additionally, Buggenhoudt, using examples from caselaw, shows that in some cases, tribunals appear insensitive towards the legitimate public interest concerns of Host States[382] whereas in other cases more recently, tribunals seem to be deferring to the state's position on the basis of necessity provisions inserted in the BITs[383] and also using a 'proportionality' yardstick.[384] Buggenhoudt concludes that though there seems to be an emerging consensus tending towards deference based on democratic legitimacy, as for example, where a tribunal recognised that 'it is not its mandate to … censure Argentina's sovereign choices as

[378] Ibid 45

[379] As Haarstad states, these short-term interests of private investors, do not necessarily overlap with the development objectives of governments in the Global South. See Håvard Haarstad, 'The Architecture of Investment Climate Surveillance and the Space for Non-Orthodox Policy' (2012) Journal of Critical Globalisation Studies 5 79, 98

[380] Håvard Haarstad, 'The Architecture of Investment Climate Surveillance and the Space for Non- Orthodox Policy' (2012) Journal of Critical Globalisation Studies 5 79, 98

[381] Radi Yannick, 'Realizing Human Rights in Investment Treaty Arbitration: A Perspective from within the International Investment Law Toolbox' (2012) 37 NCJ Int'l L & Com Reg 1107, 1114

[382] *Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic* (Award, 22 May 2007), ICSID Case No ARB/01/3, online, ICSID; See also *Sempra Energy International v Argentine Republic* (Award, 28 September 2007), 20(1) World Trade and Arb Mat 117. These cases are usually quoted as typical examples of ICSID tribunals' being insensitive to the legitimate issues of public regulation. Note the view of the annulment committee, however in Tan, Celine, and Julio Faúndez, (eds) *Natural Resources and Sustainable Development: International Economic Law Perspectives* (Edward Elgar Publishing, 2017) 40

[383] *LG and E Energy Corporation, LG and E Energy Corporation and LG and E Energy International Inc. v Argentine Republic* (Award 3 October 2006) 46 ILM 40.

[384] *Continental Casualty Co v Argentine Republic* (Award, 5 September 2008), 21 World Trade and Arb Mat 181

an independent state'[385] there remains an uncertainty which serves neither the foreign investor who cannot predict how much protection investment law will afford it, nor the Host state who cannot anticipate which regulatory measures the tribunal will accept as having passed the standard of review.[386]

Next, this thesis examines the case for holding Multinational Enterprises responsible for Human Rights and Environmental Breaches in Host States. This would be in addition to the incorporation of sustainable development provisions to protect the environment and the natural resources of the Host State.

2.3.5 A CASE FOR HOLDING MULTINATIONAL ENTERPRISES (MNES) RESPONSIBLE FOR HUMAN RIGHTS AND ENVIRONMENTAL BREACHES IN HOST STATES

This discussion arises because there are several examples of cases where MNEs have been responsible for Human Rights and Environmental breaches in Host States but have escaped responsibility after arbitration.[387] In this context, it is worth noting that 'regulatory space' is one of those phrases which defies exact definition, but which everyone is confident that they can recognise when it is being excessively constrained. Muchlinski describes it as the 'complex interactions between private and public actors who contest regulatory agendas conditioned by power relations and local, political, social and cultural environments',[388] whilst the United Nations Conference on Trade and Development (UNCTAD) expands this definition further by describing a national policy space as 'the operational bridge between the differing perspectives of host countries, home countries and investors.'[389] Although UNCTAD makes the valid point that developed countries also need policy space to pursue their own national objectives, the emphasis of this thesis is on developing countries and the overwhelming perception that their regulatory (or national policy) space has been excessively constrained through the medium of asymmetrical IIAs[390] and overly expansive interpretations by ISDS tribunals.[391] Whilst Fritz and other scholars advocate that the solution to this problem of constrained regulatory space is the abandonment of IIAs and ISDS[392] on the basis that there is no empirical evidence that shows a correlation between IIAs and the receipt of FDI by developing countries,[393] Muchlinski points out that this may be easier said than done,[394] since IIAs evolved in response to real

[385]' Claire Buggenhoudt, 'The public interest in international investment arbitration on natural resources' in Celine Tan and Julio Faundez (eds) *Natural Resources and Sustainable Development* (Edward Elgar Publishing, 2017) 313

[386]Ibid 315

[387]For example, in the late 1990s, the Philip Morris Company threatened the government of Canada with a NAFTA arbitration if Canada persisted with plans to introduce plain (generic) packaging of tobacco products. The government abandoned its plans in this area. See "The Danger of International Investment Agreements for Tobacco Control in Canada", Submission of Physicians for a Smoke-Free Canada to the Federal Standing Committee on Foreign Affairs and International Trade, April 1999, at pg.14. Available online at: wtosubmission (smoke-free.ca)

[388] Peter Muchlinski, *Multinational enterprises and the law* (Oxford University Press, Third Edition, 2021) 652; See also Robert Baldwin, Colin Scott, and Christopher Hood, *A Reader on Regulation* (Oxford University Press, 1998)

[389] UNCTAD World Investment Report 2003, https://unctad.org/system/files/official-document/wir2003light_en.pdf, 145 accessed on 12.05.2021. The foundation of National Policy Space is a State's right to regulate, a sovereign prerogative that arises out of a State's control over its own territory and that is a fundamental element in the international legal regime of State sovereignty.

[390] Muthucumaraswamy Sornarajah, *Resistance and change in the international law on foreign investment* (Cambridge University Press, 2015); See also Surya P. Subedi, *International investment law: reconciling policy and principle* (Bloomsbury Publishing, 2020)

[391] Joost Pauwelyn, 'Rational design or accidental evolution?' in Zachary Douglas, Joost Pauwelyn and Jorge E. Viñuales (eds) *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press 2014)

[392] T Fritz, 'International investment agreements under scrutiny' (2015) Traidcraft, Gateshead

[393] Traidcraft. 'International investment agreements under scrutiny: Bilateral investment treaties, EU investment policy and international development' (2015) Authors state inter alia that *'Developing countries that sign IIAs with developed countries are taking a high-risk gamble. In return for hoping to stimulate foreign direct investment (FDI) they severely restrict their policy space. But growing evidence proves that IIAs as such do not attract FDI – other determinants such as market size and the supply of natural resources are more important. When signing their first IIAs developing country negotiators were largely unaware of the risks posed by ISDS – a perception that only changed when they were hit with the first claims'.* They also refer to the ISDS regime as one that *'takes place behind closed doors and does not adhere to basic public law principles. The regime has evolved into a business controlled by a few law firms and lawyers prone to conflicts of interest. Investment tribunals are composed of for-profit lawyers instead of independent judges – a system only foreign investors are allowed to use. Evidence shows that even the threat of claims deters government action, the so-called "regulatory chill". The vague IIA rules provide arbitrators with interpretative leeway enabling them to challenge a broad range of public interest regulation. As IIAs delegate treaty interpretations to arbitrators, tribunals are effectively taking over state functions*.

[394] Peter Muchlinski, *Multinational Enterprises and the Law* (Oxford University Press, Third Edition, 2021) 653

risks faced by investors.[395] He argues that the provisions of IIAs were initially perceived as relatively straightforward until such time as expansive and sometimes surprising interpretations by Arbitral Tribunals led to a backlash.[396] He approaches this issue from the angle of MNEs and the recent trend not only towards holding MNEs responsible for Human Rights and Environmental breaches in Host States, but also holding them to a higher standard – one that expects them to be proactive in their actions and not merely reactive. Muchlinski traces the history[397] of the emergence of MNEs on the Trade and Investment scene, providing examples of the most common definitions, such as the one favoured by economists, namely 'a corporation which owns (in whole or in part), controls and manages income generating assets in more than one country'.[398] The Organisation for Economic Co-operation and Development (OECD) is an international organisation that works to build better policies for better lives.[399] The OECD Guidelines for Multinational Enterprises (OECD Guidelines) provides an expansive description[400] of an MNE. The OECD Guidelines also state that as part of the activities of the MNEs in a Host Country, 'there should not be any contradiction between the activity of MNEs and sustainable development',[401] and that the Guidelines are meant to foster complementarities in this regard. Indeed, links among economic, social, and environmental progress are a key means for furthering the goal of sustainable development, described as 'Development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[402]

Furthermore, Muchlinski notes that as discussed by John Kline and Nadia Bernaz, ethical business practice and Corporate Social Responsibility (CSR)[403] was originally part of the Corporate philanthropic ethos which MNEs would either chose to follow or not. The trend towards holding MNEs responsible for their actions and inactions in relation to Human and Environmental Rights in developing Host States[404] commenced in earnest in June 2011, when the UN Human Rights Council endorsed the UN Guiding Principles on Business and Human Rights (UNGPs). [405] These UNGPs were crafted by Professor John Ruggie, the Special Representative of the Secretary-General (SRSG) appointed to oversee the issue of human rights and transnational corporations.[406] The UNGPs have created a framework for business and human rights[407] which is predicated on three pillars, namely The State Duty to Protect

[395] Muthucumaraswamy Sornarajah, *Resistance and change in the international law on foreign investment* (Cambridge University Press, 2015) 87

[396] See Working Group III: Investor-State Dispute Settlement Reform | United Nations Commission On International Trade Law accessed on 24.09.2022.

[397]Peter Muchlinski, *Multinational Enterprises and the Law* (Oxford University Press, Third Edition, 2021) 653.The first use of the term 'multinational' in relation to a corporation has been attributed to David E. Lilienthal, who, in April 1960, gave a paper to the Carnegie Institute of Technology on 'Management and Corporations in 1985', later published as 'The Multinational Corporation' (MNC). He defined MNCs as 'corporations… which have their home in one country, but which operate and live under the laws and customs of other countries as well.

[398] Peter Muchlinski, *Multinational Enterprises and the Law* (Oxford University Press, Third Edition, 2021) 5; See also John H Dunning, and George Norman, 'The theory of the multinational enterprise: An application to multinational office location' (1983) Environment and Planning A 15.5 675

[399] https://www.oecdbetterlifeindex.org/#/11111111111 accessed on 24.09.2022.

[400] An MNE usually comprises companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one MNE to another. Ownership maybe private, State or mixed. Guidelines for multinational enterprises - OECD accessed 24.09.2022.

[401] https://www.oecd.org/daf/inv/mne/48004323.pdf at 23, accessed on 12.05.2021.

[402] This is one of the most broadly accepted definitions of sustainable development and is found in Chapter 2 of the 1987 World Commission on Environment and Development (the Brundtland Commission). Our_common_futurebrundtlandreport1987.pdf accessed on 24.09.2022.

[403] John Kline, *Ethics for International Business: Decision-making in a global political economy (*Routledge, 2010) 25; Nadia Bernaz, *Business and human rights: History, law and policy-Bridging the accountability gap* (Taylor & Francis, 2016)

[404] Karin Buhmann, *Changing sustainability norms through communication processes: the emergence of the business and human rights regime as transnational law* (Edward Elgar Publishing, 2017)

[405] The UNGPs were subsequently endorsed by the G-7 Leaders' Summit in 2015. See https://sustainabledevelopment.un.org/content/documents/7320LEADERS%20STATEMENT_FINAL_CLEAN.pdf accessed on 12.05.2021

[406] https://www.ohchr.org/en/issues/business/pages/srsgtranscorpindex.aspx accessed on 13.05.2021

[407] https://www.ohchr.org/Documents/Issues/Business/IntroductionsGuidingPrinciples_en.pdf

Human Rights,[408] the Corporate Responsibility to Respect Human Rights[409] and Access to Remedy.[410] Each of these three pillars is designed to be an essential component in a system of preventative and remedial measures which is meant to be both dynamic and inter-related. As Ruggie explains, 'the State duty to protect because it lies at the very core of the international human rights regime; the Corporate Responsibility to respect because it is the basic expectation society has of business in relation to human rights; and Access to Remedy because even the most concerted efforts cannot prevent all abuse'.[411] Muchlinski argues however, that claims against corporations cannot be substituted for State Responsibility, and corporate human rights responsibility cannot take the place of good state regulations aimed at protecting workers, providing health and safety for communities and social justice and environmental protections.[412] That said, wherever there is proof that MNEs have engaged in, or been complicit in human rights abuses, there should be the apparatus both on the national and the international planes, to support victims in having their claims heard and appropriate redress made available.[413] The positive obligation upon MNEs to promote human rights is also implicit in the UN Sustainable Development Goals (SDGs), and businesses can contribute to the SDGs using social development initiatives, always of course, using the UNGPs as a benchmark to prevent any negative human rights repercussions.[414] Muchlinski concludes that the environmental responsibilities of MNEs are primarily to ensure sustainable development, which is supplemented by three additional principles of environmental protection, namely 'precautionary', 'preventative' and 'polluter pays', all of which are self-explanatory.[415] This potential solution, which aims at addressing CSR, environmental protection and sustainability, and which has been warmly embraced by Muchlinski, has its roots in UN initiatives by UNCTAD and the UN's SDGs. The pros and cons of these suggested solutions promulgated in existing works will be explored later in this thesis and evaluated against possible solutions suggested in this thesis.

2.4 The ORIGINAL CONTRIBUTION OF THIS THESIS TO LITERATURE

Whilst each of the suggested solutions in existing literature outlined above may provide partial answers to the problems outlined in the research question, namely, "*What is the solution to the potential problem of the further erosion of Ghana's Regulatory Autonomy due to the types of provisions of contained in Ghana's old-style BITs arising from inherited colonial bias?"*, none of the solutions proposed in the existing literature, goes to the heart of the matter. This thesis argues that the heart of the matter is that rather than trying to find a solution after an investor has instigated proceedings before an International Arbitral Tribunal which then proceeds to expansively interpret BIT provisions to the detriment of the Host State in a situation reminiscent of 'bolting the barn door after the horse has bolted', a solution must be found which nips the potential problem in the bud at the outset.

Some additional suggested solutions, not only in existing academic literature, but in live discussion fora, such as the UN, also have serious cost implications for Host States, which are mostly developing states who sought out BITs for the purpose of attracting much needed FDI. Therefore, this thesis would suggest that a proposed solution that requires developing states with financial challenges to

[408] This is the State's duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication.
[409] This relates to the Corporate Responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved.
[410] The third is the need for greater access by victims to effective remedy, both judicial and non-judicial.
[411] John Ruggie, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (2011) 29 Neth Q Hum Rts, 224, 226
[412] Peter T. Muchlinski, 'Human rights and multinationals: is there a problem?' (2001) International affairs 77.1 31, 44, 45, 46
[413] Peter T. Muchlinski, *Multinational enterprises and the law* (Oxford University Press, Third Edition, 2021) 605
[414] Shift, Oxfam and Global Compact Network Netherlands, *Doing Business with Respect for Human Rights: A Guidance Tool for Companies* (2016) https://www.businessrespecthumanrights.org/image/2016/10/24/business_respect_human_rights_full.pdf accessed on 13.05.2021.
[415] Peter Muchlinski, *Multinational enterprises and the law* (Oxford University Press, Third Edition, 2021) 608

dedicate a proportion of their fiscal budget to paying for a service such as the UNCITRAL WGIII Advisory Centre, is not "fit for purpose" either.

2.5 CONCLUSION

As discussed above, the relevance of provisions incorporating the requirement that a foreign investor subscribes to CSR for matters relating to Sustainable Development, Human Rights of the citizens of the Host State and the Environmental concerns of the Host Country cannot be overstated. The relevance of these provisions, together with the implications of the provisions of other BITs signed by Ghana[416] as well as the implications for a Host Country if an investor has PRI cover, are pertinent issues with far-reaching consequences that must be borne in mind by negotiators representing Host States in IIA negotiations.

In conclusion, it is clear from the ideas examined in the existing literature above, that the originality of this thesis is that it aims to propose a unique solution that is firstly conceived from the viewpoint of a developing Host State rather than an imperialistic and/or Eurocentric proposal presented under the guise of International Law or altruistic-sounding International Institutions. Secondly this thesis seeks to nip problems in the bud at the stage of (re)negotiation and drafting, rather than focussing on the result, namely the expansive interpretations of BITs by tribunals, as per existing literature.

The next chapter will outline the methodology to be used in this thesis and will provide a justification of the methods and approaches that will be employed in order to achieve the aims and objectives of this thesis.

[416] E.g., the effect of having an MFN provision in another BIT and its implications on other BITs that have explicitly omitted NT provisions.

Chapter Three: Research Methodology

3. INTRODUCTION

The previous chapter provided an examination of the existing literature relating to the research question and concluded by pointing out the perceived gap in the existing literature, indicating the original contribution that this thesis will make to that existing pool of literature by advancing a solution and developing scholarship in this area.

This chapter will set out the methodologies and approaches to be employed in the conduct of the research in this thesis and provides the justification of the particular methods employed to achieve the aims and objectives of this thesis.[417] In light of the anticipated contribution that this thesis will bring to the existing body of knowledge in this field, it is imperative that the methods used for data collection be explicit and rigorous[418]. These approaches and methodologies have been chosen after careful consideration of the research question and the sub-questions set out in Chapter One. To that end, this chapter is presented in five sections, including this introductory section. Section 3.1 provides an overview of the methodologies that will be utilised in this thesis, as well as the approaches to be implemented, namely a qualitative method, starting with positivism, and continuing with a TWAIL historical approach to give context to the perceived problem with the law as it stands now, and finally a comparative approach in relation to the proposed solutions. Following on from that, Section 3.2 is divided into sub-sections, which will examine each of the approaches and methodologies outlined in 3.1. Thereafter, Section 3.3 will examine the framework within which the proposed solution will be advanced. This chapter concludes with Section 3.4, where all these strands of these will be woven together into a coherent whole.

3.1 AN OVERVIEW OF THE METHODOLOGIES AND APPROACHES TO BE EMPLOYED

This thesis will employ a qualitative methodology. To set this in context, it must be noted that there is a fundamental difference between qualitative and quantitative studies, in that they have different epistemological positions. The fact that one of the approaches to be utilised in this work is positivism, and that this work simultaneously employs a qualitative methodology, may seem on the face of it, contradictory, since the debates between quantitative and qualitative methods have traditionally been along the lines that quantitative analysis is best utilised in line with a positivist approach, wherein proponents like Comte, Mill and Durkheim believed that the social world could be viewed in the same way as natural sciences.[419] Qualitative scholars on the other hand, have embraced the interpretative path espoused by philosophers like Dilthey, Rickert and Weber who follow the Kantian tradition, challenging the positivist tradition.[420] Researchers like Linos and Carlson have stated that qualitative methods are particularly well suited for analysing evidence and developing arguments,[421] which is how this thesis aims to tackle the research question. In support of the choice of qualitative methodology for this thesis, Patton argues that this methodology has evolved to such an extent that it encompasses a wide range of approaches, resulting in a qualitative diversity[422] that was not previously available to researchers. In conclusion, whilst it has been argued that qualitative methods should be used for exploratory research, i.e. research that is designed to examine whether an issue, situation or problem

[417] Estelle M. Phillips and Derek S. Pugh, *How to Get a PhD; a Handbook for Students and their Supervisors* (Maidenhead: Open University Press 2007) 68. As stated by Phillips and Pugh, the research methodology "gives the justification for the relevance and validity of the material [that one is] going to use to support the thesis".
[418] Jan Jonker and Bartjan Pennink, *The Essence of Research Methodology: A Concise Guide for Master and PhD Students in Management Science* (Springer-Verlag 2010).
[419] Medani P. Bhandari, 'The Debates Between the Quantitative and Qualitative Methods: An Ontology and Epistemology of the Qualitative Method' in *Perspectives on Sociological Theories, Methodological Debates, and Organizational Sociology* (River Publishers, 2022) 61
[420] John K. Smith, 'Quantitative Versus Qualitative Research: An Attempt to Clarify the Issue' (1983) Educational Researcher 12.3 6
[421] Katerina Linos & Melissa Carlson, 'Qualitative Methods for Law Review Writing' (2017) University of Chicago Law Review 84 213, 214.
[422] Michael Quinn Patton, *Qualitative research & evaluation methods: Integrating theory and practice* (Sage publications 2014)xi.

exists and if so, to then define it,[423] that quantitative research methods should be reserved for 'research that is designed to determine why or how an issue, situation or problem is the way it is', namely explanatory research,[424] and that both types may be used for descriptive studies, which refers to 'research designed to describe an issue, situation, problem or set of attitudes',[425] some commentators posit that these 'rules', whilst containing an element of truth, are 'by no means determinative'.[426] Lisa Webley maintains that it is possible to use qualitative research for all three types of research (namely exploratory, explanatory and descriptive) referred to above, so long as the researcher 'develops an appropriate research design and adopts an appropriate data collection method and mode(s) of data analysis in order to answer the research questions posed'.[427] Using a qualitative methodology will enable this thesis to examine the problems pertaining to the BITs in existence in Ghana, and to craft a potential solution to answer the research question, using explanatory, exploratory and descriptive research methods. For the sake of clarity, it is worth pointing out that the research objects are the BITs entered into by Ghana since gaining political independence. This is the ontological aspect of this research. The possibility of having meaningful and substantive knowledge of these objects (i.e., the epistemological aspect of this research) can only be arrived at via qualitative (as opposed to quantitative) research methodology which will be conducted via an interpretative analysis of the BITs, the historical neo-colonial times in which the BITs were entered into by newly independent Host States desperate for FDI, and the ways in which the BITs can be improved in the present social context using a Case Study and a textual analysis of documents.

Although it may seem that qualitative research methods are more often identified with the social sciences and humanities than with law, Webley argues that many common law practitioners undertake qualitative empirical legal research on a regular basis – perhaps unbeknownst to them citing as an example, the case-based method of establishing the law through the analysis of precedent, which is actually a form of qualitative research using documents as source material.[428] This thesis will be undertaken using documents (namely, BITs to which Ghana is a signatory, Awards of cases before ICSID Arbitral Tribunals in which Ghana is a respondent and Model BITs from Ghana and other jurisdictions) as source material to establish the present position as well as to analyse possible solutions to the perceived problem of expansive arbitral interpretations of BITs.
Kirk and Miller explain the distinction between qualitative and quantitative methodology by stating that 'a qualitative observation identifies the presence or absence of something, whereas a quantitative observation involves measuring the degree to which some feature is present',[429] such measurement usually arrived at via statistical quantification.[430] Since this thesis entails the identification of the presence or absence of specific provisions in Ghana's BITs that are 'fit for purpose', together with possible solutions to rectify the absence of essential requisite features, a qualitative methodology will be employed. Patton sets out the ways in which qualitative inquiry contributes to our understanding of the world,[431] namely by *inter alia,* illuminating meanings, understanding context: how and why it matters, identifying unanticipated consequences and making case comparisons to discover important patterns and themes across cases.[432] His explanation of these markers underlines how pertinent and appropriate a qualitative methodology is for this thesis. In relation to illuminating meanings, this research will inquire into and analyse documents, in particular the BITs and any available background documentation, because this research is concerned with

[423] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 928.
[424] Ibid 928.
[425] Ibid 928.
[426] Ibid 928.
[427] Ibid 928.
[428] Ibid 927.
[429] Jerome Kirk and Marc L. Miller, *Reliability and validity in qualitative research* (Vol. 1. Sage, 1986)
[430] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (OUP 2010)
[431] Michael Quinn Patton, *Qualitative Research & Evaluation Methods: Integrating Theory and Practice* (Sage publications 2014)2.
[432] Ibid 3-12.

socially constructed meanings, which are actually concretised in the documents being interrogated. Using this methodology will contribute to the understanding of the historical context in which the ITR came into existence, in particular the effects of the historical imperialist bias prevalent at the inception of those documents. This will bring to light the asymmetries of power within the seemingly "equal" wording of the BITs as well as how this is further perpetuated by the manner in which Arbitral Tribunals prioritise the interests of the Global North (i.e., the former colonisers) when interpreting BITs. This thesis will then conduct a comparison of how other states have dealt with the effects on their RA of expansive arbitral interpretation of provisions. This will help to provide a solution that is suitable for Ghana's needs as a developing country Host State. In excavating the historical imperialist bias referred to above, this thesis conducts the research via a version of Critical Discourse Analysis (CDA), an area of interdisciplinary research and analysis which took root in the 1980s and which now incorporates a number of different approaches.[433] It has been said that 'CDA does not stop once it has analysed a problem, but rather it attempts to intervene into social processes by proposing verbally and in writing, possible changes that could be implemented by practitioners'.[434] This is an accurate description of the methodology employed in this thesis, whereby the thesis seeks to analyse the problem with BITs, and then, by interrogating the social processes in existence, aims to propose a solution that could be implemented in Ghana and subsequently, potentially in other Host States as well.

Since a qualitative researcher is the instrument of the inquiry, what a researcher brings to an inquiry is very relevant.[435] In the case of this thesis, what the researcher brings to the inquiry is a background as a legal practitioner and the experience, skills, and cross-cultural sensitivity when engaging in the research and subsequent analysis.[436] The net result of such reflective and reflexive research will undergird the credibility of the findings.[437] This aspect of the research connects to hermeneutics as a research practice, whose philosophical origins have been described as involving a reappraisal and reinterpretation in relation to its cultural contexts.[438] In examining BITs, this thesis involves both a review of the BITs already in existence, as well as a reimagination of how they can best be refashioned when it comes to renegotiating old BITs or negotiating new BITs. In essence, a 'looking back in order to look forward', as the hermeneutics tradition.[439] With regards to understanding context, how and why it matters and identifying unanticipated consequences, goes to the very heart of this research. Some commentators state that a qualitative study of how systems function and the consequences of system dynamics must include attention to context, namely, what was happening around and in respect of the people, groups, organisations, communities, and systems of interest at the time. For context, at the time of signing up to these BITs, Ghana had recently attained independence from her colonial oppressors and was very keen to attract FDI, hence the desire to sign up to BITs, in the hope that the BITs would deliver this goal. This ties in neatly with unanticipated consequences, which have been described as information that is uncovered as a result of the openness of an inquiry.[440]

> Leaders, planners, social innovators, politicians etc. strive to attain their intended goals… But things seldom go as planned. Much of what was intended never occurs, and things that are never intended, and never even imagined, do occur. The open-ended fieldwork of qualitative inquiry documents both intended and unintended consequences of change processes.[441]

[433] Norman Fairclough & Ruth Wodak, Critical Discourse Analysis in Teun Adrianus van Dijk (ed) *Discourse as Social Interaction* (vol. 2 Sage 1997) 258
[434] Ruth Wodak,'Critical Discourse Analysis at the End of the 20th Century'(1999) Research on Language & Social Interaction 32.1-2 185, 187
[435]Michael Quinn Patton, *Qualitative Research & Evaluation Methods: Integrating Theory and Practice* (Sage publications 2014)
[436] Ruth Wodak, Critical Discourse Analysis at the ~End of the 20th Century." *Research on Language & Social Interaction* 32.1-2 (1999): 185, 186. Moreover, "critical" implies that a researcher is self-reflective whilst conducting research about social problems.
[437] Michael Quinn Patton, *Qualitative Research & Evaluation Methods: Integrating Theory and Practice* (Sage publications 2014)
[438] G McCaffrey, S. Raffin-Bouchal & N.J. Moules, 'Hermeneutics as Research Approach: A Reappraisal' (2012) International Journal of Qualitative Methods 11(3) 214 https://doi.org/10.1177/160940691201100303
[439]ibid
[440] Michael Quinn Patton, *Qualitative Research & Evaluation Methods: Integrating Theory and Practice* (Sage publications 2014) 11
[441]Michael Quinn Patton, *Qualitative Research & Evaluation Methods: Integrating Theory and Practice* (Sage publications 2014) 13

This quote is an uncannily accurate description of the unintended consequences of newly independent African States entering into BITs with the intention of securing much needed FDI for the economic betterment of their citizens, as well as the unintended consequences of the ISDS system and the expansive arbitral interpretations given to some of the provisions in the BITs that have turned out to be problematic.

Finally, using a comparative research approach, this thesis will compare the way other jurisdictions have dealt with the unintended consequences of the seemingly innocuous provisions of BITs. This is because such comparative research will provide valuable data from which to distil the reasons for the successes of some solutions proposed by some states. Comparative research, which has been described as 'one approach in the spectrum of scientific research methods',[442] draws on aspects of both experimental science and descriptive research, which will be useful for this research. This approach will also enable a solution to be proposed that it is anticipated will be fit for purpose in Ghana. It will furthermore inform potential solutions to the similar problem faced by other less developed Host States, thus showing the practical value and reach of this thesis. Within the qualitative methodology as described above, a series of approaches have been selected to develop this work. This thesis begins with a Legal Positivist approach, sometimes referred to as analytical, or doctrinal legal research, the underpinnings of which are that all law is created and posited (or laid down) by humans and that the validity of a rule of law lies not in its relation to morality or any other externally validating factor, but lies in its formal legal status.[443] The use of this approach at the outset is to enable an examination of the BITs as they are now, before conducting an exploratory deconstruction of how they came into existence. In some earlier versions of legal positivism, law was identified solely as commands to subordinates from a sovereign, and by that reasoning, international law would have had to be excluded from the category of 'law'.[444] That viewpoint has been debunked by later positivists, in particular Kelsen and positivism is now considered by scholars to be the dominant approach amongst international lawyers, and in particular, by practitioners of international law.[445]

One commentator posits that there are three types of legal theorists, firstly, general theorists who shoe-horn international law into their theories from a position of 'relative ignorance and non-involvement in foreign affairs' such as Herbert Hart, secondly theorists who are primarily experts in international law but who propose a theoretical perspective such as Reisman and finally, the few general theorists who also have substantial expertise in international law, such as the renowned Hans Kelsen[446] who strove to avoid idealizing the law via his Pure Theory of Law.[447] Delivering a critique of idealizing the law, Somek points out that the most prevalent idealization among legal scholars is that 'law, in and of itself or *in toto*, is a good thing' and states that this is exactly the type of idealization that Kelsen strove to avoid, maintaining that all idealizations that are also unnecessary, are indefensible.[448] Somek gives as an example, the theory by the Anglo-American version of positivism, that the law and its sources are constituted by conventions, concluding that conventions camouflage

[442] F. Esser and R. Vliegenthart, 'Comparative Research Methods' in Jorg. Matthes, Christine S. Davis and Robert F. Potter (eds) *The International Encyclopedia of Communication Research Methods* (No. 1 Wiley 2017)
[443] Robert Cryer, Tamara Hervey and Bal Sokhi-Bulley with Alexandra Bhom, *Research Methodologies in EU and International Law* (Bloomsbury Publishing 2011)
[444] Ibid
[445] Ibid
[446] Hans Kelsen, *Introduction to the Problems of Legal Theory* Bonnie Litschewski Paulson and Stanley L Paulson(trs) (Clarendon Press Oxford) 18,19. He states that The Pure Theory aims to depict the law as it is, without legitimising it as just or disqualifying it as unjust; the Pure Theory enquires into actual and possible law, not into "right" law. Also, that All ideology has its roots in will, not in cognition… cognition rends the veil that the will, through ideology, draws over things. Nevertheless, a cognitive science of the law [which is what the Pure Theory of Law aims to be] cannot concern itself with either the authority who would preserve the system or the forces that would destroy it.
[447] Ian Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (Martinus Nijhoff Publishers 1998)
[448] Alexander Somek, 'Kelsen lives' (2007) European journal of international law 18.3 409

as much as they reveal the power structures underpinning the operations of the legal order.[449] This example resonates, because whilst some international organisations might seek to claim that the source of International Investment Law lies in the Conventions and Treaties entered into by states parties, this thesis would argue that in fact the legal norms are effectively laid down by the more powerful states who produced the de facto Conventions and Treaties to developing countries desperate to attract FDI. These Treaties and Conventions therefore camouflage and at the same time reveal the power structures underpinning the operations of the legal order. Following this argument, the historical reasoning behind the entry by African States into so many IIAs with more powerful countries will be examined further in this thesis.

Under the umbrella of Legal Positivism, the doctrinal analysis approach (or black-letter method), which is known as the traditional legal methodology,[450] will be used to collect data from, and then to analyse primary sources such as statutes, case law, domestic legislation, international investment agreements, investment treaties and conventions. This will include a documentary analysis of reports from international organisations such as the United Nations (UN), UN Commission on International Trade Law (UNCITRAL), UN Conference on Trade and Development (UNCTAD) and the International Institute for Sustainable Development (IISD). The use of a doctrinal approach will enable a clear identification of the contexts in which Ghana's IIAs were negotiated and signed, including those clauses that have the capacity of cramping Ghana's regulatory space. This is based on the premise that 'the law is based on certain principles which can be revealed through studying the relevant laws and that once the premise is discerned, then the law can be assessed for compliance with the relevant principle(s) and explained according to that framework'.[451] Since "black-letter-lawyers" seek to 'systemise and rationalise'[452] the law, this thesis by using this approach, will establish the foundations, using the present position of the law as it stands in relation to the contents of Ghana's BITs. A properly nuanced answer to the research question can then be pursued from this landing stage.

3.2 APPROACHES EMPLOYED IN THIS THESIS TO EXAMINE THE PROBLEM OF ASYMMETRY IN GHANA'S BITS and the EROSION OF REGULATORY AUTONOMY

To arrive at an understanding of the perceived problem of the asymmetrical nature of the provisions in Ghana's BITs in favour of foreign investors in a manner which stifles her Regulatory Autonomy, this thesis will start with the theoretical approaches of Positivism and Legal History followed by a critical TWAIL approach, which shows the socio-historical context of the law and the asymmetric power relations being played out via the provisions of the BITs. An analysis of the provisions of the BITs will be conducted through a legal positivist lens to help identify the problem. Once the problem has been identified, a historical analysis of the clauses will be conducted, using the TWAIL Critical Approach.

3.2.1 LEGAL POSITIVISM

A positivist approach, which although described by Lauterpacht somewhat condescendingly as 'a mere chronicle[r] of events laboriously woven into a purely formal pattern of a legal system',[453] is much more than that. Legal positivism, described as 'the observable phenomenon of legislation, custom, and adjudication by courts and other legal institutions',[454] is the favoured and default methodological approach amongst international lawyers.[455] It is therefore adopted in this thesis as the best approach

[449] Ibid 409, 412
[450] Caroline Murphy and Cian Murphy, *Getting a PhD in Law* (Hart Publishing 2011)
[451] Ibid
[452] Ibid
[453] Hersch Lauterpacht, 'The Grotian tradition in international law' (1946) Brit. YB Int'l L. 23 5
[454] Robert Cryer, Tamara Hervey and Bal Sokhi-Bulley with Alexandra Bhom, *Research Methodologies in EU and International Law* (Bloomsbury Publishing 2011)38.
[455]Ibid 39.

to engage the Research Question, and to advance knowledge. As Gardener argues, the one aspect of positivism upon which its proponents (namely, Thomas Hobbes, Jeremy Bentham, John Austin, Hans Kelsen, and Herbert Hart) converge, is that 'in any legal system, a norm is valid as a norm of that system solely by virtue of the fact that at some relevant time and place some relevant agent or agents announced it, practiced it, invoked it, enforced it, endorsed it, or otherwise engaged with it'.[456] Whether or not it was an appalling norm that should never have been engaged with, is neither here nor there *at this point*. In other words, to quote Austin, 'the existence of law is one thing; its merit or demerit is another'.[457] Whilst this thesis does not interrogate the 'appalling norms' at the point of identification of such norms, it does critically engage with the provisions of the BITs in order to provide a complete picture. This initial positivist approach is therefore well suited to the introductory chapters of this thesis when the objective is to first ascertain the nature and existence of the BITs and the types of clauses contained therein. As Austin states, the main aim is an objective view of the law as it stands now - not whether it is good or bad.[458] This positivist approach will therefore lay a solid foundation for the more nuanced critical theoretical perspectives which are eminently suited to 'unpacking' the rest of the research question by virtue of the fact that they engage in critique and do not toe the line of the 'traditional' methodologies usually associated with the study of international law.[459]

3.2.2 LEGAL HISTORY

As stated by the late Professor Willard Barbour:

> [T]he road map for legal historians entails beginning with some situation in modern law that seems to demand an explanation, then delving into the situation by planting our feet firmly upon that which we are familiar, after which we can set off backward into its origins, to aid us to understand the situation and thus come up with a solution.[460]

Taking this approach, this thesis starts from the present-day situation where all the BITs entered into by Ghana, contain provisions which have the effect of constraining her RA. This thesis then proceeds upon a historical excavation and examination of the origins of the situation, to decipher the thought processes that went into formulating those agreements. Once that is ascertained, this thesis proceeds to read history forwards, with the aim of formulating a potential solution to the problem. The question has been asked whether legal history is merely 'a pleasant avocation, something desirable but a mere frill?'[461] or whether it can actually help us understand the modern law? The unequivocal answer, as posited by this thesis, is 'Yes', it can actually help us understand the modern law, if only because it causes one to question the status quo, not content to preserve things as they are, 'just because they are so'.[462] A caveat however is that before one sets out to alter rules or even challenge them, it is usually a good idea to try to understand how they came to be in existence in the first place. If the reason is no longer valid, then as Prof Barbour suggests, one must either find a reason that resonates now or abandon the rule. Whilst history may teach us to have less respect for something that has been too readily embraced, one should also be wary of the futility of sudden radical changes [merely for the sake of change],[463] preserving what Justice Holmes has referred to as an 'enlightened

[456] John Gardner, 'Legal Positivism: 5 1/2 Myths' (2001) 46 Am J Juris 199, 200
[457] Austin, *The Province of Jurisprudence Determined* W.E. Rumble (ed) (Cambridge: Cambridge University Press 1995)
[458] Alan D Cullison, 'Morality and the Foundations of Legal Positivism' (1985) 20 Valparaiso University Law Review 61, 63.
[459] Robert Cryer, Tamara Hervey and Bal Sokhi-Bulley with Alexandra Bhom, *Research Methodologies in EU and International Law* (Bloomsbury Publishing 2011)38.
[460] Notes of Prof Barbour in Paul Vinogradoff, 'Meaning of Legal History' (1922) 22 Colum L Rev 693; The Columbia Law Review published fragmentary notes as they were left by their author. Only such changes as have been made in punctuation and in the form of citations, as seemed necessary for clarity. The editors of the Review have wished thus to preserve to the reader, as far as may be, the vigour and charm of style with which the author so delighted them.
[461] Notes of Prof Barbour in Paul Vinogradoff, 'Meaning of Legal History' (1922) 22 Colum L Rev 693
[462] Ibid 693, 697
[463] Square brackets are mine

scepticism'.[464] These caveats will inform this thesis. The final point to be borne in mind during this exercise is that the past definitely has an effect on the morals, terminology, and notions of the law, and this is succinctly elucidated by von Ihering thus:

> Law is not less a product of history than handicraft, naval construction, or technical skill: as Nature did not provide Adam's soul with a readymade conception of a kettle, of a ship, or of a steamer, even so she has not presented him with property, marriage, binding contracts, the State. And the same may be said of all moral rules... The whole moral order is a product of history, … of the striving toward ends, of the untiring activity …tending to satisfy wants and to provide against difficulties.[465]

As a prequel to the Critical Approaches to be discussed and utilised below, and following from the discussion on legal positivism in the preceding subsection, it is worth noting that although positivism is often considered to be a conservative approach, representing 'old-fashioned conservative …naïve views of dead white men on the possibility of objectivity in law and morals',[466] this is far from being the full picture, since the original postcolonial international law scholars, such as Taslim O Elias, were positivists.[467] In fact, these postcolonial scholars used positivist ideas such as non-interference, sovereignty and sovereign equality to bolster their writings about the role of the newly-independent African States.[468] This leads seamlessly into the discussion in the next sub-section which expands upon a critical Third World Approach to International Law.

3.2.3 THIRD WORLD APPROACH TO INTERNATIONAL LAW (TWAIL)

Having unearthed the problems with BITs resulting from the imperialistic historical bias underpinning the development of International Law, this thesis next examines the problem and potential solution using TWAIL as a critical lens. TWAIL scholarship has been credited with making pioneering contributions to the critique and reconstruction of themes that are central to international law.[469] Using the approach of TWAIL's founding fathers (namely Antony Anghie, Makau Mutua, James Thuo Gathii and B S Chimni), this thesis aims at deconstructing the historical context of the BITs, IIAs and the ISDS system. "TWAILism", as both a deconstructive and a reconstructive tool, has been described by Appiagyei-Atua as an attempt to promote and inject an 'ethical dimension' into the arena of international law, thus ensuring a fair playing field for all actors in this arena.[470] How successful this attempt has been to date, will be examined as this thesis unfolds. TWAIL, according to Mutua, has three interrelated objectives:

> [F]irstly it aims to understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans; secondly it seeks to construct and present an alternative normative legal edifice for international governance; and finally, it seeks through scholarship, policy and politics, to eradicate the conditions of underdevelopment in the Third World.[471]

[464] Notes of Prof Barbour in Paul Vinogradoff, 'Meaning of Legal History' (1922) 22 Colum L Rev 693, 698
[465] Quoted by Prof Barbour in Paul Vinogradoff, 'Meaning of Legal History' (1922) 22 Colum L Rev 693, 697
[466] A Paulus and B Simma, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts – A Positivist View' (1999) 93 American Journal of International Law 302
[467] Robert Cryer, Tamara Hervey and Bal Sokhi-Bulley with Alexandra Bhom, *Research Methodologies in EU and International Law* (Bloomsbury Publishing 2011)38.
[468] Ibid 38.
[469] Branwen Gruffydd Jones (ed), *Decolonizing International Relations* (Rowman & Littlefield 2006)
[470] Kwadwo Appiagyei-Atua, 'Ethical Dimensions of Third-World Approaches to International Law (TWAIL): A Critical Review' (2016) 8 Afr J Legal Stud 209
[471] Makau Mutua and Antony Anghie, 'What is TWAIL?' Proceedings of the ASIL Annual Meeting (Vol. 94. Cambridge University Press, 2000 on behalf of the American Society of International Law)

By tracing the history of Africa in its proper context through colonization by military conquest, fraud, intimidation[472] and brute force,[473] TWAIL makes the valid point that even though many colonies jettisoned the yoke of direct colonial rule after WW II, it was soon apparent to them that they were still in bondage to the West politically, legally, and economically, thus rendering their formal freedoms merely illusory for the most part. It is through this lens that this thesis aims to explain the eagerness of Ghana (and other Host African States) to sign up to BITs which they thought would help them to gain a real freedom from the tentacles of their colonial past. To quote Mwalimu Julius Nyerere, the late President of Tanzania and an original TWAIL statesman:

> The Third World consists of the victims and the powerless in the international economy... Together we constitute a majority of the world's population and possess the largest part of certain important raw materials, but we have no control and hardly any influence over the manner in which the nations of the world arrange their economic affairs. In international rule making, we are recipients not participants.[474]

He also defined 'neo-colonialism' as the inability of Third World States to change their dependency upon and exploitation by the former imperial powers.[475] Other TWAIL commentators make the linkages between neo-colonialism and the United Nations as a front wherein European hegemony over global affairs was simply transferred to the big powers[476] in the Security Council under Article One of the UN Charter,[477] which made a mockery of the notion of equality amongst sovereign states, since the Security Council has primacy over the UN General Assembly, where the Third World States 'reside'. This, as shown in Chapter Two, is of relevance to the origins of the NIEO and BITs. TWAIL's overriding purpose is stated as the elimination of Third World powerlessness.[478] In this thesis, this "powerlessness" is represented by those provisions in Ghana's BITs which work to her detriment and undermine her regulatory autonomy. This thesis aims at exposing, unpacking, examining, and ultimately proposing a potential solution to the phenomenon of these problematic provisions and the expansive interpretation accorded them under ISDS, to help redefine Ghana's sovereignty. Mutua also concludes that TWAIL is fundamentally a 'reconstructive movement that seeks a new compact of international law'[479] and to that end, TWAIL is committed to ensuring that all factors that create, foster, legitimize, and maintain harmful hierarchies and oppressions are revisited and changed. Therefore, this thesis investigates and examines whether the provisions in Ghana's BITs could be described as creating, fostering, legitimizing, and maintaining harmful hierarchies and oppressions, and if so, how they can be revisited and changed or reversed.

3.2.4 CASE STUDY RESEARCH

The methodology used to present this is a single-case study as opposed to a multiple-case study. The single case, namely Ghana, will represent the critical test of this significant theory. As Yin explains:[480]

[472] Makau Mutua, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry' (1995) 16 MICH. J. INT'LL.1113. This provides a discussion of the legal and political justifications for colonization.

[473] Adam Hochschild, *King Leopold's ghost: A story of greed, terror and heroism in colonial Africa*. (Picador, 2019). The book provides a vivid historical account of the brutalities committed in Central Africa by the Belgians.

[474] Julius K. Nyerere, South-South Option, in The Third World Strategy: Economic and Political Cohesion. 9,10 (Altaf Gauhar ed. 1983)

[475] Daily News (Tanzania), Nov. 17, 1976.

[476] Dianne Otto, Subaltemity and International Law: The Problems of Global Community and the Incommensurability of Difference (1996) 5 Soc. & LEGAL STUD. 337, 340; see also Surakiart Sathirathai, An Understanding of the Relationship between International Legal Discourse and Third World Countries (1984) 25 HARV. INT'LL. J. 395

[477] The USA, Britain, France, the Soviet Union, and China allotted themselves permanent seats at the Security Council, the most powerful UN organ.

[478] Makau Mutua and Antony Anghie, 'What is TWAIL?' Proceedings of the ASIL Annual Meeting (Vol. 94. Cambridge University Press, 2000 on behalf of the American Society of International Law)

[479] Ibid

[480] Robert K. Yin, *Case Research and Applications: Design and Methods* (SAGE 2017)

> [T]he theory should have specified a clear set of circumstances within which its propositions are believed to be true. You can then use the single case study to determine whether the propositions are correct or whether some alternative set of explanations might be more relevant.[481]

In this scenario, the "clear set of circumstances" are a developing state that has entered into several BITs with states economically more powerful than itself hoping to secure FDI to develop its country after achieving political independence. The propositions are that these BITs are asymmetrical and will remain so unless addressed in a targeted manner to enable the country to decolonise the BITs in force, thus ending the legacy of decades of unfair historical practices perpetuated via asymmetrical provisions in the old-style BITs.

3.2.5 RATIONALE AND JUSTIFICATION FOR THE CHOICE OF GHANA AS A CASE STUDY

In terms of international participation, it is worth noting that Ghana was one of the first countries in the world to sign up to the ICSID Convention on 26 November 1965. The Convention was ratified on 13 July 1966 and came into force on 14 October 1966. Ghana acceded to the New York Convention on the 9th of April 1968. Ghana is an active member of the United Nations Commission on International Trade Law (UNCITRAL) and in May 2022, hosted the launch event of UNCITRAL Days in Africa, a programme which will focus on the modernization and harmonization of international commercial law in the context of the AfCFTA. It is important to clearly articulate the rationale for the choice of Ghana as a case study in order to delineate the scope of this chapter, not least because the fifty-five member states which comprise the AU[482] have diverse legal systems and diverse experiences with the IIA (including BIT) scene. This number of African States makes it impossible for this thesis to examine all fifty-five. As stated in Chapter One, Ghana has been chosen as a Case Study for this thesis because although Ghana may be perceived as having escaped relatively unscathed from the scale of arbitral disputes and expensive arbitral decisions suffered by other developing states, the potential for arbitral challenges to Ghana via the ISDS mechanism in her BITs remains high, mainly due to the type of provisions contained in the old-generation BITs to which Ghana remains a signatory party. Although in comparison to other developing Host States Ghana may be perceived as having had relatively few cases brought against it under the umbrella of its BITs, the potential for the institution of expensive arbitral tribunal proceedings against Ghana remains. This is because the BITs in existence to which Ghana is a signatory party, contain asymmetric provisions that would allow foreign investors to translate acts of RA carried out or instigated in the interests of Ghana's citizens as breaches of investor rights and a cause for submission to international arbitration.

Directly related to the previous point is the fact that although there are several new and innovative clauses now in existence, both in IIAs emanating from the Global North as well as in IIAs developed by African RECs and African States, Ghana has no BITs in existence which incorporate these new and innovative clauses and so does not have the protection that could be afforded by such clauses, leaving International Arbitrators free to make Awards that could be very damaging to Ghana's RA and economic sovereignty. It is therefore imperative that Ghana takes urgent steps to rectify the situation.

Additionally, another justification for the choice of Ghana as a Case Study is the negotiating and drafting capability of Ghana. Ghana is classed as a 'developing country'[483] and presently does not have

[481] Neal Gross, M. Bernstein, and J. B. Giacquinta, *Implementing Organisational Innovations: A National Study of the Open Classroom in the USA*. (1971)

[482] AU Member States https://au.int/en/member_states/countryprofiles2 accessed on 18.06.2022.

[483] The definition of a developing (or developed) country is not always clear. Although the United Nations determines which countries are among the least developed countries, it has not itself adopted criteria for developing countries. Nevertheless, with the "Human Development Index" they provide an important underlying value. This index combines the framework conditions of daily life such as nutrition, medical care, education, and income into a comparable index. Probably the most widespread interpretation of the term

a team of experts dedicated to negotiating and drafting new BITs or to re-negotiating the terms of the old-generation BITs in existence to ensure that the country's regulatory space is well protected. The current practice in relation to negotiation and drafting of IIAs is that teams are assembled on an ad-hoc basis, comprising functionaries from various government departments, such as the GIPC, the Ministry of Trade, Ministry of Foreign Affairs, Ministry of Justice, the Registrar General's Department, and the Attorney General's Department. Whilst each of these departments undoubtedly has a certain level of expertise, it is arguable whether this is indeed adequate for the purposes of negotiating and drafting IIAs with cutting-edge innovative clauses that are "fit for purpose".

In support of this position, Nana Dr S.K.B. Asante, Former Solicitor-General of Ghana, and Former Director, United Nations Centre on Transnational Corporations, New York, speaking at the 2022 Annual Ghana Association of Former International Civil Servants (GAFICS) lecture in Accra, Ghana, stated that 'the country must improve the process and structure within which it conducts international negotiations'.[484] This Public Lecture was entitled "Taking International Negotiations Seriously" and in his speech, Nana Dr S.K.B. Asante stated inter alia that 'the evidence of bad negotiations was clear from the high volume of judgement debts and deleterious conditions placed on the State as an outcome of performance on some of these deals'.[485] Additionally, the incorporation of innovative clauses in a new Model BIT could then be used as a template for negotiation and drafting, which would be able to protect the RA of the country, whilst also holding foreign investors responsible for their actions (or inaction) relating to sustainable development and corporate social responsibility. For all these reasons, it is imperative to examine avenues which will allow Ghana to legally extricate itself from the BITs[486] to which Ghana is signatory, whilst simultaneously exploring innovative ways of formulating future IIAs and local legislation in a manner that allows for primacy of its Constitution and RA, thus protecting and redefining its sovereignty.

Furthermore, this thesis has practical reach beyond Ghana, given the extensive discourse around the regulatory autonomy of developing states on the African continent and in the developing world generally, and the varied efforts of developing states to reform their BITs and their relationship with foreign investors[487] and the International Investment Regime. Another example of the practical reach of this thesis beyond Ghana is the fact that Ghana, in common with many other African countries, relies heavily on its natural resources of oil and gas, bauxite, manganese, gold and diamonds[488] for revenue in the form of foreign exchange. A study of cases in the ISDS eco-system shows that the cases mostly arise out of foreign investments in the area of natural resources on which Ghana and most other African countries rely.[489] It is therefore not unrealistic to conclude that there is a high risk that a lot of other African countries will also sooner or later face claims by foreign investors brought under the old-style BITs which remain in existence and therefore any solutions proposed in this thesis for Ghana, could potentially benefit other developing states in the future.

"developing country" is that of the International Monetary Fund (IMF). Here, states are classified on the basis of three criteria: Average per capita income, Diversification of export goods and Degree of participation in the international financial system. A further classification, which is occasionally equated with a developing country has been created by the World Bank relating to average annual income. Developing countries are those countries who's standard of living, income, economic and industrial development remain more or less below average. A further downgrade takes place vis-à-vis the least developed countries of the "Fourth World". According to the IMF definition, there are 152 developing countries with a current population of around 6.62 bn. At 85.20%, this is a considerable proportion of the world's population. It includes the whole of Central and South America, the whole of Africa, almost all Asian countries and numerous other island states. See https://www.worlddata.info/developing-countries.php accessed on 19.06.2022

[484] Ghana must do better in international negotiations - S.K.B. Asante - Ghana Business News accessed on 19.06.2023

[485] Samuel K.B. Asante, 'The Perspectives of African Countries on International Commercial Arbitration' (1993) 6 LJIL 331; See also S. K. B. Asante in 'Some key issues in negotiating international joint ventures'(1998) Banking and Financial Law Journal of Ghana 1.1 53; See also Samuel K.B. Asante, 'The concept of the good corporate citizen in international business' (1989) ICSID Review 4, no. 1 1; The contents of this Public Lecture are an updated amalgam of several of Dr Asante's previous works.

[486] UNCTAD Ghana | International Investment Agreements Navigator | UNCTAD Investment Policy Hub accessed on 18.06.2022

[487] Brazil, India, South Africa, Nigeria, Morocco, and Tanzania for example

[488] https://resourcegovernance.org/our-work/country/ghana; The natural resources of Ghana https://fortuneofafrica.com/ghana/2014/02/07/natural-resources-of-ghana/ accessed on 18.06.2022.

[489] ICSID Case Database https://icsid.worldbank.org/cases/case-database accessed on 18.06.2022.

Therefore, the rationale for this single-case case study is the *critical* case[490] as described by Yin. The single case can represent the critical test of a significant theory, in this case, the proposed solution to the perceived problem of the erosion of Ghana's regulatory autonomy which will be "fit for purpose".

Ghana relies heavily on its natural resources of oil and gas, bauxite, gold and diamonds[491] for revenue in the form of foreign exchange. Research has proven that most cases that are brought before arbitral tribunals by foreign investors arise out of investments in the natural resources on which Ghana relies. It is therefore not unreasonable to anticipate that Ghana will most probably continue to encounter claims by foreign investors brought under old BITs still in existence. Ghana, while not as successful as South Africa or Egypt in terms of attracting FDI,[492] is aspiring to become a leading recipient of FDI and to that end, like a lot of other African countries, has signed up to and ratified several older BITs, which incorporate the problematic provisions previously discussed in this thesis. It is therefore very likely that a disgruntled foreign investor will sometime in the near future bring a case against Ghana based upon the alleged breach of one of these provisions. Ghana is therefore an ideal candidate to be chosen as a case study to examine the issues of the provisions contained in old-style BITs and the propensity of arbitral tribunals to construe these provisions expansively to the detriment of Host States, as well as to suggest a potential solution.

Case study research has been defined by Yin as a two-fold empirical method that investigates a contemporary phenomenon (the 'case') in depth and within its real-world context, especially when the boundaries between phenomenon and context may not be clearly evident.[493] In this thesis, the contemporary phenomenon that is being investigated is provisions of BITs signed up to by Ghana, and the attendant propensity of arbitral tribunals to expansively interpret these provisions to the detriment of developing Host States. This is being investigated within its real-world context, namely the asymmetric relationship between the Global North and the Global South, starting from the immediate post-colonial era, which resulted in skewed Investment Treaties and continues to mitigate against developing states from the Global South because of the stranglehold on their regulatory space. The boundary between this phenomenon and its context is not clearly defined and therefore in line with the definition above, a case study research methodology is ideal for this thesis. The presumption that case-study research is only a preliminary method of inquiry and one that cannot be used to describe phenomena or explain propositions (and hypotheses) has been shown by commentators[494] and indeed by case studies,[495] to be a misconception. By using the case study as a research method, this thesis aims to design a good case study which will then enable the collection, collation, presentation, and analysis of data. The end result of the case study will be valuable findings which will then be used to inform potential reform proposals. There are five components of a research design, as set out by Robert Yin.[496] Firstly, a case study's questions. The case study questions here are -

- Why do the BITs entered into by Ghana contain provisions that potentially restrict its regulatory autonomy?
- How does Ghana approach the drafting and negotiating of BITs?
- What negotiation processes does a BIT go through?

[490] Robert K. Yin, *Case Research and Applications: Design and Methods* (SAGE 2017) 49
[491] https://resourcegovernance.org/our-work/country/ghana; https://fortuneofafrica.com/ug/natural-resources/ accessed on 27.10.2020
[492] https://unctad.org/system/files/official-document/wir2019_en.pdf accessed on 27.10.2020
[493] Robert K. Yin, *Case Research and Applications: Design and Methods* (SAGE 2017) 15
[494] Robert K. Yin, *Case Research and Applications: Design and Methods* (Sixth Edition SAGE 2017) 7
[495] Some of the best and most famous case studies have been explanatory case studies. See Joan Hoff Wilson, Graham T. Allison, *Essence of Decision: Explaining the Cuban Missile Crisis*. (Written under the auspices of the Faculty Seminar on Bureaucracy, Politics, and Policy of the Institute of Politics, John Fitzgerald Kennedy School of Government, Harvard University. Boston: Little, Brown and Company 1971) 338; Louise Fitzsimons. *The Kennedy Doctrine*. (New York: Random House. 1972) 275; James E. Mcsherry, *Khrushchev and Kennedy in Retrospect* (Open-Door Press 1971) 233 https://doi.org/10.1086/ahr/77.5.1521
[496] Robert K. Yin, *Case Research and Applications: Design and Methods* (Sixth Edition SAGE 2017) 27

- Which Ministries deal with the negotiations?
- Do the Ministries have a dedicated team?
- What expertise do the negotiators have?
- What experience do the negotiators have?
- In which sectors have investments been made?
- Which countries do investors come from?
- Have these BITs contributed anything to the economy?
- What disputes has Ghana faced?
- Which provisions have been invoked the most in disputes?
- How successful has Ghana been in defending these disputes?
- Does Ghana presently face any disputes?

These questions were arrived at by interrogating the research problem and aims of this thesis.

The second component of a research design, according to Yin, are propositions. For the purposes of this thesis, these will be described as a hypothesis. The first hypothesis of this thesis is that the present state of Ghana's BITs, which are not "fit for purpose" and have the potential to allow foreign investors to maintain a stranglehold on Ghana's regulatory autonomy and therefore its sovereignty, could perhaps be rectified by a focus on negotiating and drafting of BITs that actually reflect the needs of Ghana. The second hypothesis is that the ISDS system could probably acquire legitimacy if Ghana (and by extension other developing Host States) had a meaningful role in the (re)negotiation and drafting processes and in the appointment of arbitrators.

The next stage in the design of a Case Study deals with identifying 'the case' to be studied. This entails defining the case as well as specifying time boundaries to define the estimated start and end of the case.[497] For the purposes of this thesis, the 'case' to be studied is Ghana, and embedded in that study are all BITs signed by Ghana from 1980 to the present. The timescale of 1980 to the present has been chosen to encapsulate the run up to the first BIT that Ghana entered into in 1989, until the present time. Setting boundaries in this manner will help delineate the scope of data collection in this thesis. It also helps in distinguishing data about the subject of this case study (namely the phenomenon of asymmetric BITs) from data that forms the context of the case (i.e., data going back to the colonial era), but which is nevertheless highly relevant to the thesis[498]. The reasoning behind the choice of Ghana as a Case Study has been set out at the beginning of this section. This thesis has reach because Ghana's problems are unfortunately not unique amongst developing states in terms of the BITs entered into, when compared to the level of FDI attracted. Therefore, any solution would be of immense importance if it could be scaled up and used by other developing states to assist them reclaim their RA and redefine their sovereignty.

With regards to the next criteria, namely the logic linking the data to the propositions, this thesis will centre around the period of time for the collection of the data, i.e., from 1980 to the present time. Yin states that the final stage in the design of any Case Study, is the criteria for interpreting the strength of a case study's findings.[499] The criterion to be utilised in this case study research, is to identify and address some possible rival explanations for the findings in this thesis.[500] The potentially important rival explanations in this case study will be identified as the data is collected and analysed. This thesis is aiming to identify a potential solution to deal with the issue of problematic provisions in BITs that do not serve the interests of Ghana but in fact end up potentially restricting the country's regulatory autonomy. The case study aims to find out whether proposals like the Multilateral Advisory Centre posited by UNCITRAL and other "Advisory" initiatives based in the Global North, are actually helpful or whether they would merely add an unnecessary layer of bureaucracy to the ISDS regime,

[497] Robert K Yin, *Case Study Research and Applications: Design and Methods* (Sixth Edition, SAGE Publications, 2017) 31
[498] Ibid 31
[499] Robert K Yin, *Case Study Research and Applications: Design and Methods* (Sixth Edition, SAGE Publications, 2017) 33
[500] Robert K Yin, *Case Study Research and Applications: Design and Methods* (Sixth Edition, SAGE Publications, 2017) 34

levying additional unnecessary costs to developing countries such as Ghana. The case study will also examine the possibility of these rival proposals being perceived as yet another form of thinly disguised foreign control over the regulatory space of African States. The aim is that these theoretical propositions will play a critical role in helping to extend the lessons learned from this case study, forming the basis of an analytic generalization which may be based on either (a)corroborating, modifying or otherwise advancing the theoretical concepts set out whilst designing this case study, or (b)on new concepts that arose after the completion of the case study.[501] Either way, based on the findings, the result will be a conceptually superior generalization.

3.3 METHODOLOGY EMPLOYED TO ARRIVE AT A POSSIBLE SOLUTION TO THE ISSUE OF ASYMMETRICAL PROVISIONS IN OLD-STYLE BITS

Following on from the examination of the problem above, the approach that will be employed to propose a practical, workable solution to the identified problem is a Critical Comparative approach. This approach will be used to compare how other jurisdictions deal with drafting and (re)negotiating their IIAs as well as comparing other relevant initiatives that have been trialled by other developing countries. There are several other relevant research methods that could have been utilised but after careful consideration, this approach was deemed to be the most suitable. Whilst Ghana will be utilised as a case study for this work, for the reasons set out under the "Rationale" in Chapter One, the possibility of a solution being beneficial to other developing Host States on the African continent and beyond could be explored further in post-doctoral research.

The utilisation of comparative methods in relation to international law, would, as comparativist Harold Gutteridge commented, 'at first sight appear to be excluded, because rules which are avowedly universal in character do not lend themselves to comparison'.[502] Anthea Roberts and others have pointed out however, that this conception is not the experience found in real-world international legal practice and that in fact, many scholars and practitioners have noted that international law is often 'understood, interpreted, applied and approached differently in different settings'.[503] This thesis is concerned with BITs entered into by Ghana and therefore it is of interest that Katerina Linos posits that whilst Treaty interpretation does not require cross-country comparison per se, as the text of the Treaty itself could provide answers, (as opposed to, say, custom or general principles), in practice, comparison is useful, as international and domestic courts are often faced with ambiguous treaty terms.[504] Thus a Critical Comparative Approach to discovering a solution is apt, as this thesis is intended to be intensely practical, argued from the viewpoint of a practitioner and aimed at providing a workable solution to the conundrum of Ghana's asymmetrical BITs. In order to arrive at a solution, this thesis proposes a comparative examination of the ways in which other countries have dealt with their IIAs (and BITs in particular) and their Investment Treaties in general, as a reaction to their experience with the international investment regime and its impact on their RA, particularly in the areas of economic and social policy.[505] Whilst some work has been done by Broude, Haftel and Thompson in relation to renegotiation of BITs and the inclusion of ISDS provisions in the context of state regulatory space generally, there has been no such research done in respect of an African country. In fact, their conclusion in respect of sub-Saharan Africa was that 'Most countries in these

[501] Robert K Yin, *Case Study Research and Applications: Design and Methods* (Sixth Edition, SAGE Publications, 2017) 39

[502] H.C. Gutteridge, 'Comparative Law and the Law of Nations' in W.E. Butler (ed) *International Law in Comparative Perspective* (1980)

[503] Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier, and Mila Versteeg, (eds) *Comparative International Law* (Oxford University Press 2018). David Kennedy, a US international lawyer, observed that International law "is different in different places"; B.S. Chimni, an Indian international lawyer, states that "location matters" when it comes to international law "be it in terms of the issues that are addressed or the ways in which these are approached"; Xue Hanquin, the Chinese Judge at the International Court of Justice, comments that "Notwithstanding its universal character, international law in practice is nonetheless not identically interpreted and applied among States.

[504] Katerina Linos,' Methodological Guidance, How to Select and Develop Comparative International Law Case Studies' in Anthea Roberts, Paul B Stephan, Pierre-Hugues Verdier and Mila Versteeg (eds) *Comparative International Law* (Oxford University Press 2018) 36

[505] Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2004) Fordham L. Rev. 73 1521.

regions renegotiated BITs with Northern partners and follow the general trend: that is, high levels of regulatory space in the initial BITs and more investor-friendly renegotiated agreements in the 1990s and 2000s'.[506] This conclusion goes to the heart of the research question being addressed in this thesis and whilst that conclusion may be true on the face of it, it is clearly not the full story and the full, nuanced story behind those results will be examined in this thesis through the critical lens of TWAIL.

Finally, using this Critical Comparative approach, this thesis will, in addition to exploring the ways in which other countries have dealt with their BITs, also conduct a comparative law analysis on provisions of the Pan-African Investment Code (PAIC) and the Model BIT produced by the Africa Arbitration Academy in July 2022 (the AAA Model BIT). The PAIC is the first continent-wide investment instrument that has been drafted from the perspective of Third World countries and that incorporates some innovative features, as well as focusing on sustainable development goals.[507] The AAA Model BIT has been drafted from the perspective of African Host States and a comparative analysis of these instruments when compared with Ghana's present Model BIT should provide some very interesting insights as well as possible solutions to the research question. As the ISDS regime is going through a period of intense introspection with regards to its legitimacy and bona fides with regards to African States and other Third World countries, an analysis of the PAIC and the AAA Model BIT, in conjunction with a comparison of other suggested reform approaches, is very timely. This thesis will therefore help to identify those clauses which lend themselves to regional or national adaptation and which of the usual BIT clauses are "fit for purpose" or "not fit for purpose" in this context.[508]

3.4 CONCLUSION

This thesis examines the texts of the BITs to which Ghana has signed up, using a reflective yet critical methodological lens, starting with a Positivist approach to identify the issues, followed by using a critical TWAIL approach to situate the problems in a relevant historical context, and finally, utilising a Critical Comparativist approach to identify the proposed solution. The intention is that the proposed solution will set Ghana upon a path that provides a realistic prospect of redefining sovereignty by restoring its RA. In this context, Zinaida Miller's introduction to her review of Kennedy's A World of Struggle,[509] is worthy of reproducing verbatim, as it encapsulates the situation that Ghana (and several other developing Host States) finds itself in at the moment, with regards to some of the clauses in its BITs, which, having crept seemingly innocuously into these agreements with the aid of "experts", now seem to hold the State ransom in terms of its ability to realize regulatory autonomy:

> In World of Struggle, David Kennedy argues that people deploying the vocabularies of expertise shape the global order by first engaging in continuous, ruthless battles and subsequently hiding those skirmishes from view. In the process, "struggle and distribution disappear as experts embody the voice of reason and outcomes are assimilated as facts rather than contestable choices". In many arenas, those facts become the hardened concrete of unequal distribution, a set of arrangements made incontestable through invisibility: the obscurity of the expert decision-makers, the rationalized language of decision, and the veiling of prior struggle in present agreement work together to naturalize the status quo.[510]

[506] Broude, Tomer, Yoram Haftel, and Alexander Thompson, 'Who cares about regulatory space in BITs? A comparative international approach' in Anthea Roberts, Paul B Stephan, Pierre-Hugues Verdier and Mila Versteeg (eds) *Comparative International Law* (Oxford University Press 2018) 544

[507] Mbengue, Makane Moïse, and Stefanie Schacherer, 'Africa and the rethinking of international investment law: about the elaboration of the Pan-African investment code' in Anthea Roberts, Paul B Stephan, Pierre-Hugues Verdier and Mila Versteeg (eds) *Comparative International Law* (Oxford University Press 2018) 547

[508] Anthea Roberts et al,(eds) *Comparative international law* (Oxford University Press, 2018) 568

[509] David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy*, (Princeton University Press, 2016)

[510] Zinaida Miller, Reviewing David Kennedy's A World of Struggle (Vol 67 No.1 Autumn 2017) Journal of Legal Education 345

In 'World of Struggle', David Kennedy continues his project, started twelve years earlier with 'Dark Sides of Virtue',[511] of shining a light on the hidden implications of a myriad of "expert" decisions that on the face of it seem mundane, but that taken in the round, have the effect of shaping a world that is paradoxically, both unstable and unshakable.[512] According to Miller, Kennedy's challenge to readers is 'to unsettle what has seemingly been seamlessly resolved, to un-tell the familiar stories of binaries and boundaries, to uncover the struggles that expertise obscures, and thus to unleash the possibility of remaking the world'.[513]

These sentiments underline what TWAIL theorists have been articulating for many years, that even though African States seemingly threw off the yoke of imperialism and colonialism years ago, their struggle for sovereignty continues to this day, and is endemic, because law has now morphed into a tool for redistributing resources and power, rather than an instrument for 'ordering, problem-solving, or expressing global values'.[514] This conundrum is taken a step further by Koh[515] who suggests that perhaps not all treaties are created equal and that securing compliance with a treaty may in some circumstances actually be undesirable, if the treaties themselves are 'unfair or enshrine disingenuous or coercive bargains'.[516] Whilst all this may seem almost heresy on the face of it, the reality, as will be examined in this thesis, may not be that far of, when Ghana's BITs are examined in their proper context. Thus, the struggle for sovereignty continues on several fronts. This thesis focusses on the battleground of the law in action and argues that a solution to the problem of asymmetrical BITs between powerful western states and Ghana would have to be practical and not merely theoretical.

The next chapter identifies and examines the International Legal Framework relating to the regulation and governing of IIAs, which is derived from a range of sources.

[511] David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press 2005)
[512] Zinaida Miller, Reviewing David Kennedy's A World of Struggle (Vol 67 No.1 Autumn 2017) Journal of Legal Education 345 Published by: Association of American Law Schools; URL:https://www.jstor.org/stable/26453548 Accessed: 28-08-2020 13:40 UTC
[513] Z Miller, Reviewing David Kennedy's A World of Struggle (Vol 67 No.1 Autumn 2017) Journal of Legal Education 345, 353
[514] Z Miller, Reviewing David Kennedy's A World of Struggle (Vol 67 No.1 Autumn 2017) Journal of Legal Education 345, 353
[515] Harold Hongju Koh, 'Why Do Nations Obey International Law' (1997) 106 Yale LJ 2599
[516] Harold Hongju Koh, 'Why Do Nations Obey International Law' (1997) 106 Yale LJ 2599, 2641

Chapter Four – A Critical Examination of the International Legal Framework for regulating Regional and International Investment Agreements

4. INTRODUCTION

As noted in earlier, the struggle for sovereignty by developing countries which are Host States, continues on several fronts. The previous chapters laid bare the problem of asymmetrical old-style IIAs between powerful western states and poorer developing states, with an emphasis on Ghana. This chapter deals with an exposition of the International Legal Framework relating to IIAs, together with current and past practices relating to the negotiation and drafting of these legal instruments. This exposition identifies and examines the Law regulating and governing the negotiation and drafting of IIAs and the enforcement of the Awards made by the arbitral tribunals under the ISDS. The legal framework derives from a proliferation of sources that range from public to private law, and hard law to soft law. These are identified in this chapter, providing a comprehensive picture of the substantive law in this area. This chapter represents a preliminary step in the examination of the Research Question and the argument of this thesis by setting out what the current International Legal Framework relating to IIAs is and identifying any inherent weaknesses in this framework that cause the problems. This is because, before these problems can be examined, an overview of the Law as it presently stands must be undertaken, in the positivist tradition. Thereafter, Chapter Five will probe the problems arising from any weaknesses identified in this chapter, using Ghana as a Case Study.

The United Nations Conference on Trade and Development (UNCTAD)[517] is a permanent intergovernmental body established by the UN General Assembly in 1964, reporting to the UN General Assembly and the Economic and Social Council as part of the UN Secretariat[518] and the UN Development Group.[519] As the global focal point for all matters relating to International Investment Agreements and their development implications, UNCTAD is world-renowned for its work in analysing latest trends and key emerging issues in IIAs and providing a platform for universal, inclusive and transparent stakeholder engagement in issues such as building the capacity of developing countries to negotiate and implement IIA that can foster sustainable development.[520] Additionally, UNCTAD has been involved in the ongoing efforts to reform the International Investment Regime and has been described as serving as 'a global centre of excellence in managing trade data, statistics and related analytical software', maintain a database comprised of 'data collected and regularly updated from national economies and international sources'.[521] Using the 2020 edition of the United Nations Conference on Trade and Development (UNCTAD)[522] World Investment Report (WIR 20)[523] as a starting point, this thesis shows that the proliferation of IIAs is a global phenomenon and one that continues to grow. Section 4.1 of this thesis sets out what exactly constitutes an IIA.

This critical examination of the Legal Framework relating IIAs also includes an in-depth review of the three phases outlined in UNCTAD's 2018 Reform Package for the International Investment Regime (the Reform Package). The Reform Package has been described as:

[517] https://unctad.org/about accessed on 19.06.2021.
[518] https://www.un.org/en/ accessed on 19.06.2021.
[519] https://unsdg.un.org/ accessed on 19.06.2021.
[520] https://unctad.org/topic/investment/international-investment-agreements accessed on 19.06.2021.
[521] Helen Canton, 'United nations conference on trade and development—UNCTAD' in *The Europa Directory of International Organizations 2021* (Routledge, 2021) 172
[522] https://unctad.org/ accessed on 19.06.2021.
[523] https://unctad.org/system/files/official-document/wir2020_en.pdf accessed on 19.06.2021.

> a pooling of global expertise in the investment and sustainable development field from international organizations and numerous international experts, academics, businesses, practitioners, and other stakeholders in the field of investment law and policy.[524]

The existence of such an overarching piece of work as the Reform Package is proof that this issue relating to older IIAs and the resultant lack (or restriction) of regulatory autonomy in Host States, is not an issue that affects only a few states, but a global problem that could potentially affect all African states rich in natural resources. As stated in the Executive Summary of the Reform Package:

> A shared view has emerged on the necessity to ensure that the international investment treaty regime works for all stakeholders. The question is not about whether to reform, but about the substance of such reform (the what), as well as the processes and mechanisms of reform (the how).[525]

Thereafter, this chapter examines Customary International Law's links with the more common standards of treatment of investors and their investments found in IIAs, as well as the impact of the Vienna Convention on the Law of Treaties (VCLT)[526] on the Legal Framework of IIAs, since it has been described as a 'unique treaty instrument … designed to govern all other treaties'.[527] Moving from the generic to the particular, this chapter deals next with the quest for a multilateral agreement on Investment, starting with the aborted Havana Charter for an International Trade Organization[528] (the Havana Charter), to the WTO's General Agreement on Tariffs and Trade (GATT)and the OECD[529] Multilateral Agreement on Investment (MAI)[530], culminating with an update on the Joint Ministerial Statement on Investment Facilitation for Development[531] launched at the 11th WTO Ministerial Conference held in December 2017 in Buenos Aires. As part of the analysis of the Legal Framework relating to IIAs, this chapter draws comparisons between the approach(es) to negotiation and drafting styles used by western states on the one hand and the approach(es) to negotiating and drafting of IIAs in the African context on the other. It also examines treaty drafting developments at the AU level, at the Regional Economic Community level and thereafter at the domestic level. There have been some innovative initiatives by way of template agreements of IIAs pioneered by various African RECs over the years which will be discussed later in this thesis, which do not seem to have progressed further or at all. This chapter examines and analyses why these initiatives floundered and what lessons could be learned from their failures, such as perhaps a lack of unity amongst African States, resulting in the continent's inability to leverage its collective bargaining power in negotiations.

This chapter also examines the extent to which UN's Sustainable Development Goals[532] have been incorporated in some of the more innovative Investment Agreements internationally as well as on the African continent, such as the PAIC and the Investment Protocol of the African Continental Free Trade Area Agreement (AfCFTA) agreement, to ascertain how successful those initiatives have been and

[524] UNCTAD's Reform Package for the International Investment Regime (2018 edition) See https://investmentpolicy.unctad.org/publications/1190/unctad-s-reform-package-for-the-international-investment-regime-2018-edition- accessed on 05.09.2022

[525] UNCTAD's Reform Package for International Investment Regime accessed 29.11.2021 7

[526] Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331; VCLT hereafter) The VCLT applies only to treaties between states.

[527] Maria Frankowska, 'The Vienna Convention on the Law of Treaties before United States Courts' (1988) 28 Va J Int'l L 281, 285.

[528] https://www.wto.org/english/docs_e/legal_e/havana_e.pdf accessed on 24.06.2021.

[529] Organisation for Economic Co-operation

[530] The MAI has been described by some NGOs as a draft agreement negotiated in secret between members of the OECD between 1995 and 1998. One that sought to establish a new body of universal investment laws that would grant corporations [near] unconditional rights to engage in financial operations around the world, without any regard for national laws and citizen's rights. For OECD perspective, see https://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm accessed on 17.06.2021

[531] See https://www.wto.org/english/news_e/news20_e/infac_25sep20_e.htm accessed on 17.06.2021.

[532] See https://sdgs.un.org/goals accessed on 18.06.2021.

what lessons can be learned from those innovative initiatives. At the end of this chapter the various strands of the argument will be brought together in a conclusion. The next section explains and examines the phenomenon of IIAs in the context of International Law.

4.1 THE EVOLUTION OF INTERNATIONAL INVESTMENT AGREEMENTS

IIAs are a global and growing phenomenon. There are two types of IIAs, namely BITs and TIPs. A BIT is an agreement between two countries regarding promotion and protection of investments made by the investors from the respective signatory countries, in each other's territory. The great majority of IIAs are BITs.[533] The reason for this growing phenomenon is mainly because the efforts of developing countries starting from the 1950s to attract and benefit from FDI. Their aim was to obtain funds to enable them to fund development projects in their countries. This resulted in a network of investment rules which can be found in numerous BITs, free trade agreements (FTAs) with investment components, double taxation treaties and other TIPs. This veritable 'spaghetti-bowl'[534] of investment rules, are most often to be found in older treaties which are badly in need of reform. It must be appreciated that IIAs – like most other treaties – need to be understood in relation to the context at the time they were negotiated. Each IIA was negotiated and concluded in a particular historic, economic, and sociological context and this was in response to the needs and challenges of the Home State and Host State parties at the time. The very first recorded bilateral IIA was signed between Germany and Pakistan more than half a century ago, on 25th November 1959 and entered into force on 28th April 1962.[535] It is therefore astonishing that the investor-centred focus of IIAs has hardly changed over the past fifty years and that a real re-consideration of the position of Host States has only recently been brought to the fore.

The UNCTAD World Investment Report (WIR) 2020[536] was the 30th Anniversary edition of UNCTAD's World Investment Reports. Based on the length of time that it has been monitoring IIAs and FDI flows, UNCTAD is qualified to provide an authoritative commentary on whether IIAs are a global and growing phenomenon or not and how much growth there has been over the past years. The Secretary-General of the United Nations, António Guterres, in his preface to UNCTAD's 2020 WIR, succinctly described it as a publication that 'supports policymakers by monitoring global and regional FDI trends and documenting national and international investment policy developments'.[537] According to UNCTAD in its 2018 Reform Package for the International Investment Regime[538], the evolution of the IIA regime can be divided into four distinct eras. These are The Era of Infancy (1950's to 1964); the Era of Dichotomy (1965 to 1989); the Era of Proliferation (1990 to 2007) and the Era of Re-orientation (2008 to present day).

[533] See International Investment Agreements Navigator | UNCTAD Investment Policy Hub under Terminology. Accessed on 05.09.2022. The category of TIPs brings together various types of investment treaties that are not BITs. Three main types of TIPs are (1)broad economic treaties that include obligations commonly found in BITs (e.g., a free trade agreement with an investment chapter); (2)treaties with limited investment-related provisions (e.g., only those concerning establishment of investments or free transfer of investment-related funds); and (3)treaties that only contain "framework" clauses such as the ones on cooperation in the area of investment and/or for a mandate for future negotiations on investment issues. In addition to IIAs, there exists an open-ended category of Investment Related Instruments (IRIs) which encompasses various binding and non-binding instruments. These include, for example, Model Agreements and Draft Instruments, Multilateral Conventions on Dispute Settlement and Arbitration Rules, documents adopted by International Organisations and others.

[534] Zakaria Sorgho, RTAs' Proliferation and Trade-diversion Effects: Evidence of the 'Spaghetti Bowl' Phenomenon (2016) The World Economy 39.2 285

[535] https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/1732/germany---pakistan-bit-1959- accessed on 17.09.2024

[536] https://unctad.org/system/files/official-document/wir2020_en.pdf accessed on 19.06.2021.

[537] https://unctad.org/system/files/official-document/wir2020_en.pdf accessed on 19.06.2021.

[538] https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf accessed on 19.06.2021.

(i) The hallmark of the Era of Infancy was that it was the beginning of the emergence of IIAs, starting with the Germany/Pakistan BIT in 1959. By 1964, there were 37 IIAs in existence and none of them had the protection of an Investor State Dispute Settlement (hereinafter ISDS) clause incorporated in the Agreement. In that Era, the main Legal developments on the international arena, which impacted the IIA regime, however obliquely, were the General Agreement on Trade and Tariffs (hereinafter GATT) in 1947[539], the Draft Havana Charter in 1948[540], the Treaty Establishing the European Community in 1957[541], the New York Convention[542] in 1958, the OECD Liberalization Codes[543] in 1961 and the UN Resolution on Permanent Sovereignty over Natural Resources[544] in 1962. The context of this Era was that the newly independent African States were beginning to throw off the shackles of colonialism at this time, starting with the independence in 1957 of Ghana, the first African Country (south of the Sahara) to attain its independence.

(ii) During the Era of Dichotomy, the number of new IIAs increased by 367, bringing the total number of cases worldwide to 404[545]. It was in this era that the Codes of conduct for investors were first mooted, with enhanced protection for investors as well as ISDS clauses being introduced into the IIAs. The first ISDS case was also brought in this Era. With regards to legal developments, this Era saw the establishment of ICSID[546] in 1965, the establishment of UNCITRAL[547] in 1966, the signing of the first BIT with an ISDS clause in 1968 between the Netherlands and Indonesia, the UN Declaration on the NIEO[548] in 1974, the OECD Guidelines for Multinational Enterprises[549] in 1976 and the Convention Establishing the Multilateral Investment Guarantee Agency (hereinafter MIGA Convention)[550] in 1985. These landmark pieces of legislation show the legal and political context into which these 367 IIAs came into existence explain why certain clauses were incorporated into IIAs.

(iii) The penultimate Era run from 1990 till 2007, during which time the hallmark of the times was a push by the developed world to 'encourage' economic liberalization and globalization in the economies of the developing (Host) States. In that era, there was also an expansion of ISDS with 291 new (known) ISDS cases being instituted, in stark comparison to the fact that from the 1950s to 1989, there was only one (known) ISDS case instituted. The Era of Proliferation is also aptly named because between 1990 and 2007, UNCTAD recorded 2663 new IIAs, which brought the total IIAs in existence as at the end

[539] The GATT deal was signed on 30 October 1947 and the tariff concessions came into effect by 30 June 1948 through a "Protocol of Provisional Application" and thus the new General Agreement on Tariffs and Trade was born, with 23 founding members (officially "contracting parties").
[540] See below under MAI discussion.
[541] https://ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_3_antlasmalar/1_3_1_kurucu_antlasmalar/1957_treaty_establishing_eec.pdf
[542] https://www.newyorkconvention.org/english accessed on 25.06.2021.
[543] https://www.oecd.org/daf/inv/investment-policy/codes.htm accessed on 25.06.2021. The Code of Liberalisation of Capital Movements was born with the OECD in 1961 at a time when many OECD countries were in the process of economic recovery and development and when the international movement of capital faced many barriers. For almost 60 years, the Code has provided a balanced framework for countries progressively to remove barriers to the movement of capital, while providing flexibility to cope with situations of economic and financial instability. Throughout this period, the OECD has provided a forum for international dialogue and co-operation. Under the Code, an adhering country is entitled to benefit from the liberalisation of other adhering countries regardless of its own degree of openness.
[544] https://legal.un.org/avl/ha/ga_1803/ga_1803.html accessed on 25.06.2021.
[545] According to UNCTAD Reports
[546] The International Centre for Settlement of Investment Disputes is an international arbitration institution (under the auspices of the World Bank) established in 1966 for legal dispute resolution and conciliation between international investors and States.
[547] https://uncitral.un.org/ accessed on 25.06.2021.
[548] http://www.un-documents.net/s6r3201.htm accessed on 25.06.2021.
[549] https://www.oecd.org/corporate/mne/ accessed on 25.06.2021.
[550] https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800c7c17 accessed on 25.06.2021.

of that era to 3067, indicating the scale of growth of this global phenomenon. The highlights of the legal framework brought into existence during this Era of Proliferation are the World Bank Guidelines for the treatment of FDI[551] in 1992, the North America Free Trade Agreement between the US, Canada and Mexico (NAFTA)[552] in 1994, the APEC Non-Binding Investment Principles[553] in 1994, the Energy Charter Treaty[554] in 1994, and the Draft OECD MAI[555] from 1995 to 1998. In addition, there are the WTO's General Agreement on Trade in Services (GATS)[556], the WTO's Agreement on Trade-Related Investment Measures (TRIMS)[557], the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[558] in 1994 and the WTO Working Group on Trade and Investment[559] which was established in 1996 to conduct analytical work on the relationship between Trade and Investment. Each of these legal instruments is a piece of the jigsaw that formed the legal framework at the time and to some extent, explains the explosive proliferation of IIAs that occurred in this era.

(iv) The final Era, which started from 2008 and continues to date, is described as the Era of Re-orientation, and marks a shift from bilateral treaty arrangements, to regional IIAs. Since 2008, according to the International Investment Agreements Navigator of the UNCTAD Investment Policy Hub[560] there have been 683 new IIAs. This is a very distinctive drop from the peak during the Era of Proliferation, which recorded 2,663 new IIAs entered into during that 17-year period. In this period referred to by UNCTAD[561] as the era of Re-orientation, not only has there clearly been a steep decline in the number of new IIAs being entered into, but there has also been a corresponding increase in the number of States wishing to revise or re-negotiate IIAs, or simply exit those IIAs altogether. The reason for this seeming change of heart by Host States will be explored later in this work. In relation to the legal framework pertaining during this Era of Re-orientation, the most notable legal instruments are the EU Lisbon Treaty of 2007 which entered into force on 1

[551] https://documents.worldbank.org/en/publication/documents-reports/documentdetail/955221468766167766/guidelines accessed on 20.06.2021.
[552] https://www.thebalance.com/nafta-definition-north-american-free-trade-agreement-3306147#:~:text=The%20North%20American%20Free%20Trade%20Agreement%20(NAFTA)%20was%20a%20treaty,and%20its%20impact%20on%20trade. Accessed on 25.06.2021
[553] https://www.apec.org/Achievements/Group/Committee-on-Trade-and-Investment-2/Investment-Experts-Group-2#:~:text=The%20APEC%20Non%2DBinding%20Investment,were%20successfully%20revised%20in%202011. Accessed on 25.06.2021.
[554]https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/ accessed on 25.06.2021.
[555] This will be dealt with in more detail later in this Chapter.
[556] https://www.wto.org/english/tratop_e/serv_e/gatsintr_e.htm accessed on 25.06.2021.
[557] https://www.wto.org/english/tratop_e/invest_e/invest_info_e.htm accessed on 25.06.2021. TRIMS recognizes that certain investment measures can restrict and distort trade. It states that WTO members may not apply any measure that discriminates against foreign products or that leads to quantitative restrictions, both of which violate basic WTO principles. A list of prohibited TRIMS, such as local content requirements, is part of the Agreement. The TRIMS Committee monitors the operation and implementation of the Agreement and allows members the opportunity to consult on any relevant matters.
[558] https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm accessed on 25.06.2021. The TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.
[559] https://www.wto.org/english/tratop_e/invest_e/invest_e.htm accessed on 25.06.2021.
[560] https://investmentpolicy.unctad.org/international-investment-agreements accessed on 20.06.2021.
[561] https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf

December 2009[562], the UNGPs[563], the UNCTAD Investment Policy Framework of 2012[564] introducing for the first time, a comprehensive Investment Policy Framework for Sustainable Development, as well as the 2014 UN Convention on Transparency in Treaty-based Investor-State Arbitration (hereinafter the "Mauritius Convention on Transparency")[565].

(v) Additional pertinent and timely legal instruments that have come into existence since 2008, bringing about a paradigm shift in the sustainable development Agenda where the Legal Framework of IIAs are concerned, will be considered later in this chapter.[566]

Having examined the various eras above, it is evident that challenges persist to the present day, despite several concerted efforts to reform IIAs. Part of these challenges are linked to the relationship between Customary International Law and Investment Law, as will be explored below.

4.2 THE RELATIONSHIP BETWEEN CUSTOMARY INTERNATIONAL LAW and INTERNATIONAL INVESTMENT LAW

The texts of IIAs are interpreted against overarching principles that apply in the broad field of international law and to this end Customary Law is a key source. CIL comprises rules that gradually develop over time based on the uniform and consistent practice[567] of a large number of [representative] States as a result of their belief or conviction that this practice that they follow, is required by law (*opinio juris sive necessitatis*).[568] This element is more often referred to as *opinio juris.*[569] Dumberry references d'Aspremont, who takes the view that 'international investment law has now reached a stage of its development where the doctrine of sources can no longer be left in limbo and needs to be critically explored' so that this field of law 'rests on solid bases in terms of

[562] https://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon accessed on 25.06.2021. The Treaty of Lisbon (initially known as the Reform Treaty) is an international agreement that amends the two treaties which form the constitutional basis of the European Union (EU). The Treaty of Lisbon, which was signed by the EU member states on 13 December 2007, entered into force on 1 December 2009.

[563] https://www.business-humanrights.org/en/big-issues/un-guiding-principles-on-business-human-rights/ accessed on 25.06.2021. The UN Guiding Principles on Business and Human Rights are a set of guidelines for States & companies to prevent, address and remedy human rights abuses committed in business operations. They were proposed by the UN Special Representative on business and human rights, John Ruggie and endorsed by the UN Human Rights Council in June 2011. In the same resolution, the UN Human Rights Council established the UN Working Group on business & human rights. The UNGPs rest on three pillars – Protect (referring to the State's duty to protect human rights), Respect (referring to the Corporate Responsibility to protect human rights), and Remedy (i.e., access to remedy for victims of business-related abuses).

[564] https://unctad.org/webflyer/investment-policy-framework-sustainable-development-2012-edition accessed on 25.06.2021. To help policymakers address the challenges posed by this new agenda, this report takes a fresh look at investment policymaking, and does so by taking a systemic approach, examining the universe of national and international policies through the lens of today's key investment policy challenges. It explicitly focuses on the development dimension and presents a comprehensive Investment Policy Framework for Sustainable Development (IPFSD). The IPFSD consists of a set of Core Principles for investment policymaking, guidelines for national investment policies, and guidance for policymakers on how to engage in the international investment policy regime, in the form of options for the design and use of IIAs.

[565] https://uncitral.un.org/en/texts/arbitration/contractualtexts/transparency accessed on 25.06.2021. The UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration (the "Rules on Transparency"), which came into effect on 1 April 2014, comprise a set of procedural rules that provide for transparency and accessibility to the public of treaty-based investor-State arbitration. The Rules on Transparency apply in relation to disputes arising out of treaties concluded **prior** to 1 April 2014, when Parties to the relevant treaty, or disputing parties, agree to their application. The Rules on Transparency apply in relation to disputes arising out of treaties concluded on or after 1 April 2014 ("future treaties"), when investor-State arbitration is initiated under the UNCITRAL Arbitration Rules unless the parties otherwise agree. The Rules on Transparency are also available for use in investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules, and in ad hoc proceedings.

[566] For example, NAFTA and its successor, USMCA; the PAIC; the India Model BIT; the Canadian Model BIT; the Nigeria-Morocco BIT and the South African domestic legislation. Note how these move the AU Agenda 2063 forward and how the creation of Specialist Teams will help move the dial further.

[567] Italics mine

[568] Patrick Dumberry, *The formation and identification of rules of customary international law in international investment law* (Vol. 119 Cambridge University Press, 2018) 41

[569] Also referred to as the 'psychological' (or 'subjective') requirement.

sources'.[570] Clearly the doctrine of sources (i.e., Customary Law) in relation to international investment law needs to be critically explored and this thesis will examine this area and by so doing, clarify how solid it is in reality. While some commentators like Jean d'Aspremont maintain that customary law rules in international investment arbitration do exist[571], other commentators maintain that they do not[572]. Any piece of work dealing with the sources of customary law in the international investment arena must have a solid basis in general public international law, in order to be credible. It is therefore important to set out the basis upon which a court of law or an arbitral tribunal would recognise a source as being a rule of customary law. Referred to as one of the best-established principles of international law[573], Anthea Roberts describes this two-pronged requirement, or 'traditional' approach, as one 'focus[ing] primarily on state practice in the form of interstate interaction and acquiescence', with *opinio juris* being 'a secondary consideration invoked to distinguish between legal and nonlegal obligations.'[574]

There are, perhaps unsurprisingly, detractors from this viewpoint, like Scharf wishing to add additional elements to the criteria,[575] D'Amato using different concepts such as 'articulation' and 'act'[576] and others developing various alternative theories that have collectively been referred to as 'modern custom', positing that *opinio juris* is more important than actual State practice.[577] Dumberry quotes the ILC (International Law Commission) Special Rapporteur, who described the so-called 'modern custom' thus:

> [This approach] ultimately turns the ascertainment of "new customary international law" into a normative exercise rather than a strictly empirical one. Employing a deductive methodology, it attempts to make customary international law a more rapid and flexible source of international law, one that is able to fulfil a "utopian potential" and "compensate for the rigidity of treaty law", particularly in the fields of human rights and humanitarian and environmental law." (…) Such "conceptual stretching", celebrated as the "new vitality of custom", has also encouraged calls for opening the process of customary law creation to non-State actors, namely, international organizations and their agencies, as well as individuals.[578]

The reality is that witty and provocative as such theories are, these writers and commentators have not made much of a dent in the approach taken by States, courts, or Arbitral Tribunals.[579] The Legal Framework is usually affected by the manner in which Judges and Arbitrators decide cases and take consideration of the rules of Customary Law when issuing Judgements and Awards. To illustrate this point is the fact that the traditional approach has been recognised by such important bodies as the

[570] Jean d'Aspremont, 'International Customary Investment Law: Story of a Paradox', in T. Gazzini and E. de Brabandere (eds), *International Investment Law: The Sources of Rights and Obligations* (Leiden; Boston: Martinus Nijhoff, 2012)
[571] Patrick Dumberry, *The formation and identification of rules of customary international law in international investment law* (Vol. 119 Cambridge University Press, 2018) 44. He analyses the principle of the 'minimum standard of treatment' (MST), the general prohibition against expropriation without compensation and the fair and equitable treatment (FET) standard found in numerous investment treaties, to ascertain if these qualify as rules of customary law in international investment law.
[572] See generally, Muthucumaraswamy Sornarajah, *The international law on foreign investment* (Cambridge university press, 2021)
[573] Patrick Dumberry, *The formation and identification of rules of customary international law in international investment law* (Vol. 119 Cambridge University Press, 2018) 77
[574] Anthea Elizabeth Roberts, 'Traditional and modern approaches to customary international law: a reconciliation' (2001) American Journal of international law 95.4 757, 758
[575] Michael P. Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (Cambridge University Press, 2013) 211. He posits that a 'third ingredient' of custom is the 'context of fundamental change' which serves as an 'accelerating agent, enabling customary international law to form much more rapidly and with less state practice than is normally the case'. See also. Baker, Roozbeh (Rudy) B Baker, 'Customary international law in the 21st century: old challenges and new debates' (2010) European Journal of International Law 21.1 173,175
[576] A. D'Amato, *The Concept of Custom in International Law* (Ithaca: Cornell University Press, 1971) 88
[577] Philip M Moremen, 'National court decisions as state practice: a transnational judicial dialogue' (2006) NCJ Int'l L. & Com. Reg. 32 259.
[578] ILC First Report (2013) 51
[579] Patrick Dumberry, *The formation and identification of rules of customary international law in international investment law*. (Vol. 119 Cambridge University Press, 2018) 79 referring to the Second Report of the ILC (2014) 11

International Tribunal for the Law of the Sea (ITLOS)[580] in the judgement of the case of Saint Vincent and the Grenadines v. Guinea,[581] by the ICJ[582] which stated that 'it is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States'[583] and its predecessor the Permanent Court for International Justice[584] (PCIJ) in the judgement of the S.S. Lotus Case,[585] as well as by the Panels and Appellate Body of the WTO.[586] Several Arbitral Tribunals have also recognised the two-pronged traditional approach as the correct approach.[587] As a baseline, there seems to be universal consensus that there is an international Minimum Standard of Treatment (MST) in Customary International Law, which both Host States and Investors need to be cognisant of and bear in mind when negotiating and drafting treaties and which Judges and Arbitrators need to take into consideration when issuing Judgements and Awards. The problem arises when parties and/or commentators attempt to elevate a treaty or clause to the status of Customary International Law, with the result that it begins to have an effect on the development of the Legal Framework of International Investment Law.

Some commentators and even Arbitral Tribunals and Courts, have argued that BITs have now become the new "custom" in this field[588] and that clauses relating to FPS and FET are interchangeable with the minimum standard of treatment set down in accordance with International Law.[589] One of the arguments put forward by Steffan Hindelang in his introduction is that a careful analysis of the two 'traditional' elements of custom, namely *consuetudo and opinio juris* will demonstrate that legal 'hard facts' show that there is a strong case for an effect of BITs on customary international law[590]. Having given examples of a range of cases where tribunals decide for and against the position that BITs have been elevated to the position of CIL,[591] he concludes that BITs have a 'double nature', whereby they contain common principles on foreign investment which have passed into customary international law and, at the same time, contain particular provisions that although widely used, are applicable only between the parties to the agreement.[592] Referencing the volume of BITs in existence as of 2004, he argues that this situation carries with it a danger of differing interpretations in respect of BITs that are similarly worded, resulting in conflicting or contradictory decisions. His solution to this problem would

[580] https://www.itlos.org/en/ accessed on 05.07.2021.
[581] *M/V SAIGA (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)* Judgment ITLOS Reports (1999) 10 paras 133–134
[582] See judgements in the *Right of Passage Case (Portugal* v. *India)* ICJ Rep (1960) 42–43; *Military and Paramilitary Activities in and around Nicaragua (Nicaragua* v. *United States)* Merits Judgment ICJ Rep (1986) 97 para 183; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada* v. *United States)* Judgment ICJ Rep (1984) 299, para. 111; *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)* Judgment ICJ Rep (2012) 122 para 55
[583] *Continental Shelf Case (Libya* v. *Malta)*, Judgment ICJ Rep (1985) 13 para 27
[584] https://www.icj-cij.org/en/pcij accessed on 05.07.2021.
[585] *S.S. Lotus Case (France* v. *Turkey)* Merits (1927) P.C.I.J. (ser A) No 9 18, 28
[586] Patrick Dumberry, *The formation, and identification of rules of customary international law in international investment law (*Vol. 119 Cambridge University Press 2018) 81
[587] See *United Parcel Service of America Inc.* v. *Canada* UNCITRAL Award on Jurisdiction 22 November 2002 para 84 The Tribunal stated that 'to establish a rule of customary international law, two requirements must be met: consistent state practice and an understanding that the practice is required by law'.
[588] Steffen Hindelang, 'Bilateral Investment Treaties, Custom and a Healthy Investment Climate: the Question of Whether BITs Influence Customary International Law Revisited' (2004) 5 Jwi & T 789; Bernard Kishoiyian, 'The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law' (1993) 14(2) NJILB 327; See also Abdullah Al Faruque,'Creating Customary International Law Through Bilateral Investment Treaties: A Critical Appraisal' (2004) 44 Indian J Int L 292; T. Gazzini, 'The Role of Customary International Law in the Protection of Foreign Investment' (2007) 8(5) JWi & T 691; C. McLachlan, 'Investment Treaties and General International Law' (2008) 57.2 ICLQ 361; Cai Congyan, 'International Investment Treaties and the Formation, Application and Transformation of Customary International Law Rules' (1998) 7.3 Chinese J Intl L 659. Patrick Dumberry, 'Are BITs Representing the New Customary International Law in International Investment Law' (2010) 28 Penn St Int'l L Rev 675 argues against this position.
[589] Rudolf Dolzer and Christoph Schreuer, *Principles of international investment law* (Oxford University Press, 2012) 134
[590] Steffen Hindelang, 'Bilateral Investment Treaties, Custom and a Healthy Investment Climate: The Question of Whether BITs Influence Customary International Law Revisited' (2004) 5 J World Investment & Trade 789
[591] See the North Sea Continental Shelf cases, Icj Rep. [1969] 3, 42-46; the Lotus case, PclJ [1927] Series A, No. 10 4; For multinational treaties, see for example the North Sea Continental Shelf cases 41. For a series of bilateral treaties, see, for example, the Nottebohim case *Liechtenstein v. Guatemala* IJ Rep [1955] 4,23
[592] Steffen Hindelang, 'Bilateral Investment Treaties, Custom and a Healthy Investment Climate: The Question of Whether BITs Influence Customary International Law Revisited' (2004) 5 J World Investment & Trade 789

be a common set of principles in customary international law which would contribute to a more uniform interpretation and application of a given BIT rule, making outcomes of investment dispute more predictable. He concludes by stating that it is clear that there is a real 'interest of States' in a set of principles on foreign investment in CIL and, thus, *opinio juris* can be established. This, he believes, would be a good result because in the long run, it is in everyone's interest for there to be minimum standard of protection embodied in CIL derived from BITs, so long as foreign investment continues to be viewed favourably.[593] Whilst it is true that the burgeoning amount of BITs in existence and the expansive interpretation of the provisions in these BITs by Arbitral Tribunals has often resulted in contradictory Awards, the solution to the problem is not a convoluted argument aimed at elevating BITs to CIL simply because there is a 'real interest of States' in a set of principles on foreign investment in CIL. CIL can only be established when the two traditional criteria of *consuetudo and opinio juris* can be proven. Without that, although BITs may have an effect on CIL, their provisions cannot be said to have risen or morphed into CIL.

Dolzer and Schreur[594] suggest that there are growing doubts about the relevance of the whole debate[595] about the difference between the FET treaty standard and the customary minimum standard and that in any event, the emphasis on linkages between FET and CIL may have the effect of accelerating the development of customary law through the rapidly expanding practice of FET clauses in treaties, rather than restraining the evolution of the FET standard.[596] The issue of FET will be dealt with in the next section, but insofar as the effect of BITs on the development of the Legal Framework goes, there seems to be no doubt that the proliferation of BITs, especially in the 1990's, has had a marked effect on CIL and Treaty Drafting. The question is whether this effect has elevated BITs to the level of CIL? The former president of the ICJ, and well-known arbitrator in investor-State disputes, Judge Stephen Schwebel, takes the view that 'customary international law governing the treatment of foreign investment has been reshaped to embody the principles found in more than a thousand concordant bilateral investment treaties'.[597] The Tribunal in a case where Judge Schwoebel was sitting as arbitrator, unsurprisingly reached a similar conclusion, namely that BITs had 'reshaped the body of customary international law'.[598] Another Tribunal, interpreting NAFTA Article 1105, stated that the content of current international law had been 'shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce'.[599] As a matter of principle, there is no reason why a treaty rule (or BITs in this instance) cannot develop into a CIL rule, under the right circumstances. This principle has been acknowledged variously by the ICJ,[600] some commentators such as Akehurst who states that 'state practice covers any act or statement by a state

[593] Steffen Hindelang, 'Bilateral Investment Treaties, Custom and a Healthy Investment Climate: The Question of Whether BITs Influence Customary International Law Revisited' (2004) 5 J World Investment & Trade 789

[594] Ursula Kriebaum, Rudolf Dolzer and Christoph Schreuer, *Principles of international investment law* (Oxford University Press 2022)

[595] Stephan Schill, 'Fair and equitable treatment, the rule of law and comparative public law' (2010) International investment law and comparative public law Oxford University Press 151

[596] Iona Tudor, *The fair and equitable treatment standard in the international law of foreign investment* (Oxford University Press on Demand, 2008) 83

[597] Stephen M. Schwebel, 'Investor-State Disputes and the Development of International Law: the Influence of Bilateral Investment Treaties on Customary International Law. (2004) 98 ASiL PROC 27 quoted in Patrick Dumberry, 'Are BITs Representing the New Customary International Law in International Investment Law' (2010) 28 Penn St Int'l L Rev 675, 681

[598] *CME Czech Republic B.V. v. Czech Republic* Award 498 (Mar 14 2003) (UNCITRAL)

[599] *Mondev International Ltd. v. United States* Award 121 (Oct 11 2002) (ICSID).

[600] North Sea Continental Shelf Case (*FR Germany v. Denmark*) (1969) ICJ 71 explains the phenomenon as follows: **"....** a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the *opinio juris,* so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained."

from which views about customary law may be inferred'[601] and indeed Art 38 of the Vienna Convention on the Law of Treaties, which reads 'Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such'.[602] However, while it is self-evident that customary law has probably been "shaped" and "reshaped" by the proliferation of BITs, it is quite a leap to conclude from that fact, that the clauses of these BITs have now been elevated to the status of CIL, merely by virtue of the sheer volume of these treaties, as Lowenfeld argues when he states that 'taken together, the [BITs] are now evidence of customary international law, applicable even when a given situation or controversy is not explicitly governed by treaty'.[603] This position is endorsed by Laird who declares that 'we have reached that point in the development of international investment law where we must seriously consider these instruments[604] as reflective of the development of *new* customary international law'[605] and Schwebel who states that 'when BITs prescribe treating the foreign investor in accordance with customary international law, they should be understood to mean the standard of international law embodied in the terms of some two thousand concordant BITs'.[606] Lowenfeld argues moreover, that the actions of states in the intervening years since the vague formulation of Article 42 of ICSID, have moved BITs to the level of customary law effective even for non-signatories, at least in relation to the overall concepts and precedents such as the obligations of the host state to avoid discrimination, to treat foreign investors fairly, and to expropriate only against adequate compensation.[607] The basis of his argument is that the law applicable to Investor-State arbitration in situations where there is no treaty relationship between parties, is covered by Article 42 of the ICSID Convention, which refers to the law of the contracting state party to the dispute 'and such rules of international law as may be applicable'.[608] Conceding that this conclusion flies in the face of the traditional definition of customary law, which states *inter alia* that states practice is only elevated to the level of Customary Law if the practice is undertaken from a sense of legal obligation, he suggests 'tentatively' that the undertaking of such practice by a large group of states, even if their motives for so doing are not unanimous, has resulted in 'something like customary law'[609] and that 'perhaps the traditional definition of customary law is wrong, or at least,… incomplete'.[610] Note however the Canadian position in the NAFTA arbitration proceedings where the point was made that even amongst BITs, the differences in the terms and in the scope and nature of access to international arbitration made it practically impossible to point to a consistent practice, without which there isn't even a starting point from which to claim the existence of a customary norm.[611] As is clear from the criteria set out earlier, 'volume' is only one of the requirements for the elevation of a practice to the status of Customary International Law as set out by traditional approach, the other requirement being the belief by states that there is a legal

[601] Michael Akehurst, 'Custom as a Source of International Law' in Martti Koskenniemi (ed) *Sources of International Law* (1st ed. Routledge 2017 https://doi.org/10.4324/9781315087795)251; See also Anthony A. D'Amato, 'The Concept of Custom in International Law' (1969) American Journal of International Law 63.2 211 where he argues that a treaty is a clear record of a binding international commitment that constitutes the 'practice of states' and hence is as much a record of customary behaviour as any other state act or restraint.
[602] https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf accessed on 13.07.2021.
[603] Andreas F. Lowenfeld, 'Investment Agreements and International Law' (2003) 42 COL **JLT** 123
[604] Bilateral Investment Treaties
[605] Ian A. Laird, 'A Community of Destiny-The Barcelona Traction Case and the Development of Shareholder Rights to Bring Investment Claims' in T.Weiler (ed) International Investment Law and Arbitration: Leading Cases from The ICSID, NAFTA Bilateral Treaties and Customary International Law *(Cameron May* (2005) 77, 96
[606] Stephen M. Schwebel, 'Investor-State Disputes and the Development of International Law: The Influence of Bilateral Investment Treaties on Customary International Law' (2004) 98 ASiL PROC 27
[607] Andreas F Lowenfeld, 'Investment Agreements and International Law' (2003) 42 Colum J Transnat'l L 123
[608] Article 42(1) reads: The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the contracting state party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.
[609] Andreas F Lowenfeld, 'Investment Agreements and International Law' (2003) 42 Colum J Transnat'l L 123, 130
[610] Andreas F Lowenfeld, 'Investment Agreements and International Law' (2003) 42 Colum J Transnat'l L 123, 130
[611] See Canada's Article 1128 Submission on Jurisdiction Concerning Loewen Corporate Restructuring 118 (June 27, 2002), submitted in the context of the case of *Loewen Group, Inc. and Raymond L. Loewen v. United States* (ICSID)

obligation upon them so to act (*opinio juris*). This duality of requirements is one of the most well-established principles of International Law and has been recognised as such in the investor-State arbitration arena in the UPS Tribunal which stated that 'to establish a rule of customary international law, two requirements must be met: consistent state practice and an understanding that the practice is required by law'.[612] A piece of work commissioned by the International Law Association (ILA) on customary international law[613] concluded that there was no "presumption" that a succession of similar treaty provisions would have the effect of giving rise to a new customary law of the same content. It states:

> The question of the legal effect of a succession of similar treaties or treaty provisions arises particularly in relation to bilateral treaties, such as those dealing with extradition or investment protection...[T]here seems to be no reason of principle why these agreements, however numerous, should be *presumed* to give rise to new rules of customary law or to constitute the State practice necessary for their emergence.... Some have argued that provisions of bilateral investment protection treaties (especially the arrangements about compensation or damages for expropriation) are declaratory of, or have come to constitute, customary law. But **...** there seems to be no special reason to *assume* that this is the case, unless it can be shown that these provisions demonstrate a widespread acceptance of the rules set out in these treaties *outside the treaty framework'.*[614]

Secondly, there is no evidence to support a contention that States parties entered into the BITs in the belief that there was a legal obligation upon them so to do, and in fact, Guzman and Abdullah state that BITs are in reality, the result of trade-offs and mutual concessions between States and merely reflect the relative strengths of the political and economic bargaining power that each negotiating party wields. Guzman convincingly concludes that it is 'simply not possible to explain the paradoxical behaviour [of less developed countries] toward foreign investment based on a view that BITs reflect *opinio juris'* as these BITs 'do not reflect a sense of legal obligation but are rather the result of countries using the international tools at their disposal to pursue their economic interest'. [615] To quote Abdullah, 'the unequal bargaining strength especially manifested in BITs between developed and developing countries, diminishes the developing country's autonomy to give consent to BIT considerably'.[616]

In conclusion, in addition to the lack of evidence of *opinio juris*, regardless of the plethora of BITs in existence, the formulation of their content is neither uniform nor consistent and therefore does not attain the level required to elevate it to the status of customary international law. As explained by the ICJ in the North Sea Continental Shelf case, State practice must be 'both extensive and virtually uniform' before a persuasive assertion of customary international law can be made.[617] While not rising to the level of customary international law, there is consensus that the sheer volume of BITs could contribute to the shaping of the development of the Legal Framework in this area of International Investment Law. This would be firstly by contributing to the consolidation of some of the pre-existing rules of customary international law,[618] and secondly by contributing to the crystallisation of new rules of customary international law in the future by the setting of certain standards as to the types of

[612] *United Parcel Service v. Canada, Dec. Jurisdiction* 84 (Nov. 22, 2002), (UNCITRAL).
[613] Principle No. 25 of the International Law Association (ILA), *Statement of Principles Applicable to the Formation of General Customary International Law,* Final Report, 8 (2000).47
[614] Principle No. 25 of the International Law Association (ILA), *Statement of Principles Applicable to the Formation of General Customary International Law,* Final Report, 8 (2000).47 Italics mine.
[615] Andrew T. Guzman, 'Why LDCs sign treaties that hurt them: Explaining the popularity of bilateral investment treaties' (1997) Va. j. Int'l L. 38 639, 687
[616] Abdullah Al Faruque, 'Creating Customary International Law Through Bilateral Investment Treaties: A Critical Appraisal' (2004) Indian Journal of International Law 44.2 292, 310
[617] North Sea Continental Shelf Case (*FR Germany v. Denmark*) (1969) ICJ 71
[618] Tarcisio Gazzini, 'The role of customary international law in the field of foreign investment' (2007) The Journal of World Investment & Trade 8.5 691, 703

clauses that appear in the treaties.[619] As Sornarajah states, '[it is] possible that, if there is a concordance of standards in these [BITs], such standards on which there is consistent agreement evidenced by such treaties could become international law'.[620] BITs also affect the Legal Framework because Customary Law remains essential in cases where BITs make explicit reference to custom, as well as having an important gap-filling role in cases where a BIT is silent on a particular legal issue.[621]

4.3. CUSTOMARY INTERNATIONAL LAW'S RELATIONSHIP WITH THE FAIR AND EQUITABLE TREATMENT STANDARD (FET)

As set out in the previous section, BITs have played a very important role in the evolution of International Investment Law, whilst not rising to the level of CIL. This section takes a closer look at the clauses in IIAs relating to FET and how this standard and staple of IIAs has come to assume such great importance in CIL generally and in Customary Law as it relates to International Investment Law in particular. The FET standard has been chosen firstly because it is not possible to cover all the key standards in detail, secondly because commentators have heralded it as being a key element in contemporary IIAs[622] and most importantly because it is the one standard that is most often cited in investor-state disputes.[623] It is also the most difficult standard to allocate a definition to.[624] As argued by Schill:

> Fair and equitable treatment does not have a consolidated and conventional core meaning as such nor is there a definition of the standard that can be applied easily. So far it is only settled that fair and equitable treatment constitutes a standard that is independent from national legal order and is not limited to restricting bad faith conduct of host States. Apart from this very minimal concept, however, its exact normative content is contested, hardly substantiated by State practice, and impossible to narrow down by traditional means of interpretative syllogism.[625]

This vagueness arising from the fact that there seems not to be a clear-cut definition of FET, has resulted in the FET standard being interpreted widely and inconsistently by Arbitral Tribunals, which in turn makes it near-impossible for Host States to anticipate which level or type of administrative or governmental actions are likely to fall within the ambit of the degree of seriousness required to trigger a claim for compensation by a foreign investor that is likely to succeed before an Arbitral Tribunal. The trajectory seems to be that the Arbitral Tribunals are more often than not leaning towards a less stringent interpretation of the FET standard than was understood in customary international law as the standard treatment required towards aliens. As a result, there is a greater possibility that several more State regulations or administrative measures are likely to be found by Arbitral Tribunals to have infringed the FET standard than was foreseen by the Host State at the time of entering into the Treaty. This affects developed countries, certainly, but the effect is potentially much more devastating for developing countries, where a government may often have to make wide-ranging legislative or administrative changes in response to circumstances that had not been anticipated at the time of their

[619] Bernard Kishoiyian,'The utility of bilateral investment treaties in the formulation of customary international law' (1993) Nw J Int'l L & Bus 14 327,374

[620] Muthucumaraswamy Sornarajah, *The international law on foreign investment* (Cambridge university press, 2004)

[621] Patrick Dumberry, 'Are BITs Representing the New Customary International Law in International Investment Law' (2010) 28 Penn St Int'l L Rev 675

[622] Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II.20 https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf accessed on 24.07.2021

[623] David Collins, *An introduction to international investment law* (Cambridge University Press, 2016) 125

[624] Martins Paparinskis, *The international minimum standard and fair and equitable treatment* (Oxford University Press 2013)

[625] Stephan W. Schill, *The multilateralization of international investment law*. (Vol. 2. Cambridge University Press, 2009) 263

entry into the IIA. Although it goes without saying that State intervention must take place within the boundaries of good governance and have a legitimate public interest purpose, the expansive interpretative approach taken by Arbitral Tribunals in respect of complaints based on the FET standard, which includes undue importance being given to what investors describe as their 'legitimate expectations', makes it highly likely that the resulting Award will be skewed in favour of investors and undermine decisions by Host States that are legitimately upon Good Governance. This could in turn exacerbate the issue of 'regulatory chill', as Host States may hesitate before taking decisions which are legitimately for the benefit of their citizens and the development of their countries.

On the face of it, there seems to be little difference between the CIL norm of Minimum Standard of Treatment (MST) and FET, in which case the question might well be properly asked, that if there is no difference, then what is the point in specifying FET in BITs? Prior to the emergence of FET clauses in BITs, the CIL rule of MST was the basis upon which legal protection was afforded to foreign investors and represented the applicable legal regime of protection in the absence of any Treaty.[626] It has been argued that the main reason why investors and states begun inserting FET clauses in the 1960s and 1970s was because the concept of MST was so shrouded in controversy[627] and ambiguity[628] and that the FET meant something other than MST and therefore it was felt important to spell that out in a Treaty. To quote Schreuer and Dolzer, 'if the parties to a treaty want to refer to customary international law, one would assume that they will refer to it as such rather than using a different expression'.[629]

A question that has pre-occupied several commentators is whether the FET standard has itself become a rule of customary international law. Dumberry argues that the FET standard has not become a rule of custom, precisely for the same reasons as set out previously in relation to BITs, namely that although the practice of including FET clauses in BITs can be considered as "general, widespread and representative", the contents of these FET clauses are neither uniform nor consistent. In fact, as will be shown below, there are many different types of FET clauses, which underlines the fact that they are neither uniform nor consistent in content. Furthermore, the second criteria, namely *opinio juris* has not been met either. There is no indication either in practice or literature to support a contention that States parties believe themselves to be under an obligation under international law to provide protection under FET clauses to each other's investors. This is also borne out by the fact that their National foreign investment laws hardly ever contain sections specifically offering FET protection to foreign investors[630] whilst other foreign investment laws refer to a 'transparency' obligation, which is an element of protection sometimes identified with the FET standard.[631] It is therefore fair to conclude that the FET standard has not become a rule of customary international law.

Regarding the relationship between CIL and IIA's, and in order to answer the question as to whether or not FET has had an influence on Customary International Law (or vice versa) and if so, what

[626] Patrick Dumberry, *The formation and identification of rules of customary international law in international investment law* (Vol. 119. Cambridge University Press 2018) 42

[627] The very existence of the MST was a highly contentious issue, which was contested by developing States. See Patrick Dumberry, Patrick, 'The Fair and Equitable Treatment Standard. A Guide to NAFTA Case Law on Article 1105' (October 2013). Wolters Kluwer, Kluwer Law International, 2013, Available at SSRN: https://ssrn.com/abstract=3614789

[628] Todd Weiler, *The interpretation of international investment law: equality, discrimination and minimum standards of treatment in historical context* (Martinus Nijhoff Publishers 2013) 199; See also Stephen Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 70 British YIL 157

[629] C Schreuer and R Dolzer, Principles of International Investment Law (OUP 2008) 124

[630] Patrick Dumberry, 'The Practice of States as Evidence of Custom: An Analysis of Fair and Equitable Treatment Standard Clauses in States' Foreign Investment Laws' (2015) McGill J. Disp. Resol 2 66. Of the 165 laws examined, Dumberry found that only 10 of them expressly referred to the FET standard.

[631] Wenhua Shan, 'General Conclusions' in Wenhua Shan (ed*) The Legal Protection of Foreign Investment: A Comparative Study* (Oxford: Hart Publishing, 2012); See also Meg Kinnear, *The Legal Protection of Foreign Investment: A Comparative Study* (Bloomsbury Publishing 2012)

influence it has had, it would be useful to look at some of the more common FET clauses in IIAs and how they have been interpreted by Arbitral Tribunals and Courts in this arena. Whilst being mindful of the fact that there is no real practice of 'jurisprudence' in this arena, it is nevertheless indicative of the way in which Tribunals deal with such cases, since the vast majority of cases brought before them have investors praying in aid FET either as the sole basis or as one of the limbs of their case. Before setting out these examples, it is worth noting that although many IIAs mention the FET standard together with the obligation to accord FPS to investments, the two standards cover separate and distinctive areas. The FET standard deals with the process[632] of administrative and judicial decision-making, while the FPS standard usually requires the Host State to undertake *all reasonable measures*[633] to physically protect assets and property belonging to the foreign investor from threats or attacks by public officials or third parties, such as in the case of riot or armed insurrection. The critical phrase here is "all reasonable measures". This standard is therefore distinct from the requirements and expectations of the FET standard. As previously stated, the vast majority of IIAs have provisions which refer to the FET standard, although these provisions are not uniformly expressed, as will become clear below. This is relevant because the way in which the FET provision in an IIA is articulated has a crucial effect upon how the standard is interpreted by Arbitral Tribunals.

According to UNCTAD's[634] Fair and Equitable Treatment Series on Issues in International Investment Agreements II,[635] the most common approaches to the FET standard as utilised in treaties are as follows:

(a) Where there is no mention of an obligation of FET;
(b) Where there is a provision relating to FET without any reference to any additional criteria, such as international law usually referred to as an unqualified, autonomous or self-standing FET standard;
(c) Where the FET standard is linked to international law;
(d) Where the FET provision is linked to the minimum standard of treatment of aliens (MST) under customary international law;
(e) Where the FET provision refers to some additional substantive content, such as denial of justice, unreasonable/discriminatory measures, breach of other treaty obligations, accounting for the level of development.

It is imperative to examine how the FET clause is drafted in a Treaty because the manner in which an Arbitral Tribunal interprets the FET clause before it is largely dependent upon how the clause has been drafted. This will be dealt with in the next sub-section.

4.3.1 TREATY DRAFTING AND THE FET CLAUSE

The way Arbitral Tribunals deal with cases brought before them by foreign investors, a determinant factor of whether the foreign investor is able to pray in aid FET is how the FET clause has been set out in the Treaty. These are discussed below.

(a) Where there is no mention of an obligation of FET:
Some notable IIAs that have omitted to include FET provisions[636] are the 2003 Australia-Singapore FTA and the 2005 India-Singapore Comprehensive Economic Cooperation Agreement, both of which instead of FET, place the emphasis on National Treatment as the main standard of treatment of foreign

[632] See David Collins, *An introduction to international investment law*. Cambridge University Press, 2016. 125. He suggests that the essence of FET has more to do with the manner in which the Host State's laws are applied than the actual content of the laws themselves, i.e., more to do with 'due process' in this context
[633] Italics my own
[634] the United Nations Conference on Trade and Development
[635] https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf accessed 25.07.2021
[636] Also, the New Zealand-Singapore FTA of 2001, the New Zealand-Thailand Closer Economic Partnership Agreement (EPA) (2005), the Albania-Croatia BIT (1993), the Croatia-Ukraine BIT (1997) and a number of BITs concluded by Turkey do not contain an FET clause.

investors. It must be borne in mind however, that regardless of whether or not there is an FET provision included in a treaty, the international MST still exists in customary law. Whether a foreign investor would be able to use the investor-State dispute settlement (ISDS) clause in an IIA as a vehicle to enforce the MST depends upon the wording of the ISDS clause. Two examples referred to in the UNCTAD Report[637] are the ISDS clause in the India-Singapore Comprehensive Economic Cooperation Agreement and the New Zealand-Thailand Closer Economic Partnership Agreement. In the India-Singapore case, the tribunal decided that they had no jurisdiction to 'import' an FET clause into the treaty, since the ISDS clause stated that it only applied to disputes 'concerning an alleged breach of an obligation of the former under this Chapter'[638], whereas in the New Zealand Thailand case, the tribunal felt that the ISDS clause covering all disputes 'with respect to a covered investment'[639] was broad enough to give them jurisdiction to deal with claims relating to the violation of the minimum standard of treatment of aliens under customary international law. It is noteworthy that the standard of treatment referred to here is the MST and not the FET, but the reality is that the effect of those standards of treatment are very similar, and it is in this manner that the customary law has had an effect of FET and vice-versa. Where both States Parties have opted to leave out all mention of FET in their Treaty, another manner in which a foreign investor can still pray in aid the FET standard is via the MFN clause. The Arbitral Tribunal in this particular case decided, by virtue of the fact that reference was made to the FET standard in the preamble of the Pakistan-Turkey BIT, that this gave them jurisdiction to import the standard from Pakistan's BIT with a third party, via the MFN clause. The Tribunal stated:

> It is true that the reference to FET in the preamble together with the absence of an FET clause in the Treaty might suggest that Turkey and Pakistan intended not to include an FET obligation in the Treaty. The Tribunal is, however, not persuaded that this suggestion rules out the possibility of importing an FET obligation through the MFN clause expressly included in the Treaty. The fact that the States parties to the Treaty clearly contemplated the importance of the FET rather suggests the contrary. Indeed, even though it does not establish an operative obligation, the preamble is relevant for the interpretation of the MFN clause in its context and in the light of the Treaty's object and purpose pursuant to Article 31(1) of the VCLT [Vienna Convention on the Law of Treaties].[640]

Treaty practice seems to suggest that States Parties that deliberately do not include a reference to FET in their treaty have done this on purpose, because they do not wish to be under an obligation to provide this standard of protection to foreign investors and/or that they do not wish to subject their regulatory measures to review under this standard. For that reason, any Arbitral Tribunal that chooses to import and FET clause from another IIA using the MFN clause should not take this step lightly and above all, should consider the unambiguous intention of the parties.

(b) A provision relating to FET without any reference to any additional criteria, such as international law, is referred to as an unqualified, autonomous, or self-standing FET standard. Most BITs, including the BITs signed by China, Germany, and the UK,[641] simply refer to the FET standard without additional elaboration. Article 1105 of NAFTA, however, seeks to provide additional clarification by linking the FET standard to the MST level required under general international law. This will be dealt with under sub-heading (d) below.

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[637] UNCTAD FET Report https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf accessed 25.07.2021

[638] See (Article 6.21) of the COMPREHENSIVE ECONOMIC COOPERATION AGREEMENT BETWEEN THE REPUBLIC OF INDIA AND THE REPUBLIC OF SINGAPORE (unctad.org) accessed 25.07.2021

[639] See (Article 9.16) of the THAILAND-NEW ZEALAND CLOSER ECONOMIC PARTNERSHIP AGREEMENT I (unctad.org) accessed 25.07.2021

[640] Note that the Vienna Convention on the Law of Treaties will be discussed in more detail later in this Chapter.

[641] Note that in some cases, such as *Biwater Gauff Ltd v Tanzania*, also *National Gird PLC v. Argentina*, the Arbitral Tribunals concluded that the FET is an autonomous treatment standard, which is different from customary international law.

There are several IIAs,[642] such as the 2009 Belgium-Luxembourg Economic Union Tajikistan BIT, whose FET provision can be described as an "unqualified formulation", because it just simply spells out the fact that a Host State is obliged to treat relevant investments in a fair and equitable manner, such as 'All investments made by investors of one Contracting Party shall enjoy a fair and equitable treatment in the territory of the other Contracting Party'.[643] While the debate continues as to whether an FET clause drafted in this manner translates as an autonomous standard that can be dealt with by Arbitral Tribunals on a case-by-case basis or whether it remains tethered to the customary law MST regime, the Tribunals themselves seem to be interpreting an unqualified FET provision as a "stand-alone" standard, relying on the plain meaning of the terms "fair" and "equitable". This is regardless of the fact that the commentary to the 1967 OECD Draft Convention on the Protection of Foreign Property, which included an unqualified FET formulation, equated FET to the minimum standard. Following on from this, in 1984 the OECD Committee on International Investment and Multinational Enterprises reported that all Member countries which had commented on this point, believed that the FET referred to a substantive legal standard referring to general principles of international law whether explicitly stated or not. Since neither of these Reports has legal binding effect, Arbitral Tribunals have tended to attach little, if any, weight to them. In conclusion, this unqualified formulation could end up setting a very low liability threshold with the attendant risk that a valid State regulatory action could be found in breach of this standard.

(c) Where the FET standard is linked to international law:
There are two types of FET clauses that make a reference to international law. The first type sets international law as a minimum base level below which the FET obligation cannot go.[644] although conversely, that seems to leave Arbitral Tribunals with as much unfettered powers of interpretation as the cases of 'unqualified formulation' of FET. The second type[645] states that parties shall be accorded FET in accordance with international law and the provisions of the Agreement, which seems aimed at ensuring that the Arbitral Tribunal when applying the FET clause, does not go beyond what the sources of international law dictate the scope and meaning of FET to be.

(d) Where the FET provision is linked to the minimum standard of treatment of aliens under customary international law:
Mostly as a result of the expansive interpretation of FET provisions by Arbitral Tribunals as evidenced above, an increasing number of IIAs have now adopted the practice of linking the FET clause to the customary law minimum standard by which foreigners should be treated (MST). The idea behind this seems to be as a bid to "reign in" Arbitral Tribunals and prevent their overly expansive interpretations of the FET standard. Another string to the bow of States Parties is the new(ish) practice of adding an Annex or Addendum that refers the Arbitral Tribunal to examples of serious behaviour (e.g., denial of justice) that would constitute a violation of the minimum standard of the manner in which foreigners must be treated. By setting their wishes and context out clearly the States Parties perhaps hope to indicate to Arbitral Tribunals the boundaries of the minimum standard of treatment under CIL beyond which it is unacceptable for them to proceed. The challenge with this manner of thinking is that this presumes that there is a clear consensus as to what everyone agrees is the minimum standard of treatment under customary international law. Unfortunately, much in the same way as FET lacks clearly defined parameters and definition,[646] the MST also often requires interpretation, using the two

[642] In some agreements – especially in Spanish and French language treaties – the phrase appears as "just and equitable treatment". This variation appears to be interchangeable with "fair and equitable treatment" and can be directly translated as such from French ("un traitement juste et equitable") or Spanish ("un trato justo y equitativo").
[643] Article 3 of Belgium-Luxembourg Economic Union-Tajikistan BIT (2009)
[644] For example, see Article 2(3)(a) of the Bahrain-United States BIT (1999) "Each Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favourable than that required by international law".
[645] See Art 3(2) of the Croatia-Oman BIT (2004) "Investments or returns of investors of either Contracting Party in the territory of the other Contracting Party shall be accorded fair and equitable treatment in accordance with international law and provisions of this Agreement".
[646] Stephan W. Schill, *The multilateralization of international investment law*. (Vol. 2. Cambridge University Press 2009) 263

criteria for customary international law referred to earlier in this Chapter to establish customary law. Although all this engenders an unfortunate degree of unpredictability, this attempt to clarify treaty provisions[647] is welcome. Particularly from the perspective of the Host Country, the linking of the FET standard to the minimum standard of treatment of aliens is certainly a positive step[648] which will hopefully encourage Arbitral Tribunals to apply a higher threshold for finding a breach of the FET standard, as compared with the very low threshold used in the case of unqualified formulation FET clauses.

In conclusion, Some FET provisions are explicitly linked to the MST under customary international law, while others simply contain an undertaking to accord fair and equitable treatment, with no additional qualification. More recently, (perhaps because of wide-ranging interpretation by Arbitral Tribunals), some States have begun to include clauses clarifying the meaning of the FET standard, on the basis that the more specific the clause, the clearer its scope and content and the less leeway there will be for Arbitral Tribunals to apply their own expansive interpretations of clauses. The importance of the incorporation of these clarifying texts will be addressed further when discussing the importance of Specialist Teams and how targeted drafting plays a crucial role in curbing the ability of Arbitral Tribunals to expansively interpret IIAs.

Next, this thesis addresses the relationship between Customary International Law and other standards of treatment pertaining to the level of protection of investments enjoyed by foreign investors.

4.4 RELATIONSHIP BETWEEN CUSTOMARY INTERNATIONAL LAW and OTHER STANDARDS OF TREATMENT

There are some key standards / clauses that are found in most BITs in existence. These include full protection and security (FPS), prohibition of unlawful expropriation (Expropriation), National Treatment (NT), Most Favoured Nation (MFN) and Umbrella Clauses. As part of the examination of the International Legal Framework relating to the regulation and governing of IIAs, this section will briefly describe the issues which arise in connection with each of these standards of treatment. There are also standards of treatment under domestic law, which usually focus on the implementation of (or the deviation from) national treatment.[649]

Full Protection and Security – This clause is often found in BITs and stems from Customary Law standards requiring the state to provide protection to the interests of the foreign investor if such violence could be 'reasonably anticipated'[650]or for the state to ensure that its forces be not utilised to harm the foreign investor's property.[651] While Arbitral Tribunals initially agreed with this Customary

[647] NAFTA Free Trade Commission: Notes of interpretation of certain Chapter 11 provisions, 31 July 2001. Minimum Standard of Treatment in Accordance with International Law. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).
[648] The language of the NAFTA Free Trade Commission's Note has appeared in the subsequent model BITs of the NAFTA countries. It has also been echoed in a significant and growing number of recent IIAs involving non-NAFTA countries, including the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (2009), the Japan-Philippines FTA (2006), the China-Peru FTA (2009), the Malaysia-New Zealand FTA (2009) and the India-Republic of Korea Comprehensive Economic Partnership Agreement (2009) to name a few.
[649] Meg Kinnear, *The Legal Protection of Foreign Investment: A Comparative Study* (Bloomsbury Publishing 2012)
[650] Muthucumaraswamy Sornarajah, *The international law on foreign investment* (Fifth Edition, Cambridge University Press 2021) 250
[651] Ibid

Law definition[652] there has recently been an indication that Tribunals might wish to expand this definition to require Host States to maintain 'conditions of stability for the investment'.[653] See also *Biwater Gauff Ltd v. Tanzania*, where the Tribunal ruled that FPS 'implies a State's guarantee of stability in a secure environment, physical, commercial and legal'.[654] As a result of such rulings, there has been push-back from newer BITs, such as paragraph 3.2 of the Indian Model Treaty which states that '…For greater certainty, "full protection and security" only refers to a Party's obligations relating to physical security of investors and to investments made by the investors of the other Party and not to any other obligation whatsoever'.[655]

Expropriation - The provisions in BITs relating to Direct expropriation originated from the 1960s and the 1970s, when one of the greatest perceived risks to foreign investors was the direct and outright taking of foreign property (usually in all economic sectors or on an industry-specific basis) by Host States, commonly referred to as "nationalisation".[656] This is now a rarity. [Indirect] Expropriation on the other hand, also referred to as indirect takings or indirect expropriation, whilst falling short of actual physical appropriation of property, usually results in the loss of management, use or control of the assets owned by a foreign investor, or even a significant depreciation of the value of their assets. The general view of scholars is that 'a taking which lacks a public purpose and a discriminatory taking are illegal in international law and that the lack of a public purpose indicates a confiscation rather than an expropriation'.[657] A widening interpretation of this clause by Arbitral Tribunals could have the effect of curbing the Regulatory Autonomy of Host States and it is therefore incumbent upon Host States to so draft their BITs in such a manner as to limit the amount of leeway that Arbitral Tribunals will have to utilise expansive interpretation of Agreements.

National Treatment (NT) – The basic premise of a NT clause (which it must be noted is not an obligation under Customary International Law) is the requirement that Host States must accord to foreign investors, the same treatment that they accord to their own nationals 'in similar circumstances'.[658] This on the face of is, would seem uncontroversial. However, this standard has been described as 'just another loaded concept shrouded in ambiguity',[659] because it has afforded Arbitral Tribunals the opportunity to expand this requirement to mean much more than simply a way to 'promote investment neutrality through the provision of a level playing field for foreign investors'[660] after an investment has been established. An example is the Final Award in the UNCITRAL Arbitration brought by Lauder against the Czech Republic, which stated that 'a discriminatory measure is … one that fails to provide the foreign investment with treatment at least as favourable as the treatment of domestic investment'[661] and therefore found the Czech Republic to be in breach of its obligation to refrain from arbitrary and discriminatory measures against the Claimant.

The ambiguity also extends to the divergent meaning given by Tribunals to the phrase 'similar circumstances' or 'similar situations' or 'like circumstances', since it is not clear whether this phrase

[652] See for example the case of Bernhard von Pezold and others v. Republic of Zimbabwe (ICSID Case No. ARB/10/15), where the Claimants note in para 583 that "the Parties agree that the above standards require the State to act vigilantly and take all measures necessary to ensure the full enjoyment of protection and security of the investor's investment". The Tribunal did not oppose this definition and found inter alia in paras 1016 and 1017 that the Respondent had failed to accord full protection and security to the Claimants and their investments.

[653] Muthucumaraswamy Sornarajah, *The international law on foreign investment* (Fifth Edition, Cambridge University Press 2021) 250

[654] *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), paragraph 729. Case Details | ICSID (worldbank.org) accessed 14.09.2023.

[655] See download accessed on 30.11.2024

[656] Kyla Tienhaara, 'Mineral investment and the regulation of the environment in developing countries: lessons from Ghana' (2006) International Environmental Agreements: Politics, Law and Economics 6.4 371, 378

[657] Muthucumaraswamy Sornarajah, *The international law on foreign investment* (Fifth Edition, Cambridge University Press 2021) 519

[658] See NAFTA Art. 1102 - North American Free Trade Agreement – Investment accessed 28.10.2024

[659] George Forji Amin, 'All That Glitters Is Not Always Gold or Silver: Typical Bilateral Investments Treaties (BITs) Clauses as Peril to Third World Economic Sovereignty' (2020) 6 Athens JL 299, 306

[660] Ibid

[661] See Ronald S. Lauder v. The Czech Republic, Final Award, 3 Sep. 2001, 9 ICSID Reports, para. 220. ita0451.pdf accessed on 28.10.2024

requires the Host State investor to be in exactly the same business as the foreign investor, or whether the business only needs to be 'similar' and what type of differential treatment would amount to a violation of the NT standard. Whilst one Tribunal has suggested that a violation of the NT standard could be found if the investment related to the same business, in that case, the export of cigarettes[662], others have leaned towards a much more expansive interpretation, as per this example:

> The Tribunal considers that the interpretation of the phrase "like circumstances" in Article 1102 must take into account the general principles that emerge from the legal context of the NAFTA, including both its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns. The assessment of "like circumstances" must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest. The concept of "like circumstances" invites an examination of whether a non-national investor complaining of less favourable treatment is in the same "sector" as the national investor. The Tribunal takes the view that the word "sector" has a wide connotation that includes the concepts of "economic sector" and "business sector[663]

Therefore, the expansive interpretation of this standard of treatment may well result in a situation where the foreign investor is in a more advantageous position than the national of the Host State in similar circumstances and this directly impacts the regulatory autonomy of Host States.

Most Favoured Nation (MFN) - Another clause usually found in BITs which also requires Host States not to discriminate against foreign investors is the MFN[664]. The reasoning behind this clause is that the Host State must not treat foreign investors of a contracting state less favourably than investors from another foreign country. Commentators have opined that the reality however is that Host States are likely to find themselves having to afford to foreign investors, additional privileges that were not in the contemplation of either party at the time of negotiating the BIT between those two states. Host States therefore need to be conscious of the potential repercussions of the rights accorded to foreign investors in subsequent BITs when compared to earlier treaties.[665] This directly impacts the regulatory autonomy of Host States as they need to ensure that they do not inadvertently cede more of their regulatory autonomy than they intended to.

An example of the standard MFN clause wording can be found in Article 4 of the 2012 US Model BIT which states:

> 1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory[666].
>
> 2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments[667]

[662] See para. 171 of Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1 (also known as Marvin Feldman v. Mexico) | italaw accessed on 28.10.2024
[663] See para. 250 of S.D. Myers, Inc. v. Government of Canada, UNCITRAL | italaw accessed on 28.10.2024
[664] Michael J.Trebilcock and Shiva K. Giri. 'The national treatment principle in international trade law' in *Handbook of International Trade: Economic and Legal Analyses of Trade Policy and* Institutions 2 (2004) 185, 186
[665] George Forji Amin, 'All That Glitters Is Not Always Gold or Silver: Typical Bilateral Investments Treaties (BITs) Clauses as Peril to Third World Economic Sovereignty' (2020) 6 Athens JL 299, 306, 309. See also UNCTAD MFN Most-favoured nation treatment | UNCTAD accessed 03.11.2024
[666] US Model BIT text for ACIEP Meeting accessed on 03.11.2024
[667] Ibid

Some key awards that form de facto precedents for the MFN standard, (albeit contradicting each other, such that they are not 'precedents' in the true sense of the word), are the Awards delivered by Arbitral Tribunals in the cases of *Maffezini*[668], *Siemens*[669], *Salini*[670]and *Plama* [671](amongst others). Whereas in the cases of Maffezini and Siemens the Tribunals expansively decided that the MFN clauses applied also to Dispute Resolution provisions, the tribunal in Salini declined to follow that route, declaring that MFN clauses in BITs 'should not be interpreted in a manner that opens the gate for treaty-shopping'[672]. The Plama tribunal also declined to follow the earlier expansive route taken by the Maffezini and Siemens tribunals, as in their view, the MFN clause would only apply to the Dispute Resolution provisions if it was clear in the language of the BIT and the specific intent of the parties also bore that out.[673] These Awards and the dangers of 'treaty-shopping' [674]are very relevant to the issue of Regulatory Autonomy, since to quote the Tribunal in Plama, 'such a trend [expansive interpretation] is very precarious because it would inevitably subject host states to several dispute settlements to which they have not necessarily consented'.

Under the MFN standard, the States Parties agree to treat each other in a manner that is "at least as favourable as the manner in which they treat third parties". The idea behind this is to create a level playing field amongst all foreign states, so that there is no discrimination against a party by virtue of the fact that they are of a different nationality.[675] Although the MFN standard in most BITs and FTAs is restricted to the period after the investment has been established in the Host State, the US[676] Canada[677] and Japan[678] in their recent BITs, have extended this standard such that it covers the stage during which the foreign investment is being established, which is of course advantageous to the foreign investor but not for the Host State.

Umbrella Clauses - Among the many issues being raised in the negotiations of IIAs and in investment disputes in the recent past, is the term "umbrella clause". The name came from the concept that private contractual claims are brought under the protection of the "umbrellas" of BITs and FTAs.[679] This so-called umbrella clause is a provision in an investment protection treaty that guarantees the observance of obligations assumed by the host state in respect of the investor. They are so-called because they bring the contractual and other commitments under the protective umbrella of the

[668] *Emilio Agustion Maffezini V. Kingdom of Spain, ICSID Case No. ARB/97/7,* Decision of January 25, 2000
[669] *Siemens A.G. V. The Argentina Republic, ICSID Case No. ARB/02/8,* Decision of August 3, 2004
[670] *Salini Construttori S.p.A and Italstrade S.p.A V. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13,* Decision of November 15, 2004
[671] *Plama Consortium Limited V. Republic of Bulgaria, ICSID Case No. ARB/03/24,* Decision of February 8, 2005
[672] *Salini Construttori S.p.A and Italstrade S.p.A V. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13,* Decision of November 15, 2004 Paragraph 115
[673] *Plama Consortium Limited V. Republic of Bulgaria, ICSID Case No. ARB/03/24,* Decision of February 8, 2005 Paras 204, 218, 221 and 223.
[674] Ibid Para 219
[675] N Gallagher and W Shan, *Chinese Investment Treaties: Policy and Practice* (Oxford University Press, 2009)
[676] Article 4 of the USA Model BIT 2004, entitled National and MFN Treatment, states that 'Each Party shall accord to investors of the other party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory'.
[677] On May 12, 2021, Canada published its new Model Foreign Investment Promotion and Protection Agreement (the new Model BIT) revising the 2004 Model BIT. Article 6 of the 2021 Model BIT (which mirrors Article 4 of the 2004 Model BIT), states 'Each Party shall accord to an investor of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of an investment in its territory'.
[678] Article 2.2 of the Japan-Republic of Korea BIT states that 'Each Contracting Party shall in its territory accord to investors of the other Contracting Party and to their investments' treatment no less favourable than the treatment it accords in like circumstances to investors of any third country and to their investments (hereinafter referred to as "most-favoured-nation treatment") with respect to investment and business activities'. For the avoidance of doubt, Article 2.1 of the same BIT states that 'Each Contracting Party shall in its territory accord to investors of the other Contracting Party and to their investments treatment no less favourable than the treatment it accords in like circumstances to its own investors and their investments (hereinafter referred to as "national treatment") with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, and sale or other disposal of investments (hereinafter referred to as "investment and business activities").'
[679] Anthony C. Sinclair, 'The Origins of the Umbrella Clause in the International Law of Investment Protection' (2004) 20 Arbitration International 412

treaty.[680] The result is that a contractual obligation is turned into a treaty obligation, making what would otherwise be a simple contract violation now a treaty violation[681] with the attendant enhanced level of protection for foreign investors.[682] Although they are also sometimes referred to as 'observance of undertakings clauses',[683] this thesis will use the term umbrella clause.

This section will now examine the influence that customary international law has had on these substantive protection standards and vice versa. There are two distinct rules of Customary International Law which emerged in the twentieth century with the primary role of providing legal protection to foreign investors, the MST rule, and the rule 'prohibiting expropriation without compensation'. Each of these rules has greatly influenced substantive protection standards in the field of International Investment Law. The two main sources of International Law are Customary Law and Treaties[684]. Over the years, the importance of each of these sources has ebbed and flowed, as a result of which each of them has in some way been influenced by the other. Customary Rules were the first in time to appear on the scene in the history of international investment law, with the MST and the general prohibition against expropriation without compensation being generally recognised as the main bulwarks of protection for foreign investors at the beginning of the twentieth century.[685] The authority and role of these standards as principles of customary law was not embraced by all of the international community however, and the developing countries challenged the very existence of these norms in the 1960s and the 1970s, perceiving them as neo-colonial constructs.[686] Whilst the developing States distrusted these constructs because they perceived them as another form of colonialism, the developed states, while maintaining the existence of these customary rules, believed that the efficacy of the rules were curtailed in reality, as a result of the deep-rooted opposition by so many of the developing States. As a result, the customary law rules were not recognised by the developed States as robust enough legal protection for foreign investors aspiring to do business outside their home States.

Developing States around the early 1990s, (a period marked by intense globalisation) believing that the best way to accelerate economic development in their countries was to encourage FDI by offering greater legal protection to foreign investors, began to sign up to BITs. Most of these BITs contained provisions actually provided foreign investors with the very protections that developing states were previously reluctant to accede to. It is ironic that although bitterly opposed to the rules of CIL that aimed to protect foreign investors who hailed from previously colonial states, by signing up to these BITs, developing countries afforded these same foreign investors protections and rights equal to and often more than the rights and protections that they would have enjoyed under CIL. Thus, it is clear that the influence of the MST afforded to foreign investors under CIL, had an effect upon the clauses in BITs such as the MFN, NT and FPS clauses, which appear in practically all first-generation BITs and afford foreign investors even more protection than was the norm under the CIL rules. It could also

[680] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012)
[681] Christoph Schreuer, 'Travelling the BIT Route of Waiting Periods, Umbrella Clauses and Forks in the Road' (2004) 5.2 Journal of World Investment & Trade 231; See also A. A. Stanimir, 'Breaches of Contract and Breaches of Treaty: The jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of Contract Claims in SGS v. Pakistan and SGS v. Philippines' (2004) 5 Transnational Dispute Management 555
[682] Jarrod Wong, Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations and the Divide between Developed and Developing Countries in Foreign Investment Disputes (2006) 14 George Mason Law Review 135, 166
[683] For a general overview, see Katia Yannaca-Small, 'What About This "Umbrella Clause"' in Katia Yannaca-Small, Katia (ed) *Arbitration under international investment agreements: A guide to the key issues* (Oxford University Press 2010) 479
[684] Patrick Dumberry, *The formation and identification of rules of customary international law in international investment law* (Vol 119 Cambridge University Press 2018)
[685] Patrick Dumberry, *The formation and identification of rules of customary international law in international investment law* (Vol 119 Cambridge University Press 2018) 745
[686] In the 1980s, many developing countries believed that the absence of consensus on existing basic legal protection had in fact prevented the development and crystallization of rules of customary international law in the field of international investment law.

be said that the customary law rule of the general prohibition against expropriation without compensation has now been crystalized into treaties in the form of Guarantees against Expropriation and Compensation. Additionally, the provisions of most of these old-generation BITs had ISDS clauses, which meant that foreign investors now had the power to take States before Arbitral Tribunals in the case of perceived breaches of the standard provisions or clauses, a power which they did not have under the rules of CIL. Furthermore, Dumberry's conclusion, with which this thesis concurs, is that at the time, Treaties had replaced custom as the prevalent source of investment protection.[687]

Article 38(1) of the Statute of the ICJ, although it has its detractors, is a sensible 'launching pad' for any examination of CIL and sets out the sources[688] of international law which the Court, whose function it is to decide disputes submitted to it in accordance with international law, will take cognisance of. The source most relevant to this chapter is Article 38(1)(b) namely, 'international custom, as evidence of a general practice accepted as law'.[689] Strictly speaking, the ICJ can only apply customary law, and not a custom, and as Villiger points out, this should read in reverse, namely that it is 'the general practice accepted as law which constitutes evidence of a customary rule'.[690] Building on this definition, Villiger refers to the work of the Special Rapporteur to the International Law Commission (hereinafter ILC), Manley Hudson, in his working paper on Article 24 of the ILC Statute, where the criteria required for the establishment of a Customary Rule, were (a)concordant practice by a number of states with reference to a type of situation falling within the domain of international relations; (b)continuation or repetition of the practice over a considerable period of time; (c) conception that the practice is required by or consistent with, prevailing international law; (d) general acquiescence in the practice by other states.[691] Michael Wood, a subsequent ILC Special Rapporteur in his Second Report, referred to CIL as 'those rules of international law that derive from and reflect a general practice accepted as law,'[692] This encapsulates the descriptions articulated by previous commentators. One viewpoint of CIL is that any enquiry into the sources of international investment law must be based on the recognized sources of general international law listed under Article 38(1)[693] of the Statute of the ICJ, because international investment law is not a self-contained regime[694] but comes under the ambit of public international law.[695] The next section will examine the impact of the Vienna Convention on the Law of Treaties upon IIAs. The Vienna Convention is important because treaties are the primary source of international obligations, and therefore 'the rules of the law of

[687] Patrick Dumberry, *The formation and identification of rules of customary international law in international investment law* (Vol 119 Cambridge University Press 2018) 746

[688] Carl Landauer, 'J.L. Brierly and the Modernization of International Law' (1993) 25 Vand J Transnat'l L 881. Bear in mind that there has been some doctrinal disagreement as to the concept of a "source", since sources have been equated with the basis of obligation in the field of international law – Note that the English version of Brierly's lecture was his original draft, but the lecture was first published as JL Brierly, Le Fondement du caractère obligatoire du droit international.

[689] https://www.icj-cij.org/en/statute accessed on 08.07.2021.

[690] Mark Eugen Villiger, *Customary international law and treaties: a manual on the theory and practice of the interrelation of sources* (Vol 28 Martinus Nijhoff Publishers 1997)15

[691] Mark Eugen Villiger, *Customary international law and treaties: a manual on the theory and practice of the interrelation of sources* (Vol 28 Martinus Nijhoff Publishers 1997)15

[692] Special Rapporteur Wood in his Second Report (International Law Commission, 'Second Report on Identification of Customary International Law', by Michael Wood, Special Rapporteur, Sixty-sixth Session, Geneva, 5 May–6 June and 7 July–8 August 2014, UN Doc A/CN.4/672 [hereinafter referred to as ILC, Second Report, 2014], Draft Conclusion 2 of the ILC 'Proposed draft conclusions on the identification of customary international law': customary international law 'means those rules of international law that derive from and reflect a general practice accepted as law'.

[693] https://www.icj-cij.org/en/statute accessed on 08.07.2021.

[694] *Archer Daniels Midland Company and Tate and Lyle Ingredients Americas, Inc, v Mexico* (Award, 21 November 2007) ICSID Case No ARB(AF)/04/05 195

[695] C Tams, 'The Sources of International Investment Law' in T Gazzini and E de Brabandere (eds*) International Investment Law: The Sources of Rights and Obligations* (Martinus Nijhoff 2012) 320; See also Jose E Alvarez, 'A Bit on Custom' (2009–2010) 42 NYU J Intl L Pol 76; Also, C McLachlan, L Shore and M Weiniger*, International Investment Arbitration: Substantive Principles* (OUP 2007) 15

treaties permeate the whole body of international regulation and create the fundamental framework within which this regulation operates'.[696]

4.5 THE IMPACT OF THE VIENNA CONVENTION ON THE LAW OF TREATIES ON IIAS

The Vienna Convention on the Law of Treaties, (the Vienna Convention or VCLT) is an international agreement governing treaty between states. It was drafted by the International Law Commission of the United Nations and adopted on May 23, 1969, entering into force on January 27, 1980.[697] The Vienna Convention gives guidelines on how treaties should be interpreted[698] in accordance with International Law and the Customary Rules of International Law.

As one commentator states, treaties are 'the cement that holds the world community together'.[699] Whilst treaties play a major role in international investment law by virtue of the sheer volume of such treaties in existence,[700] Customary Law Rules still have an important role to play in the interpretation of treaties, as can be noted from Article 31(3)(c) of the Vienna Convention. Article 31 is entitled "General rule of interpretation" and Article 31(1) states that 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Furthermore, Article 31(3) states that matters to be considered when interpreting a treaty, in addition to the terms of the treaty in their context, are, inter alia, 'any relevant rules of international law applicable in the relations between the parties'.[701] As set out earlier in this chapter, 'relevant rules' in International Investment Arbitration include the existing Customary Law Rules which clearly fall within the ambit of Article 31(3)(c).[702] As stated by Verzil, 'every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way'.[703] The reference to 'international convention' can be taken to mean a reference to 'international treaty' as well in this instance and therein lies the basis that Article 31(3)(c), as some commentators have posited, expresses a general principle of treaty interpretation, better known as 'systemic integration' within the international legal system.[704] This is somewhat self-evident, since treaties are creatures of international law and therefore regardless of the details of the subject-matter of the treaty or the scope of its subject-matter, the fact remains that at its core, the treaty is only in existence by virtue of the fact that it is part and parcel of the international law system, which is the bedrock of its existence.[705] The role of this principle of treaty interpretation, which has acquired the status of a constitutional norm within the international legal system, has been likened by a commentator[706] to

[696] Maria Frankowska, 'The Vienna Convention on the Law of Treaties before United States Courts' (1988) 28 Va J Int'l L 281

[697] The Vienna Convention on the Law of Treaties was signed in Vienna on 23 May 1969. https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf accessed on 04.08.2021

[698] It also provided guidance on Amendment and Modification of Treaties, as well as grounds upon which a State may invalidate, terminate, withdraw from or suspend the operation of a Treaty and situations under which a State would be taken to have lost its right to invoke such grounds.

[699] Kearney & Dalton, 'The Treaty on Treaties' (1970) 64 Am J Int'l L 495. The article provides an excellent account of the making of the Vienna Convention.

[700] Tarcissio Gazzani, 'The Role of Customary International Law in the Field of Foreign Investment' (2007) 8 J World Investment & Trade 691. Although, note that Gazzani states that BITs cover only about 13% of the bilateral relationships between the States composing the international community.

[701] Article 31(3)(c) of the Vienna Convention on the Law of Treaties

[702] Patrick Dumberry, *The formation and identification of rules of customary international law in international investment law* (Vol 119 Cambridge University Press 2018) 749

[703] Verzijl P, *Georges Pinson Case* (1927-8) AD 292

[704] Campbell McLachlan, 'The principle of systemic integration and article 31 (3)(c) of the Vienna Convention' (2005) International & Comparative Law Quarterly 54.2 279

[705] Campbell McLachlan, 'The principle of systemic integration and article 31 (3)(c) of the Vienna Convention' (2005) International & Comparative Law Quarterly 54.2 279

[706] Campbell McLachlan, 'The principle of systemic integration and article 31 (3)(c) of the Vienna Convention' (2005) International & Comparative Law Quarterly 54.2 279, 280

the role of a master-key in a large building, an analogy which he attributes to the Ambassador of China to the Netherlands and member of the International Law Commission (ILC). In much the same way as a master-key is required when access is required into all the rooms in a building, he posits that whilst normally, it would be possible in the vast majority of cases to provide an interpretation of a treaty simply by reference to its own terms and its context, in more difficult cases, Article 31(3)(c) of the Vienna Convention on the Law of Treaties provides the justification for looking beyond the parameters of that particular treaty, and applying the general principles of international law, which of course, include Customary International Law. There has been a perception in the recent past in relation to International Law that there is arising the possibility of the fragmentation of this body of law. Bownlie describes it thus:

> A related problem is the tendency to fragmentation of the law which characterizes the enthusiastic legal literature. The assumption is made that there are discrete subjects, such as 'international human rights law' or 'international law and development'. As a consequence, the quality and coherence of international law as a whole are threatened…
>
> A further set of problems arises from the tendency to separate the law into compartments. Various programmes or principles are pursued without any attempt at co-ordination. After all, enthusiasts tend to be single-minded. Yet there may be serious conflicts and tensions between the various programmes or principles concerned.[707]

Brownlie was concerned that International Law no longer seemed as "joined-up" as it should be, but more importantly, he was drawing the attention of the International Law community to the inherent problem that if specialised fields of international law persisted in developing in silos it could lead to serious conflict of laws issues which could then pose a systemic risk to the field of International Law. This issue was taken up by the ILC when it decided to examine the issue of the fragmentation of international law, which led to the establishment of a Study Group which looked at some of the tools or techniques available to the international lawyer, namely *jus cogens* or status, *lex specialis* or specificity and *lex posteriroi* or temporality. As underlined by McLachlan, however, interpretation precedes all these techniques, since it is only through the process of interpretation that it is possible to ascertain whether there is indeed a conflict of norms at all.[708] An ILC associate states:

> Hence the system of international law consists of erratic parts and elements which are differently structured so that one can hardly speak of a homogenous nature of international law. This system is full of universal, regional or even bilateral systems, subsystems and sub-subsystems of different levels of legal integration.[709]

This view of international law, whilst articulated from a different standpoint, is also reflected by the views of the eminent Koskenniemi,[710] who makes the point that although we tend to address the transformations of the international [legal] world in terms of 'fragmentation', with the suggestion that where once there was unity, there is now a 'splintered and fractured world', the reality is that this is not particularly plausible, since there is at its core, not much difference between, say, legal experts from Amnesty International and experts from a Ministry of Defence.[711] In his view, the terms 'Unity'

[707] Ian Brownlie, 'The Rights of Peoples in Modern International Law' in J. Crawford (ed) *The rights of peoples* (Vol. 59 Oxford: Clarendon Press 1988)1, 15

[708] Campbell McLachlan, 'The principle of systemic integration and article 31 (3)(c) of the Vienna Convention' (2005) International & Comparative Law Quarterly 54.2 279, 286

[709] Gerhard Hafner, 'Risks ensuing from fragmentation of international law' (2000) Report of the International Law Commission on the Work of its fifty-second Session 1 321

[710] Martti Koskenniemi and Päivi Leino, 'Fragmentation of international law? Postmodern anxieties' (2002) Leiden Journal of International Law 15.3 553

[711] M Koskenniemi,'Global legal pluralism: multiple regimes and multiple modes of thought' (2005) Palestra pro-ferida em Harvard em 2

and 'Fragmentation' are actually matters of narrative perspective, in that although looking at a legal system from a particular angle it may seem terribly 'distorted and chaotic', a view from another angle may reveal a 'finely nuanced and sophisticated reflection of a deeper unity'.[712] Furthermore, he makes the point that presenting the world as 'fragmented, chaotic or senseless' is often the first step in the speaker's ploy to impose their own perspective on the world. This can be seen in the examples of various rights of so-called "less developed countries" violated under the pretence of cultural difference i.e., 'surely there must be a court of law to deal with that, but which law, and whose court'?[713] Unity, he suggests, is a hegemonic project that seeks the predominance of 'my perspective', 'my institution' and he invites the reader to view the multiplicity of laws and regimes as a 'counter-hegemonic strategy', a 'receipt for freedom, innovation and novelty'.[714]

This idea of the world (or International Law) as oppressively homogenous, with most of the world being ruled by a 'totalising logic of power, globalisation and empire'[715] is a precursor to the issue of the imbalance of Power and its influence on Treaty Negotiation, which is one of the reasons why this thesis posits that the establishment of Specialist Teams in developing Host States will be invaluable, will be explored in detail later in this chapter. As Koskenniemi states, 'The real concern is the homogeneity of the cultural and professional outlook of the participants [and] the pretense that the decisions follow cognitive or technical grounds and are therefore immune to political contestation'.[716] He goes on to suggest that 'the discourse of multiplicity should itself be redescribed in political terms, as a competition between different systems and criteria for allocating resources between social groups. Who will win and who will lose?'[717]

In conclusion, it is important to note that this section is highly relevant to this thesis, because an oppressively homogenous world of International Law, enabled in so being by the International Law Framework, can be rebalanced one BIT at a time by the creation of a Specialist Team in each developing Host State with the expertise and the mandate to (re)negotiate and draft Investment Agreements that are 'fit for purpose' for the States concerned and which provide the much-needed protection for the Regulatory Autonomy of these developing States.

The next section addresses the quest for a Multilateral Agreement on Investment and the effect of this quest on the Investment Treaty Regime.

4.6 THE QUEST FOR A MULTILATERAL AGREEMENT ON INVESTMENT (MAI) – THE ORIGINS OF FOREIGN INVESTMENT

Foreign Investment has been taking place across the world for hundreds of years and was one of the drivers behind the expansion of the European powers, such as the British Empire, worldwide. This section traces the antecedents of foreign investment practice via its historical routes, explaining and making it clear how 'developing' Host States come to find themselves in the disadvantaged position that they now occupy. As far back as 1500 BC, the Phoenicians[718] traded by sea with the Greeks and established outposts around the Eastern Mediterranean, from which they could sell goods that they brought from Phoenicia. This together with the spread of the Phoenician alphabet (the precursor of all modern Western alphabets), could be described as the origins of foreign direct investment (FDI), since the Phoenician outposts could be likened to the establishment of a 'lasting commercial presence

[712] M Koskenniemi,'Global legal pluralism: multiple regimes and multiple modes of thought' (2005) Palestra pro-ferida em Harvard em 4
[713] M Koskenniemi,'Global legal pluralism: multiple regimes and multiple modes of thought' (2005) Palestra pro-ferida em Harvard em 5
[714] M Koskenniemi,'Global legal pluralism: multiple regimes and multiple modes of thought' (2005) Palestra pro-ferida em Harvard em 5
[715] M Koskenniemi,'Global legal pluralism: multiple regimes and multiple modes of thought' (2005) Palestra pro-ferida em Harvard em 5
[716] M Koskenniemi,'Global legal pluralism: multiple regimes and multiple modes of thought' (2005) Palestra pro-ferida em Harvard em 5
[717] M Koskenniemi,'Global legal pluralism: multiple regimes and multiple modes of thought' (2005) Palestra pro-ferida em Harvard em 5
[718] A civilization that flourished from 1500 BC in the area now occupied by Israel and Palestine

in a foreign state' and the spread of the language could be likened to a form of 'knowledge transfer' contributing to the economic development of the Host State,[719] both of which show the desire to create a long-term relationship (i.e. the commitment of resources to an enterprise for the pursuit of profit over a period of time) and remain as a key feature of investment as distinct from trade or other forms of commercial activity. Some centuries after the Phoenicians, the Silk-Road trading routes were established between Europe (controlled at the time by the Roman Empire), the Middle East and the Pacific Ocean. This vibrant overland trading route, extending over 6000 km through the deserts, plains and mountains of Asia, allowed the exchange of a wide variety of goods and also created the long-term relationships referred to earlier, as the trading agents often established themselves in foreign states for long periods of time. This route remained highly relevant until the fifteenth century, when extensive trans-oceanic trade between Europe, China and India meant that Port cities now became a major hub of commercial activity, with the concomitant creation of infrastructure in Host States being a clear example of the creation of a long-term FDI relationship to the benefit of the Host States.

Next came the colonial era when western European countries began establishing permanent colonies in areas where they had previously only visited in order to trade. This practice of establishing permanent colonies was to exploit the abundant resources (and sometimes cheap labour) available in countries that were less developed than the European powers. The exploitation of these resources (especially gold and silver) enriched the colonial powers to the detriment of the colonies and the resources were then used to fund more armies and navies which in turn helped the colonial powers to further dominate the colonies. At this time, there was no need for any international form of protection for the investors from the European states, since all investment was undertaken in the context of colonial expansion and the colonies were effectively within the jurisdiction of the European power, thus giving more than adequate protection to their investments. In fact, from the outset when Europeans set up trading posts in the local communities of the areas their countries had colonised in the Americas, Africa and Asia, the tacit understanding was that local law was not applicable to these foreigners, because they were already subject to the law of their home countries which in their view was a more 'civilized' law.[720] They therefore required no additional legal protection, as this "superior position" meant that a foreigner was usually treated better by the local community than a local or native person would be. As this continued, this "superior treatment" crystallised into an international minimum standard of protection to be accorded to all foreigners now referred to as a principle of Customary International Law known as the MST. The presumption behind the international minimum standard of treatment was the often-inaccurate view that some countries' legal systems were simply inadequate, at least from the standpoint of the European colonisers. This 'legal entitlement' of foreigners was initially vigorously opposed by the Host States (Latin American states in particular) who were adamant that the rights of individuals must come solely from domestic law.[721]

With colonialism beginning to unravel in the late nineteenth century, the colonies, after throwing off their shackles, started to challenge the idea that foreigners who remained in these newly independent countries to live and do business there, should continue to be governed by laws other than those enacted by the newly independent states, as this was anathema to their new sovereign status. The former colonial powers, to protect their citizens when faced with situations such as any interference by the host state in their business, would employ a mixture of diplomacy and force, which came to be known as "Gunboat diplomacy". This usually entailed sending a fleet of war ships to moor off the coast of the host state in support of the position of their national, the foreign investor, until such time

[719] David Collins, *An introduction to international investment law* (Cambridge University Press 2017)
[720] David Collins, *An introduction to international investment law* (Cambridge University Press 2017) 9
[721] Edwin Borchard, 'The "Minimum Standard" of the treatment of aliens' (1940) Michigan Law Review 38.4 445

as the host state caved in, a stark reminder of the strength of their former colonial masters.[722] The use of force to protect investments still continued after World War II[723] long after the Convention on the Peaceful Resolution of International Disputes, a multilateral treaty which effectively precluded military intervention in economic matters was signed in 1907, during the Second Hague Peace Conference. "Gunboat diplomacy" was widely employed by former colonial powers and was the precursor to diplomatic protection, a construct which first appeared in the writings of Emmerich de Vattel[724] and which is now recognised as a principle of international law, having been enshrined in rulings of the PCIJ[725] and also the UN's ICJ.[726] Between the end of the use of "Gunboat diplomacy" and the complete establishment of diplomatic protection as a principle of international law, the former colonies were indicating their eagerness for genuine economic independence as opposed to merely physical independence. The manner in which their efforts towards full autonomy was formally supported by the General Assembly of the UN is dealt with later in this chapter.

4.6.1 RELATIONSHIP BETWEEN MAI AND INTERNATIONAL TRADE UNDER THE AUSPICES OF THE WTO

Capital-exporting countries, anxious to negotiate a "high-quality investment agreement" announced at the Ministers meeting at a meeting of the OECD[727] in 1995 that they would create an Multilateral Agreement on Investment (MAI) by their 1997 Ministerial meeting. The idea behind the choice of the OECD as a negotiating venue was that its membership comprised "like-minded" (capital-exporting) states who it was hoped would ensure fast-paced negotiations unencumbered by the views of the developing-country members who the OECD states believed had hindered progress during the Uruguay Round. The plan was that this "free-standing", "carefully constructed investment agreement" would ensure that the investment and trading regimes complemented each other until such time as they might be successfully integrated[728] in a multilateral arena, (most likely the WTO), where the developing countries would be presented with a "fait accompli". On 25th May 1995, the OECD launched negotiations for the MAI. These negotiations were expected to be concluded by May of 1997. The plan was that once the Agreement had been negotiated and drawn up between OECD member states, the MAI would be opened to accession by those non-OECD countries that had opened their investment regimes to liberalization and had welcomed investors. Despite the best efforts of the OECD member states, the MAI negotiations were suspended in 1998 and not revived.[729]

[722] For example, in 1850 the British Navy blockaded the Greek port of Piraeus as retaliation for the harming of a British subject without compensation. 50 years later Italy and Britain sent ships to the Venezuelan coast to demand reparation from Venezuela for defaulting on its sovereign debt. The implication being that just as former colonies were threatened when interests of foreigners were not safeguarded, the (not so subtle) threat was clear when they did not honour their debt obligations. See also David Collins, *An introduction to international investment law* (Cambridge University Press 2017) 11

[723] The invasion of Egypt by Israel, the UK and France following Egypt's nationalisation of the Suez Canal in 1957 was probably the last incident where the protection of private property belonging to an alien was used as a justification for armed attack by a government. It is interesting that the Suez crisis was ended in part by the peaceful intervention of the USA, which threatened to inflict damage on the UK's financial system by selling off its UK bonds to devalue the British pound. Another quirky factor of note is that newly autonomous states like Canada and India sought to stimulate their economic growth through international trade with shorter shipping routes thanks to the Suez and Panama Canals as well as faster ships, and through access to foreign capital.

[724] Emer De Vattel and Charles G Fenwick,'The Law of Nations, Or, Principles of the Law of Nature' (Vol 4 first published by Oceana 1964) Béla Kapossy and Richard Whitmore (eds) (Indianapolis: Liberty Fund 2008) Available at http://oll. libertyfund. org/title/2246/212414

[725] The Mavrommatis Palestine Concessions (1924) PCIJ Ser A No.2.

[726] *Barcelona Traction (Belgium v. Spain),* Merits [1970] ICJ Rep.3

[727] https://www.oecd.org/ accessed on 17.12.2021. The website states that the Organisation for Economic Co-operation and Development (OECD) is an international organisation that works to build better policies for better lives. Our goal is to shape policies that foster prosperity, equality, opportunity and well-being for all.

[728] https://www.oecd.org/daf/mai/htm/cmitcime95.htm accessed on 28.06.2021.

[729] Riyaz Batlu, 'A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment' (2000) 24 Fordham Int'l LJ 275, 276

This thesis will now critically examine progressive Treaty Drafting practices from the Global North with a view to ascertaining what lessons can be learned from those states.

4.7 LESSONS FROM INTERNATIONAL REGIONAL TREATIES

One of the objectives of this thesis is to critically examine progressive Treaty Drafting practices from the Global North to compare these with the approaches by Host Countries in the Global South, to (re)negotiating and drafting their IIAs. The aim of such a critical examination is to reveal the gaps existing in the present infrastructure in developing states and show what a significant difference the concept of Specialist Teams could make to the capacity of African States, using the lessons learned from the more developed states, to regain and retain their regulatory sovereignty. The main international drafting practices that are examined in this section are the practices utilised by the USA, the EU, the United Kingdom, and Canada. The choice of these particular Western countries was influenced by the fact that these countries have historically been involved in negotiating and re-negotiating such IIAs as the multilateral NAFTA[730] which has been superseded by the United States-Mexico-Canada Agreement (USMCA),[731] bilateral IIAs such as the Canada-EU Comprehensive and Economic Trade Agreement (CETA), the Trans-Pacific Partnership (TPP) Agreement, the now stalled US-EU Transatlantic Trade and Investment Partnership (TTIP) as well as Model BITs such as the 2021 Canadian Model BIT.[732]

Chapter 11, the Investment Chapter of NAFTA, has generated a great deal of comment over the years. An examination of that Chapter will chart the investment negotiation journey of the USA, Canada, and Mexico, analysing the distinctions between an investment negotiation journey in the Global North and the investment negotiation journey of African States in the Global South, in particular Ghana. The ultimate aim of this section is to show how, with the existence of a dedicated Specialist drafting and negotiating Team, it would be possible to learn lessons from the past in order to navigate the future. The three parties to the NAFTA, the USA, Canada, and Mexico, each had slightly different prior relationships with investment treaties, and each had a different focus/agenda for the negotiations. While the USA was interested in creating a large free trade region without trade barriers such as tariffs,[733] Mexico's main concern was to secure an agreement that dealt with issues relating to agriculture,[734] general market access[735] and the agreement's impact on maquiladoras[736] whilst Canada

[730] The North America Free Trade Agreement (NAFTA) which was enacted on January 1, 1994, and created a free trade zone for Mexico, Canada and the United States, eliminated all tariffs on U.S exports to Mexico and Canada by January 2008. This has since been replaced by the U.S.-Mexico-Canada Agreement (USMCA) which entered into force on July 1, 2020 as part of an election pledge by Donald Trump.
[731] This agreement is known variously as the United States-Mexico-Canada Agreement (USMCA), the Canada-U.S.-Mexico Agreement (CUSMA) or the Tratado entre Mexico, Estados Unidos y Canada (T-MEC). It is designed to facilitate trade across North America and includes chapters pertaining to rules of origin, intellectual property, labour, environmental issues, and investment.
[732] https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng accessed on 21.03.2022
https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=eng accessed on 21.03.2022
[733] Ian L. MacDonald et al, 'The Negotiation and Approval of the FTA', in Ian L. MacDonald (ed) *Free Trade-Risks and Rewards* (McGill-Queen's Press-MQUP)73; see also Maxwell A. Cameron and Brian W. Tomlin, *The making of NAFTA: How the deal was done* (Cornell University Press, 2000); see also Justine Daly, 'Has Mexico Crossed the Border on State Responsibility for Economic Injury to Aliens? Foreign Investment and the Calvo Clause in Mexico after the NAFTA' (1994) 25 St. Mary's L J 1147, 1153; see also Michael Gordon, 'Economic Integration in North America: An Agreement of Limited Dimensions but Unlimited Expectations' (1993) 56 MOD L REV 157. Gordon notes that while free trade was well established between Canada and the United States, due to the CUSFTA, the US was particularly interested in an agreement which facilitated free economic exchange between the U.S. and Mexico, while permitting initiatives aimed at reducing illegal immigration between the two countries.
[734] Frederick W. Mayer, *Interpreting NAFTA: The science and art of political analysis* (Columbia University Press 1998)
[735] Isidro Morales, 'Trade Relations' NAFTA, The First Year: A View from Mexico (1996)17
[736] A maquiladora is a low-cost manufacturing operation in Mexico that manufactures goods for export to the United States capitalizing on the cheap labour force in Mexico and the benefits of the free trade agreement. See Manuel Chavez & Scott Whiteford, 'Beyond the

wanted a dispute settlement mechanism that could properly deal with issues such as excesses in the application of US domestic anti-dumping and countervailing duties, all of which were dealt with under Chapter 19 of NAFTA. Prior to the NAFTA, the US negotiators were familiar with many of the concepts of Chapter II, such as expropriation, national treatments and providing for arbitration of disputes, because of their involvement in earlier investment treaties (mostly Bilateral treaties), and the Canadian negotiators were also familiar with many of the concepts due to earlier negotiations under the 1988 Canada-US Free Trade Agreement (CUSFTA)[737] as well as Canada's Foreign Investment Promotion and Protection Agreements (FIPAs).[738] Mexico's experience of investment liberalisation was however relatively new at the time it entered into the NAFTA negotiations, as it had pursued restrictive economic policies, challenging traditional international law rules which governed investment since the 19th century, only shifting this stance when economic pressures in the 1980s forced it to liberalise its investment regulations as way of securing capital and technology.[739] In fact, Mexico had only recently restructured its domestic laws in 1989 to allow for international commercial arbitration[740] and certainly had no experience of investor-state arbitration. While the USA and Canada, had experience of IIAs at the time of the NAFTA negotiations, as at the time NAFTA came into effect in 1994, no arbitral awards had been awarded against either country under U.S. BITs or Canadian FIPAs. It would therefore be fair to conclude from the above that although effective investor-state dispute resolution would have been one of the objectives of the NAFTA negotiations, it was certainly not top of the agenda of any of these parties,[741] nor could they have imagined the spate of investor-state arbitrations that would subsequently be generated under Chapter 11.

It is noteworthy that the eleven initial disputes that arose under NAFTA were not pursued via Chapter 11, but under Chapters 19 and 20, shortly after the agreement entered into force.[742] The cases that

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Market: Political and Socioeconomic Dimensions of NAFTA for Mexico' in Karen Roberts and Mark I. Wilson (eds) *Policy Choices: Free Trade Among NAFTA Nations* (Vol. 3. East Lansing: Michigan State University Press 1996); see also Jaime Serra Puche, NAFTA and the Mexican Economy, in Ian L. MacDonald (ed*) Free Trade-Risks and Rewards* (McGill-Queen's Press-MQUP) 200

[737] CUSFTA contained obligations on national treatment (Article 1602), performance requirements (Article 1603), transfers (Article 1606) and expropriation (Article 1605). Such obligations were similar to those outlined in NAFTA Articles 1102, 1106, 1109 and 1110 respectively. See Canada-U.S. Free Trade Agreement, Jan. 2, 1988, U.S.-Can., 27 I.L.M. 281 (entered into force Jan. 1, 1989) [hereinafter CUSFTA], available at http://www.dfait-maeci.gc.ca/tna-nac/documents/cusfta-e.pdf.

[738] Canada began negotiating FIPAs in 1989 to secure increased investment liberalization, using a model developed by the Organization for Economic Cooperation and Development ("OECD"). Although similar to the U.S. BIT program, the FIPA program was neither as developed nor as exhaustive as its American counterpart. Additionally, the similarity of Chapter 16 of CUSFTA to Part A of NAFJTA Chapter 11 made Chapter 11 a logical continuation of Canada's efforts to liberalize its international investment regime.

[739] Gloria L. Sandrino, 'The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective' (1994) 27 VAND. J. TRANSNAT'L L. 259, 300. Sandrino cites the following as factors Mexico's 1980's economic crisis: decline in world petroleum prices; increase in world interest rates, world recession; and sustained balance of payments difficulties caused by an excessive imports-to-exports ratio. One clear indicator of Mexico's resulting shift in policy stance was the country's 1986 entry into General Agreement on Tariffs and Trade (GATT). See also Maxwell A. Cameron and Brian W. Tomlin, *The Making Of NAFTA: How the Deal Was Done* (Cornell University Press, 2000)

[740] Mexico's Commercial Code was reformed to permit commercial arbitration on January 4, 1989. Articles 1415 to 1437 were added under the heading "Title Four: Of Arbitration Procedures." See Margarita Trevino Balli & David S. Coale, 'Recent Reforms to Mexican Arbitration Law: Is Constitutionality Achievable?' (1995) 30 TEX. INT'L L.J. 535, 543. Following this change in the Commercial Code, Mexico passed a law in 1992 authorizing the country to enter into treaties containing mechanisms for dispute resolution between Mexico and foreign governments or foreign individuals. Dispute resolution mechanisms which were permitted under the 1992 law included investor-State arbitration. Patrick Del Duca cites this law as "Ley sobre la celebraci6n de tratados," D.O., available at http://www.cddhcu.gob.mx/leyinfo/pdf/216.pdf (Jan. 2, 1992). See Patrick Del Duca, The Rule of Law: Mexico's Approach to Expropriation Disputes in the Face of Globalization (2003) 51 UCLA L REV 35, 114

[741] Canada, for example, sought effective state-to-state dispute settlement (NAFTA Chapter 20), applicable to all chapters of the treaty. See Jonathan T. Fried, 'FTA and NAFTA Dispute Settlement in Canadian Trade Policy' in Ian L. MacDonald (ed) Free Trade-Risks and Rewards (McGill-Queen's Press-MQUP) 171

[742] The first Chapter 20 case was *Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products,* for which the United States requested consultations with Canada on February 2, 1995. *See* Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products, (NAFTA Ch. 20 Arb. Trib. Dec. 2, 1996), No. CDA-95-2008-01, *at http://www.nafta-sec-alena.org/app/DocRepository/l/Dispute/english /N A F Tr A - C h ap t e r* 20/Canada/cb95010e.pdf. The first NAFTA Chapter 19 case, which pertained to the import of apples to Canada, was dropped before the Panel Report stage. *See* Certain Fresh, Whole, Delicious, Red Delicious and Golden Delicious Apples, originating in or Exported from the United States of America, Excluding Delicious, Red Delicious and Golden Delicious Apples Imported in Non-Standard Containers for Processing, No.CDA-94-1904-01. Following

were pursued under Chapter 11 of NAFTA, on the other hand, started slowly with the first Notice of Intent (which in any event, never proceeded beyond this stage), being filed in March 1996[743] and the first NAFTA investor-state arbitration starting in January 1997.[744] In this case, Metalclad Corporation, a U.S. investor, filed a notice of arbitration alleging that Mexico's treatment of Metalclad's development of a waste landfill in the state of San Luis Potosi breached NAFTA Chapter 11. This case and its journey from arbitral tribunal to appeal,[745] attracted a great deal of debate from the media, academia and even government agencies. Condemnation of the tribunal's award emanated from a wide range of the public and governmental organisations, as it was perceived as an abuse of the ISDS mechanism, an attack against the environmental legislation of Host States and thus an infringement on the national sovereignty of Mexico in particular, and on national sovereignty generally.[746] Another consequence was a joint interpretive statement issued by the NAFTA Free Trade Commission aimed at clarifying those aspects of Chapter 11 that were clearly raising concerns in the public. The joint interpretive statement affirmed that 'concepts of fair and equitable treatment . . . do not require treatment in addition to or beyond that which is required by the customary international law', and that 'nothing in the relevant arbitral rules imposes a general duty of confidentiality' on the disputing parties to a Chapter 11 arbitration.[747] This is relevant, as it firstly shows how important it is to keep abreast with developments, since these can have a direct effect on IIAs and secondly, as will be clear later in this thesis, such interpretive statements are becoming more and more important in restricting the expansive interpretations of arbitral tribunals, making it difficult for them to maintain that there was no indication of what the parties were thinking.

Two other cases, both brought against the Canadian government by American investors, produced more disquiet by NAFTA observers. Firstly, in *Ethyl Corp. v. Government of Canada*, an American chemical company sued the Canadian government over its partial ban of Methylcyclopentadienyl Manganese Tricarbonyl (MMT), a fuel additive.[748] Of particular note is the potential for "regulatory chill" in host states as a result of ISDS cases, demonstrated here by the fact that at the time the MMT Act was being deliberated in Parliament, Ethyl Corp publicly threatened to respond with a Chapter 11 suit. After the MMT Act was passed, Ethyl Corp carried out its threat, initiating a claim against Canada, arguing that the ban of MMT violated its rights under Articles 1102 (NT), 1106 (ban on performance requirements), and 1110 (safeguard against expropriation) of NAFTA. Disregarding the fact that Ethyl

this, the first Chapter 19 Panel Report was released on April 10, 1995, which reviewed an injury determination by the Canadian International Trade Tribunal. *See* In the matter of Synthetic Baler Twine with A Knot Strength of 200 Lbs or less, originating in or Exported from the United States of America, (NAFTA Ch 19. Arb. Trib. Apr. 10, 1995), No. CDA-94-1904-02, *at* http://www.nafta-sec-alena.org/app/DocRepository/CaDispute/english/N A FTA - Chapter_19/Canada/ca94020e.pdf. In total, there were eleven Chapter 19 cases before the first investor claim under Chapter 11.

[743] The first Chapter 11 notice of intent was filed in March 1996 by a Mexican company named Signa, claiming that Canada's Patented Medicines (Notice of Compliance) Regulations violated Articles 1105 and 1110

[744] *Metalclad Corp. v. Mexico,* Notice of Arbitration, Jan 2, 1997.

[745] The tribunal awarded Metalclad more than $16 million in damages. The decision was controversial for three main reasons. First, it maintained an unusually strict standard for transparency under NAFTA Article 102, by requiring a host NAFTA country to pre-emptively determine its regulatory positions and clarify any potential points of misunderstanding—lest it breaches the "fair and equitable" requirement in Article 1105. Second, it defined "expropriation" under Article 1110 more broadly than prevailing international customs. Third, the decision curtailed the ability of NAFTA host countries to enact environmental regulations vis-à-vis NAFTA investments, notably by bypassing an in-depth discussion on Article 1114. Mexico appealed the award to the Supreme Court of British Columbia ("BCSC"). In 2001, the BCSC overturned the tribunal's ruling on Article 1105 and found the tribunal overreached in finding Mexico's misrepresentations towards Metalclad amounted to indirect expropriation under Article 1110. However, the BCSC refused to do the same regarding the tribunal's "extremely broad" definition of expropriation; it also declined to qualify the tribunal's dismissal of Mexico's argument based on Article 1114 as "patently unreasonable." In the end, the BCSC granted a partial award to Metalclad.

[746] Examples of organizations include Greenpeace, the Sierra Club of Canada, the World Wildlife Fund, and the U.S. Environmental Protection Agency. See Lucien J. Dhooge, 'The North American Free Trade Agreement and the Environment: The Lessons of Metalclad Corporation v. United Mexican States' (2001) 10 MINN. J. GLOB. TRADE 209

[747] Jerry L. Lai, 'A Tale of Two Treaties: A Study of NAFTA and the USMCA's Investor-State Dispute Settlement Mechanisms' (2021) 35 Emory Int'l L Rev 259. Available at: https://scholarlycommons.law.emory.edu/eilr/vol35/iss2/3

[748] MMT contains manganese, which in the form of exhaust, may cause airborne manganese poisoning in humans. The additive is also suspected of interfering with on-board emissions monitoring and diagnostic systems. Concerned about MMT's public health and environmental risks, the Canadian Parliament introduced the Manganese-based Fuel Additives Act ("MMT Act") in 1997, which banned the commercial importation and intra-provincial transport of MMT.

had not come to the law 'with clean hands', having violated procedural requirements,[749] the tribunal found against Canada.[750] The result was Canada settled with Ethyl for over $13 million, gave a public apology and later withdrew its partial ban on MTT. The final case in this trilogy is *Clayton/Bilcon of Delaware v. Government of Canada*, where the Claytons, American citizens, and Bilcon of Delaware, Inc. (Bilcon), a U.S.-based company, brought a case against Canada in 2008 for rejecting their plan to develop a quarry and marine terminal in Digby Neck, Nova Scotia. Their contention was that Canada's conduct had breached Articles 1102 (NT), 1103 (MFN), and 1105 (MST) of NAFTA. They alleged that the Canadian government had rejected their project proposal because of the recommendations of a Joint Review Panel (JRP), which, in their view, was legally unnecessary, and resulted in an assessment of their proposal that was "unfair, politically biased and discriminatory" every step of the way, based on environmental grounds that they had no way of knowing about beforehand and therefore were unable to address. The majority found in favour of the claimants,[751] but in a strong dissenting judgement, Professor Donald McRae disagreed,[752] stating that it was not that the claimants were unfairly surprised by the "community core value" standard to as "community core values." That in fact the claimants knew these topics[753] were included in the environmental assessment process but were simply not prepared to deal with them.[754] He concluded that 'a failure to comply with Canadian law by a review panel now becomes the basis for a NAFTA claim allowing a claimant to bypass the domestic remedy provided for such a departure from Canadian law' which was a 'significant intrusion into domestic jurisdiction and will create a chill on the operation of environmental review panels'.[755] This strong dissenting judgement shines a light on an inherent flaw in the ISDS system and by extension in the Legal Framework of IIAs.

Some commentators have argued that the issues arising here, namely the fact that judicial review of Chapter 11 cases has 'no teeth', the 'chilling effect, that ISDS may assert on environmental and health regulations domestically, as laid bare by Metalclad the contrariness in the procedural integrity of ISDS as per the Ethyl decision, and the fact that an international tribunal felt justified in making a ruling about the domestic legal system of a party, as in the Clayton/Bilcon case,[756] provided critics of ISDS with grist for their mill.[757] It seemed initially as if all the cases were being brought by U.S. investors against Canada and Mexico, but this soon changed dramatically, resulting in a concomitant change in

[749] Canada argued that the tribunal did not have jurisdiction because Ethyl had violated the procedural requirements stipulated in Article 1120 and had not waited six months after the passage and implementation of the ban before filing a claim. The tribunal, whilst conceding Ethyl's violation of Article 1120, declined to withdraw jurisdiction over the case with the justification that the six-month "cooling off" period would have been of little use in the case, since it has been given "no reason to believe that any 'consultation or negotiation' pursuant to Article 1118, which Canada admitted the six-month provision in Article 1120 was designed to encourage, was even possible."
[750] Turbulent Time for Trade: Impacts on Maine's Agriculture and Food Safety by Debbie Barker (October 2018) p.31, accessed at https://legislature.maine.gov/doc/3160 on 13.03.2022.
[751] The tribunal found Canada had breached Article 1105. The majority's findings were based on the fact that the JRP's recommendation improperly relied upon the vague "core community values" standard, which was neither in compliance with Canadian law nor communicated to the claimants beforehand. Therefore, the application of this standard violated the claimants' right to due process, since they were not given an opportunity to make or modify their case based on the standard.
[752] *Bilcon of Del. et al. v. Gov't of Can.*, Dissenting Opinion of Professor Donald McRae, Case No. 2009- 04, ¶ 25 (Perm. Ct. Arb. 2015). Professor McRae concluded his opinion by qualifying the majority decision as a "remarkable step backward in environmental protection," a sentiment that seems to be shared by environmental activists and groups. However, legal critics of NAFTA Chapter 11 contend the decision highlighted an even bigger problem: an international tribunal made a determination on whether a domestic government agency's actions breached domestic law, without any input from a domestic court or any deference to the domestic agency. In short, the *Bilcon* case raises the question of whether a Chapter 11 tribunal has the power to review domestic legislation, the answer to which may carry serious implications regarding Chapter 11's effects on the judicial sovereignty of NAFTA countries.
[753] Topics "relating to the human environment," such as First Nations resource use, community history, and local heritage.
[754] Jerry L. Lai, 'A Tale of Two Treaties: A Study of NAFTA and the USMCA's Investor-State Dispute Settlement Mechanisms' (2021) 35 Emory Int'l L Rev 259, 269. Available at: https://scholarlycommons.law.emory.edu/eilr/vol35/iss2/3
[755] Laura Letourneau-Tremblay & Daniel F. Behn, 'Judging the Misapplication of a State's Own Environmental Regulations' (2016) 17 J World Investment & Trade 823, 828. See *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015 (Bruno Simma, Bryan Schwartz, Donald McRae) and Dissenting Opinion, 10 March 2015 (Donald McRae)
[756] Laura Letourneau-Tremblay & Daniel F. Behn, 'Judging the Misapplication of a State's Own Environmental Regulations' (2016) 17 J World Investment & Trade 823 at 824
[757] Jerry L. Lai, 'A Tale of Two Treaties: A Study of NAFTA and the USMCA's Investor-State Dispute Settlement Mechanisms' (2021) 35 Emory Int'l L. Rev. 259, 270 Available at: https://scholarlycommons.law.emory.edu/eilr/vol35/iss2/3

the USA's attitude towards the rights of foreign investors, a situation that was reflected in their future negotiating stance. The change in public perception, which was reflected in a change in the US Policy and Negotiating stance, was because after the initial cases brought against Mexico and Canada, several cases were brought against the USA in quick succession. These were one in October 1998 by a Canadian funeral home,[758] two claims in 1999,[759] one in 2000,[760] two more claims in 2002,[761] another claim in 2003[762] and three additional claims in 2004.[763] Although it has been commented upon that the number of Chapter 11 cases brought under NAFTA was probably not that remarkable when viewed in the context of the volume and complexity of reciprocal trade and investment flows amongst the three NAFTA parties,[764] the fact remains that the number of investor-state disputes generated under Chapter 11, clearly took the parties by surprise. The result was a backlash, particularly in the USA, where commentators stated that foreign investors should not be accorded more rights than were accorded to domestic investors, but that they should be required to accord with the legislation of the USA, which was more than adequate.[765] Some commentators have noted that the views being espoused in the USA at the time were reminiscent of the Calvo doctrine[766] historically promulgated by the Latin American states, and which is also reflected in the stance of several developing countries over the years in which the ISDS mechanism has been in existence.

Note that it was not only the USA that had misgivings about the NAFTA, but also academia and civil society in Canada, due to the number of investor-state cases brought by investors from the USA in particular.[767] These reactions by the public were reflected in the stance taken by negotiators in future negotiations and resulted in the NAFTA being renegotiated under the Trump administration[768] replacing the 26-year-old NAFTA on July 1, 2020. This new agreement, known variously as the United States-Mexico-Canada Agreement (USMCA), the Canada-U.S.-Mexico Agreement (CUSMA) or the Tratado entre Mexico, Estados Unidos y Canada (T-MEC), is a clear change of direction in that it

[758] *The Loewen Group Inc. v. United States,* Notice of Arbitration, Oct. 30, 1998.
[759] *Mondev International Ltd. v. United States,* Notice of Arbitration, Sept. 1, 1999, and *Methanex Corp. v. United States,* Notice of Arbitration, December 2 1999
[760] *ADF GroupInc. v. United States,* Notice of Arbitration, July 19, 2000.
[761] *Canfor Corp. v. United States,* Notice of Arbitration, July 9, 2002; *Kenex Ltd. v. United States,* Notice of Arbitration, Aug. 2, 2002.
[762] *Glamis Gold Ltd. v. United States,* Notice of Arbitration, Dec. 10, 2003,
[763] *Grand River Enterprises et al. v. United States,* Notice of Arbitration, Mar. 12, 2004; *Terminal Forest Products Ltd. v. United States,* Notice of Arbitration, Mar. 31, 2004; *Tembec Corp. v. United States,* Notice of Arbitration, Dec. 3, 2004.
[764] Meg Kinnear & Robin Hansen, 'The Influence of NAFTA Chapter 11 in the BIT Landscape' (2005) 12 U C Davis J Int'l L & Pol'y 101, 105
[765] Comments reflecting the view that foreign investors' rights should not exceed domestic investors' rights include the following: "There is a growing consensus that we need to make sure that new trade and investment agreements don't give foreign investors in the United States greater rights than we give our own citizens." 107 CONG.REC. S4267-8 (daily ed. May 13, 2002) (statement of Sen. Baucus). Legislators' concerns regarding preferential treatment being given to foreign investors were also reflected in the final version of the act which eventually granted Trade Promotion Authority, the Trade Act of 2002. The act mentions explicitly at § 2103(b)(3) that the United States is to pursue its trade objectives "while ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States." Trade Act of 2002, Pub. L. No. 107-210, § 2103(b)(3), 116 Stat. 933 (2002), available at https://www.govinfo.gov/app/collection/PLAW accessed on 08.03.2022.
[766] According to the Calvo Doctrine, named for Argentinean diplomat and legal scholar Carlos Calvo, disputes involving foreign investors and host states ought to be resolved exclusively through local courts, precluding international arbitration or action via diplomatic channels. The doctrine attained influence in several Latin American countries and was reflected in these countries' foreign investment policies and constitutions. As Cremades writes, the doctrine "placed foreigners on an equal- and no more than equal - footing with Latin American nationals by providing that foreigners could seek redress for grievances only before local courts." See also Bernado M Cremades, 'Disputes arising out of foreign direct investment in Latin America: a new look at the Calvo Doctrine and other jurisdictional issues' (2004) Dispute Resolution Journal 59.2 78, 80
[767] In relation to the Bilcon case referred to above a commentator posited that "Given the strength of the arguments presented by the Dissent and the arguable contention by the Majority of the Tribunal that it had the competence to assess the domestic legality of Canada's EA processes, the *Bilcon* case raises, but does not resolve, a pair of relevant normative questions in the context of investment treaty arbitration: I) should a State ever be able to have the legality of its domestic EA processes subject to review by an international tribunal without first having those processes addressed through the domestic judiciary; and 2) should an international tribunal be able to assess the legality of domestic law instead of merely applying domestic law as a fact in the assessment of an international treaty violation? As neither of these questions are definitively answered by the Decision, it is likely that the outcome in *Bilcon* will - for years to come - be a central case in the ongoing debates on the legitimacy of investment treaty arbitration". See Laura Letourneau-Tremblay & Daniel F. Behn, 'Judging the Misapplication of a State's Own Environmental Regulations' (2016) 17 J World Investment & Trade 823, 832
[768] The agreement is referred to as the Canada–U.S.–Mexico Agreement (CUSMA) by the Government of Canada, in the US it is known as the United States-Mexico-Canada Agreement (USMCA) and is known as The Tratado entre Mexico, Estados Unidos y Canada (T-MEC) by the Government of Mexico.

eliminates ISDS between Canada and the U.S. and significantly scales it back between the U.S. and Mexico.[769] Although it is true that it took 26 years for this change to come about, the fact is that the negotiators clearly learned lessons from the past and applied those lessons in their subsequent negotiations, a stance that this paper will be actively encouraging, through the establishment of Specialist Negotiating Teams. It is this reflection upon and learning from the past, which seems missing from the contemplation of African States.

In conclusion, the lesson is that the negotiating teams from these more developed countries, took note of lessons learned from previous international negotiations and agreements, as well as criticisms from academia and civil society, and used those lessons to inform future negotiations, to the benefit of their countries. It is in a bid to use the lessons learned from these teams from the Global North, that this thesis proposes the creation of a team comprising Specialists in Ghana tasked primarily with dealing with (re)negotiating and drafting IIAs in a manner that will protect Ghana's RA. The next section examines inherent flaws in the ILF stemming from a power imbalance in treaty negotiations.

4.8 HOW POWER IMBALANCE HAS SHAPED THE LEGAL FRAMEWORK OF IIAS – INHERENT FLAWS?

The issue of a power imbalance as far as treaty negotiations in International Law is concerned, although previously discussed in this thesis, is worth expanding upon to shine a light on the inherent flaws in the International Legal Framework (ILF). The predominant narrative in TWAIL literature has been that this imbalance is due in the main, to the effects of colonialism and neo-colonialism in the form of economic policies foisted upon the former colonial states by the more powerful Western states. The formal (western) narrative is that the power imbalance caused by the use of 'gunboat diplomacy' to protect the assets and investments of European powers in the colonies, ceased after these colonies gained independence, and that there is now a level playing field because any disputes relating to the treatment of foreign assets or investments by Host States can now be dealt with by a neutral tribunal under the rule of law[770]. As has been pointed out, Europeans from the earliest times, tried to tread a fine line between the state and private commercial interests,[771] and trying to find a palatable narrative to explain the pillage and subjugation of non-European nations and resources. Although initially the narrative was that 'the white man's burden' was to bring other (lesser) races to civilization, the reality is that this was merely a pretext to hide the real reason for their presence in

[769] https://www.isds.bilaterals.org/?the-rise-and-demise-of-nafta accessed on 08.03.2022. This article also states that "The abolition of ISDS has been demanded by NAFTA Chapter 11 critics and trade justice activists for over two decades. Its removal is cause for celebration. This move greatly reduces Canada's vulnerability to ISDS lawsuits, nearly all of which have been initiated under NAFTA by U.S. investors. It is also an important step toward dismantling the ISDS regime globally. Yet it is only a partial victory. CUSMA's revamped investment chapter gave the old NAFTA Chapter 11 a three-year lease on life, during which much harm can still be done. ISDS also persists in an attenuated form between the U.S. and Mexico. Most significantly, Canada, the U.S. and Mexico continue to be enmeshed in an extensive web of bilateral and regional accords containing ISDS, including the misleadingly labelled Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)".

[770] Muthucumaraswamy Sornarajah, *Resistance and change in the international law on foreign investment* (Cambridge University Press, 2015) 81

[771] A perfect example is to be found in the British East India Company, which was formed by the British grandees. The company in effect, achieved the conquest of India before India was brought under imperial control in 1858 after the First War of Indian Independence. This is how the role of the East India Company was described in a recent article in the press "The Company created a powerful East India lobby in Parliament, a caucus of MPs who had either directly or indirectly profited from its business and who constituted, in Edmund Burke's opinion, one of the most united and formidable forces in British politics. It also made regular gifs to the Court: Lord Macaulay wrote "All who could help or hurt at Court, ministers, mistresses, priests, were kept in good humour by presents of shawls and silks, birds' nests and attar of roses, diamonds and bags of guineas". The Economist, 'Company that Rules the Waves', 17 December 2011. Present day multinational corporations follow the same playbook, by acting in tandem with state power and at other times, acting independently to enhance their own power, with the tacit co-operation of the state. See Steve Coll, *Private Empire: Exxon Mobil and American Power* (London: Penguin, 2013)

resource-rich countries, namely, to pillage resources of those resource-rich countries[772] for the benefit of the imperial states who were intent on finding resources they needed to fuel the industries in their countries, as well as ready markets for their manufactured products. Their colonies ticked both boxes perfectly. Once the colonies started to regain their independence and the imperial states no longer had that element of control, it was imperative that another route be found, to ensure the continuation of the imperial economic system. The modern international law regime on foreign investment was the perfect vehicle to ensure the continuation of the imperial economic system, and it continues to perpetuate these imbalances, but now under the guise of the neutrality of legal norms. As one commentator puts it 'Law becomes a substitute for the use of force, and gun-boat diplomacy comes to be replaced by arbitration'[773] established by the use of private power.

The next subsection deals with the "domino effect" of this power imbalance, as law becomes a substitute for the use of force, via the establishment of private power as wielded by Arbitral Tribunals.

4.8.1 THE "DOMINO EFFECT" OF POWER IMBALANCE – FROM NEGOTIATION, TO DRAFTING TO ARBITRATION

Whilst there is without doubt a historical correlation between their colonial past and the BITs signed by former colonies after colonialism, this thesis seeks to look beneath the surface to ascertain the reasons behind this perception of a power imbalance and why it persists so many years after the end of colonial rule. Treaties are generally not negotiated in a vacuum, nor are they arrived at overnight. Additionally, there is the possibility of either termination or re-negotiation, if a treaty is properly negotiated and drafted to contain the appropriate clauses to prevent the possibility of problems (both foreseen and unforeseen) further down the line. It is against this backdrop that this thesis seeks to discuss the issue of how treaty negotiation has been approached originally by developing African States and then subsequently, once problems such as the expansive interpretation of treaty obligations came to light because of decisions of arbitral tribunals. The ideal opportunity to take stock of and recalibrate the content of treaties and the negotiating stance and position of parties, especially Host States, is at the early negotiation stage.

Anthea Roberts, whilst concluding that the investment treaty arena is a 'conceptual mess' due to the fact that there is no single recognized and authoritative voice to definitively resolve the differences in a system which is based on thousands of FTAs and BITs, which are then interpreted by hundreds of arbitral tribunals comprised of arbitrators and advocates from divergent backgrounds, with no proper jurisprudence or central appellate body,[774] still attempts to analyse the various paradigms in this arena.[775] She contrasts the public international law paradigm with the commercial arbitration paradigm, explaining that the paradigm adopted for understanding this arena does not tend only to mould the answers given to questions put by observers, but also helps to shape understandings of the investment treaty system as to whether it is more "private" or "public" law in nature. Looking at the

[772] Kate Miles, *The origins of international investment law: empire, environment and the safeguarding of capital* (Vol 99 Cambridge University Press 2013)

[773] Muthucumaraswamy Sornarajah, *Resistance and change in the international law on foreign investment* (Cambridge University Press 2015) 82. See also Claire Cutler, *The Emergence of Private Authority in Global Governance* (Cambridge University Press 2003) for the role of power in creating normative orders.

[774] ICSID awards are subject to annulment, but annulment committees are also appointed on an ad hoc basis, and their mandate is more constrained than a typical appellate body. Non-ICSID awards are subject to some level of review by national courts at the seat of arbitration and the place of enforcement, but this review is also decentralized and limited in scope. Debates about whether an appellate body should be introduced often draw on analogies with other legal fields, including international commercial arbitration (which has no appellate mechanism), trade law (which introduced the WTO Appellate Body), and public law (which typically include domestic appellate mechanisms).

[775] Anthea Roberts, 'Clash of paradigms: actors and analogies shaping the investment treaty system' (2013) American journal of international law, 107 1 45

system through the public international law paradigm prioritises the Treaty as foundational, and in so doing, places the signatories to the Treaty in a superior position to investors (who are clearly not signatories to the Treaty) as well as to arbitral tribunals, which public international law deems to be an agent of the signatory parties. On the other hand, looking at it via the commercial arbitration paradigm, places the spotlight on the parties to the dispute, portraying the Host State and the investor as being equal, thus elevating the significance of investors, whist simultaneously downgrading the significance of states. This paradigm also places undue emphasis on confidentiality, which, together with party autonomy, is a hallmark of commercial arbitration[776] but not public international law. It is perhaps not surprising that non-governmental organisations (NGOs) tend to favour yet another paradigm, that of public law, since that tends to turn the spotlight onto the interests of the public at large and suggests that the dispute resolution proceedings should be held in public and be open to all interested parties (e.g., civil society)[777], regardless of the wishes of the parties[778].

This issue of which paradigm Investment Treaties inhabit, is explored further[779] when dealing with the next stage, that of dispute resolution. It has been argued that the manner in which an Arbitrator approaches the resolution of an Investor-State dispute before her, will depend to a large extent upon how she views this arena. Does she approach it from a public international law perspective, in which case she will consider herself as a quasi-judicial public law maker, whose role includes the clarification of the law for the benefit of the public at large, or from a private law perspective, in which case she is more likely to consider her role as akin to an arbiter of a private contractual dispute.[780]

An example cited is in relation to the meaning of the obligation of a Host State to provide FET when dealing with a foreign investment. The lens or paradigm through which an Arbitrator will approach this will depend upon whether she considers FET obligation as invoking the usual minimum standards of customary international law, or whether she considers an FET obligation as specifically relating to the particular BIT under consideration and therefore more akin to a private contract between two parties. As the tribunal in *Glamis Gold v. United States*[781] pointed out 'those treaties with fair and equitable treatment clauses that expand upon, or move beyond, customary international law, lead their reviewing tribunals into an analysis of the treaty language and its meaning, as guided by Article 31(1) of the Vienna Convention'.[782] This is quite a different scenario from those cases where 'those treaties and free trade agreements, like the NAFTA, that are to be understood by reference to the customary international law minimum standard of treatment necessarily lead their tribunals to analyze custom'.[783]

Some authors argue that there has been a gradual introduction since the 1990s, of a plethora of rules and processes in the international investment arena, which have had the result of perpetuating a power imbalance between developed and developing countries, resulting in the restriction of the regulatory activities of developing states whilst at the same time moulding the balance to be struck between competing market priorities.[784] One of the processes referred to above is the dispute resolution regime of arbitral tribunals as opposed to courts of law. These

[776] Jorge E. Viñuales, Amicus Intervention in Investor-State Arbitration (2006) 61 Disp Resol J 72, 75; Tomoko Ishikawa, 'Third Party Participation in Investment Treaty Arbitration' (2010) 59 INT'L & COMP. L.Q. 373, 375; Yves Fortier, 'The Occasionally Unwarranted Assumption of Confidentiality' (1999) 15 ARB. INT'L 131

[777] Ross P. Buckley & Paul Blyschak, 'Guarding the Open Door: Non-party Participation Before the International Centre for Settlement of Investment Disputes' (2007) 22 BANKING & FIN L REV 353, 355

[778] Anthea Roberts, 'Clash of paradigms: actors and analogies shaping the investment treaty system' (2013) American journal of international law, 107 1 45

[779] Alex Mills, 'The public-private dualities of international investment law and arbitration' (2011) 114

[780] Alex Mills, 'The public-private dualities of international investment law and arbitration' (2011) 115

[781] *Glamis Gold Ltd v. The United States of America* (Award of 8 June 2009).

[782] *Glamis Gold Ltd v. The United States of America* (Award of 8 June 2009) para 606

[783] *Glamis Gold Ltd v. The United States of America* (Award of 8 June 2009) para 606

[784] Gus Van Harten, "Investment treaties as a constraining framework." In *Towards New Developmentalism*, 172-192, 172. Routledge 2010

arbitral tribunals are charged with resolving disputes. Their role includes interpreting, applying and enforcing these rules which in the international investment arena, are perceived as being skewed towards the advancement and protection of the economic demands of foreign investors in a manner which results in the constraint of policy choices of host states who have entered into these BITs seemingly unaware of the underlying potential results of their agreements.

There is a school of thought that believes that this situation has come about because 'the international law on foreign investment has hitherto been developed in a fragmented fashion, probably because of the fact that it served the specific purpose of investment protection.'[785] Sonarajah argues that there was a concerted strategy to untether the international law on foreign investment from its "moorings" in international law, with the aim of ensuring that undue focus was placed on investment protection, rather than on the other considerations which come into play in the process of investing in foreign states, such as the human rights of the citizens of the host state and the environment,[786] to name but a few, all of which are all equally relevant. Whilst this may or may not have been the driving force behind the international law on foreign investment, the reality is that there is indeed undue focus placed on investment protection, which could only have come about due to a power imbalance between the negotiating parties, with the Home States insisting on this level of protection for their nationals as foreign investors.

According to the UNCTAD International Investment Navigator 2022, there are 2861 BITs in existence at the moment (out of which 2219 are in force). Additionally, there are 430 Treaties with Investment provisions in place (of which 336 are in force),[787] and regional economic agreements in existence that contain an investment chapter.[788] Together, these treaties set out a framework that aims to protect the investments of foreign investors from what is deemed to be interference from host states, but which has increasingly been identified as any regulation by the host state. These rights of foreign investors are backed by the use of international arbitration as set out in the dispute resolution clauses of most of the treaties. Other analysis[789] shows that investment treaty arbitration (or even the mere threat of investment treaty arbitration) impacts negatively upon regulatory decision-making of Host developing states. This examination focuses on the scope, i.e., the institutions that the framework applies to, the substantive standards that govern the conduct of investment treaties e.g., the language used to define the rules, and thirdly, the framework's mechanism for dispute settlement and enforcement, and leads to the characterization of the framework as 'an instrument that generates market rules and so shapes underlying economic relationships'.[790] It can therefore be concluded that the present iteration of investment treaties, namely old-generation BITs, provide a robust framework that succeeds in constraining policy making in host developing states that are usually less powerful than the home state signatories.[791]

Whilst there may be options within this constraining framework for states to pursue policies that could result in regulation of foreign investment, this raises once again the spectre of power imbalance. Developing states are unlikely to have the political and financial clout required to reject investment treaty arbitration, to take steps to protect their assets abroad from being

[785] M Sornarajah, *Resistance and change in the international law on foreign* investment (Cambridge University Press 2015)
[786] Markus W. Gehring and Marie-Claire Cordonier Segger, *Sustainable Development in World Investment Law* (Wolters Kluwer 2010); See also Jorge Viñuales, Foreign Investment and the Environment in International Law (No. 94 Cambridge University Press 2012)
[787] https://investmentpolicy.unctad.org/international-investment-agreements accessed on 18.09.2022.
[788] For example, Chapter 11 of the North Atlantic Free Trade Agreement (NAFTA)
[789] Gus Van Harten, 'Investment treaties as a constraining framework' in Shahrukh Rafi Khan and Jens Christiansen (eds) *Towards new developmentalism: Market as means rather than master* (Vol. 83. Routledge 2010) 172, 173
[790] Gus Van Harten, 'Investment treaties as a constraining framework' in Shahrukh Rafi Khan and Jens Christiansen (eds) *Towards new developmentalism: Market as means rather than master* (Vol. 83. Routledge 2010) 172, 173
[791] Note that this constraint in policymaking in a Host Country has been observed even in developed states, for example the *Ethyl Corp. v. Government of Canada*, where an American chemical company sued the Canadian government over its partial ban of MMT. Note that at the time the MMT Act was being deliberated in Parliament, Ethyl Corp publicly threatened to respond with a Chapter 11 suit. After the MMT Act was passed, Ethyl Corp carried out its threat, initiating a claim against Canada, arguing that the ban of MMT violated its rights under several Articles of NAFTA. This situation is only made worse where there is a power imbalance between the two signatory states.

seized in response to an arbitral award or to resist pressure from the international community to pay awards meted out following expansive interpretation by arbitrators.

As evidenced elsewhere in this thesis, most African countries are still signed up to BITs that although formulated as reciprocal in nature, are in reality totally imbalanced and asymmetrical, since it is mainly investors from the developed countries who invest in the developing countries and thus any clauses dealing with protection of investment, in reality have no practical benefit to nationals of the developing countries who are signatories to these BITs[792]. It has been noted for example, that one of the main reasons why countries have been unable to formulate a multilateral investment regime to date is because:

> Given the asymmetric nature of bilateral negotiations between a strong, developed country, and a usually much weaker developing country, the bilateral setting allows the developed country to use its power more effectively than does a multilateral setting, where the power may be much diluted[793]

Given the perception of an imbalance in the negotiating positions of parties to bilateral treaties, it would be instructive to explore how developed countries go about conducting negotiations. The example chosen here is the USA, since the change in their negotiating stance is worthy of emulation. Prior to initiating BITs, the primary trade treaty instrument utilised by the USA was the Friendship, Commerce and Navigation (FCN) treaty program, which commenced during the American Revolution initially as a way to establish commercial relations with European states.[794] The US later negotiated FCNs with Latin American, Asian and African countries, to regulate the trading relationships that they had entered into with these countries.[795] From the outset, these FCNs included provisions to protect property that was owned by US nationals but situated in the country with which the FCN was negotiated. Investment protection only became a primary purpose of treaties after the end of the second world war and the FCN treaty program continued until there was no impetus from other countries, as a result of which the USA's BIT program was launched in 1977 as a successor to the FCNs, which by then had been running for nearly 200 years.

Of note is the fact that the first four years or so of the USA's BIT programme were devoted to the preparation of a Model BIT Text which would form the basis of their negotiations.[796] The text was based on an amalgamation of their FCNs as well as the bilateral investment protection agreements which were being used by the European powers,[797] and the initial formulation of the text was carried out via lengthy consultations between the two departments with responsibility for the treaty drafting, namely the State Department and the Office of the US Trade representative. There are three main reasons that have been identified in literature as the underlying reasons why the US decided to pursue BITs. Firstly, due to the claim by many developing countries embodied in the UN General Assembly's adoption of CERDS[798] in 1974 stating that compensation for expropriation could be decided by the law

[792] Won Kidane, 'China's Bilateral Investment Treaties with African States in Comparative Context' (2016) 49 Cornell Int'l LJ 141, 143
[793] Jeswald W. Salacuse, 'The Emerging Global Regime for Investment' (2010) 51 Harv Int'l LJ 427, 464
[794] Kenneth J Vandevelde, (ed) *United States Investment Treaties: Policy and Practice* (Kluwer Law International 1992) 29
[795] *See, e.g.,* Treaty of Amity, Commerce and Navigation, Jan. 24, 1891, U.S.-Congo, 27 Stat. 926; Treaty of Peace and Amity, Mar. 31, 1854, U.S.-Japan, 11 Stat. 597; Treaty of Peace, Amity and Commerce, July. 3, 1844, U.S.-China, 8 Stat. 592; Treaty of Friendship, Commerce and Navigation, Feb. 4, 1859, U.S.-Para., 12 Stat. 1091; Treaty of Peace, Friend- ship, Commerce and Navigation, May 13, 1858, U.S.-Bol., 12 Stat. 1003 Treaty of Friend- ship, Commerce and Navigation, July 27, 1853, U.S.-Arg., 10 Stat. 1005; Treaty of Friend- ship, Commerce and Navigation, July 10, 1851, U.S.-Costa Rica, 10 Stat. 916; Treaty of Peace, Friendship, Navigation, June 13, 1839, U.S.-Ecuador, 8 Stat. 534, General Convention of Peace, Amity, Commerce and Navigation, May 16, 1832, U.S.-Chile, 8 Stat. 434; General Convention of Peace, Amity, Navigation and Commerce, Oct. 3, 1824, U.S.-Colom., 8 Stat. 306.
[796] Kenneth J Vandevelde, 'U.S. Bilateral Investment Treaties: The Second Wave' (1993) 14Mich J Int'l L 621, 626
[797] Kenneth J Vandevelde, (ed) *United States Investment Treaties: Policy and Practice* (Kluwer Law International 1992)
[798] Charter of Economic Rights and Duties of States

pertaining in the expropriating state[799] and not by prompt, adequate and effective compensation as Western countries claimed was the requirement under customary international law, the US were keen to create a network of BITs with a clause stating that expropriation must be accompanied by prompt, adequate and effective compensation, which they hoped would quash assertions that State practice no longer supported the standard of prompt, adequate and effective compensation.[800] Secondly, the BITs were aimed at protecting investments situated in other countries, but which were owned by US companies and US nationals.[801] Thirdly, these BITs were intended to establish legal remedies for investment disputes that would not necessitate the involvement of the investor's own government. This ended the decades-old tradition whereby the only remedy available to an investor whose investment in a foreign state had been expropriated by the government of that State was to hope that the investor's home government would get involved on behalf of the investor, which made for tricky foreign policy situations and so was a worrying time for foreign investors[802].

Thus, the US authorities had a clear idea as to what they required from these BITs even before they begun to map out the Model BIT. Of importance also is the fact that although initial agreement on the contents of the model negotiating text was reached in December 1981, this was subject to several revisions[803] between 1983 and 1992, as ambiguities and contradictions came to light once the model text was used as a basis for negotiations with other countries. It is therefore clear that a great deal of thought went into the formulation of a Model BIT that supported and promoted the foreign policy aims of the US and the ambitions of its nationals. The US also had absolute clarity about issues that it was not willing to compromise on; for example, they were not willing to compromise on the standard of compensation, namely 'prompt, adequate and effective compensation', nor were they willing to compromise on the right of investors to have any disputes resolved by international arbitration.[804] In addition to this, the United States developed a standard "fallback position" in respect of those provisions that it was willing to compromise on, for example there were some states that did not agree with the standard provision which guaranteed investors the right to transfer currency out of the Host State freely and without delay. In each of these situations, regardless of differences in the detail of the texts, the essence of the "fallback position/clause" was the same, namely that the clause permitted a delay in the transfer of the funds of the US investor in some circumstances.[805] In stark contrast to this painstaking attention to detail paid by US negotiators to ensure that the US Model BIT and subsequent BITs reflected the policy position and requirements of the US, is the amount of time developing States allocated to negotiations before signing BITs with the US. For example, the United States started BIT negotiations with Grenada two years after it invaded Grenada and "restored democracy" there. It is reported that the Grenada BIT was concluded in a single negotiating session that only lasted one hour, resulting in a treaty identical to the US Model BIT of 1984.[806] The obvious power imbalance between the USA and Grenada is reflected in these BIT negotiations and is replicated in the contents of other BITs signed between powerful and less powerful states.

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[799] G.A. Res. 3281, U.N. GAOR, U.N. Doc. A/9631 (1975), *reprinted in* 14 I.L.M. 251 (1975) (Article 2.2(c) provides that each State has the right "[t]o nationalize, expropriate, or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that State considered pertinent.").

[800] Kenneth J Vandevelde, (ed) *United States Investment Treaties: Policy and Practice* (Kluwer Law International 1992)

[801] Kenneth J Vandevelde, (ed) *United States Investment Treaties: Policy and Practice* (Kluwer Law International 1992)

[802] Kenneth J. Vandevelde, 'Reassessing the Hickenlooper Amendment' (1988) 29 VA. J. INT'L L. 115

[803] Kenneth J Vandevelde, 'U.S. Bilateral Investment Treaties: The Second Wave' (1993) 14 Mich J Int'l L 621, 627. There was a 1983 draft which was streamlined to result in a February 1984 draft, which was again revised in September 1987 and again in February 1992.

[804] Kenneth J Vandevelde, 'U.S. Bilateral Investment Treaties: The Second Wave' (1993) 14 Mich J Int'l L 621, 628

[805] Kenneth J Vandevelde (ed), *United States Investment Treaties: Policy and Practice* (Kluwer Law International 1992)

[806] Kenneth J Vandevelde (ed), *United States Investment Treaties: Policy and Practice* (Kluwer Law International 1992) This scenario is duplicated in many BIT 'negotiations' between developed and developing states.

In conclusion, the issue of power imbalance is one that has a domino effect beginning with the negotiation and drafting of treaties which permeates the lifetime of the treaty, affecting the lens through which the arbitrators view their role and has a knock-on effect upon the type of awards that are handed down in investor-state dispute resolution cases. Whilst most of the examples of initiatives shaping the Legal Framework of IIAs provided so far have been from the Global North, there are also several examples of initiatives shaping the Legal Framework of IIAs that originate from the African continent. Those will be dealt with in the next section.

4.9 AFRICAN INITIATIVES SHAPING THE LEGAL FRAMEWORK OF IIAS

Having critically examined the effect that the issue of power imbalance has had on the legal framework of IIAs, resulting in a domino effect beginning with the negotiation and drafting of IIAs, permeating the lifetime of the treaties and throughout the arbitral process, this thesis will now examine negotiation and treaty drafting developments at the AU level and the Regional Level in respect of the various RECs, to analyse any innovative negotiation and treaty drafting practices at the level of individual African States. For context, it must be noted that whilst there has been the desire for African Economic Integration via a single African Economic Community (AEC) since African States first attained independence from the colonial powers[807] beginning with the independence of Ghana in 1957, the proliferation of RECs[808] has posed a seemingly insurmountable problem to such economic integration, regardless of the fact that most, if not all RECs state clearly that they are committed to African Economic Integration via a single AEC.[809] Of the many RECs in existence on the continent, the eight RECs recognized by the AU are: East African Community[810] (EAC) ,[811] Arab Maghreb Union (AMU), Economic Community of Central African States (ECCAS), Inter-Governmental Authority on Development (IGAD), Economic Community of West African States (ECOWAS), Community of the Sahel-Saharan States (CEN-SAD), Common Market for Eastern and Southern Africa [812](COMESA), and

[807] Rodrigo Tavares & Vanessa Tang, 'Regional economic integration in Africa: impediments to progress?' (2011) South African Journal of International Affairs 18:2 217

[808] Africa's regional integration is a complex web of various regional economic communities (RECs). In West Africa, there are three RECs: the West African Economic and Monetary Union **(UEMOA),** the Mano River Union (MRU) and the Economic Community of West African States **(ECOWAS).** Central Africa has two groupings: the Economic Community of Central African States **(ECCAS/CEMAC)** and the Economic Community of Great Lakes countries **(ECGLC).** In Eastern and Southern Africa six groupings co-exist: the Common Market for Eastern and Southern Africa **(COMESA),** the East African Community **(EAC),** the Inter-Governmental Authority on Development (IGAD), the Indian Ocean Commission **(IOC),** the Southern Africa Development Community **(SADC)** and the Southern African Customs Union **(SACU).** North Africa shares two RECs, the Arab Maghreb Union **(UMA)** as well as the Community of Sahel-Saharan States **(CEN-SAD).** As a consequence, as of 2017, of the **55** African countries, 28 retained dual membership, 20 were members of three RECs, the Democratic Republic of Congo belonged to four RECs and six countries maintained singular membership. See Makane Moise Mbengue & Stefanie Schacherer, 'The Africanization of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18 J World Investment & Trade 414, 417

[809] In their constitutional treaties, the AEC is universally recognised as one of the objectives of the organisations. For instance, the Revised Treaty of ECOWAS states clearly that, 'the integration of the region shall constitute an essential component of the integration of the African continent. Member States undertake to facilitate the coordination and harmonization of the policies and programmes of the Community with those of the African Economic Community' (Chapter 17, Article 78). In a similar vein, the Agreement Establishing IGAD declares that one of the aims of the organisation is to 'promote and realize the objectives ... of the African Economic Community'(See Article 7, IGAD agreement 1996). And in the EAC Treaty is expressed that 'the Partner States reiterate their desire for a wider unity of Africa and regard the Community as a step towards the achievement of the objectives of the Treaty Establishing the African Economic Community', (See Article 1302 of the East African Economic Community (EAC) Treaty)

[810] The EAC was first established in 1967, dissolved ten years later and re-established by treaty in November 1999, which entered into force in July. The EAC started off with three Member States. In 2007, Burundi and Rwanda joined the EAC and in March 2016 South Sudan also joined. It is now composed of Burundi, Kenya, Rwanda, Tanzania, Uganda and South Sudan.

[811] https://www.eac.int/press-releases/1764-eac-takes-the-lead-as-the-most-integrated-bloc-in-africa accessed on 03.04.2022.

[812] COMESA is a regional economic community that began as a preferential trade area in 1981. The Treaty establishing COMESA was signed in November1993 and ratified a year later. COMESA has 19 Member States, namely Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

the Southern African Development Community[813] (SADC). Due to the fact that almost all African countries are simultaneously members of more than one REC, this proliferation of RECs poses challenges[814] with regards to trade tariffs, membership fees to the various RECs[815] and fractured allegiances, and also raises problems when one (or more) African State in an REC enters into FTA with a non-African state,[816] raising the possibility that the other states in that REC might fall foul of the MFN provisions of that FTA to their detriment. Despite this situation, commentators have been hopeful about the desirability and possibility of an African Common Investment Area (ACIA)[817] at the continental level rather than simply in regional investment areas. This hope is now much closer to becoming a reality under the African Continental Free Trade Agreement, an agreement which aims to create a single market for goods and services, the African Continental Free Trade Area, in order to deepen the economic integration of the African continent and its peoples.[818]

4.9.1 LEGAL FRAMEWORK AS SHAPED BY THE PAN-AFRICAN INVESTMENT CODE

It is against the backdrop described under the historical context session above, that the negotiations for the PAIC,[819] a legal investment instrument negotiated and drafted under the umbrella of the African Union (AU)[820] took place, which makes it even more impressive that the drafters and negotiators managed to secure enough of a consensus to produce the PAIC with its innovative and revolutionary provisions. Furthermore, PAIC, which has been described as 'the first continent-wide African Model Investment Treaty elaborated under the auspices of the AU'[821] is a pioneering piece of work in that unlike other IIAs in existence on the continent at the time it was drafted (by African Independent Experts), it contained several innovative features specifically pertaining to African States such as the reformulation of traditional investment treaty provisions, direct obligations for investors and anti-corruption provisions, to name but a few, and was deliberately drafted from the perspective of developing countries with a view to promoting sustainable development in these developing (and least-developed) Host States. It is a legal instrument in the form of a Model Investment Treaty and presents an African consensus on the shaping of International Investment Law. This section highlights the manner in which the negotiators[822] and drafters of the PAIC took cognisance of the provisions in existing legal instruments pertaining to international investment law both within and outside the continent. They also took cognisance of the debate relating to the future of international investment

[813] SADC was previously the Southern African Development Co-ordination Conference (SAD CC) whose main objective was the liberation from colonial rule. SADC was subsequently established by treaty in 1992, and currently has 15 Member States. These are Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

[814] United Nations Economic Commission for Africa (UNECA) and African Union (AU), Assessing Regional Integration in Africa II * Rationalizing Regional Economic Communities. Addis Ababa: UNECA, 2006, p. 110. As acknowledged by the UNECA and the AU, 'overlapping mandates, objectives, protocols, and functions create unhealthy multiplication and duplication of efforts and misuse the continent's scarce resources, making regional economic communities very inefficient'.

[815] On average, a third of REC members fail to meet their contribution obligations, rising to more than half in some communities (United Nations Economic Commission for Africa (UNECA) and African Union (AU), Assessing Regional Integration in Africa II * Rationalizing Regional Economic Communities. Addis Ababa: UNECA, 2006)

[816] Clare Godfrey, *Unequal Partners: How EUACP Economic Partnership Agreements (EPAs) could harm the development prospects of many of the world's poorest countries* (Oxfam International 2006)

[817] Laura Paez, 'Bilateral Investment Treaties and Regional Investment Regulation in Africa: Towards a Continental Investment Area' (2017) 18 J World Investment & Trade 379, 403

[818] What you need to know about the African Continental Free Trade Area - African Business accessed on 19.04.2022

[819] https://au.int/en/documents/20161231/pan-african-investment-code-paic accessed on 02.04.2022.

[820] The AU is mandated by its Member States to enhance the political and socio-economic integration of the continent and to promote sustainable development. See Constitutive Act of the AU https://au.int/en/treaties/constitutive-act-african-union accessed on 20.04.2022

[821] Makane Moise Mbengue & Stefanie Schacherer, 'The Africanization of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18 J World Investment & Trade 414

[822] Makane Moise Mbengue & Stefanie Schacherer, 'The Africanization of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18 J World Investment & Trade 414, 415. The authors were involved in the elaboration process from 2014-2015. Professor Mbengue was the lead expert and negotiator during this period.

law and dispute resolution that was ongoing at the time in order to orient their deliberations. The lessons learned from this exercise in negotiation and drafting can positively inform the steps towards protecting the Regulatory Autonomy of Ghana (and perhaps other African States in the future) as proposed in this thesis.

Additionally, although the PAIC was negotiated in challenging times based on the scenario where there was (and still is) a proliferation of RECs on the continent, there were also challenges to the ISDS regime and the perceived advantages enjoyed by foreign investors to the detriment of Host states beyond the continent. In spite of all these challenges, the negotiators and drafters managed to produce the PAIC which governmental representatives agreed to adopt during a meeting in Nairobi in November 2016 as a non-binding model investment treaty.[823] Regardless of the non-binding nature of the PAIC, there are valuable lessons to be learned from how the negotiators built upon the positive elements of traditional international investment treaty practice, whilst simultaneously making the PAIC provisions uniquely relevant to the challenges faced by African States[824] and these lessons could inform the remit any institution tasked with strengthening the ability of the government to freely exercise its RA.

Therefore this thesis explores how the PAIC builds upon the elements of traditional international investment treaty practice whilst simultaneously recognising interests unique to African States and using these interests to shape the negotiations and drafting, resulting in a framework that contains uniquely innovative provisions which address specific aspects of African development, as well as treaty practices not only from developing countries outside the continent,[825] but also from investment chapters in comprehensive FTAs such as the TPP[826] and the CETA,[827] both of which were discussed in an earlier section of this work. The negotiators of the PAIC also had an eye on policy proposals in existence from both NGOs and governmental organisations such as the UN[828] and the Canadian based International Institute for Sustainable Development[829] (IISD), an award-winning independent think tank working to fulfil a bold commitment: to create a world where people and the planet thrive. Building upon lessons gleaned from outside the continent[830] as well as the strides made by the RECs and individual African States on a micro level, the negotiators and drafters of the PAIC, comprising a team of experts drawn widely from representatives from the different RECs, from academia and from the private sector / business,[831] took the issue of the Legal Framework of IIAs a step further by producing a legal instrument which is a distillation of progressive treaty drafting practices which additionally, has provisions that address the unique challenges faced by African countries, ensuring that for example, the preamble sets out very clearly the intentions of the Host State, the expectations of the Host State and the responsibilities of both the investor and the Host State. This will prove to be important in pre-empting the inclination by Arbitrators to interpret ambiguous provisions in a manner which might not necessarily be in the best interests of the Host State. Furthermore, some examples of the (dis)integration of traditional investment standards in the PAIC will be addressed and discussed in this section. The uniqueness of the PAIC is to be found in the manner in which it 'reformulates traditional treaty language, adds new provisions, omits certain provisions completely'[832] and then proceeds to add some innovative features, resulting in a legal framework that showcases

[823] It is interesting to underline that this political decision was made despite the recommendations of the independent experts that recommended the PAIC to be a binding instrument.
[824] Makane Moise Mbengue & Stefanie Schacherer, 'The Africanization of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18 J World Investment & Trade 414, 415
[825] For example, treaty practices pioneered by Brazil and India
[826] Trans-Pacific Partnership
[827] The Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada
[828] In particular, the UN Conference on Trade and Development (UNCTAD),
[829] https://www.iisd.org/ accessed on 20.04.2022
[830] NAFTA I & II, CETA, etc.
[831] Makane Moise Mbengue & Stefanie Schacherer, 'The Africanization of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18 J World Investment & Trade 414, 420
[832] Makane Moise Mbengue & Stefanie Schacherer, 'The Africanization of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18 J World Investment & Trade 414, 420

not only an IIA that is more balanced than pre-existing legal instruments, but one that addresses specific aspects of development that are important to developing Host States, especially those on the African continent.

a. Preamble and Objective of the PAIC[833] – It is clear from the preamble to the PAIC that the drafters and negotiators sought to achieve an overall balance of the rights and obligations between AU Member States and foreign investors. This is a clear move away from previous IIAs where the primary objective has been the protection of foreign investments, to a position where the PAIC seeks firstly to promote investments, then to facilitate investments, and only after that does it focus on the protection of investments.[834] The PAICs Preamble specifically refers to the right of AU Member States to regulate all aspects relating to investments within their territories with a view to meeting their national policy objectives and to promoting sustainable development objectives. Following on from that, Article 1 of the first chapter, states that the objective of the Code 'is to promote, facilitate and protect investments that foster the sustainable development of each Member State, and in particular, the Member State where the investment is located'.[835] This signals a clear move away from the traditional preambles, and adds weight to the Preamble and the objective, which has consequences for how an IIA will be interpreted by arbitrators in the event of a dispute between a foreign investor and a Host State, or between states parties.[836]

b. Definition of Investment – The negotiators and drafters of the PAIC decided upon and enterprise-based definition, whereby an investment means 'an enterprise or a company, as defined under Paragraph 1, which is established, acquired or expanded by an investor, including through the constitution, maintenance or acquisition of shares, debentures or other ownership instruments of such an enterprise, provided that the enterprise or company is established or acquired in accordance with the laws of the host State…'.[837] It then sets out the types of assets that such an enterprise or company may possess and excludes portfolio investments[838] and investments in any sector that the Host State considers sensitive to its development and that would have an adverse impact on its economy.[839] Additionally, in order to qualify as an investment, the enterprise must be a substantial business activity[840] and have a 'commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and a significant contribution to the host State's economic development',[841] which mirrors the full *Salini* test.[842] This deviation from the

[833] https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf accessed 22.04.2022

[834] Makane Moise Mbengue & Stefanie Schacherer, 'The Africanization of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18 J World Investment & Trade 414, 421

[835] https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf . PAIC Article 1 accessed 22.04.2022

[836] Rudolf Dolzer and Margrete Stevens, *Bilateral investment treaties* (Martinus Nijhoff Publishers 1995)

[837] https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf . PAIC Article 4 accessed 22.04.2022

[838] PAIC Article 4(10) states - "portfolio investment" refers to any investment where the investor owns less than 10 per cent of shares in a company or through stock exchange, or otherwise does not give the portfolio investor the possibility to exercise effective management or influence on the management of the investment; https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf accessed 22.04.2022

[839] https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf PAIC Article 4(v) accessed 22.04.2022

[840] As per Paragraph One of the PAIC

[841] https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf PAIC Article 4(vi) accessed 22.04.2022

[842] *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco, Jurisdiction*, 6 I.C.S.I.D. Rep 398 (2001). The US Model BIT was the first treaty text to make reference to the test, however always by excluding the significant contribution to the host State's economic

traditional definition has been followed by a few other developing states[843] and RECs[844] although it is unfortunately, still is not the norm.

c. Definition of Investor – The definition of an investor, under the Article 4(5) of the PAIC, states "investor" means 'any national, company or enterprise of a Member State or *a* national, company or enterprise from any other country that has invested or has made investments in a Member State'.[845] Article 4(1), which elaborates on the meaning of "company or enterprise", states that it means any entity duly constituted or otherwise incorporated, under the applicable laws and regulations of a Member State 'provided that it maintains *substantial business activity*[846] in the Member State in which it is located'. It also clarifies that to ascertain whether or not there is substantial business activity would entail 'an overall examination, on a case-by-case basis, of all the circumstances, …'[847] The combination of these articles shows that the PAIC is once again breaking new ground in setting out the legal framework where IIAs are concerned.

d. Pre-Establishment Commitments – The norm in traditional IIAs is for the standards of treatment protections to be accorded to foreign investors after the investment has been established, although there has been a recent trend towards including commitments to the investor in the pre-establishment phase of the investment.[848] Commentators[849] state that negotiators of the PAIC took the view that pre-establishment commitments might be detrimental to the interests of host states wishing to make changes to their domestic legislation to further their sustainable development goals and therefore the PAIC makes no reference to commitments by host states in the establishment, acquisition or expansion phase of the investment.

e. Standards of Protection – Differentiating itself from the traditional norms in respect of the legal framework pertaining to standards of protection, the PAIC seeks to broaden the scope of phrases such as 'like circumstances' and make it more difficult for arbitral tribunals to limit such 'like circumstances' to whether investors are operating in the same 'economic' or 'business' sector.[850] This was achieved by stating

development. 48 Similar to the US Model BIT are the approaches in the TPP and CETA.49 Other treaties, such as those based on Model BITs from European countries, as well as some of Japan's recent BITs, adopt the traditional approach of not mentioning the elements of the Salini test at all. The Indian Model refers, like the PAIC, to all four elements. By including the last characteristic of the Salini test: 'the significant contribution to the host State's economic development', the drafters of the PAIC left no doubt that a covered investment under the PAIC has to have a strong relationship with the development of the host State's economy.

[843] https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf accessed 22.04.2022. India Model BIT; https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4715/download accessed 22.01.2022. Brazil-Malawi BIT

[844] The SADC Model BIT contains three options for the definition of an investment: an enterprise-based definition, an asset-based definition with a closed list and an asset-based definition with an open list see Commentary 12-13. SADC Model BIT Template (iisd.org)

[845] https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf PAIC Article 4(5) accessed 22.04.2022

[846] Italics mine

[847] https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf PAIC Article 4(1) accessed 22.04.2022. Including, inter alia: (i) the amount of investment to be brought into the host State, (ii) the number of jobs to be created, (iii) its effect on the local community, and (iv) the length of time the business has been in operation.

[848] This is in particular the case with comprehensive Free Trade Agreements. Besides the USA and Canada, the EU also has sought to include pre-entry commitments in its treaties and these pre-establishment obligations have usually been formulated by including references to MFN treatment as well as National Treatment.

[849] Makane Moise Mbengue & Stefanie Schacherer, 'The Africanization of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18 J World Investment & Trade 414, 426

[850] See *SD Myers v The Government of Canada*, UNCITRAL, Partial Award (13 November 2000) para 251*; Archer Daniels Midland Company and Tat & Lyle Ingredients Americas, Inc v Mexico*, ICSID Case No ARB (AF)/04/5, Award (21 November 2007) para 198. Extreme approaches were taken by the tribunal in *Methanex v USA* taking into account only identical comparators. See *Methanex v United States*, UNCITRAL, Award (3 August 2005) part IV and Occidental v Ecuador, UNCITRAL, Award (July 2004) paras 173 ff

in Article 7.3[851] and Article 9.3[852] that the application of 'like circumstances' would require an overall examination, conducted on a case-by-case basis, of all the circumstances of an investment, including inter alia, 'its effects on third persons and the local community; on the local, regional or national environment… and other factors directly relating to the investment or investor…'.[853] The reference to the environment here underlines the importance sustainable development is accorded in this instrument. The PAIC also states in Article 8 and Article 10 that member states may adopt measures that derogate from the MFN and NT principle in listed circumstances and adds in relation to NT that they may derogate provided such measures are not arbitrary.[854] One of the ways in which the PAIC deviates from the traditional norms is in stating that measures taken by reason of 'national security, public interest, public health or public morals' are not to be considered 'less favourable treatment'.[855] It is of note that the issue of the legitimacy of policy measures taken by States on the grounds of national security has been recognised as acceptable and even necessary as far back as the 19th century in respect of relations between states.[856] Thus, this issue was addressed in the 1899 Hague Convention on the Pacific Settlement of International disputes, in that Article 16 of that Convention[857] by recognising that whilst arbitration is '… the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle,' it limited the extent of the issues that could be brought before arbitration to 'questions of a legal nature'.[858] There was the assumption and tacit understanding between States that "political questions", i.e., issues relating to the vital interests or essential security of States, would be excluded under this form of wording.[859] As ISDS clauses became more prevalent in IIAs and private investors became increasingly unhappy and uneasy about the fact that measures taken by Host States under the umbrella of "national security" could end up outside the ambit of arbitral tribunals, with the result that Host States would not be held accountable for actions taken under this catch-all designation, which negated the aim of the provision of certainty and security to private investors who brought proceedings under IIAs.[860] This came to be regarded as an unacceptable "political risk". Since the end of WW II, however, it was not unusual to find clauses in prominent international trade and investment agreements[861] which referencing "national security" or "essential security interests" as a reason why States would be allowed to renege on commitments made to foreign investors or traders. Regardless of these clauses,

[851] https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf PAIC Article 7(3) re. Most-Favoured-Nation treatment, accessed 22.04.2022
[852] https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf PAIC Article 9(3) re. National Treatment, accessed 22.04.2022
[853] https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf PAIC Article 9(3) re. National Treatment, accessed 22.04.2022
[854] https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf PAIC Article 10(1) re. Exceptions to National Treatment, accessed 22.04.2022
[855] https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf PAIC Article 8(3) re. Exceptions to Most-Favoured-Nation Treatment, accessed 23.04.2022
[856] Kevin HO Rourke and Jeffrey G Williamson, *Globalization and History: The Evolution of a Nineteenth-Century Atlantic Economy* (MIT Press 1999); Thomas Piketty, *Capital in the Twenty First Century* (Harvard UP 2014)
[857] The 1899 Hague Convention on the Pacific Settlement of International disputes.
[858] The Convention for the Pacific Settlement of International Disputes (signed 29 July 1899, entered into force 4 September 1900) 187 CTS 410, art 16.
[859] On the historic distinction between political and legal disputes that are also reflected in art 16 of the 1899 Hague Convention, see Hersch Lauterpacht, *Function of Law in the International Community* (Clarendon 1933)
[860]Stephan W. Schill and Geraldo Vidigal, 'National Security, Private Actors, and Political Risk: Judicial and Non-Judicial Responses: An Introduction' (2021) The Journal of World Investment & Trade 22 4 503
[861] For example - General Agreement on Tariffs and Trade [GATT], Annex IA the Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154.

the international courts and tribunals[862] robustly took the view that they had the jurisdiction to make a determination as to whether or not issues of national security[863] were at stake and justified the actions of Host States that took measures that resulted in their reneging on their international legal obligations[864]. As a result, more and more states[865] are adopting new laws or revising their existing legislation to reflect the considerations, firstly that any security exception inserted into an IIA is intended to be exempt from the scrutiny of international adjudication and secondly that foreign direct investment should be screened on the grounds of national security. Cheng Bian[866] considers that this issue of screening on the grounds of national security poses regulatory hurdles to investors, resulting in unpredictability, procedural uncertainty, and the lack of transparency in practice, particularly in the case of the two countries that his research focuses on, namely Germany and China. Bian's suggested solution to remedy the problems posed to investors is the regulation of investment screening within the ambit of IIAs that have dispute settlement mechanism clauses to reduce the political risk in respect of market access faced by foreign investors and give them the reassurance for stability that they crave.

Another proposed solution to this issue of national security is specialised insurance[867] which would have the effect of allowing Host States to retain full control over their regulatory affairs as far as national security is concerned, whilst ensuring that any negative consequences suffered by private investors arising from actions taken by Host States in furtherance of national security protections, is covered by the insurance. These issues may be borne in mind as another tool in the armoury of the negotiators in the Specialist Teams of the future as envisaged by this work, when considering the Legal Framework relating to IIAs.

The final consideration in respect of standards of protection is FET which has been recognised by commentators as a frequently invoked by investors in investment disputes.[868] Although a viable reform approach would have been to draft clearer and more predictable FET provisions,[869] the drafters of the PAIC chose not to include an FET in the legal instrument, [870] yet another innovation in the IIA Legal Framework.

[862] Including the International Court of Justice (ICJ), World Trade Organization (WTO) panels, and investment treaty tribunals

[863] For an overview of different models of security exceptions in trade and investment agreements, see United Nations Conference on Trade and Development (UNCTAD), The Protection of National Security in IIAs (2008) UNCTAD/DIAE/IA/2008/5. See also Sebastián Mantilla Blanco and Alexander Pehl, *National Security Exceptions in International Trade and Investment Agreements – Justiciability and Standards of Review* (Springer 2020)

[864] For references to the jurisprudence, see Geraldo Vidigal and Stephan W Schill, 'International Economic Law and the Securitization of Policy Objectives: Risks of a Schmittean Exception' (2021) 48 2 Legal Issues of Economic Integration 109,111. International courts and tribunals recognized, however, that the degree of scrutiny they could exercise also depended on the wording of security exceptions. Clauses featuring self-judging elements, for example, were recognized to grant greater discretion to invoking States and to limit the standard of review exercised by an international adjudicatory body from full scrutiny to compliance with good faith. See WTO, Russia – Traffic in Transit, Report of the Panel (26 April 2019) WT/512/R, paras 7.102 ff; Saudi Arabia – IP Rights, Report of the Panel (16 June 2020) WT/567/R, para 7.231. See also Stephan W Schill and Robyn Briese, 'If the States Considers: Self-Judging Clauses in International Dispute Settlement' (2009) 13 Max Planck Yearbook of United Nations Law 61; Momchil Milanov, 'A Lauterpachtian Affair: Security Exceptions as "Self-Judging Obligations" in the Case Law of the International Court of Justice and Beyond' (2021) 22 JWIT 509

[865] Examples are Germany and China

[866] Cheng Bian, 'Foreign Direct Investment Screening and National Security: Reducing Regulatory Hurdles to Investors Through Induced Reciprocity' (2021) The Journal of World Investment & Trade 22.4 561

[867] Teoman M Hagemeyer and Jens Hillebrand Pohl, 'Managing the Risk of Self-Judging Security Exceptions Through Insurance: How Recent Mergers and Acquisitions Practice Copes with Investment Screening' (2021) 22 JWIT 596

[868] Rudolf Dolzer, Ursula Kriebaum, and Christoph Schreuer, *Principles of international investment law* (Oxford University Press 2022) It is interesting to note that Schreuer considered that the lack of precision might be a virtue rather than a shortcoming, since in practice it would be impossible to anticipate in the abstract the range of possible types of infringements upon investor's legal position.

[869] Stephan W. Schill and Marc Jacob, 'Trends in International Investment Agreements, 2010-2011: The Increasing Complexity of International Investment Law' in Karl P Sauvant (ed), *Yearbook on International Investment Law & Policy 2017-2012* (OUP 2013) 142 Consider TPP Art 9 in combination with annex 9-A; Indian Model BIT Art 3 as well as COMESA Investment Agreement Art 14.

[870] This option has been used by South Africa in its 2013 Promotion and Protection Investment Act; see also the Brazil-Malawi CIFA; it is also recommended by SADC. See SADC Model BIT Commentary 22. SADC Model BIT Template (iisd.org)

f. Transfer of Funds - Whilst it is clear that one of the main drivers behind investments for foreign investors is the ability to repatriate their profits either to their home countries or another destination of their choosing, the reality is that for Host States, the ability to administer its foreign (and local) currency reserves means that they have a duty to protect their ability to monitor and control large currency transfers in and out of their country, in order to protect their national policies.[871] Since the PAIC has stated in its preamble that it seeks to 'achieve an overall balance of the rights and obligations between Member States and the investors', it is not surprising that the PAIC under Article 15, permits all transfers relating to an investment to be made freely and without delay subject to national laws and then under Article 16, sets out the conditions under which a host state may apply restrictions on international transfers of funds and payments current transactions relating to investments made in its territory,[872] with the caveat that these measures 'shall be made public, be temporary and be eliminated as soon as conditions permit',[873] thus affording the member states the ability to have strong safeguard provisions that will allow their developing economies the flexibility to pivot and respond to emergency situations.

g. Performance Requirements – Under the heading of 'Development Related Issues', the PAIC has introduced performance requirements, which although not the norm in traditional IIAs, have been suggested to be helpful to host states wishing to ensure that their domestic economy actually benefits from real growth.[874] Article 17 provides member states with the ability to introduce performance requirements that promote domestic investments and local content, together with a non-exhaustive list of what such measures may look like. It is worth noting that US BITs have always included provisions prohibiting host states from imposing performance requirements on foreign investors[875] and the insertion of this provision by the negotiators and drafters of the PAIC provides a Legal Framework that protects the interests of African Host States, allowing them to introduce measures that would (amongst other things) 'enhance productive capacity, increase employment, increase human resource capacity and training, research and development … and other benefits of investment through the use of specified requirements on investors.'[876]

h. Reshaping and Restructuring resulting in an innovative Legal Framework – In addition to influencing the Legal Framework of IIAs by making adjustments to the provisions traditionally found in IIAs, the drafters of the PAIC introduced several innovative provisions, which could form the basis of a Legal Framework specifically geared towards ensuring that IIAs are more balanced and contain provisions that allow

[871] Makane Moise Mbengue & Stefanie Schacherer, 'The Africanization of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18 J World Investment & Trade 414, 432

[872] Firstly, restrictions can be adopted provided that they are 'in accordance with taxation as well as financial laws and regulations' of the concerned Member State. Secondly, AU Member States can prevent a transfer in a non-discriminatory manner and in accordance with its laws and regulations relating to bankruptcy, insolvency or other legal proceedings to protect the rights of creditors, to criminal or administrative violations or to ensure the satisfaction of judgments in adjudicatory proceedings. Thirdly, the PAI **C** foresees the possibility for AU Member States to adopt or maintain measures in the event of serious balance-of-payments and external financial difficulties or threat thereof, as well as in cases where, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies.

[873] https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf PAIC Article 16 re. Exceptions to the Transfer of Funds, accessed 23.04.2022.

[874] David Collins, *Performance requirements and investment incentives under international economic law* (Edward Elgar Publishing, 2015)

[875] Microsoft Word - BIT text for ACIEP Meeting (unctad.org) accessed 23.04.2022. Article 8

[876] https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf PAIC Article 17(2)(c) re. Performance Requirements accessed 23.04.2022.

African Host States to work towards a true vision of the Africa we want.[877] The highlights are, Investor Obligations, [878] and Investment Related issues such as ensuring that African Traditional Knowledge receives adequate protection by enforcing Intellectual Property Rights and Traditional Knowledge[879] and the need to put in place policies for the purpose of promoting and encouraging the transfer and acquisition of appropriate technology.[880] Both member states and investors are encouraged to take all practicable steps to promote, facilitate, and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how[881] and investors are required in the performance of their activities, to protect the environment take reasonable steps to restore it if their activities result in harm to the environment. Both member states and investors are required to carry out Environmental Impact Assessments (EIA) in relation to investments.[882] Finally, member states are to ensure that they do not waive or derogate from domestic labour legislation as an encouragement for the establishment, maintenance, or expansion of an investment in its territory.[883]

i. ISDS – Due to the backlash against the ISDS regime, some international organisations, such as ICSID have undertaken their own internal review,[884] and UNCITRAL's WG III was formed, which is compiling views from member states across the world, with a view to distilling proposals aimed at reforming the ISDS system. Some countries, both in Africa and beyond, have already taken unilateral steps either to eschew ISDS and eliminate all mention of it from their IIAs or else severely curtail its reach. This issue will be discussed in the next section in relation to international legal investment agreements created by RECs, but it is worth noting that the negotiators and drafters of the PAIC failed to agree on whether to include or ban ISDS in the PAIC.[885] South Africa[886] and all the Member States of SADC[887] were in favour of jettisoning ISDS,

[877] AU

[878] https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf PAIC Article 19(1) re. Framework for Corporate Governance accessed 23.04.2022.

[879] https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf PAIC Article 25 re. Intellectual Property Rights and Traditional Knowledge, inter alia, 25(3) Member States and investors shall, in accordance with generally accepted international legal standards and best practices, protect traditional knowledge systems and expressions of culture as well as genetic resources that are sought, used or exploited by investors, or are otherwise relevant to their contracts, practices and other operations in such Member States. 25(4) Member States shall provide, within national laws, principles for the patenting of biological materials or of traditional knowledge systems and expressions of culture for the protection of local communities in such Member States. accessed 23.04.2022. The notions of 'traditional knowledge systems and expressions of culture' have been taken from the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Diversity of Cultural Expression.' See UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (signed 20 October 2005, entered into force 18 March 2007) https://en.unesco.org/creativity/convention accessed 25.04.2022**.** The Convention recognizes traditional knowledge systems as part of humanity's cultural heritage and their protection and promotion as an ethical imperative.

[880] https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf PAIC Article 29 re. Transfer of Technology accessed 23.04.2022.

[881] https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf PAIC Article 30 re. Environment and Technologies accessed 25.04.2022.

[882] https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf PAIC Article 37 re. Environment accessed 25.04.2022.

[883] https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf PAIC Article 34 re. Labour Issues accessed 25.04.2022.

[884] https://icsid.worldbank.org/about accessed 25.01.2023.

[885] Makane Moise Mbengue & Stefanie Schacherer, 'The Africanization of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18 J World Investment & Trade 414

[886] https://www.gov.za/documents/protection-investment-act-22-2015-15-dec-2015-0000 accessed 26.04.2022. South Africa jettisoned ISDS and makes no mention of it in its Protection of Investment Act 22 2015, which came into forces in July 2018.

[887] https://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf accessed 26.04.2022 - NOTE: The Drafting Committee was of the view that the preferred option is not to include investor-State dispute settlement. Several States are opting out or looking at opting out of investor-State mechanisms, including Australia, South Africa and others. However, if a State does decide to negotiate and include this, comprehensive guidance is provided in the Commentary for this purpose.

whilst the majority of African states, still perhaps believing that ISDS is required in order to attract FDI, wished to include ISDS.[888]

The compromise eventually agreed upon by the PAIC negotiators and drafters, is to be found in Chapter Six of the Code,[889] with some noteworthy innovative provisions. Unlike most traditional IIAs which do not make any reference to State-to-State dispute resolution the PAIC starts off in Article 41 with an encouragement to member states to resolve any disputes regarding the interpretation and application of the Code, initially through consultations, negotiations, or mediation, which can then be escalated to arbitration which must be conducted at an established African ADR Centre. If all the above are unsuccessful in resolving the dispute within six months, any disputing member state is at liberty to refer the matter to the African Court of Justice, where the decision will be final and binding. Not only are these provisions innovative because they allow for State-State dispute resolution, but also because they specify that disputes must be adjudicated on the continent, where there are many ably qualified arbitrators and centres.

With regards to Investor-State disputes, the negotiators of PAIC sought to tread a narrow path between those member states who were totally anti-ISDS and those pro-ISDS, by allowing, but not insisting that member states should, agree to utilize the ISDS mechanism in line with their domestic policies.[890] This innovative provision relates to overturning the traditional stance whereby investors could go straight to international arbitration[891], using the (unfounded) excuse that they were unlikely to receive a fair hearing due to the state of the legal systems in developing Host States, a position robustly refuted by some commentators.[892] PAIC stipulated that disputes arising between investors and Members States under the specific agreements that govern their relations had to be resolved under those agreements.[893] The PAIC also sets a six-month 'cooling-off' period, during which the member-states and investor must seek to resolve the dispute through consultations and negotiations,[894] and only after these options have been explored without success, may the dispute be resolved through [international] arbitration, which, in another innovative deviation from the traditional norms, is 'subject to the applicable laws of the host State and/or the mutual agreement of the disputing parties, and subject to exhaustion of local remedies'.[895]

[888] Andrew T. Guzman, 'Why LDCs sign treaties that hurt them: Explaining the popularity of bilateral investment treaties' (1997) *Va. j. Int'l L.* 38 639.

[889] https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf PAIC Chapter Six - Dispute Resolution. Accessed 26.04.2022.

[890] https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf PAIC Article 42(1). Accessed 26.04.2022.

[891] Note the requirement to exhaust local remedies adopted by IISD Model BIT (n **127)** art 45; **SADC** Model BIT (n **20) art** 2 9 -4(b). SADC Model BIT Template (iisd.org)

[892] Muthucumaraswamy Sornarajah, *Resistance and change in the international law on foreign investment* (Cambridge University Press 2015) 190. Also, Makane Moise Mbengue & Stefanie Schacherer, 'The Africanization of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18 J World Investment & Trade 414, 443 states that according to **UNCTAD,** the requirement of dispute resolution before the domestic courts of the host country has several advantages, and might even foster sound and well-working legal and judicial institutions in the host States.

[893] https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf PAIC Article 42(1)(a) Accessed 27.04.2022.

[894] https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf PAIC Article 42(1)(b) Re: Cooling off period of consultation and negotiation, including non-binding third party mediation etc. Accessed 27.04.2022

[895] https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf PAIC Article 42(1)(c) Accessed 27.04.2022. Note that a number of IIAs require pursuing local remedies for a period of time, see eg Agreement between the Belgium-Luxembourg Economic Union and the Republic of Botswana on the Reciprocal Promotion and Protection of Investments (signed 7June **2006,** not yet in force) **art12.2** <http://investmentpolicyhub.unctad.org/Download/ TreatyFile/331>;

The two-fold innovation in this provision is that in the case of South Africa, for example, where their applicable laws state that a dispute between an investor and the state must be settled under its Protection of Investment Act 2015, there is no avenue to international arbitration open to the investor.

Secondly, the reference to arbitration being subject to the exhaustion of local remedies, which is also a deviation from the traditional norm, reduces ISDS arbitration to a remedy of last resort, rather than the first port of call for investors. Although it is good to see that member states are encouraged to conduct arbitration at any established African public or African private ADR centre, the provision that the arbitration shall be governed by the UNCITRAL rules, is not a particularly innovative position, since UNCITRAL rules are very often used in international investor-state dispute settlements.[896]

To conclude this examination of the innovative provisions in the PAIC aimed at changing the Legal Framework of IIAs, Article 43 introduces the possibility of Host States bringing counterclaims against investors, invoking any relevant international treaty protecting the environment, human rights and labour standards .[897] Tribunals have historically refused to allow host states to counterclaim, on the basis that the IIAs did not have a clear provision giving them jurisdiction to allow counterclaims.[898] The insertion of this clear provision in the PAIC deals with this excuse and it will be interesting to see how this would be dealt with in court.

4.9.2 LESSONS FROM NEGOTIATORS AND DRAFTERS IN AFRICAN REGIONAL ECONOMIC COMMUNITIES

Lessons can also be learnt from the negotiators and drafters of legal instruments pertaining to the regulation of foreign investment in some of the African RECs. In spite of the seemingly 'spaghetti-bowl'[899] of investment regimes described in the historical context of this section, some RECs on the continent have managed to negotiate and draft legal instruments concerning the regulation of foreign investment[900] and although none of these legal instruments is in effect or binding on the member states of those particular RECs, the contents of those legal instruments provide an insight into the particular provisions that African States consider to be important enough to be included in IIAs and those that were considered potentially harmful and so deleted from the legal instruments.

The following are examples of the innovative legal instruments enacted by some African RECs:

I. In 2006 the SADC produced a Protocol on Finance and Investment. Annex 1 to the SADC Finance and Investment Protocol (FIP), which was introduced in recognition the need for greater regional cooperation to make the SADC region a more attractive investment destination, was amended in August 2016, removing access to ISDS and limiting some substantive protections (the Amended Annex). It entered into force on 22 August 2017.[901]

[896] https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf PAIC Article 42(1)(d) Accessed 27.04.2022.
[897] https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf PAIC Article 43 Re: Counterclaims by Member States. Accessed 27.04.2022.
[898] Mark N. Bravin & Alex B. Kaplan, 'Arbitrating Closely Related Counterclaims at ICSID in the Wake of Spyridon Roussalis v. Romania' (2013) 3 YB on Int'l Arb 185; Clara Picasso Achaval, 'Tipping the Balance towards Investors' (2008) 9 J World Investment & Trade 14
[899] Laura Paez, 'Bilateral Investment Treaties and Regional Investment Regulation in Africa: Towards a Continental Investment Area' (2017) 18 J World Investment & Trade 379, 390
[900] Some of these are - the 1965 CEMAC Investment Agreement; the 1982 ECGLC Investment Code; the 1990 Arab Maghreb Union Investment Agreement and two protocols adopted by ECOWAS that relate indirectly to foreign investment: the 1984 ECOWAS Protocol on Community Enterprises and the 1979 ECOWAS Protocol on Movement of Persons and Establishment.
[901] Pursuant to Article 22 of the SADC Treaty, Member States are required to conclude Protocols in each area of co-operation to stipulate the objectives and scope of, and institutional mechanisms for, co-operation and integration.

II. In addition to this FIP, the SADC adopted a non-binding Model BIT in 2012[902], the aim of which was to enhance the harmonization of investment regimes in the region and to provide an effective tool / template for future IIAs produced by its member states.

III. In 2006 the EAC adopted a Model Investment Code (EAC MIC), which had several laudable investment initiatives.[903] The reasoning behind the adoption of the EAC MIC, as set out in the Preamble, was that the partner states 'before harmonisation of their investment laws and policies, need a Model Investment Code to assist them in improving their national investment codes and policies through capturing the best international investment practices while working towards harmonisation'.[904] Therefore, the EAC MIC though not legally binding upon the member states, provides them with guidance and best practice.[905]

IV. In 2007 COMESA concluded the COMESA Common Investment Area Agreement (CCIA Agreement),[906] the aim of which was to establish the COMESA Common Investment Area. Although the agreement is not yet in force,[907] the inventive provisions are noteworthy.

V. In 2015, three RECs, namely EAC, COMESA and SADC, signed an Agreement on a Tripartite Free Trade Area (TFTA)[908] aimed at promoting the harmonization of trade and investment between them. This Agreement has several novel provisions.

Each of these legal instruments has several fresh and innovatory provisions which when taken in the round, show clearly that the negotiators paid particular attention to the developmental needs of their member states, as well as to the need to move away from the traditional clauses which were neither helpful nor beneficial to African states. Although several of these legal instruments are either non-binding or not yet in force or both, they are clear examples of Best Practice on the continent and must be considered as building blocks for the reinstatement of the Regulatory Autonomy of developing states, starting with Ghana.

These examples of Best Practice relating to the Legal Framework surrounding Treaty negotiations and drafting on the African continent, can be grouped under the headings of Preamble, Definition of Investment, Definition of Investor and Standards of Protection, such as NT, FET, MFN, FPS, Expropriation clauses (linked to the Right to Regulate), Transfer of Funds by Investor, Investor Obligations and Dispute Settlement Mechanisms. Each of these will be dealt with below. The overarching aim of these deviations from the traditional IIA norms is a re-alignment of the purpose of IIAs, to change the focus from the protection of investors and their investments to the facilitation of investments for the benefit of both Host States and investors, including conferring obligations on both parties and not only on Host States.[909]

i. Preamble – the significance of a preamble in IIAs is that it gives third parties (particularly international arbitrators) and insight into the thought processes of the negotiating parties to the Agreement, which is especially important when it comes to the interpretation of the IIA in the event of a dispute between a foreign investor and a Host State[910]. The 2016 SADC

[902] SADC Model BIT Template (iisd.org) accessed on 06.04.2022
[903] https://investment-guide.eac.int/index.php/the-regional-framework/legal-framework accessed 06.04.2022.
[904] Preamble to the EAC MIC
[905] Article 3(1) EAC MIC
[906] https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3092/download accessed on 06.04.2022.
[907] This is because the required threshold of ratification by at least six Member States has not yet been met
[908] TRIPARTITE-FREE-TRADE-AREA-AGREEMENT.pdf (comesa.int) accessed on 06.04.2022.
[909] Rukia Baruti, 'Investment Facilitation in Regional Economic Integration in Africa: The Cases of COMESA, EAC and SADC' (2017) 18 J World Investment & Trade 493, 494
[910] Rudolph Dolzer and U. Kriebaum, *Principles of international investment law*. (Oxford University Press 2022)

Amended Annex FIP[911], the SADC Model Treaty[912] and the CCIA make clear linkages between the recognition of the importance of direct investment in advancing the development of economic, industrial and technological growth of its member states and the achievement of sustainable development in the region.[913] In the same vein, the Preamble to the EAC Treaty refers to the importance of having a 'fast and balanced regional development' by creating an environment which will support its Member States in their bid facilitate investment flows. One of the ways in which it has done this is via the adoption of a Model Investment Code (EAC MIC) aimed to give its Member States a template of Best Practices to improve their national investment policies and legislation.[914]

ii. Definition of Investment – The negotiators were clearly conscious of and intent on taking the opportunity to address some of the concerns raised in the arbitration arena in relation to what was perceived as an excessive focus on protection of investments.[915] To this end, the negotiators, with the specific aim of changing the focus from the protection to the facilitation of investments,[916] moved from an asset-based definition of investment in the 2006 SADC, to an enterprise-based definition in the 2016 Amended Annex, which described an investment as 'an enterprise within the territory of the state party which is established, acquired or expanded by an investor, including through the constitution, maintenance or acquisition of shares, debentures or other ownership instruments of such an enterprise'[917] and excluding portfolio assets from the definition altogether.[918] The SADC Model BIT on the other hand, provides options for an enterprise-based definition, a closed-list asset-based approach, and an open-list asset-based approach, setting out the pros and cons of each in the commentary, from the least to the most expansive in terms of their coverage.[919]

iii. Definition of Investor – Whereas contemporary treaty drafters have variously aimed to limit the traditionally wider definition of investor by narrowing it down to three main criteria when determining the nationality of a legal entity, namely control, incorporation and social seat[920] or by positing that nationality be not only determined by the place of incorporation but additionally that it must have a 'substantial business activity' in the home state,[921] the SADC 2016 Amended Annex defines investor as 'a natural or a juridical person of another State Party, in accordance with the laws and regulations of the State Party in which the investment is made'.[922] This definition has been criticized as "limiting the usefulness" of the 2016 Amended Annex being too narrow a definition, since it means that the definition only covers investors originating from SADC member countries, leaving foreign investors with no protection under the Amended Annex.[923] Regardless of its perceived limited usefulness, it is still an improvement on the traditional definition, and a step in the right direction that could perhaps be considered as part of the proposed legal tool-kit of solutions.

[911] Protocol on Finance
[912] https://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf accessed 06.04.2022.
[913] https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3092/download accessed on 06.04.2022.
[914] Rukia Baruti, 'Investment Facilitation in Regional Economic Integration in Africa: The Cases of COMESA, EAC and SADC' (2017) 18 J World Investment & Trade 493, 503
[915] M. F. Qumba, 'Balancing investor protection with a state's regulatory autonomy in the amended SADC FIP' (2021) *Obiter*, *42* 3 625, 629
[916] Rukia Baruti, 'Investment Facilitation in Regional Economic Integration in Africa: The Cases of COMESA, EAC and SADC' (2017) 18 J World Investment & Trade 493, 503
[917] Agreement Amending Annex 1 - Cooperation on investment - on the Protocol on Finance Investment - English - 2016.pdf (sadc.int) accessed on 06.04.2022.
[918] Portfolio assets are considered by commentators to be merely speculative investments initiated without any intention to hold on to them or to contribute towards the economic development of the host state. See A Rajput, 'Safeguarding India's Regulatory Autonomy: Analysis of the New Model Bilateral Investment Treaty' (2017) Manchester Journal of International Economic Law 279, 284
[919] https://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf accessed on 06.04.2022.
[920] Makane Moise Mbengue & Stefanie Schacherer, 'The Africanization of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18 J World Investment & Trade 414, 425
[921] P. Ranja & P. Anand, The 2016 model Indian bilateral investment treaty: a critical deconstruction (2017) Nw. J. Int'l L. & Bus 38
[922] Agreement Amending Annex 1 - Cooperation on investment - on the Protocol on Finance 2016.pdf accessed on 06.04.2022.
[923] M. F. Qumba, 'Balancing investor protection with a state's regulatory autonomy in the amended SADC FIP' (2021) *Obiter*, *42* 3 625, 631

iv. Standards of Protection – The drafters and negotiators in the RECs under consideration, obviously believed that making changes in the standards of protection, would not only assist their member states to attract FDI,[924] but would also protect member states from the expansive interpretation of arbitral tribunals. To that end, the EAC MIC excludes provisions on FET, MFN as well as FPS, whilst retaining the NT protection for investors. This is however tampered by a promise of non-discrimination as far as the rights of establishment, protection and benefits are concerned. Other important provisions in the EAC MIC include the setting up of national investment agencies,[925] special economic zones,[926] export processing zones[927], zones for manufacturing under bond[928], technology and industrial parks[929] and virtual zones[930], all of which take into account the unique developmental needs of its member states.[931] The 2016 Amended Annex to the SADC FIP on its part, narrows the existing NT standard, requiring a State Party to 'accord to investors and their investments, treatment no less favourable than the treatment it accords in like circumstances to its own investors and their investments with respect to the managements, operation and disposition of investments in its territory'.[932] Additionally, it states in Article 6(2) that references to 'like circumstances' must be looked at on a case-by-case basis, providing a non-exhaustive list of matters that should be taken into consideration and adding for good measure in Article 6(3), that States Parties may, notwithstanding Art. 6(1), 'in accordance with their respective, domestic legislation, grant preferential treatment to domestic investments and investors in order to achieve national development objectives,'[933] presumably, this was in a bid to allow States Parties the flexibility to pursue their individual national objectives without falling foul of the traditional NT standard.[934] This reference to a 'case-by-case basis' can also be found in the CCIA and the SADC Model BIT, which also allows NT to be excluded in certain sectors.[935]

It has been widely noted that the vast majority of investment disputes have invoked a violation of FET standard[936] so it is therefore not surprising that drafters and negotiators have paid particular attention to this standard of protection. Qumba sets out the four options most often utilised in treaty drafting as a solution to the challenges of the FET standard and these are: '(1) linking the FET standard to the customary international law minimum standard; (2) providing an exhaustive list of obligations related to FET; (3) completely eliminating the standard of FET from the treaty; and (4) providing an alternative formulation of the FET such as fair administrative treatment.'[937] All these options have been employed by REC drafters and negotiators and should be borne in mind by drafters and negotiators in Specialist Teams. Whilst the 2006 FIP retained the FET standard, linking it to MFN treatment, perhaps in the hope that this would ensure that all foreign investors would be entitled to the same level of compensation, thus obviating the need for claims for damages,

[924] Rukia Baruti, 'Investment Facilitation in Regional Economic Integration in Africa: The Cases of COMESA, EAC and SADC' (2017) 18 J World Investment & Trade 493, 504
[925] Article 18 EAC MIC
[926] Article 23 EAC MIC
[927] Article 24 EAC MIC
[928] Article 25 EAC MIC
[929] Articles 26 and 27 EAC MIC
[930] Article 28 EAC MIC
[931] Emmanuel Sebijjo Ssemmanda and Edmond Ashivaka Shikoli, 'Investment Regulation in the East African Community: Community and Domestic Legal Regimes' (2019/2020) African Journal of Commercial Law 1 173, 178
[932] Agreement Amending Annex 1 - Cooperation on investment - on the Protocol on Finance 2016.pdf . Article 6(1) accessed on 09.04.2022.
[933] Agreement Amending Annex 1 - Cooperation on investment - on the Protocol on Finance 2016.pdf accessed on 09.04.2022.
[934] M. F. Qumba, 'Balancing investor protection with a state's regulatory autonomy in the amended SADC FIP' (2021) *Obiter*, *42* 3 625, 633
[935] Rukia Baruti, 'Investment Facilitation in Regional Economic Integration in Africa: The Cases of COMESA, EAC and SADC' (2017) 18 J World Investment & Trade 493, 505
[936] Rudolf Dolzer and Ursula Kriebaum, *Principles of international investment law* (Oxford University Press 2022); See also M. F. Qumba, 'Balancing investor protection with a state's regulatory autonomy in the amended SADC FIP' (2021) *Obiter*, *42* 3 625, 634
[937] M. F. Qumba, 'Balancing investor protection with a state's regulatory autonomy in the amended SADC FIP' (2021) *Obiter*, *42* 3 625, 634

the Amended Annex to the FIP deletes the FET standard. The CCIA's approach shows that its negotiators paid attention to the fact that its Member States may have achieved different levels of development and therefore introduced a novel degree of flexibility[938], to reflect the fact that Member States, in addition to having different levels of development, may also have different forms of administrative, legislative and judicial systems in place.[939] This was done by obliging Member States to apply FET to investors and their investments using the stricter customary international law minimum standard.[940] Whilst the SADC Model BIT[941] recommends that the FET standard be excluded and instead suggests the use of the 'FET', it does include the option, should states wish, of using the FET standard linked to the customary international law minimum standard as utilised in the Neer case,[942] which is a narrower standard than is found in traditional IIAs and therefore not so restrictive.

Distinct from the FET, the premise of the MFN standard is that signatory states enter contract to treat investors and their investments in their country on a basis that is no less favourable than the treatment accorded to investments of nationals of any third states. Whilst the idea behind the MFN standard (to create equal competitive conditions for all foreign investors, independent of their nationality, by creating a level playing field for all foreign investors without discrimination on the basis of nationality) is laudable, the unintended consequences of this standard, based on the overly broad interpretation accorded to it by arbitral tribunals, have been to allow foreign investors to 'borrow' advantageous substantive and procedural provisions from third-country investment treaties to replace the provisions of their own primary investment agreement such as a BIT, which in effect undermines the originally negotiated BIT, as well as the political and diplomatic reasons behind negotiating that particular BIT on those terms. As a result, some countries have removed the MFN protection from their IIAs.[943] In terms of RECs, the MFN provision has been removed by the Amended Annex 1 of the SADC FIP and does not appear in the SADC Model BIT[944] either. Some commentators posit that the exclusion of this principle from the Amended Annex is likely to cause a degree of unease among investors[945] because without an MFN clause to fall back onto, foreign investors will have to come to terms with the possibility that their investment may end up receiving less favourable treatment compared with the investments of other. It remains to be seen whether investors consider this a 'deal-breaker', since the reality is that without MFN, each investor will have exactly what was negotiated and agreed, without 'parachuting' other more favourable terms in through the back door, so to speak. The EAC MIC also excludes MFN. In terms of (re)negotiating and drafting BITs to restore Regulatory Autonomy to Ghana, this could be yet another positive tool to be utilised by the proposed team of Specialists.

In relation to the FPS standard of protection, this is excluded by the CCIA Agreement Although the SADC Model BIT includes a FPS standard, it is linked to non-discriminatory treatment and not FET, proving for an award of compensation only for losses suffered

[938] Peter Muchlinski, 'The COMESA common investment area: substantive standards and procedural problems in dispute settlement' (2010) SOAS School of Law Research Paper 11
[939] CCIA Article 14(3)
[940] CCIA clarifies that this does not require treatment in addition to or beyond what is required by that standard. See CCIA Article 14(1)
[941] https://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf accessed on 09.04.2022.
[942] *LFH Neer and Pauline Neer (USA) v. United Mexican States*, 4 R.I.A.A. 60, 4 U.N.R.I.A.A. 60 (1923).
[943] The South African government has removed the MFN clause and replaced it with a more substantive national treatment provision. See https://static.pmg.org.za/150922summary.pdf accessed on 09.04.2022.
[944] Article 4 of the SADC Model BIT only covers non-discrimination for post-establishment rights of management, operation and disposition in order to limit the potential for claims.
[945] M. F. Qumba, 'Safeguarding Foreign Direct Investment in South Africa: Does the Protection of Investment Act Live up to Its Name?' (2018) South African Journal of International Affairs 347

from war or other armed conflict,[946] which could help protect host states from expansive interpretation by arbitral tribunals.

Expropriation, another standard of protection afforded to foreign investors, historically referred to the direct taking of the foreign investor's property or the transfer of title away from the investors, usually by the Host State government and with force. Since there are hardly any occasions now of direct expropriation by forcible seizure, the term has been expanded by arbitral tribunals to include indirect expropriation, which has been described as 'when a state takes effective control of, or otherwise interferes with the use, enjoyment or benefit of investment, strongly depreciating the economic value, even without a direct taking of property'.[947] The traditional mode of compensation for expropriation afforded to foreign investors in IIAs has been a reflection of the Hull formula, named after the US Secretary of State, who first used it in 1938[948], requiring the payment of "prompt, adequate and effective compensation", although this formula was fiercely contested by the newly-independent states at the UN in the 1960s and 1970s.[949] The changes made by the various RECs show that they were in tune with the views originally espoused by the newly-independent Africa States as described above. These changes differ in nuance as follows-

Whilst the EAC MIC[950] and the original FIP[951] both adopt the traditional "Hull" compensation standard, the CCIA Agreement only allows for 'prompt' and 'adequate compensation' and furthermore this may be adjusted to 'reflect the aggravating conduct by a COMESA investor or such conduct that does not seek to mitigate damages'[952], thus ensuring that there is a more balanced regime, that takes cognisance of the actions of the investor as well as the Host State, in effect, ensuring that the investor's conduct will be taken into consideration unless he comes to the law 'with clean hands'.[953] The Amended Annex to the FIP provides for 'fair and adequate compensation',[954] allowing the investor the right under domestic law, to challenge the expropriation or the value of the compensation awarded, either by an independent enquiry or by judicial review, thus affording investors fair recourse to justice.[955] whereas The SADC Model BIT also allows for 'fair and adequate' compensation to be paid in the case of expropriation and additionally, this must be done 'within a reasonable period of time'[956] whilst also stating that expropriation need not be non-discriminatory in order to be lawful.[957] With regards to the 'prompt' aspect of payment of compensation, both the CCIA Agreement and the SADC Model BIT, as well as the Amended FIP incorporate a revolutionary provision that permits Host States to pay awards seen to be 'significantly burdensome' in instalments on a yearly basis[958] 'over a period agreed by the parties, subject to interest at the rate established

[946] https://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf Article 9, accessed on 09.04.2022.
[947] Talkmore Chidede, 'The Right to Regulate in Africa's International Investment Law Regime' (2018) Or Rev Int'l L 20 437, 442
[948] Maurice H. Mendelson, 'Compensation for Expropriation: The case law' (1985) American Journal of International Law 79.2 414, 420
[949] This position was supported by the UN General Assembly Resolutions 1803 (on Permanent Sovereignty Over Natural Resources) and 3281 (Charter of Economic Rights and Duties of States). Both established that the standard of compensation had to be determined by reference to the domestic law of the expropriating state.
[950] https://investment-guide.eac.int/index.php/the-regional-framework/legal-framework accessed 06.04.2022.
[951] SADC Protocol on Finance and Investment 2006 https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2730/download accessed on 10.04.2022.
[952] CCIA Agreement
[953] https://uk.practicallaw.thomsonreuters.com/6-521-9533?transitionType=Default&contextData=(sc.Default)&firstPage=true (accessed 30.04.2022)
[954] Amended SADC Protocol on Finance and Investment https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5527/download accessed on 30.04.2022. Signed on 31 August 2016, it states inter alia that the payment shall be made in a freely convertible currency in accordance with the applicable law of the host state
[955] Amended Annex to FIP
[956] SADC Model BIT https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf accessed on 30.04.2022.
[957] The explanation given for this is that expropriations are usually targeted and specific and could therefore be viewed as discriminatory anyway. See commentary on SADC Model BIT
[958] The Amended Annex to the FIP allows compensation to be paid yearly over a 3-year period.

by agreement' i.e. either agreed by the tribunal or by the parties.[959] This option to stagger compensation payments to investors could be crucial, in the case of a developing country with insufficient resources to immediately satisfy the Arbitral Tribunal's Order for compensation.[960]

Finally, the SADC Model BIT, the CCIA Agreement and the Amended Annex to the FIP, all address the issue of indirect expropriation and affirm the Host State's right to regulate by providing that those regulatory measures 'designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment' shall not constitute indirect expropriation. This underlines the right of the Host State to regulate its own affairs, especially in the area of sustainable development, and also protects the Host State from frivolous suits from investors relating to important domestic measures undertaken by Host States.

v. Transfer of Funds by Investors - The issue of free transfer of funds by investors is one that has been identified by commentators[961] as a bone of contention between foreign investors and Host Countries. This is because, whereas Host States consider the control and monitoring of large currency transfers in and out of their territories to be a necessary part of administering their currency reserves, for most foreign investors, the ability to freely transfer capital and profits out of the Host State to a destination of their choice is a core purpose of their investment. Whilst traditional IIA provisions have (in the main), allowed a completely free and unlimited transfer of funds, things are changing in the new generation of IIAs, where the transfer of funds is made subject to regulations and laws of the Host State, relating to inter alia, bankruptcy, insolvency, the protection of the rights of creditors, dealing in securities, criminal or penal offences, financial reporting or record keeping when necessary to assist law enforcement or financial regulatory authorities or ensuring compliance with orders or judgements in judicial or administrative proceedings, such as, for example, in the Morocco-Nigeria Reciprocal Investment Promotion and Protection Agreement[962] which will be discussed in more detail in the next section.

In terms of RECs, Article 13(2) the Amended Annex to the FIP allows the repatriation of investments but subjects it to restrictions subject to the domestic laws and regulations of the Host State when necessitated by a non-exhaustive list of economic constraints.[963] Although it has been commented that this provision could be abused by Host States[964], this author is of the view that such provisions are crucial in addressing the asymmetric nature of traditional IIAs. The ability to pause the transfer of foreign currency at a time when Host (usually developing) States might be facing a balance-of-payments crunch, is extremely useful and therefore an important addition to the Legal Framework relating to IIAs and to the arsenal of future Specialist Teams.

[959] Amended FIP, SADC Model BIT, CCIA Agreement. Note that in addition, the SADC Model BIT and the CCIA Agreement provide that compensation will not be payable for 'the issuance of compulsory licences granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with applicable international agreements on intellectual property.'

[960] Mmiselo Freedom Qumba, 'Balancing investor protection with a state's regulatory autonomy in the amended SADC FIP' (2021) Obiter 42.3 625, 640

[961] Mmiselo Freedom Qumba, 'Balancing investor protection with a state's regulatory autonomy in the amended SADC FIP' (2021) Obiter 42.3 625, 647

[962] See Morocco-Nigeria Reciprocal Investment Promotion and Protection Agreement. https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download accessed 30.04.2022 . See also Section 11 of South Africa's Protection of Investment Act 22 of 2015

[963] https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5527/download See Article 13[Capital Movements] accessed on 30.04.2022.

[964] Mmiselo Freedom Qumba, 'Balancing investor protection with a state's regulatory autonomy in the amended SADC FIP' (2021) Obiter 42.3 625, 649

vi. Dispute Settlement Mechanisms – The RECs, whilst retaining ISDS provisions in the main, in line with the perceived aim of rebalancing the relationship between Host State and Investor, make any recourse to international arbitration conditional upon the exhaustion of local remedies and an attempt at amicable settlement of the dispute.

vii. Other innovative provisions – The most innovative aspects of new-style IIAs can be found in the emphasis on Sustainable Development as well as obligations upon foreign Investors, which was noticeably absent from previous IIAs.[965]

Having dealt with the role of RECs in influencing the Legal Framework of IIAs, this thesis now deals with the role of African States in influencing the Legal Framework of IIAs, even if only peripherally.

4.9.3 THE ROLE OF AFRICAN STATES IN INFLUENCING THE LEGAL FRAMEWORK OF IIAS

In addition to the Investment Instruments discussed in this chapter, which originate from the AU and RECs, there are some Investment Instruments that have been crafted by African and other developing states like India and Brazil which also have the potential to shape the International Legal Framework of IIAs. As stated by Kamau,[966] domestic laws of a state are a good indicator of the state's investment policy. This is because they are unilateral, and not a result of bilateral or multilateral negotiations, where the outcome is usually a compromise between the negotiating parties.[967] This is also borne out by an examination of the BITs to which Ghana is signatory, as part of the Case Study in Chapter Five, where the problematic aspect of Ghana's BITs will be examined, and some key clauses proposed in a bid to redress those problems.

There are some African states, for example Algeria,[968] Angola,[969] Burkina Faso,[970] Cote d'Ivoire,[971] Egypt,[972] Namibia[973] and Tunisia,[974] that have amended their domestic investment laws in the past decade. An examination of these amendments, however, shows that although innovative the amendments are not so fundamental as to have the effect of shaping the Legal Framework relating to International Investment Agreements. Tanzania another trailblazer, even though she has not amended her Investment Law, has enacted a series of amendments in other laws related to investment and investor-state dispute resolution, that are illustrative of its approach to reform.[975] The most far-reaching changes in this arena were undertaken by South Africa (SA) in response to the issues being faced with challenges to the equalizing provisions in its new constitution from foreign investors.[976]

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[965] See Canada's Model BIT, the ISER organisation's Model BIT, etc.

[966] Gathii, James Thuo and Olabisi D. Akinkugbe, 'Introduction to the Inaugural Issue of the African Journal of International Economic Law' (2020) VI

[967] Ndgana Kamau, 'Investment Law and Treaty Reform in Africa: Fragments and Fragmentation' in Gathii, Loyola, James T, et al. (2020) African Journal of International Economic Law 199, 204

[968] Promotion de l'investissement, Loi no2016–09 (Aug. 3, 2016) (Algeria). Algeria - Promotion of | investment Investment Laws Navigator | UNCTAD Investment Policy Hub accessed 21.07.2022.

[969] https://investmentpolicy.unctad.org/investment-laws/laws/252/angola-private-investment-law accessed 22.07.2022.

[970] https://investmentpolicy.unctad.org/investment-laws/laws/276/burkina-fa-so-burkina-faso-investment-code-2018- accessed 22.07.2022.

[971] https://investmentpolicy.unctad.org/investment-laws/laws/284/c-te-d-ivoire-code-des-investissements-c-te-d-ivoire accessed 22.07.2022.

[972] https://investmentpolicy.unctad.org/investment-laws/laws/167/egypt-investment-law- accessed 22.07.2022.

[973] https://investmentpolicy.unctad.org/investment-laws/laws/178/namibia-investment-promotion-act accessed 22.07.2022.

[974] https://investmentpolicy.unctad.org/investment-laws/laws/179/tunisia-loi-de-l-investissement accessed 22.07.2022.

[975] Tanzania is evaluating the implications of the ISDS mechanism, after several recent very expensive Arbitral Awards against the country. See commentary - https://thechanzo.com/2023/12/28/transforming-tanzania-a-call-for-reform-in-investor-state-dispute-settlement-mechanisms-isds/ accessed on 29.12.2023; See also https://www.thecitizen.co.tz/tanzania/oped/-investor-state-dispute-settlement-in-tanzania-2670464 accessed on 29.12.2023; See also https://afaa.ngo/page-18097/10382568 accessed on 29.12.2023; See also https://www.iisd.org/itn/en/2020/10/05/the-need-for-africa-focused-arbitration-and-reform-of-tanzanias-arbitration-act-amne-suedi/ accessed on 29.12.2023

[976] Engela C. Schlemmer, 'An overview of South Africa's bilateral investment treaties and investment policy' (2016) ICSID Review-Foreign Investment Law Journal 31.1 167,185

The background to this is that the end of the apartheid era brought about a fundamental change in South African politics, with the new government acutely aware of the need to put legislation in place aimed at righting the wrongs of the apartheid era and creating more equality and inclusivity within the society. One of these pieces of legislation was the Broad-based Black Economic Empowerment (BEE) Act which aimed to "advance economic transformation and enhance the economic participation of Black people (namely African, Coloured and Indian people who are South African citizens) in the South African economy".[977] This legislation came into effect in 2003 and was supported by supplemental legislation, including the Codes of Good Practice on Broad-based Economic Empowerment (BEE).[978] The way this worked in practice was that each business entity was given a BEE Scorecard with five elements, which were ownership, management control, skills development, enterprise and supplier development, and socio-economic development. These elements were aimed at increasing Black participation in the economy and after an assessment, the entity would be issued a BEE score, which they needed in order to obtain licensing from the state allowing them to transact with the state or private entities.[979]

Thus, the implementation of BEE in effect, created two classes of SA citizens - those who receive economically preferential treatment, and those who did not. SA, it must be noted, had entered into a slew of BITs at the end of the apartheid era, in a bid to attract FDI and all the BITs had the usual national treatment standards and dispute settlement standards discussed earlier in this work. The BEE legislation therefore left the door wide open for foreign investors to claim that South Africa had violated the NT standard by giving the recipients of the BEE treatment, better treatment than the foreign investors.[980] Furthermore, the dispute settlement clause in the BITs decreed that the issue must be decided under ISDS, which was problematic for SA, because it was highly unlikely that the Arbitrator would have the same level of constitutional expertise and understanding of the complexities of the situation and the background of the BEE Act as would a domestic judge.[981] There were two arbitrations in 2009, which caused SA to review its relationship with the BIT and ISDS regime. One of the cases concerned an alleged violation of the BIT between Switzerland and South Africa and because the arbitration was held under the UNCITRAL Arbitration Rules, the issues and the outcome were dealt with under a cloak of confidentiality. It is alleged however that a Swiss investor invested in property in South Africa, with the intention of developing a game farm and conference facilities on the property. The allegation against South Africa was that it breached its obligation to provide police security/protection and to guarantee the safety of both the investor and his investment under the 'full protection and security' clause contained in the BIT.[982] The two main allegations at the centre of the arbitration claim were that South African police turned a blind-eye to the series of incursions upon the investor's property, and secondly, that the investment was subjected to a cumulative expropriation either due to the destruction inflicted upon the property or, in the alternative, by reason of a domestic land claims process under which several local residents were seeking all or parts of the property in question.[983] The Arbitral Tribunal found in favour of the Swiss investor in respect of the allegations of not providing full protection and security, but found the alleged expropriation unproven. Damages were split because the investor was found not to have taken enough precautionary measures to secure and protect his property, yet the South African government was ordered to pay 6.6 million rand

[977] Norton Rose Fulbright, 'Broad-based Black Economic Empowerment—Basic Principles' (2018) Thought Leadership Publications
[978] Norton Rose Fulbright, 'Broad-based Black Economic Empowerment—Basic Principles' (2018) Thought Leadership Publications
[979] Norton Rose Fulbright, 'Broad-based Black Economic Empowerment—Basic Principles' (2018) Thought Leadership Publications
[980] Engela C. Schlemmer, 'An Overview of South African Bilateral Investment Treaties and Investment Policy' (2016) 31 1 ICSID Rev 167
[981] Ibid 167, 174
[982] Mmiselo Freedom Qumba, 'South Africa's move away from international investor-state dispute: a breakthrough or bad omen for investment in the developing world?' (2019) De Jure Law Journal 52.1 358, 359
[983] Luke Peterson, 'Swiss Investor Prevailed in 2003 in Confidential BIT Arbitration over South Africa Land Dispute; Award Remains Unpublished, But IA Reporter Investigation Unearths Significant Details About Arbitration Outcome' Investment Arbitration Reporter (22 October 2008); see also Peter Leon 'Balancing Investor Certainty and SA's Legitimate Interests' (16 September 2009) Business Day 13

plus interest and also to pay two-thirds of the investor's legal costs in an undisclosed but (no doubt) substantial figure.

In the second case, dealt with under the ICSID Additional Facility, the value of the claim against the South African government was 260 million euros. The foreign investors claimed breaches of the expropriation and discrimination standards contained in the South Africa-Italy BIT (1997) and the South Africa-BLEU BIT (1998). The case was eventually settled between the parties and the merits not argued, with a resultant costs order made in favour of South Africa for 400,000 euros, which was seen as a token award, since their initial claim was for over 5million euros.[984] These results showed South Africa that it had 'traded a portion of its legislative sovereignty for foreign investment'.[985] As a result, by a Cabinet decision of July 2010, South Africa put its treaty partners on notice that it would begin unilaterally cancelling BITs to which it was party, and not renew those coming up for renewal, regardless of the fact that many of the cancelled BITs contained sunset provisions which would keep the provisions contained within the BIT in effect for a period of time after its termination.[986] In addition, South Africa also announced a decision to refrain from entering into BITs in the future, unless compelling economic and political reasons exist; a decision to develop a new Model BIT as a basis for (re)negotiation and a decision to advance all decision making in respect of BITs to an inter-ministerial committee to oversee the process.[987] It also passed the Protection of Investment Act, 2015, (the Act), which came into force in 2018, replacing the BIT regime with a domestic legal framework that allowed South Africa to have more regulatory sovereignty whilst simultaneously offering a comparable level of protection for her investors. The contents of the Protection of Investment Act, together with the detailed observations set out by South Africa in its 2019 submission[988] to UNCITRAL's Working Group III (Investor State Dispute Settlement Reform) are both innovative and so fundamental as to have an effect on the shaping of the Legal Framework relating to International Investment Agreements. The details of these instruments from the African continent, will be discussed in more detail in the next chapter, when dealing with Ghana as a Case Study, examining the problems Ghana faces with old-style BITs, and proposing some key clauses aimed at redressing those problems.

4.10 CONCLUSION

It is clear therefore, that the International Legal Framework for treaty drafting has hardly changed in the fifty plus years since the first BIT was signed in the 1950s, even though the focus of Host States and the International Investment climate have indisputably changed in that period. The argument has been made by several commentators that placing undue emphasis on investor protection in IIAs creates an asymmetry (in favour of foreign investors) between the rights and obligations of investors and the rights and obligations of host States in IIAs, which is clearly an inherent weakness in the ILF

[984] See *Piero Foresti, Laura de Carli and others v Republic of South Africa*, ICSID Case No ARB(AF)/07/1 (4 August 2010) (Foresti), reprinted in Oxford Reports on International Investment Claims, Doc IIC (2010) 445

[985] Taylor Bates, 'Will They Stay or Will They Go? An Examination of South Africa's International Investment Arbitration Policy' (2020) 46 Brook J Int'l L 149, 171

[986] Engela C. Schlemmer, 'An Overview of South African Bilateral Investment Treaties and Investment Policy' (2016) 31 1 ICSID Rev 167, 189

[987] Maria Chochorelou & Carlos Espaliu Berdud, 'Recent Regional Investment Treaties and Dispute Settlement: Investors and States on a Roller-Coaster of Predominance' (2016) 49 Rev BDI 487, 500. See also Engela C. Schlemmer, 'An Overview of South African Bilateral Investment Treaties and Investment Policy' (2016) 31 1 ICSID Rev 167, 190

[988] V1907251.pdf (un.org) accessed on 26.09.2022.

relating to IIAs.[989] This argument is further developed by von Moltke and Mann[990] who argue that it is not only surprising, but actually shocking that there has been no real investment policy debate about the fact that existing IIAs are based on an outdated 50-year-old model that remains focussed solely on the interests of investors from developed countries, to the detriment of issues that are of importance to developing countries and to their citizens.[991] In their argument, Moltke and Mann rightly identify major issues of concern from the perspective of development and sustainable development for developing countries that are not being addressed in the current negotiating processes. The arguments in their 2007 paper, as well as the updated arguments of Dr Howard Mann and his co-author Motoko Aizawa [992] in a more recent work[993] mirror the arguments articulated in this thesis about an inherent weakness in the framework, and the conclusions reached in this thesis after researching and referencing developments in African States and RECs.

In conclusion, the arguments outlined in this chapter show that although there has not been enough of a shift in the foundations of the ILF relating to IIAs to reflect the needs of Host States, the International Investment Regime has undergone some changes. This is clear from the examples of the Treaty Drafting Practices from the Global North, the examination of the International Regional Treaties, and the excavation of African Initiatives such as the PAIC, some initiatives from the African RECs, the legislative changes in SA, and the establishment of UNCITRAL's WG III. To make the ILF for Treaty Drafting truly relevant and fairer to the needs of both parties, the inherent flaws and weaknesses that have been identified in respect of the asymmetric relationship between developed Home states and developing Host states need to be addressed, a process which some commentators believe needs to be reconceptualized 'from the ground up'.[994] This would have a profound effect upon the ILF for treaty drafting as it presently stands, making it more relevant to the needs of developing Host countries in the 21st century such as Ghana as they seek to reclaim their RA and economic Sovereignty. The domestic Legal Framework is dealt with as part of the Case Study in Chapter Five.

Chapter Five will provide empirical evidence in support of the statement that there is a serious problem looming in relation to foreign investors bringing cases (some spurious) against Ghana under

[989]Secretariat, C., 2007. A Southern Agenda on Investment? Promoting Development with Balanced Rights and Obligations for Investors, Host States and Home States. In Commonwealth. Retrieved from https://policycommons.net/artifacts/1158673/a-southern-agenda-on-investment-promoting-development-with-balanced-rights-and-obligations-for-investors-host-states-and-home-states/ on 22 Jul 2022. CID: 20.500.12592/whmfq6; Graham Mayeda, 'International Investment Agreements between Developed and Developing Countries: Dancing with the Devil - Case Comment on the Vivendi Sempra and Enron Awards' (2008) 4 McGill Int'l J Sust Dev L & Pol'y 189; Kate Miles, 'International Investment Law: Origins, Imperialism and Conceptualizing the Environment' (2010) 21 Colo J Int'l Envtl L & Pol'y 1; David Schneiderman, 'Kate Miles, the Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital' (2014) 25 Eur J Int'l L 942

[990]Howard Mann has been specialising in international law and sustainable development for almost 30 years. He began his career with the Government of Canada as an international environmental treaty negotiator. In 1999, he began working with the International Institute for Sustainable Development, where he established the Investment and Sustainable Development programme. He has advised dozens of governments on international and domestic law relating to foreign investment, as well as on dispute settlement processes and arbitrations. This includes investment contracts and investment treaties. He is widely published in these areas. Howard is also serving as an arbitrator in an international investment arbitration. See www. howardmann.ca

[991] Secretariat, C., 2007. A Southern Agenda on Investment? Promoting Development with Balanced Rights and Obligations for Investors, Host States and Home States. In Commonwealth. Retrieved from https://policycommons.net/artifacts/1158673/a-southern-agenda-on-investment-promoting-development-with-balanced-rights-and-obligations-for-investors-host-states-and-home-states/ accessed on 22.07.2022.

[992] Motoko Aizawa is President of the Observatory for Sustainable Infrastructure, a research organisation that aims to bridge the sustainability gap of mega-infrastructure development, investment and finance through data collection and policy research. She spent more than two decades at the World Bank Group in various capacities, including as Sustainability Advisor to the World Bank's Sustainable Development Network. She is the principal author of the original IFC Performance Standards; she also supported the creation and implementation of the Equator Principles. Motoko began her career as a business lawyer, specialising in due diligence in mergers and acquisitions, and project financing of infrastructure projects at IFC's Legal Department. After she left the World Bank, she served as Managing Director USA of the Institute for Human Rights in Business between 2014 and 2016. She currently serves as the Chair of the District of Columbia's Commission on Human Rights.

[993] https://www.thecommonwealth-ilibrary.org/index.php/comsec/catalog/book/11 accessed on 22.07.2022.

[994] Secretariat, C., 2007. A Southern Agenda on Investment? Promoting Development with Balanced Rights and Obligations for Investors, Host States and Home States. In Commonwealth. Retrieved from https://policycommons.net/artifacts/1158673/a-southern-agenda-on-investment-promoting-development-with-balanced-rights-and-obligations-for-investors-host-states-and-home-states/ accessed on 26.09.2022.

its old-style BITS, unless the problem is addressed imminently. The suggested solutions will be examined in the next chapter.

Chapter Five – A Case Study of Ghana

5. INTRODUCTION

This chapter aims to examine the International Investment Regime as it pertains to Ghana. Following on from chapter Four, which critically examined the International Legal Framework (ILF) for the negotiation and drafting of IIAs, unearthing the theoretical limitations of IIAs in existence and exposing the inherent weaknesses and flaws in the present International Legal Framework relating to IIAs, this chapter analyses the problem, using Ghana as a Case Study. This chapter will provide empirical evidence in support of the position that there are potentially serious problems ahead in relation to foreign investors bringing cases (spurious or otherwise) against Ghana under the auspices of her old-style BITS, unless this potential problem is addressed urgently.

In the previous chapter, this thesis showed that the ILF as it pertains to IIAs (including BITs) has hardly changed in the five decades since the signing of the first BIT in the 1950's. It is untenable that undue emphasis is still placed on the protection of foreign investors and their investments in these BITs, to the detriment of the regulatory autonomy of Host States, which are usually developing countries. Although there has been some progress in recent years, with the introduction of innovative clauses in new-generation BITs that emphasize for example, the importance of Sustainable Development and Investor Obligations, most Host States, especially in Africa, have still not taken advantage of these innovative clauses. This is in spite of the fact that if utilised properly, these innovative clauses clearly have the ability to profoundly influence the International Legal Framework of IIAs for Host States from the Global South positively. The incorporation of such innovative clauses in BITs would allow Host States to continue to attract FDI for the benefit of their countries without leaving themselves vulnerable to BITs that only provide for the protection of the investments of the foreign investors with no reciprocal investor obligations or Host State rights.

Due to its lesser bargaining power and the loose structure of the provisions contained in its existing BITs, Ghana is vulnerable to the institution of arbitral proceedings against the state by foreign investors. This chapter evidences the most likely problems and explores potential solutions by -

(i) examining the history of Ghana's economy, who has invested in Ghana, how much FDI is flowing into Ghana and the sectors that foreign investors are likely to be interested in, in order to situate the discussion in context and map out the Investment Profile of Ghana;

(ii) analysing the number and types of BITs that Ghana has entered into, any underpinning law, as well as any domestic laws dealing with FDI, to identify any weaknesses in the laws and thus ascertain how widespread the potential problem is, e.g., is the right to regulate in the national interest recognised in BITs? and

(iii) critically evaluating the potential for future cases being brought against Ghana by foreign investors under the umbrella of Ghana's BITs, given that those in existence are old-generation BITs. This chapter will also examine any National Policy Framework for the future of FDI in existence in Ghana now, whether the laws presently in place support any proposed Reform, and what mechanisms Ghana has in place to protect itself from allegations of impropriety by foreign investors which could lead to a case being brought against Ghana before an Arbitral Tribunal.

5.1 THE ECONOMIC PROFILE OF GHANA

The Republic of Ghana, previously known as the Gold Coast, is located on the West Coast of Africa with Accra as the capital city and English as the official language. The currency is the Ghana Cedi (GHS) and the nominal GDP as of December 2020 was 68.4 billion USD[995], with a GDP growth rate of 6.6% as at Q3 2021 and inflation of 13.9% as at February 2022. The exchange rate as of February 2022 was USD1.00 to GHS 6.50, with a minimum wage of GHS12.53 as of December 2020. Ghana's population is 30.8 million with a growth rate of 2.39% and a land size mass of 238,533 sq. km. The economy in Ghana is expected to recover to its potential growth by 2025 following relatively subdued growth rates of 1.5% and 2.8% in 2023 and 2024 respectively.[996]

Ghana is Africa's biggest gold mining country and the world's second-largest producer of cocoa, second only to Cote d'Ivoire. In terms of governance, Ghana has a Constitutional Democracy, comprising the Executive, the President and his Cabinet. It is also one of the continent's fastest growing economies, as will be evidenced by the international statistics produced later in this thesis. Ghana has also made significant progress both in the attainment and consolidation of growth, and in the area of poverty reduction. To put this into context historically, Ghana was the first country in Africa south of the Sahara to achieve the Millennium Development Goal (MDG) 1, which was the target of halving extreme poverty. The 2010 MDG report[997] indicated that MDG 1A target of halving extreme poverty and MDG7B of halving the proportion of people without access to safe drinking water were achieved by Ghana ahead of time. Ghana was also noted as being on track to potentially achieving the targets of MDG1C of halving proportion of people who suffer from hunger; MDG2 of achieving universal basic education; MDG3 of eliminating gender disparity in school for both boys and girls; MDG4 of reducing under-five mortality; MDG6 of halting/reversing the spread of HIV/AIDS & malaria; MDG8 of ensuring debt sustainability.[998] The MDGs have been superseded by the UN 2030 Agenda for Sustainable Development (SDGs),[999] which is why reference is made in Table One on page 13 of this thesis to the AU Agenda 2063 Priority Areas which mirror the UN 2030 SDGs. Additionally, in relation to business and economic capability, Ghana is ranked as one of the best places for doing business in West Africa[1000] and has one of the continent's most favourable economic environments for investors seeking to do business on the continent.

Furthermore, with respect to natural resources as a barometer for FDI, Ghana is the number one gold-producing country in Africa, the second largest cocoa producer in the world, the third largest bauxite reserve in Africa with an estimated reserve base of 900 million tonnes, valued at $50million in its raw state and $400 billion refined, over 150 million tons of Iron deposit and over 60 million tons of Manganese, produces over 189 thousand barrels of oil daily, 8 trillion cubic feet of natural gas reserves and 5 million hectares of arable land, together with 4 million hectares of cultivable land.[1001] Whilst there are several sectors that could attract Foreign Investors to Ghana, these are the most relevant to potential arbitration cases to be brought against Ghana -

[995] See Ghana's Overall 2021 Real GDP Growth Of 5.4 Percent Outperforms The 4.4 Percent Growth Target | Ministry of Finance | Ghana (mofep.gov.gh) accessed on 07.07.2022

[996] https://www.gipc.gov.gh/wp-content/uploads/2023/08/Final-Q2-2023-Investment-Report-25082023.pdf accessed 20.09.2023

[997] Millennium Development Goals in Ghana. Note that five targets – MDG1B of achieving full and productive employment and decent work; MDG3 of achieving equal share of women in wage employment in non-agriculture sector; MDG5 of reducing maternal mortality; and MDG7 target of reversing the loss of environmental resources and address the problem of sanitation are unlikely to be achieved. https://www2.statsghana.gov.gh/docfiles/2010phc/Mono/MDG%20report.pdf accessed on 19.06.2022.

[998] https://www2.statsghana.gov.gh/docfiles/2010phc/Mono/MDG%20report.pdf p.3 accessed 18.09.2024

[999] THE 17 GOALS | Sustainable Development (un.org) accessed on 18.09.2024

[1000] According to the World Bank's Ease of Doing Business Report 2020 https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf accessed on 19.06.2022

[1001] Ghana Investment Promotion Centre https://gipc.gov.gh/why-ghana/ accessed on 19.06.2022.

1. Agriculture and Agro-processing[1002] - This sector comprises crop (the most well-known of which is cocoa) and livestock farming, as well as fishery and forestry. Latest GIPC data puts the value of Ghana's Agriculture sector at 11.5 billion USD, which translated to 17.5% of the GDP of the country.[1003]

2. Energy and Renewable Energy[1004] - The Akosombo hydroelectric dam was constructed in 1965 and continues to be a very important investment in Ghana' economic history. With the increasing demand for power by users, Ghana now has additional sources of power, namely thermal, solar and windmills.

3. Oil and Gas[1005] - Since 2007, which signalled the first significant deep-water discovery of Oil and Gas, the industry has enjoyed rapid growth and development, attracting foreign investors such as Tullow Oil plc, Kosmos Energy and ENI Gas. Ghana has three major offshore oil and gas fields, namely the Jubilee, Tweneboa-Enyera-Ntomme and Sankofa fields, and the total output in 2019 was 71.54 million barrels, which was a significant increase from the 2018 output figure of 60.05 million barrels. This output is expected to maintain a steady growth in the years to come.[1006] In addition to this, the net gas production from the fields was 140853.67 million standard cubic feet per day, and crude oil is also contributing significantly to the country's Gross Domestic Product (GDP).

4. Mining and Mineral Processing[1007] - This sector is particularly attractive to foreign investors, as foreign companies are not legally mandated to have local participation in this sector, as is the case in other extractive industries. Ghana is the leading producer of gold in Africa and one of the Top 10 Gold Producers in the world, with gold accounting for 95% of the country's mineral revenue. Additionally, Ghana produces bauxite, manages, diamonds and iron ore in commercial quantities, and has deposits of limestone, feldspar, quartz and columbite-tantalite which need further exploration before they can be exploited. The mining industry contributes 19% of all direct tax payments in the country as well as 37% of export revenues.

5.2 AN ANALYSIS OF INVESTORS WHO HAVE ENTERED INTO THE GHANAIAN MARKET RECENTLY.

As is clear from the information contained in the tables obtained from GIPC, the investors who have entered the Ghanaian market recently, invested in a wide range of sectors.[1008]

INVESTMENTS (FDI) Registered by GIPC in USS Million

Sector	2018	2019	2020	2021
Agriculture	8.58	1.31	1.00	17.42
Building & Construction	1,115.58	100.32	43.65	55.46
Export Trading	2.23	5.02	16.82	67.72
General Trading	129.40	78.87	15.42	69.51

[1002] See https://www.gipc.gov.gh/sector/agriculture-agro-processing/ accessed on 2.11.2023.
[1003] See https://www.gipc.gov.gh/sector/agriculture-agro-processing/ accessed on 2.11.2023.
[1004] Energy and Renewable Energy Sector https://gipc.gov.gh/energy/ accessed on 19.06.2022.
[1005] Oil and Gas Sector https://gipc.gov.gh/petroleum/ accessed on 19.06.2022.
[1006] Due to a total proven reserve base as at January 2019 of approximately 660 million barrels of oil and 2,312.4 billion cubic feet of gas with over 36,000 km2 and 103,600 km2 of open offshore and onshore acreages. See https://gipc.gov.gh/petroleum/ accessed 19.06.2022
[1007] Mining and Mineral Processing Sector https://gipc.gov.gh/mining/ accessed 19.06.2022.
[1008] Relates to information obtained from GIPC (Ghana Investment and Procurement Agency) https://www.gipc.gov.gh/ accessed 19.06.2022.

Liaison	153.54	3.46	0.50	1.34
Manufacturing	624.88	125.68	1,191.73	131.41
Services	1,291.89	619.02	430.40	616.70
Mining	-	175.25	424.32	-
Oil & Gas/ Petroleum	-	-	-	21.50
Tourism	-	-	-	-
TOTAL	3,326.10	1,108.93	2,123.84	981.06

In 2018 the top two sectors that received investment were Building and Construction, and Services, whilst in 2021, the top two sectors that received investment were Services and Manufacturing. Although the Mining sector received investments in 2019 and 2020, that sector had no record of investments in 2018 or 2021. Of note is the fact that whilst there was no foreign investment in the Oil & Gas/Petroleum sector from 2018 to 2020, there was some investment in that sector in 2021. Furthermore, it is worth noting that the top sources of FDI inflows to the country[1009], were from a range of countries, both from the Global North and the Global South[1010].

TOP SOURCES OF FDI into Ghana - from 2018 to 2022 (January to September)
2022 (January to September)

COUNTRY	FDI (US$ MILLION)
Australia	355.60
Burkina Faso	140.00
Singapore	140.00
China	110.62
Nigeria	41.35
South Africa	17.65
India	17.41
USA	15.04
Switzerland	11.31
UAE	11.20

2021

COUNTRY	FDI (US$ MILLION)
Singapore	370
Australia	201.47
India	93.84
China	57.27
Netherlands	48.4
USA	35.26
Mauritius	34.04
United Kingdom	30.52
Norway	21.55
Lebanon	10.81

2020

COUNTRY	FDI (US$ MILLION)

[1009] Information obtained from GIPC https://www.gipc.gov.gh/ accessed 19.06.2022.
[1010] The term Global North is a widely accepted synonym for first-world or developed countries, which are also the richest countries in the world according to metrics including GNP per capita and the Legatum Prosperity Index. The Global North is the economic opposite of the Global South, a term coined in 1969 to describe the world's developing and least developed countries. See Global North Countries 2023 (worldpopulationreview.com) accessed on 11.06.2023.

China	751.01
United Kingdom	243.17
South Africa	242.00
Australia	239.17
Netherlands	238.02
Japan	143.00
USA	75.10
India	34.87
Spain	32.70

2019

COUNTRY	**FDI (US$ MILLION)**
USA	551.00
United Kingdom	189.98
Mauritius	64.99
China	44.43
France	43.52
Mauritania	34.14
India	17.49
Nigeria	14.55
UAE	7.67
France / Netherlands	6.75

2018

COUNTRY	**FDI (US$ MILLION)**
Netherlands	1,891.40
India	510.70
Hong Kong / Angola	275.80
China	159.30
Mauritius	143.10
France	120.60
Bahamas	65.52
UK	26.62
Portugal	26.00

The tables above show that in 2018, the top two sources of FDI were the Netherlands and India, with Hong Kong and Angola coming joint third and **China** coming fourth. In 2019, the top four sources of FDI inflows were from the USA, the UK, Mauritius and **China**, whilst in 2020, **China**, the UK and South Africa were the top three FDI sources, with Australia coming fourth. In 2021, Singapore, Australia, India and **China** topped the FDI source list and finally in 2022, the top four FDI sources were Australia, Burkina Faso, Singapore and **China.** There were FDI inflows from several other countries, as the tables show, however an analysis of the top four sources of FDI in the past years shows an interesting mixture of FDI inflows. Following on from this analysis, it is clear that Ghana has attracted FDI from countries in both the Global North and the Global South. Ghana has also attracted FDI from countries with which she has BITs as well as those with which she has no BITs, as shown in the analysis in the tables below.

Year	Top Four Sources of FDI	Global North or South	BIT position
2022 (Jan-Sept)	Australia	Global North	No BIT with Ghana
	Burkina Faso	Global South	BIT signed 2001, ratified 2003
	Singapore	Global North	No BIT with Ghana
	China	Global South	BIT signed 1989, ratified 1990
Year	**Top Four Sources of FDI**	**Global North or South**	**BIT position**
2021	Singapore	Global North	No BIT with Ghana
	Australia	Global North	No BIT with Ghana
	India	Global South	BIT terminated
	China	Global South	BIT signed 1989, ratified 1990
Year	**Top Four Sources of FDI**	**Global North or South**	**BIT position**
2020	China	Global South	BIT signed 1989, ratified 1990
	United Kingdom	Global North	BIT signed in 1989, ratified in 1991
	South Africa	Global South	BIT signed in 1998, not yet ratified
	Australia	Global North	No BIT with Ghana
Year	**Top Four Sources of FDI**	**Global North or South**	**BIT position**
2019	United States of America	Global North	No BIT with Ghana
	United Kingdom	Global North	BIT signed in 1989, ratified in 1991
	Mauritius	Global South	BIT signed in 2001, not yet ratified
	China	Global South	BIT signed 1989, ratified 1990
Year	**Top Four Sources of FDI**	**Global North or South**	**BIT position**
2018	Netherlands	Global North	BIT signed in 1989, ratified in 1991
	India	Global South	BIT with Ghana terminated
	Hong Kong	Global North	No BIT with Ghana
	Angola	Global South	No BIT with Ghana
	China	Global South	BIT signed 1989, ratified 1990

Moving from sources within the country to a more international overview, some of the Key Messages from the 2022 UNCTAD World Investment Report[1011] (WIR 2022) were that although FDI flows globally in 2021 were up by 64% from the exceptionally low level in 2020, [1012] this momentum is unlikely to be sustained and the WIR 2022 expected the global FDI flows in 2022 to have a downward trajectory, or at least to remain flat, due in a great part to Investor uncertainty arising from the war in Ukraine and the lingering effects of the pandemic. Additionally, the UNCTAD Report stated that although the 2021 FDI recovery brought growth in all regions, it transpires that almost three quarters of the global increase was due to the upswing in developed countries, where FDI reached $746 billion. This was

[1011] International tax reforms and sustainable investment - Key messages (unctad.org) – accessed on 26.06.2023.

[1012] Global foreign direct investment (FDI) flows in 2021 were $1.58 trillion, up 64 per cent from the exceptionally low level in 2020. The recovery showed significant rebound momentum, with booming merger and acquisition (M&A) markets and rapid growth in international project finance because of loose financing conditions and major infrastructure stimulus packages. – See UNCTAD WIR 2022 (link ibid).

more than double the 2020 level and was caused mostly by M&A transactions and high levels of retained earnings of multinational enterprises (MNEs). The UNCTAD Report states that global inflows to developing countries remained at just above 50% and that in Africa, FDI flows reached $83 billion, from $39 billion in 2020, with most recipients reporting a moderate rise in FDI. [1013]

This positive 2021 picture is not replicated in the 2023 UNCTAD World Investment Report,[1014] published on 5th July 2023 which shows that the predicted downward trajectory did actually take place, in that FDI flows to Africa declined to $45 billion in 2022, down from the record $83 billion inflow in 2021 referred to above. This FDI inflow to Africa, accounted for a mere 3.5% of global FDI.

5.3 ANALYSING THE NUMBER, AND TYPES OF BITS THAT GHANA HAS ENTERED INTO

This information is very important, as it provides empirical evidence proving whether or not the BITs currently in existence have old generation (and therefore vulnerable) provisions or new innovative provisions capable of protecting Ghana's regulatory space.

Table One [5.3] – BITs entered into by Ghana 1989-present day.

Agreements between Ghana and Contracting Parties	Status	Date of signature	Date of entry into force
Ghana-Turkey Agreement for Reciprocal Promotion & Protection of Investments	Signed	01/03/2016	
Ghana-Barbados BIT	Signed	22/04/2008	
Ghana-Spain BIT	Signed	06/10/2006	
Ghana-Botswana Agreement for the Promotion & Protection of Investments	Signed	04/07/2003	
Ghana-Zimbabwe BIT	Signed	30/06/2003	
Ghana-India BIT	Terminated	05/08/2002	
Ghana-Mauritania BIT	Signed	18/05/2001	
Ghana-Mauritius re. the Promotion & Reciprocal Protection of Investments	Signed	18/05/2001	
Ghana-Zambia BIT	Signed	18/05/2001	
Ghana-Benin Agreement for the Promotion & Protection of Investments	Signed	18/05/2001	
Ghana-Burkina Faso BIT	In force	18/05/2001	18/08/2003
Ghana-Guinea Agreement for the Promotion & Protection of Investments	Signed	18/05/2001	
Ghana-Yugoslavia for the Reciprocal Promotion & Protection of Investments	In force	25/04/2000	07/07/2000
Ghana-Cuba BIT	Signed	02/11/1999	
Ghana-France BIT	Signed	26/03/1999	
Ghana-South Africa Agreement for the Promotion & Protection of Investments	Signed	09/07/1998	
Ghana-Italy BIT	Signed	25/06/1998	
Ghana-Egypt Agreement for the Promotion & Protection of Investments	Signed	11/03/1998	
Ghana-Côte d'Ivoire BIT	Signed	04/11/1997	
Ghana-Malaysia Agreement for the Promotion & Protection of Investments	In force	08/11/1996	18/04/1997
Ghana-Germany BIT	In force	24/02/1995	23/11/1998
Ghana-Denmark Concerning the Promotion & Protection of Investments	In force	13/01/1992	06/01/1995
Ghana-Switzerland BIT	In force	08/10/1991	16/06/1993
Ghana-Bulgaria Concerning the Mutual Promotion & Protection of Investments	Signed	20/10/1989	
Ghana-China re. the Encouragement & Reciprocal Protection of Investments	In force	12/10/1989	22/11/1990
Ghana-Romania Agreement on Mutual Promotion & Guarantee of Investments	Signed	14/09/1989	
Ghana- Netherlands re Encouragement & Reciprocal Protection of Investments	In force	31/03/1989	01/07/1991
Ghana-UK Agreement for the Promotion & Protection of Investments	In force	22/03/1989	25/10/1991

[1013] The total for the continent was inflated by a single large intrafirm financial transaction in South Africa. Greenfield announcements remained depressed, but international project finance deals were up 26 per cent, with strong growth in extractive industries - See UNCTAD WIR 2022 (link ibid).

[1014] https://unctad.org/publication/world-investment-report-2023 accessed on 15.07.2023.

Table One above shows that, Ghana is party to 28 BITs, one of which[1015] has been terminated and nine of which are in force. One of the issues that a team of Specialists could be tasked with examining is why so many of the BITs that Ghana has signed are not in force. This would be a great opportunity for an overview and overhaul with the intention of withdrawing from those BITs that are not yet in force and have provisions that are no longer "fit for purpose" and simultaneously to negotiate new agreements. Using a categorisation originally devised by Gracious Avayiwoe[1016] of First, Second and Third/Emerging Generations of BITs, this table deciphers which types of BITs Ghana has in force presently. This will then form the basis of an analysis of the potential issues that might arise in relation to these BITs, should investors choose to bring cases against Ghana under the umbrella of these BITs.

Ghana's BITs are divided into three generations in Table Two below, based on the first ten years of operation (1989-1999), the next ten years of operation (2000-2010) and finally the BITs signed after that period (2100 to date).

Table Two [5.3] – BITs entered into by Ghana 1989 to date, divided into Three Generations

1st Generation BITs (1989-1999)	2nd Generation BITs (2000 -2010)	Third Generation (2011 – date)
United Kingdom [North/South]	Spain [North/South]	Turkey [South/South]
Netherlands [North/South]	Barbados [South/South]	
Switzerland [North/South]	Serbia(Yugoslavia) [South/South]	
France [North/South]	India [South/South]	
Denmark [North/South]	Burkina Faso [South/South]	
Germany [North/South]	Benin [South/South]	
Bulgaria [North/South]	Mauritania [South/South]	
Romania [North/South]	Mauritius [South/South]	
Italy [North/South]	Guinea [South/South]	
China [South/South]	Botswana [South/South]	
Malaysia [South/South]	Zambia [South/South]	
Egypt [South/South]	Zimbabwe [South/South]	
South Africa [South/South]		
Cuba [South/South]		
Cote d'Ivoire [South/South]		

An analysis of the highlights of these BITs will show whether Ghana had a consistent plan for negotiation and drafting of BITs or whether Ghana followed the lead of whichever country she was dealing with at the time, which may well be a result of the fact that there were no IIA specialists negotiating on behalf of Ghana at the time, as opposed to the situation in net FDI providing countries in the Global North. It is of note that the BIT with Turkey, a South-South partner, was concluded after Ghana had produced a fairly innovative Model BIT,[1017] which was anecdotally produced by officials of the Office of the Attorney-General and Ministry of Justice, and the provisions of Ghana's Model BIT are for the most part reflected in the Ghana-Turkey BIT, with the significant exception of Article 13 of the Model BIT, which is headed 'Investment Promotion and Joint Commission'. The other differences between the provisions of the Model BIT and the Ghana-Turkey BIT are discussed in detail in this chapter. It has been commented upon that whilst Ghana's relationship with multilateral investment-

[1015] BIT with India

[1016] Gracious Avayiwoe, 'The Republic of Ghana and Bilateral Investment Treaties: A Burgeoning Expert?' (2020) ICSID Review-Foreign Investment Law Journal 35.1-2 50

[1017] UNCTAD – Ghana Model BIT 2008 https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2866/download accessed on 21.06.2022

related initiatives was relatively cordial,[1018] as evidenced by the fact that Ghana ratified several notable conventions, namely the convention creating the International Centre for Settlement of Investment Disputes (ICSID)[1019], the convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)[1020] and the convention establishing the Multilateral Investment Guarantee Agency (MIGA)[1021] shortly after they had been opened for signature,[1022] Ghana's relationship with IIA bilateralism seemed to follow that of most erstwhile colonies, whereby they initially considered BITs to be instruments of 'ideological realpolitik and neo-colonialism'.[1023] As a result, Ghana only entered into its first BIT in 1989,[1024] over 30 years after political independence. Since then, Ghana has concluded twenty-seven other BITs, although only nine of these are presently in force. Five[1025] of the nine BITs in force were concluded with countries from the Global North, whilst of the eighteen BITs signed but not in force, the majority were concluded with countries from the Global South.[1026] It is however premature to draw any conclusions from this state of affairs.[1027] However, what is relevant is that there is quite a volatility in the actions and reactions of African States in relation to International Investment Law generally and IIAs in particular.[1028] This ranges from what has been described as a 'revolutionist stance'[1029] to what has been described as 'insouciance and calm'.[1030] Ghana has taken the same stance as most of the AU member states which have not followed South Africa's robust stance as will be examined later in this thesis.

Having initially divided the BITs according to the decades in which they were entered into, this case study will now analyse the contents of the BITs with reference to their Preamble, Scope, Substantive Clauses and Dispute Resolution Clauses. This thesis only analyses those BITs to which Ghana is a signatory party that have an English language version available online.[1031]

[1018] Gracious Avayiwoe, 'The Republic of Ghana and Bilateral Investment Treaties: A Burgeoning Expert?' (2020) ICSID Review-Foreign Investment Law Journal 35.1-2 50

[1019] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) (ICSID Convention). Ghana signed the Convention on 26 November 1965 and ratified it on 13 July 1966, prior to its entry into force in October of the same year.

[1020] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (opened for signature 10 June 1958, entered into force 7 June 1959) (New York Convention). Ghana acceded to the Convention on 9 April 1968.

[1021] Convention Establishing the Multilateral Investment Guarantee Agency (opened for signature 11 October 1985, entered into force 12 April 1988) (MIGA Convention)

[1022] Note that Ghana only achieved political independence in March 1957.

[1023] See generally Muthucumaraswamy Sornarajah, 'The International Law on Foreign Investment' (3rd edition CUP 2010); For an overview of Ghana's inclination, see generally the political ideologies of Ghana's founding father: Kwame Nkrumah, 'I Speak of Freedom, A Statement of African Ideology' (Heinemann 1961); and Kwame Nkrumah, 'Towards Colonial Freedom: Africa in the Struggle against World Imperialism' (Heinemann 1962).

[1024] The first BIT (See Treaty between Federal Republic of Germany and Pakistan for the Promotion and Protection of Investment) was signed on 25 November 1959 between Germany and Pakistan and entered into force 28 April 1962.

[1025] Global North countries with BITs in force are The Netherlands, UK, Germany, Denmark, Switzerland

[1026] Global South countries with BITs signed but not in force - Cote d'Ivoire, Egypt, South Africa, Cuba, Guinea, Benin, Zambia, Mauritania, Mauritius, Zimbabwe, Botswana, Barbados, Turkey

[1027] Gracious Avayiwoe, 'The Republic of Ghana and Bilateral Investment Treaties: A Burgeoning Expert?' (2020) ICSID Review-Foreign Investment Law Journal 35.1-2 50, 51

[1028] To understand this range of volatility, see generally Meg Kinnear and Paul Jean Le Cannu, 'Concluding Remarks: ICSID and African States Leading International Investment Law Reform' (2019) 34.2 ICSID Rev—FILJ 542; See also Makane M Mbengue, 'Africa's Voice in the Formation, Shaping and Redesign of International Investment Law' (2019) 34.2 ICSID Rev—FILJ 455; See also Hamed El-Kady and Mustaqeem De Gama, 'The Reform of International Investment Regime: An African Perspective' (2019) 34.2 ICSID Rev—FILJ 482; See also Stephen W Schill, 'Editorial: The New African Regionalism in International Investment Law' (2017) 18 J World Inv & Trade 367; See also Makane M Mbengue, 'Africa and the Reform of the International Investment Regime' (2017) 18 J World Inv & Trade 371; See also Erik Denters and Tarcisio Gazzini, 'The Role of African Regional Organizations in the Promotion and Protection of Foreign Investment' (2017) 18 J World Inv & Trade 449; See also Rukia Baruti, 'Investment Facilitation in Regional Economic Integration in Africa: The Cases of COMESA, EAC and SADC' (2017) 18 J World Inv & Trade 493

[1029] For example, South Africa has terminated its north–south BITs after its Black Economic Empowerment (BEE) initiative was challenged by a foreign investor through international arbitration: *Piero Foresti, Laura de Carli and others v The Republic of South Africa*, ICSID Case No ARB (AF)/07/01), Award 4 August 2010. See Muthucumaraswamy Sonarajah, 'The Unworkability of "Balanced Treaties" and the Importance of Diversity of Approaches among the BRICS' (2018) 112 AJIL Unbound 223, 226; Engela C Schlemmer, 'An Overview of South Africa's Bilateral Investment Treaties and Investment Policy' (2016) 31 ICSID Rev—FILJ 167

[1030] See his description of Ghana's stance in Gracious Avayiwoe, 'The Republic of Ghana and Bilateral Investment Treaties: A Burgeoning Expert?' (2020) ICSID Review-Foreign Investment Law Journal 35.1-2 50, 51

[1031] See UNCTAD Country Navigator Ghana | International Investment Agreements Navigator | UNCTAD Investment Policy Hub accessed 23.06.2022

5.4 PREAMBLES OF BITS

Dealing firstly with Ghana's first-generation BITs as per the table above, it is clear that the Preambles are very similar, in that none of them makes reference to the issue of Sustainable Development, which is a theme that runs through new-generation BITs and is supported by UNCTAD's Investment Policy Framework for Sustainable Development.[1032] The overarching themes in these first-generation BITs are economic co-operation and the protection of investments for the benefit of investors.[1033] In the China-Ghana BIT however, there is reference to a desire to 'encourage, protect and create favourable conditions for investment' based on the principles of 'mutual respect for sovereignty, equality and mutual benefit and for the purpose of the development of economic cooperation between both states', and an attempt to go a bit further by explaining how these will be evidenced .[1034] The Ghana-Netherlands BIT also makes reference to the hope that investments will result in the stimulation of capital, technology and economic development.[1035]

The preambles of the second-generation BITs in the table above are practically the same as those of the first-generation BITs in that there is still no reference to Sustainable Development, save in the Botswana-Ghana BIT signed in July 2003, which makes reference to the right of each signatory state to 'establish their own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly their environmental laws'.[1036]

The next stage in the evolution of Ghana's BIT regime is to be found in the preamble of Ghana's Model BIT 2008.[1037] There is a reference to the aim of increasing 'long term sustainable economic growth and development', as well as a recognition of 'the importance of the transfer or technology and human resources developments arising from such investments.' This is reflected in the Ghana-Turkey BIT signed in March 2016,[1038] which has the longest preamble of all the BITs under discussion here. Also, it states that the objectives of the BIT 'can be achieved without relaxing health, safety and environmental measures …as well as internationally recognised labour rights'.[1039] Another positive development is Article 13 of the BIT which encourages foreign investors to carry out programmes to promote the long-term sustainable economic growth and development of the other contracting party as set out in the preamble as being the overarching objective of the BIT.[1040]

[1032] See https://investmentpolicy.unctad.org/investment-policy-framework -accessed on 06.10.2022

[1033] See for example the preambles of the Agreement between the Government of the United Kingdom of Great Britain & Northern Ireland and the Government of the Republic of Ghana for the Promotion and Protection of Investments (opened for signature 22 March 1989, entered into force 25 October 1991) (Ghana–UK BIT)—a first-generation north–south BIT; and Agreement between the Government of the People's Republic of China and the Government of the Republic of Ghana (opened for signature 12 October 1989, entered into force 11 November 1990) (Ghana–China BIT)—a first-generation south–south BIT.

[1034] Ghana-China BIT download (unctad.org) accessed on 23.06.2022. Article 2(1): 'Each contracting party shall encourage investors of the other contracting state to make investment in its territory . . . each Contracting State shall grant assistance and provide facilities for obtaining visa and working permit to nationals of the other Contracting State to or in the territory of the Former in connection with investment or activities associated with such investments'. See also Agreement between the Government of the Kingdom of Denmark and the Government of the Republic of Ghana Concerning the Promotion and Protection of Investments (opened for signature 13 January 1992, entered into force 16 January 1995) (Ghana–Denmark BIT) Article 2: 'Each Contracting Party shall encourage and create favourable conditions including facilitating the establishments of representative offices for the investor of the other Contracting Party to invest capital in its territory'. This reference to the establishments of representative offices could be deemed a practical demonstration of investment encouragement but it remains uncertain what those other practical mechanisms are. It is not as detailed as it could have been.

[1035] Ghana-Netherlands BIT IBO-ghana.def.doc (unctad.org) accessed on 23.06.2022

[1036] Botswana-Ghana BIT (2003) download (unctad.org) accessed 23.06.2022

[1037] Ghana Model BIT 2008 Ghana Model BIT (2008)en (unctad.org) accessed 23.06.2022

[1038] Ghana-Turkey BIT 2016 download (unctad.org) accessed 23.06.2022

[1039] See Agreement between the Government of the Republic of Turkey and the Government of the Republic of Ghana for the Reciprocal Promotion and Protection of Investments (opened for signature 1 March 2016, not yet in force) (Ghana–Turkey BIT) preamble: '[d]esiring to create favourable conditions for greater investment by investors of one Contracting Party in the territory of the other Contracting Party; . . . recognizing that the promotion and reciprocal protection of investment under this Agreement will be conducive to the stimulation of business initiatives_ and will contribute to long term sustainable economic growth and development in both Contracting Parties; . . . recognizing the importance of transfer of technology and human resource development arising from such investments; . . . agreeing that fair and equitable_ treatment of investments is desirable in order to maintain a stable framework for investment and will contribute to maximizing effective utilization of economic resources and improve living standards; . . . recognizing the importance of providing effective means of asserting claims and enforcing rights with respect to investment under national law as well as through international arbitration.

[1040] See Ghana–Turkey BIT Article 13(2): 'Each Contracting Party shall encourage their investors in the territory of the other Contracting Party to promote human capital formation, local capacity building through close cooperation with the local community, create employment opportunities and facilitate training opportunities for employees, and the transfer of technology'.

5.5 SCOPE OF BITS

In both the first and second-generation BITs in the table above, the scope of the BITs are broad, hence this section focuses on the definitions of investments in the 'scope' section of the BIT and how the first two generations of BITs differentiate between a natural person and a legal person as investors. To begin with, an asset-based definition is used for covered investments, and there is a non-exhaustive list of those covered investments.[1041] It is important to note that with the vagueness of the definitions of 'natural person' and 'legal person' as investors, there is the possibility (as has been shown by previous cases) of problems arising from situations where an investor is for example, deemed to be a national of both signatory states, or deemed to be a national of one of the signatory states and a third state. [1042] Terms such as 'place of incorporation' and 'place of constitution' or of 'establishment and recognition' and 'place of seat or economic activities', used as a descriptor of a legal person, may well be construed in an arbitrary or expansive fashion by tribunals unless there is clear clarification by the contracting parties in future BITs.

Although there is no clearer definition of a natural person as an investor in the third generation BIT between Ghana and Turkey (nor in the Model BIT), there is an element of progress in that the words 'substantial business activity'[1043] are included in the definition, to delineate what constitutes a legal person, as well as a denial of benefits clause[1044] which ensures that if this test is not satisfied, the investment is not protected. Unfortunately, this phrase could also suffer the same fate of inconsistent interpretation by tribunals, as there is no indication in the BIT as to what exactly constitutes 'substantial business activity'. Additionally, although it would have been helpful if Ghana had jettisoned the asset-based definition for a covered investment, another positive development is that this BIT sets out exceptions to what can be described as an 'investment'[1045] which adds a welcome element of certainty.

5.6 SUBSTANTIVE CLAUSES IN BITs

In most first and second-generation BITs in existence, the wording of the substantive clauses dealing with the protection of investments is not precise, as a result of which arbitral tribunals have frequently interpreted the clauses in a manner that is both subjective and inconsistent.[1046] This is the problem that Ghana faces in relation to its first and second-generation BITs as identified in the table above, and the provisions of those BITs will be analysed in this section.

[1041] See Ghana–Turkey BIT Article 1(1)(a)-(e)

[1042] See generally Jeswald W Salacuse, 'The Law of Investment Treaties' (OUP 2010)

[1043] See Ghana–Turkey BIT Article 1(2)(b): The term 'investor' means…companies, corporations, firms or business partnerships incorporated or constituted under the laws in force of a Contracting Party and having their registered offices **together with substantial business activities** in the territory of that Contracting Party.

[1044] See Ghana–Turkey BIT Article 12 and Article 11 of the Ghana Model BIT 2008

[1045] See Ghana–Turkey BIT Article 1(1)(f)-(i)

[1046] By way of example, the definition of "investment" has been inconsistent among investment tribunals examining this issue. Compare *Salini Costruttori S.p.A and Italstrade S.p.A v. Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction, (23 Jul. 2001); Joy Mining *Machinery Limited v. Egypt* (ICSID Case No. ARB/03/11), Decision on Jurisdiction, (23 Jul. 2001); *Jan de Nul N.V. v. Egypt* (ICSID Case No. ARB/04/13), Decision on Jurisdiction, (16 Jun. 2006); with *Patrick Mitchell v. Democratic Republic of Congo* (ICSID Case No. ARB/99/7), Decision on the Application For Annulment of the Award, (1 Nov. 2006); *L.E.S.I. S.p.A. et ASTALDI S.p.A. v. Algeria* (ICSID Case No. ARB/05/3), Decision, (12 Jul. 2006); *Siemens, A.G. v. Argentina* (ICSID Case No. ARB/02/8), Decision on Jurisdiction, (3 Aug. 2004); *Malaysian Historical Salvors, SDN, BHD v. Malaysia* (ICSID Case No. ARB/05/ 10), Decision on the Application for Annulment, (16 Apr 2009) Similar inconsistences are also found with respect to the application of MFN provisions. For instance, compare tribunals' positions in *Maffezini v. Kingdom of Spain* (ICISD Case No. ARB/97/7), Award, (13 Nov. 2000), 5 ICSID Report (2002), 419; *Siemens v. Argentina* (ICSID Case No. ARB/02/8), Decision on Jurisdiction with other tribunals' position in *Renta 4 S.V.S.A et al. v. Russian Federation* (Case No. V 024/2007), Arb. Inst. of Stockholm Chamber of Commerce, Award on Preliminary Objections, (20 Mar. 2009); *Tza Yap Shum v. The Republic of Peru* (ICSID Case No. ARB/07/6), Decision on Jurisdiction and Competence, (12 Feb. 2007). These inconsistences and sometimes contradictory positions do not necessarily stem from the fact that different BIT texts are being interpreted. Rather, they arguably show the fundamental differences of tribunals in approaching these key terms contained in the BITs.

5.6.1 FAIR AND EQUITABLE TREATMENT (FET) CLAUSE

FET clauses are to be found in the first-generation BITs between Ghana and states from the Global North[1047] as well as between Ghana and states from the Global South.[1048] However, no exact definition of what constitutes 'fair and equitable treatment' is stated in the BITs. This is of grave concern, since arbitral tribunals have been known to construe such vaguely worded FET clauses in a broad manner, suggesting that a Host State's obligation to accord 'fair and equitable treatment' to the investors of the other Contracting Party could include a requirement for a Host State to act in a consistent, transparent, even-handed and reasonable manner, devoid of discrimination, arbitrariness and ambiguity in ensuring due process in decision making and with respect for the investor's legitimate expectations.[1049] Thus the problem that faces Ghana presently is that with the presence of such imprecisely-worded FET clauses, it is only a matter of time before the state falls foul of a foreign investor bringing a case against it using this clause as justification.

5.6.2 FULL PROTECTION AND SECURITY (FPS)

FPS for investments is a theme that runs through most of the BITs to which Ghana is a signatory. In relation to Ghana's first-generation BITs, some South-South agreements state that investments shall enjoy 'adequate protection and security in the territory of the other Contracting Party'[1050] some refer simply to 'full protection and security'[1051] whilst others refer to 'full and adequate protection and security'.[1052] Article 3.1 of the Ghana-China BIT[1053] simply states that 'Investments and activities associated with investments of investors of either Contracting Party …*shall enjoy protection'.*[1054] As noted previously, the more loosely-worded these provisions are, the greater the likelihood that an investor's claim against a Host State under such provisions will succeed due to expansive interpretation of the provisions by arbitral tribunals. The North-South first-generation BITs, similarly, refer simply to 'full protection and security',[1055] 'full security and protection',[1056] or make no reference to protection of investments.[1057] This scenario is replicated in the second-generation BITs, where some of the BITs refer to 'full and adequate protection and security'[1058] others require 'full protection and security'[1059] and one BIT refers to 'fair and equitable protection'.[1060] Generally speaking, the fact that arbitral tribunals persist in attributing 'legal security' to the 'full protection and security' standard also remains an issue that is likely to cause problems with old-generation BITs.[1061] Finally, there is a glimmer of hope, in that although both the Ghana Model BIT 2008 and the only third-generation BIT in

[1047] See Ghana–UK BIT art 3(1); Ghana–Denmark BIT art 3(1); Ghana–Switzerland BIT art 4.
[1048] See Ghana-China BIT Article 3(1); Ghana-Malaysia BIT Article
[1049] See for example *CMS Gas Transmission Company v The Republic of Argentina,* ICSID Case No ARB/01/8, Award (12 May 2005) paras 266–84; *Metalclad Corporation v The United Mexican States*, ICSID Case No ARB(AF)/97/1, Award (30 August 2000) paras 74–101; *Te´cnicas Medioambientales Tecmed, SA v The United Mexican States*, ICSID Case No ARB (AF)/00/2, Award (29 May 2003) paras 152–74.
[1050] Article 2.2 of the Ghana-Egypt BIT (signed in March 1998 but not in force)
[1051] Article 3.1 of the Ghana-South Africa BIT (signed in July 1998 but not in force)
[1052] Article 2.2 of the Ghana-Malaysia BIT (signed in November 1996 and in force from April 1997)
[1053] Agreement concerning the Encouragement and Reciprocal Protection of Investments (signed in October 1989 and in force from November 1990)
[1054] Italics mine
[1055] See Article 3.1 of the Ghana-UK BIT (signed in March 1989 and in force from October 1991) and Article 3.1 of the Ghana-Denmark BIT (signed in January 1992 and in force from January 1995)
[1056] Article 3.2 of the Ghana-Netherlands BIT (signed in March 1989 and in force from July 1991)
[1057] See Ghana-Romania Agreement on the Mutual Promotion and Guarantee of Investments (signed September 1989, not yet in force). See also Ghana-Bulgaria Agreement concerning the Mutual Promotion and Protection of Investments (signed October 1989, not yet in force).
[1058] Article 3.1 of the Ghana-Guinea BIT (signed in May 2001 but not yet in force); see also Article 3.1 of the Ghana-Benin BIT (signed in May 2001 but not yet in force); See also Article 3.1 of the Ghana-Botswana BIT (signed in July 2003 but not yet in force)
[1059] Article 3.1 of the Ghana-Yugoslavia BIT (signed in April 2000 and in force from July 2000)
[1060] Article 3.3 of the Ghana-Mauritius BIT (signed in May 2001 but not yet in force)
[1061] See for example, *Ronald S Lauder v The Czech Republic*, UNCITRAL, Final Award (3 September 2001) para 314; *CME Czech Republic BV v The Czech Republic,* UNCITRAL, Partial Award (13 September 2001) para 613; *Siemens AG v The Argentine Republic*, ICSID Case No ARB/02/8, Award (17 January 2007) para 303.

existence, signed in March 2016 but not yet in force state that investments of nationals and companies of each Contracting Party shall be accorded … 'full protection and security'[1062] each of these agreements makes an effort to more precisely delineate this clause. The Model BIT does this by stating that '…the concept of … 'full protection and security' means treatment that meets the standard required by customary international law*[1063]* and does not require treatment in addition to, or beyond such a standard'[1064] and the Ghana-Turkey BIT describes it as 'treatment that meets the minimum standard required by international law*[1065]* and does not require treatment in addition to, or beyond such a standard'.[1066] This shows a certain degree of progress in the contemplation of Ghana where the clauses of BITs are concerned, and although the additional phrase may not be enough to save Ghana from arbitral tribunals intent on over-extending their powers, it is a step in the right direction.

5.6.3 MOST FAVOURED NATION (MFN) AND NATIONAL TREATMENT (NT) CLAUSES

The clauses relating to the MFN and NT standards sometimes appear in the same paragraph under the heading 'National Treatment and Most-Favoured-Nation Provisions'[1067] both in the first-generation and second-generation BITs. Unfortunately, the phrase 'in like circumstances' is retained,[1068] and since this is not further explained, it could be open to expansive interpretation by tribunals. Additionally, although most of Ghana's BITs have an 'Exceptions' proviso stating that the existence of an MFN clause 'shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from (a) an existing or future customs union, regional economic organisation, or similar international agreement to which either of the Contracting Parties is or may become a party, or (b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation'[1069] this does not address the mischief. Arbitral tribunals have integrated procedural provisions of a third treaty into the scope of the MFN clause in a basic treaty, resulting in a broader interpretation than was ever intended by the contracting parties.[1070] This can be rectified by clearer drafting, as stated by the International Law Commission:

> Whether MFN clauses are to encompass dispute settlement provisions is ultimately up to the States that negotiate such clauses. Explicit language can ensure that an MFN provision does or does not apply to dispute settlement provisions. Otherwise, the matter will be left to dispute settlement tribunals to interpret MFN clauses on a case-by-case basis.[1071]

[1062] Article 4.1 of the Ghana-Turkey BIT (signed in March 2016 but not yet in force); See also Article 3.1 of the Ghana Model BIT 2008.
[1063] Italics mine
[1064] Article 3.2 of the Ghana Model BIT 2008.
[1065] Italics mine
[1066] Article 4.3 of the Ghana-Turkey BIT (signed in March 2016 but not yet in force)
[1067] See for example, Article 4 of the 1st generation North-South Ghana-UK BIT signed in March 1989 and in force from October 1991; see also Article 4 of the 1st generation North-South Ghana-Denmark BIT signed in January 1992 and in force from January 1995; see also Article 4 of the 2nd generation South-South Ghana-Botswana BIT signed in July 2003 but not yet in force.
[1068] See Article 5 of the Ghana–Turkey BIT: 'Neither Contracting Party shall in its territory subject investments, once established, or returns of investors of the other Contracting Party to treatment less favourable than that which it accords, *in like circumstances*, to investments or returns of its own investors or to investments or returns of investors of any third State. . .. Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, expansion, use, enjoyment or disposal of their investments, to treatment less favourable than that which is accorded, *in like circumstances,* to its own investors or to investors of any third State' (emphasis mine). See also Article 4 of the Ghana Model BIT 2008.
[1069] See Article 5 of the 1st generation North-South Ghana-Denmark BIT signed in January 1992 and in force from January 1995; see also Article 6 of the 1st generation North-South Ghana-UK BIT signed in March 1989 and in force from October 1991; see also Article 5 of the 2nd generation South-South Ghana-Yugoslavia BIT signed in April 2000 and in force from July 2000.
[1070] See for example *Emilio Agustı´n Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision of the Tribunal on the Objections to Jurisdiction (25 January 2000) paras 38–64. The decision in Maffezini was the first time that a party had been permitted to rely upon an MFN clause to modify the jurisdictional mandate of an international tribunal. Across the hundreds of years of activity of international courts and tribunals leading up to Maffezini, there had only been judicial pronouncements against such a device, including: the International Court of Justice's judgment in the Anglo-Iranian Oil Company Case [(*United Kingdom v Iran*) 1952 ICJ Rep 93] and the British– Venezuelan Mixed Claims Commission's decision in Aroa Mines [J Ralston, Venezuelan Arbitrations of 1903 (1904) 344;]. Also, prior to Maffezini, there does not appear to be any support in the writings of publicists for the extension of the MFN clause to jurisdictional matters. For a more detailed discussion, see Zachary Douglas, 'The MFN clause in investment arbitration: treaty interpretation off the rails' (2011) Journal of International Dispute Settlement 2.1 97
[1071] Most-Favoured-Nation clause: Summary Conclusions on the Most-Favoured-Nation clause 2015 (un.org) accessed on 11th July 2022.

An attempt has been made to address this issue both in the Model Ghana BIT 2008 and the subsequent third-generation Ghana-Turkey BIT, by the insertion of an extra clause after the generic MFN clauses, stating that 'The most favoured nation treatment referred to in paragraphs (1) and (2) shall not extend to provisions of Investor-State disputes'.[1072] It remains to be seen whether this will be enough to stave off interference by arbitral tribunals, but it is certainly a step in the right direction and to be applauded. There are also potentially problematic substantive clauses relating to Compensation arising from losses incurred by the foreign investor, as well as the issue of transfer of funds, and remedies for direct and indirect expropriation. Each of these will be dealt with in turn, for the sake of completion, although the issue of a 'parachuted' MFN clause, which has been dealt with earlier in this chapter, is the most notorious of all the problematic clauses.

Avayiwoe has suggested[1073] that the fact that the contents of the majority of the first-generation clauses are different suggests that Ghana's negotiating ability was less at that point. Furthermore, the fact that the second-generation BITs are very similar to each other in content suggests that Ghana's negotiating muscles were improving and being flexed further. This thesis would not go that far. This is because unless a detailed analysis is undertaken of each of the BITs of every other Contracting State, it is not possible to categorically make this leap. What is clear however, is that the contents of the Ghana-Turkey BIT have a distinct similarity to the Ghana Model 2008 BIT, which would indicate that Ghana had made strides in tightening up the language of her BITs, which is a positive step.

5.6.4 COMPENSATION FOR LOSSES

With regards to the substantive clauses relating to Compensation for losses, the clauses in the BITs signed by Ghana, typically refer to 'losses suffered by investors owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting party'.[1074] With regards to the actual compensation, there are some states that require compensation to be 'no less favourable than that which the latter Contracting Party accords to investors of any third state', whilst other states require compensation to be 'no less favourable than that which the latter Party accords to its own nationals or companies or to nationals or companies of any third state'.[1075] The first-generation BITs between Ghana and Malaysia,[1076] China,[1077] Egypt,[1078] Bulgaria[1079] and Romania[1080] use the 'third state' criteria. The other first-generation BITs, namely between Ghana and the UK,[1081] the Netherlands,[1082] Denmark[1083] and South Africa[1084] use the 'own nationals and third state' criteria. In respect of the second-generation BITs, apart from the Agreement between Ghana and Yugoslavia[1085] which uses the 'own nationals and third state' criteria, the other four 2nd generation BITs, namely those signed between Ghana and Mauritius, Botswana, Benin and Guinea, all use the 'third state' criteria. The Ghana Model BIT 2008 uses the 'third state' formula, whilst the 3rd generation Ghana-Turkey BIT uses the 'own nationals and third state' criteria. It is worth noting that the Compensation for Losses paragraph in the BITs has another distinction, in that some

[1072] See Article 4.3 of the Ghana Model BIT 2008; see also Article 6.1 of the Ghana-Turkey BIT (signed in March 2016 but not yet in force).
[1073] Gracious Avayiwoe, 'The Republic of Ghana and Bilateral Investment Treaties: A Burgeoning Expert?' (2020) ICSID Review-Foreign Investment Law Journal 35.1-2 50, 57
[1074] See Article 4 of Ghana-Malaysia 1st Generation South-South BIT; see also Article 4 of Ghana-Bulgaria 1st Generation North-South BIT;
[1075] Some add the phrase (whichever of these standards is the more favourable from the viewpoint of the investor). See Ghana-Denmark 1st generation North-South BIT signed January 1992 and in force January 1995.
[1076] Article 4 – South-South, signed in November 1996, in force April 1997
[1077] Article 4 – South-South, signed in October 1989, in force November 1990
[1078] Article 4 – South-South, signed in March 1998, not yet in force.
[1079] Article 4- North-South, signed in October 1989, not yet in force.
[1080] Article 5 – North-South, signed in September 1989, not yet in force.
[1081] Article 5 – North-South, signed in March 1989, in force in October 1991
[1082] Article 7 – North-South, signed in March 1989, in force in July 1991
[1083] Article 7 – North-South, signed in January 1992, in force in January 1995
[1084] Article 5 – South-South, signed in July 1998, not yet in force.
[1085] Article 6 – 2nd generation South-South BIT, signed in April 2000, in force in July 2000

have an additional requirement, namely that 'resulting payments shall be freely transferable'.[1086] These discrepancies in the various BITs will be analysed later in this chapter. The impression is that the contents of these BITs are nuanced in favour of foreign investors and since Ghana has to date been (and remains) a recipient of FDI and not a provider, it would indicate that the terms favourable to investors were dictated by the other Contracting State and not by Ghana's negotiators.

5.6.5 REPATRIATION OF INVESTMENTS

In all of the first-generation BITs that Ghana is signatory to, the clause relating to the Repatriation of Investments and Returns deals primarily with the fact that investors should be able to transfer their monies[1087] out of the country with undue delay and in freely convertible foreign currencies. In four out of the five 2nd generation BITs to which Ghana is one of the Contracting Parties, there is an additional phrase, which allows the Host Contracting State a degree of autonomy. This states that 'Transfers [shall be effected]… subject, however to the right of the former Contracting Party to impose equitably and in good faith, such measures as may be necessary to safeguard the integrity and independence of its currency, its external financial position and balance of payments.'[1088] The final 2nd generation BIT between Ghana and Yugoslavia, has similar sentiments, but expressed differently.[1089] The final provision to be discussed under this sub-heading is another version of the phrase above, giving the Contracting State a degree of autonomy over its fiscal policy. This is first noted in the Ghana Model BIT 2008 and states 'Where, in exceptional circumstances, payments and capital movements cause or threaten to cause serious balance of payment difficulties, each Contracting Party may temporarily restrict transfers, provided that such restrictions are imposed on the basis of equity, non-discrimination and in good faith'.[1090] This provision is reproduced in identical form in Article 8.3 of the Ghana-Turkey BIT and since this BIT was signed in 2016, nearly eight years after the introduction of Ghana's Model BIT, it could be deduced from this, that Ghana at the time, was making positive strides in drafting and negotiating BIT provisions which were to Ghana's benefit and would allow a greater degree of regulatory autonomy.

5.6.6 EXPROPRIATION

Both the 1st and 2nd generation BITs to which Ghana is a signatory, frame their Expropriation clause in a manner which requires the payment by the Host State of 'prompt, adequate and effective compensation' once expropriation is made for a public purpose related to its internal needs. This formulation has become known as the 'Hull Rule', as referenced by a statement by the US Secretary

[1086] See 1st generation North-South Ghana-Romania BIT, Article 5 (third state criteria); see also 1st generation South-South Ghana-South Africa BIT, Article 5 (own nationals and third state criteria); see also 1st generation North-South Ghana-Denmark BIT, Article 7 (own nationals and third state criteria); see also 1st generation North-South Ghana-UK BIT, Article 5 (own nationals and third state criteria); see also 2nd generation South-South Ghana-Yugoslavia BIT, Article 6 (own nationals and third state criteria -also Resulting payments shall be freely transferable and made without delay); see also 2nd generation South-South Ghana-Mauritius BIT, Article 5 (third state criteria -also Resulting payments shall be freely transferable at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force); see also 2nd generation South-South Ghana-Botswana BIT, Article 6 (third state criteria); see also 2nd generation South-South Ghana-Benin BIT, Article 5 (third state criteria); see also 2nd generation South-South Ghana-Guinea BIT, Article 5 (third state criteria); see also Ghana Model BIT 2008, Article 8 (third state criteria); see also 3rd generation South-South Ghana-Turkey BIT, Article 10 (own investors and third state criteria -also Resulting payments shall be freely convertible).

[1087] This includes net profits, dividends, royalties, technical assistance and technical fees, interest and other current income accruing from any investment of the investors of the other Contracting party; the proceeds from the total or partial liquidation of any investment made by investors of the other Contracting party; funds in repayment of borrowings/loans given by investors of one Contracting Party to the investors of the other Contracting Party which both Contracting Parties have recognised as investment; and the net earnings and other compensations of investors of one Contracting Party who are employed and allowed to work in connection with an investment in the territory of the other Contracting Party. See Article 6 of 1st Generation Ghana-Malaysia BIT

[1088] Article 8 of the Ghana-Botswana BIT, Article 7 of the Ghana-Guinea BIT, Article 7 of the Ghana-Mauritius BIT, and Article 7 of the Ghana-Benin BIT,

[1089] Article 8 of the Ghana-Yugoslavia BIT states inter alia 'Provided however that this provision shall not preclude the affected nationals or companies from honouring their fiscal or other obligations owed to the host Contracting Party'.

[1090] Article 6.2 of the Ghana Model BIT 2008

of State Hull, although it is believed to have its origins from the Chorzow Factory Case.[1091] The problem with this formulation, as with the other broadly worded provisions described in this chapter, is that it makes BITs susceptible to subjective and inconsistent arbitral interpretations. There is, however, a change made to this articulation of the 'Hull Rule' which is to be found in the Ghana Model BIT 2008. The Model BIT inserts a paragraph stating that 'Except in rare circumstances, non-discriminatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as national security, public health, safety, and the environment, do not constitute indirect expropriations.'[1092] The effect of this is to afford the Host State a certain degree of RA which is a step in the right direction. Once again, it could be deduced that Ghana had thereafter managed to exercise some negotiating and drafting authority, since the Ghana-Turkey BIT, entered into in 2016, contains a provision that mirrors the above provision, save for the omission of a reference to national security.[1093]

5.6.7 SETTLEMENT OF DISPUTES

Disputes usually come about in two ways, namely disputes between an Investor and a Contracting Party and disputes between two Contracting Parties. In relation to a dispute between the Contracting Parties, all the BITs under discussion state that such disputes should, if possible, be settled through diplomatic channels. Whilst some BITs do not specify how long diplomatic efforts should continue,[1094] the Ghana-Denmark BIT states that the matter must be submitted to an arbitral tribunal 'if such a dispute cannot be settled within three months from the beginning of negotiations'.[1095] All the other BITs under consideration here, including the Model BIT, specify a six-month period during which the parties must aim to find a diplomatic resolution for the dispute.[1096] If it cannot be thus settled, the next stage will be for it to be submitted to an arbitration tribunal upon the request of either Contracting Party. There are guidelines set down as to how such an Arbitral Tribunal is to be constituted. Dispute resolution between sovereign Contracting Parties has never been particularly controversial, and that remains the case to date.

In relation to the clause dealing with the settlement of disputes between an investor and a Contracting Party, however, in all but two Agreements, either party is entitled to initiate judicial action before a

[1091] See EXPLAINING THE POPULARITY OF BITS - III. THE HULL RULE (jeanmonnetprogram.org) accessed on 13.07.2022. *The Chorzow Factory Case*, 1928 P.C.I.J., Ser. A, Nos. 7, 9, 17, 19, *reprinted in* STEINER, VAGTS, & KOH, supra note 12, at 451-54. This case was decided by the Permanent Count of International Justice (P.C.I.J.) and has its roots in the Treaty of Versailles, signed in 1919. The treaty contained a requirement that certain territories be transferred from German to Polish control and that the status of certain other lands be determined by plebiscite. The Geneva Convention -- adopted to implement the Treaty of Versailles -- and the plebiscites that followed ceded the region of Chorzow, located in Upper Silesia, to Poland. Under the Geneva Convention, countries that took over German territory had the right to seize land owned by the government of Germany and credit the value of that land to Germany's reparation obligations. Any disputes that arose under the Convention were to be referred to the P.C.I.J. Shortly after Poland took over Chorzow, a Polish court decreed that land belonging to the German company, Oberschlesische Stickstoffwerrke A.G., be turned over to Poland. Litigation ensued on the question of whether the land was "property" of Germany or if it was privately owned by Oberschlesische Stickstoffwerrke A.G. The dispute eventually reached the P.C.I.J. The Permanent Court concluded that the land was privately owned, and that Poland had seized private property. The Court stated that "there can be no doubt that the expropriation . . . is a derogation from the rules generally applied in regard to the treatment of foreigners and the principle of respect for vested rights." The Court also spoke to the question of appropriate compensation, stating that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed." Thus, the Permanent Court enunciated the then existing international law -- expropriations were not permitted and if they occurred, full compensation must be paid. The requirement of full compensation for expropriation was thereafter most clearly articulated in the 1930s when it was challenged by the government of Mexico. Mexico confiscated various properties between 1915 and 1940. The United States, whose nationals suffered from these acts of expropriation, sought compensation for its affected citizens. In response to the takings by Mexico, the American Secretary of State, Cordell Hull, put forth what has become the leading formulation of the full compensation standard: "The Government of the United States merely adverts to a self-evident fact when it notes that the applicable precedents and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor".

[1092] Article 7.6 of Ghana Model BIT 2008

[1093] See Article 9.6 of the Ghana-Turkey BIT signed in March 2016 and not yet in force.

[1094] Article 13(1) of the Ghana-Netherlands BIT says 'within a reasonable lapse of time'; Article 11(2) of the Ghana-South Africa BIT; Article 8(2) of the Ghana-Malaysia BIT; Article 11(2) of the Ghana-UK BIT; Article 11(2) of the Ghana-Yugoslavia BIT

[1095] Article 11(2) of Ghana-Denmark BIT

[1096] Article 11(2) of Ghana-Botswana BIT; Article 10(2) of Ghana-Benin BIT; Article 10(2) of Ghana-Guinea BIT; Article 9(2) of Ghana-Mauritius BIT; Article 9(2) of Ghana-China BIT; Article 10(1) of Ghana-Romania BIT; Article 8(2) of Ghana-Bulgaria BIT; Article 9(2) of Ghana-Egypt BIT; Article 15(1) of Ghana-Turkey BIT.

competent local court or before an international tribunal after unsuccessfully trying to settle the matter amicably.[1097] In one of the two Agreements, referred to above, that with China, it follows the Chinese model of using an ad-hoc tribunal, following the arbitration rules of either ICSID or the Stockholm Chamber of Commerce (SCC) only when the dispute concerns the amount of compensation for expropriation.[1098]The preferred venues for arbitration in the majority of the BITs are the International Centre for the Settlement of Investment Disputes (ICSID) or ad hoc arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). Amongst the 1st and 2nd generation BITs, the only Agreements which state that a dispute may be submitted to a local court or to arbitration only at the instigation of the Investor (again, as a precursor, there must have been an unsuccessful attempt at amicable settlement of the dispute) are those between Ghana and Malaysia[1099] and Egypt.[1100] The fact that the majority of the 1st and 2nd generation BITs have the same Investor State Dispute Settlement clause may indicate that Ghana exerted a degree of negotiating influence.

In Ghana's 2008 Model BIT however, Article 14, headed 'Settlement of Investment Disputes between a national or company of a Contracting Party and another Contracting Party'[1101] provides that there must be an attempt to settle disputes through consultation, negotiation or mediation upon written request submitted by either party. Next, the internal administrative remedies of the Host State should be exhausted, but if both courses of action fail, a claim in writing must be submitted by *the investor*[1102] to the other party incorporating certain details. The provision headed 'submission of claim' however states that '*the disputing party*[1103] may submit a claim to'…the national court, an ad-hoc tribunal or ICSID. It is therefore not clear whether the disputing party here refers to the investor who is the only person allowed to file a claim, or whether disputing party refers to either party. There is, however, an attempt made by Ghana to retain some RA, in that the Model BIT incorporates a provision stating that 'No claim may be submitted … if more than *three years*[1104] have elapsed from the date on which the investor acquired, or should have first acquired, knowledge of the breach and knowledge of the loss or damage arising from that breach'.[1105] This clause may indicate that the only person allowed to submit a claim under this Model BIT is an investor, rather than 'either party' as per the previous BITs entered into by Ghana, which would be a retrograde step in BIT evolution. The only 3rd generation BIT, the Ghana-Turkey BIT signed in March 2016, mirrors Ghana's Model BIT for the most part, but crucially, incorporates a provision stating that 'No claim may be submitted … if more than *six years*[1106] have elapsed from the date on which the investor acquired, or should have first acquired, knowledge of the breach and knowledge of the loss or damage arising from that breach'.[1107] The extended period of six years in this provision, as opposed to three years in the Model BIT, clearly favours Turkey, since it gives its investors a longer period of time in which to instigate a case. This would seem to indicate

[1097] An attempt at an amicable settlement should take either three or six months. See second generation BITs with Botswana (6 months); Yugoslavia (3 months); Benin (6 months); Guinea (6 months); Mauritius (6 months). See first generation BITs with Denmark (3 months); China – no reference to pre-requisite of attempt at amicable settlement; Romania (within 2 months of the exhaustion of domestic remedies); South Africa (3 months); UK (3 months); the Netherlands (6 months); Bulgaria – no reference to pre-requisite of attempt at amicable settlement; Egypt (6 months); Malaysia (3 months).

[1098] See Article 10 of Ghana-China BIT; Article 10 of the Agreement between the Government of the People's Republic of China and the Government of the Islamic Republic of Pakistan on the Reciprocal Encouragement and Protection of Investments (opened for signature 12 February 1989, entered into force 30 September 1990); and Article 10 of the Agreement between the Government of the People's Republic of China and the Government of the Hellenic Republic for the Encouragement and the Reciprocal Protection of Investments (opened for signature 25 June 1992, entered into force 21 December 1993) (China–Greece BIT).

[1099] Article 7.1 of the Ghana-Malaysia BIT signed in November 1996 and in force in April 1997

[1100] Article 8.2 of the Ghana-Egypt BIT signed in March 1998 (not in force), states that the choice of the Investor will be final. This BIT with Egypt also follows the Egyptian model of resorting to either local litigation, ICSID or ad hoc arbitration subject to a fork-in-the-road clause.

[1101] Ghana Model BIT 2008

[1102] Italics mine

[1103] Italics mine

[1104] Italics mine

[1105] Article 14.3 b) of the Ghana Model BIT 2008.

[1106] Italics mine

[1107] Article 14.3 b) of the Ghana-Turkey BIT 2016.

that Turkey had the more robust negotiating power than Ghana in those negotiations, even though Ghana had the benefit of its Model BIT to hand.

5.6.8 UMBRELLA CLAUSE

Among the many issues being raised in the negotiations of IIAs and in investment disputes in the recent past, is the term "umbrella clause".[1108] This so-called umbrella clause is a provision in an investment protection treaty that guarantees the observance of obligations assumed by the host state in respect of the investor. They are so-called because they bring the contractual and other commitments under the protective umbrella of the treaty.[1109] The result is that a contractual obligation is turned into a treaty obligation, making what would otherwise be a simple contract violation now a treaty violation[1110] with the attendant enhanced level of protection for foreign investors.[1111] Although they are also sometimes referred to as 'observance of undertakings clauses',[1112] this thesis will use the term umbrella clause.

An example of an 'umbrella clause' can be found in Article 3(3) of the Ghana-UK BIT, which states that 'Each Contracting Party shall observe *any obligation*[1113] it may have entered into with regard to investments of nationals or companies of the other Contracting Party'. The term "any obligation", which is replicated in the other first and second-generation BITs to which Ghana is a signatory, is wide enough to cover a myriad of legal obligations that a Contracting Party could assume towards a foreign investor. The resulting situation is that without having had that specific intention, a Host State now finds that by virtue of this umbrella clause a legal obligation arising from an ordinary commercial contract has now been elevated to a treaty obligation under the BIT. As stated by one commentator, 'this provision thus creates a magic gate through which a contractual obligation morphs into a treaty obligation'.[1114] These umbrella provisions have attracted voluminous comment[1115] due to the manner in which they are interpreted by arbitral tribunals[1116] and by virtue of the fact that their presence tends to exacerbate an already asymmetric situation between Host States and foreign investors. Historically, developing countries have craved FDI in order to improve the lives of their citizens and therefore foreign investment capital (usually through the vehicle of BITs) has primarily flowed from the Global North to the Global South. The net result of this has been that although the provisions of BITs are couched in reciprocal terms with each Contracting Party undertaking the same obligations, the effects are asymmetrical. This is because the foreign investor is (in the case of a North-South BIT) always a national from the Global North, while the Host State is from the Global South. It is therefore not surprising that developing Host States will aim to interpret any BIT provisions that give rights to investors as restrictively as possible, with countries from the Global North aiming for as expansive an

[1108] The name came from the concept that private contractual claims are brought under the "protection of umbrellas" of BITs and FTAs. See Anthony C. Sinclair, 'The Origins of the Umbrella Clause in the International Law of Investment Protection' (2004) 20 Arbitration International 412

[1109] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012)

[1110] Christoph Schreuer, 'Travelling the BIT Route of Waiting Periods, Umbrella Clauses and Forks in the Road' (2004) 5.2 Journal of World Investment & Trade 231; See also A. A. Stanimir, 'Breaches of Contract and Breaches of Treaty: The jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of Contract Claims in SGS v. Pakistan and SGS v. Philippines' (2004) 5 Transnational Dispute Management 555

[1111] Jarrod Wong, Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations and the Divide between Developed and Developing Countries in Foreign Investment Disputes (2006) 14 George Mason Law Review 135, 166

[1112] For a general overview, see Katia Yannaca-Small, 'What About This "Umbrella Clause"' in Katia Yannaca-Small, Katia (ed) *Arbitration under international investment agreements: A guide to the key issues* (Oxford University Press 2010) 479

[1113] Italics mine

[1114] Lee Jaemin, 'Putting a Square Peg into a Round Hole - Assessment of the Umbrella Clause from the Perspective of Public International Law' (2015) 14 Chinese J Int'l L 341, 343.

[1115] Haersolte Hof & Anne K Hoffman, 'The Relationship between International Tribunals and Domestic Courts' in: Peter Muchlinski, Federico Ortino & Christoph Schreuer (eds.*), The Oxford Handbook of International Investment Law* (2008), 962

[1116] See, *SGS v. Pakistan* (ICSID Case No. ARB/ 01 /13), Decision on Jurisdiction, (3 Aug. 2003); *SGS v. Philippines* (ICSID Case No. ARB/02/6), Decision on Jurisdiction, (29Jan. 2004); *Sempra Energy v. Argentina* (ICSID Case No. ARB/02/16), Decision on Annulment, (29 Jun. 2010); Noble Ventures Inc. v Romania (ICSID Case No. ARB/ 01 /11), Award, (12 Oct. 2005); El Paso Energy International Company v. Argentina (ICSID Case No. ARB/03/15), Decision on Jurisdiction, (27 Apr. 2006); CMS Gas Transmission Co. v. Argentina (ICSID Case No. ARB/01/8), Cite as 42 ILM 788, (2003), Decision of the Tribunal on Objections to Jurisdiction, (17 Jul. 2003); Toto Costruzioni Generali S.p.Av. Lebanon (ICSID Case No. ARB/07/12), Decision on Jurisdiction, (Sept. 2009).

interpretation of the same provision as possible.[1117] This is the classic situation where umbrella clauses are concerned, and even though BITs have now been in existence for over fifty years[1118] this asymmetric situation continues till the present day. Whereas in their earlier entrenched positions, developed states maintained that international law imposed certain obligations on Host States to protect the investments of foreign investors and pay prompt compensation for any expropriation, whilst developing countries denounced this as a way of curbing their regulatory autonomy and sovereignty, the positions have now evolved. The new arguments in this long-running saga of conflict between the foreign investment interests of developing and developed states[1119] are about how standards that both parties have agreed to in BITs, should be interpreted by arbitral tribunals. Some scholars have pointed out that it is in the interests of tribunals or arbitrators not to take an overly expansive view concerning jurisdiction, since '[a] single incident of an adventurist arbitrator going beyond the proper scope of his jurisdiction in a sensitive case may be sufficient to generate a backlash'.[1120]

Although part of the solution lies in the hands of arbitral tribunals, Host States also have a role to play in that a reformulation of provisos can result in more precisely worded clauses that leave no room for undue expansion by arbitrators. Ghana has taken a positive step in this direction in that the umbrella clause has been eliminated from the 2008 Model BIT. Article 14.8 of the 2008 Model BIT states that 'In the case where the investor and the Contracting Party in whose territory the investment is made have signed a State contract or an investment agreement, the procedure relating to the settlement of disputes foreseen in that contract or investment agreement shall apply to the settlement of disputes arising from the breach or violation of that contract agreement'. This is replicated in Article 14.9 of the Ghana-Turkey BIT,[1121] yet another indication that Ghana is perhaps maturing in her negotiating stance. This author would encourage Ghana to take next step which would be the establishment of a Specialist Negotiation and Drafting Team to ensure that these gains and the innovative provisions which have been introduced by other states are translated into all the other BITs to which Ghana is a signatory. This is because information obtained from the Office of the Attorney-General & Ministry of Justice shows that at present, there is no Specialist Negotiation and Drafting Team in place. The drafting of IIAs are undertaken by different Ministries depending upon the type of IIA being negotiated. BITs are negotiated by officials of GIPC, the Office of the Attorney-General & Ministry of Justice, the Ministry of Finance and Ministry of Foreign Affairs. Double Tax Agreements (DTAs) are negotiated by the Ghana Revenue Authority and Ministry of Finance, whilst Free Trade Agreements (FTAs) are negotiated by officials of the Ministry of Trade. As Principal Legal Advisor to the Government and pursuant to Article 88 of the 1992 Constitution, the Attorney-General reviews all IIAs before they are presented by the Sponsoring Ministry to Parliament for ratification, regardless of whether State Attorneys were part of the negotiating and drafting process.

[1117] For example, in both SGS arbitration proceedings have played out along these same lines: with Pakistan and the Philippines (the developing countries) calling for a restrictive interpretation of the umbrella clause, and investors from Switzerland (the developed country) seeking a broader interpretation. Notably, it is not merely the investors but also their governments who advocate an expansive interpretation of the umbrella clauses. This is hardly surprising since governments would be expected to champion the causes of their nationals. Case in point: After the *SGS v. Pakistan* decision was rendered, the Swiss authorities sent a letter to the ICSID Secretariat noting that they were "alarmed about the very narrow interpretation given to the meaning of [the umbrella clauses of the Switzerland-Pakistan BIT], which . . . runs counter to the intention of Switzerland . . . " Note on the Interpretation of Article 11 of the Bilateral Investment Treaty between Switzerland and Pakistan in the light of the Decision of the Tribunal on Objections to Jurisdiction of ICSID in Case No. ARB/01/13 SGS Société Générale S.A. versus Islamic Republic of Pakistan, attachment to Letter from Marino Baldi, Swiss Secretariat for Economic Affairs, to the ICSID Deputy-Secretary General (Oct. 1, 2003), reprinted in 19 MEALEY'S INT'L ARB. REP. 1 (2004). This divide separating developed and developing countries in foreign investment disputes dates back to the formative years of international investment law itself.

[1118] First recorded BIT was signed in 1959 between Pakistan and Germany.

[1119] Jarrod Wong, Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations and the Divide between Developed and Developing Countries in Foreign Investment Disputes (2006) 14 George Mason Law Review 135, 177

[1120] Jan Paulsson, 'Arbitration Without Privity' (1995) 10.2 ICSID Review: Foreign Investment Law Journal 232; See also Wei Shen, 'The Good, the Bad or the Ugly? A Critique of the Decision on Jurisdiction and Competence in Tza Yap Shum v. The Republic of Peru' (2011) 10.1 Chinese Journal of International Law 55

[1121] Ghana-Turkey BIT

5.7 A CRITICAL EVALUATION OF THE POTENTIAL FOR FUTURE CASES BEING BROUGHT AGAINST GHANA UNDER THE UMBRELLA OF BITS IN EXISTENCE

To evaluate and analyse the potential for future cases being brought against Ghana under the umbrella of the BITs presently in existence, this section will examine Ghana's history as a Respondent in arbitral proceedings under IIAs. As has been explained earlier on in this thesis, due to the private (some would say, secretive)[1122] nature of ISDS proceedings, most proceedings are conducted out of the public gaze. The exception to this rule, is the International Centre for the Settlement of Investment Disputes (ICSID)[1123] which has on its website, details of proceedings both concluded and pending, and which is a great source of information. ICSID continues to evolve and amend its rules to bring it in line with the concerns for transparency articulated by the public, and therefore this thesis will discuss primarily cases available on the ICSID database. This section critically evaluates the potential for future cases being brought against Ghana under the umbrella of the BITs presently in existence and to do that, it would be helpful to interrogate the trajectory of the previous cases brought against the State in Ghana.

In the 1989 case of *Biloune v Ghana* [1124] where a Syrian national alleged expropriation, the Arbitral Tribunal found in favour of the claimant, stating that Ghana's actions in terminating an agreement with the claimant for the construction of a hotel resort complex in the capital city, amounted to expropriation, despite the fact that the investor had not procured a construction permit as required.

Alleging expropriation in the ICSID case *of Vacuum Salt Products Limited v. Republic of Ghana* the claimant, *Vacuum Salt Products Ltd*, instituted arbitration proceedings against the Government of Ghana stating it 'suffered both a breach and progressive expropriation of its contractual rights' to produce the salt when the Government breached and terminated the lease agreement.[1125] The claimant company had entered into a thirty-year lease agreement with the Government in 1988 for salt production and mining in Ada-Songor Lagoon. The investor who had brought the case was a Greek national who owned only 20% of the shares in the company. The Ghana government objected to the jurisdiction of the Tribunal on the grounds that the company, which was incorporated in Ghana under Art. 179 of the Companies Act 1963, was a national of Ghana and not Greece. In 1994, the ICSID Tribunal upheld Ghana's submission, dismissing the claim for want of jurisdiction, deciding that each party must bear its own expenses of the proceedings, with the fees and expenses of the arbitration being borne equally.[1126]

In a 2003 case between *Telekom Malaysia Berhad (TMB),* a Malaysian telecommunication company, and Ghana, the case was settled on terms that are not public. The available facts of that case are that TMB invested USD38 million in Ghana Telecommunications Company Limited (GTCL) and acquired 30% of shares, and control over and management GTCL. After a dispute arose between the parties as

[1122] See Carlos G. Garcia, 'All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration' (2004) 16 Fla J Int'l L 301; Daniel Barstow Magraw Jr. & Niranjali Manel Amerasinghe, 'Transparency and Public Participation in Investor-State Arbitration' (2009) 15 ILSA J Int'l & Comp L 337; Gary Clyde Hufbauer, 'Investor-State dispute settlement' in Cathleen Cimino-Isaacs and Jeffrey J. Schott (eds.) *Trans-Pacific Partnership: An Assessment* (Vol. 104. Peterson Institute for International Economics 2016) 197; Lucas Bastin, 'Amici Curiae in investor-State arbitration: Eight recent trends' (2014) Arbitration International 30.1 125; Chris Ford, 'What Are Friends For - In NAFTA Chapter 11 Disputes, Accepting Amici Would Help Lift the Curtain of Secrecy Surrounding Investor-State Arbitrations' (2005) 11 Sw J L & Trade Am 207, 212; Karen Halverson Cross, 'Converging Trends in Investment Treaty Practice' (2012) 38 NCJ Int'l L & Com Reg 151, 152; See also Andrew de Lotbinière Mcdougall and Ank Santens, 'ICSID Amends Its Arbitration Rules.' (2006) International Arbitration Law Review 119; Sergio Puig, 'Emergence & Dynamism in International Organizations: ICSID, Investor-State Arbitration & International Investment Law' (2013) 44 Geo J Int'l L 531, 565; Anthony De Palma, 'Nafta's powerful little secret' (2001) 11 New York Times 1.

[1123] https://icsid.worldbank.org/ accessed 09.10.2022.

[1124] *Biloune v Ghana*. Damages were awarded against Ghana in the following terms: payment to Biloune of USD334,637, £61,811 and DM430; payment of USD100,000 to counsel for the investor; and payment of arbitration costs and fees of USD84,781.

[1125] *Vacuum Salt Products Limited v. Republic of Ghana* (ICSID Case No. ARB/92/1) (Award declining jurisdiction over the dispute rendered on 16 February 1994)

[1126] http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C143/DC679_En.pdf accessed on 09.10.2022.

to TMB's interest in GTCL, TMB initiated arbitration proceedings for purported breaches by Ghana of its BIT with Malaysia, claiming damages for expropriation of its investment in GTCL.[1127]

The 2010 case *Gustav FW Hamester GmbH & Co KG v Ghana*,[1128] arose from a dispute submitted to ICSID on the basis of the on the basis of the Treaty between the Federal Republic of Germany and the Republic of Ghana for the encouragement and reciprocal protection of investments of February 24, 1995 (the "BIT"), which entered into force on 23 November 1998, and which has previously been discussed in this thesis, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"). The dispute related to a cocoa beans processing and trade joint-venture between a German investor and a statutory company established under the laws of Ghana. The joint-venture partners created a company registered in Ghana which took over the assets of an existing factory for the processing of cocoa beans, sheanuts and other related products. The Ghanaian partner supplied cocoa beans to the joint-venture company and the German partner contributed to the modernisation of the factory and purchased the refined products. The investor claimed damages for alleged breaches by Ghana of specific standards in the BIT, namely FET, FPS and NT. According to the investor, by imposing a ban on the export of the company's products and a price agreement on the company, the State had usurped the management of the company and therefore was in breach of the BIT. In 2010, the ICSID Tribunal found against the claimant, holding that Ghana Cocoa Board is a separate legal entity whose acts could not be attributed to the State. The investor claimed costs in the total amount of £697,801.45 while the Republic of Ghana claimed a total of £2,326,712.84.262 Both Parties' claims included their respective arbitration costs, being advances paid to ICSID of USD 305,000 each. The Tribunal stated that having considered all the circumstances of this case, including the request for provisional measures by Ghana; the rejection of the Respondent's jurisdictional objections; and the outcome on the merits in favour of Ghana, it concluded that it was fair overall for the Parties bear the costs of the arbitration in equal shares, and for each Party to bear its own legal and other costs expended in connection with this arbitration.[1129]

One of the cases that directly challenged Ghana's constitutional powers and responsibilities involved a foreign investor's claim that the State had breached a Power Purchase Agreement (PPA) for the refurbishment and commissioning of a diesel and gas barge and associated facilities. This was the case of *Balkan Energy Limited (Ghana) v Ghana.*[1130] In this case, the State's argument was that the PPA was invalid because it required parliamentary approval under Article 181(5) of the Constitution of Ghana, which stated that an "international business or economic transaction" required prior Parliamentary approval, and that Parliamentary approval had not been obtained. The Tribunal in its Award on Merits dated 1st April 2014 ordered that the PPA be terminated, the Respondent was ordered to pay the Claimant 12 million USD in consideration of the Claimant's commissioning works at the Power Station, as well as an additional amount of 50,000 USD in respect of the arrest of one of the Claimant's officers, with interest accruing until final payment, whilst the Claimant was ordered to pay the Respondent 300,000 USD for its own breach of contract as per the Respondent's counterclaim. Each party was also ordered to pay half the costs of the arbitration which totalled 1,002,689.29 USD, with the Respondent ordered to reimburse the Claimant for excess payment in the sum of 30,000 USD.[1131]

Another case in which a similar argument was put forward was the case of *Bankswitch Ghana Ltd (Ghana) v Ghana*,[1132] which concerned an agreement for an investor to provide a secure document management system for the Government of Ghana. The issue in the *Bankswitch* case was also whether or not the agreement between the State and the company constituted an "international

[1127] *Telekom Malaysia Berhad v. Republic of Ghana* (PCA Case No. 2003-03) (settled)
[1128] *Gustav F W Hamester GmbH & Co. KG v. Republic of Ghana* (ICSID Case No. ARB/07/24) (Award rendered on 18 June 2010)
[1129] https://www.italaw.com/sites/default/files/case-documents/ita0396.pdf accessed on 09.10.2022.
[1130] See *Balkan Energy Limited (Ghana) v Ghana*, UNCITRAL, PCA Case No. 2010-7, Interim Award, 22 December 2010.
[1131] https://www.italaw.com/sites/default/files/case-documents/italaw8640.pdf accessed on 18.09.2024
[1132] *Bankswitch Ghana Ltd (Ghana) v The Republic of Ghana* PCA 118294, UNCITRAL Award Save as to Costs, 11 April 2014

business or economic transaction" that had to be approved by Parliament. In each of these cases, the governing Investment Agreement stated that any disputes must be settled by arbitration, hence the relevance to this work. The Supreme Court of Ghana agreed that each of these cases fell within the description of an "international business or economic transaction" under Article 181 of the Constitution, and therefore required prior Parliamentary approval, which had not been obtained. Both rulings were disregarded by both investment tribunals, which merely conceded that the Court's approach was one possible way of interpreting the provision. Disregarding the decision of the Supreme Court of Ghana, both arbitral tribunals went ahead in 2014 to adopt their own interpretation of the law and by so doing, usurped the judicial powers of the Supreme Court under the Constitution. In the operative part of their Final Award, the Tribunal rejected the Claimant's Application for the Tribunal to sign and issue the Award on Agreed Terms without the signature of the Respondent, declared that the Respondent had breached its obligations under Clauses 5 and 7 of the Agreement and awarded the amount of GHc 197,401,874 to the Claimant.[1133]

The most recent known case was brought before an ICSID Tribunal by *AngloGold Ashanti (Ghana) Limited* (AngloGold or the Claimant) against the Republic of Ghana on the basis of a Mining Lease entered into by the Government of Ghana and AngloGold. As a preliminary matter, the Government of Ghana filed a Memorial on jurisdiction, setting out its preliminary objections to jurisdiction and requesting that these objections be resolved on a preliminary basis. In 2018, the Claimant advised the Tribunal that the Parties had resolved their dispute and signed a confidential Settlement Agreement, adding that it was thereby withdrawing its claims and requested the proceedings to be discontinued.[1134]

Therefore, it is clear from the examples above that regardless of the fact that Ghana may have prevailed in the majority of known cases brought against it by an investor, the State has nevertheless had to bear the not inconsiderable financial costs of defending cases brought against it, as well as the cost of time expended by the State in investigating the facts surrounding the case and mounting a defence. As stated by the Government of Ghana in another case brought before an Arbitral Tribunal, and which became the subject of several hearings by a Parliamentary Public Accounts Committee in Ghana, 'there is a limit to how much the Government can pay' and these 'judgments against the State are invariably judgments against the Ghanaian taxpayer'.[1135]

Furthermore, in addition to the known cases examined above, there are presently two ongoing cases instituted by the same Claimant, pending before Arbitral Tribunals brought against Ghana, namely *Beijing Everyway Traffic and Lighting Tech. Co Ltd v. the Government of the Republic of Ghana,* brought before the LCIA[1136] and *Beijing Everyway Traffic and Lighting Tech. Co Ltd v. the Government of the Republic of Ghana,* an ad hoc arbitration.[1137] In respect of the ad hoc arbitration case, the arbitration arises from an Investment Treaty Claim brought by the Claimant under the Agreement between the Government of the People's Republic of China and the Government of the Republic of Ghana Concerning the Encouragement and Reciprocal Protection of Investments (the Ghana-China Agreement) concluded on 12 October 1989.[1138] On 17 September 2012, the Claimant and the Government of the Republic of Ghana (the Respondent) entered into an Engineering, Procurement, Installation and Commissioning Contract (the EPIC Contract) under which the Claimant had agreed with the Respondent, to supply equipment and provide technical services for the planning, design, construction, supervision, operation and training for a Traffic Management Project in the Accra

[1133] Bankswitch v. Ghana, Award Save as to Costs, 11 Apr 2014 (jusmundi.com) accessed on 18.09.2024
[1134] *AngloGold Ashanti (Ghana) Limited v. Republic of Ghana* (ICSID Case No. AR/16/15) (discontinued on 7 August 2018)
[1135] See Dominic Dagbanja, 'The Investment Treaty Regime and Public Interest Regulation in Ghana: Perspectives in Constitutionalism and General International Law' (2015) Diss. ResearchSpace@ Auckland 10
[1136] https://www.lcia.org/LCIA/introduction.aspx accessed 20.08.2022.
[1137] Beijing Everyway Traffic and Lighting Company Limited v. Ghana, PCA 2021-15
[1138] China - Ghana BIT (1989) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub accessed 17.08.2023.

Metropolitan Area. In the ad hoc arbitration, initiated on 10 February 2021, the Claimant prayed in aid Direct and/or Indirect Expropriation, FET, MFN and an 'umbrella clause', and sought an order awarding Everyway the damages which it claimed to have incurred as a result of breaches of the Ghana-China Treaty estimated at a figure not lower that USD 55 million. As a preliminary issue, the Claimant sought a declaration from the Tribunal that it had jurisdiction over the Claimant's claims arising from the Ghana-China Agreement. The Government of Ghana sought a declaration that the Tribunal had no jurisdiction over the Claimant's claims, and contended that moreover, with regards to the merits of the dispute, it had not breached the Treaty because Parliament had taken the decision to rescind the approval of the EPIC Contract in the interests of Ghana's national security. After deliberations, the Tribunal on 30 January 2023 rendered its decision,[1139] upholding the Respondent's objections to the Tribunal's jurisdiction and finding that it had no jurisdiction to hear the Claimant's claims. The Tribunal also stated that it did not consider that the question of its jurisdiction in the case before it was affected by the existence of the ongoing parallel arbitration proceedings between the parties under the LCIA Rules, since (regardless of the fact that both arbitrations arose from the same facts) those proceedings concerned the Respondent's obligations under the EPIC Contract, whilst the ad hoc proceedings before this Tribunal concerned the Respondent's obligations under the Ghana-China Agreement.[1140]

It is of note that in each of the past five years (from 2018 to 2022), China has been one of the top four sources of FDI into Ghana. Additionally, it would seem on the face of it, that the same investor has chosen to bring two cases before separate tribunals, a situation which is unfortunately not uncommon in the ISDS 'universe'. Due to the nature of ISDS proceedings, not much more is known about the LCIA case save for the fact that the proceedings were initiated by the same Claimant on 17 May 2021 under the Rules of the London Court of International Arbitration based on sub-clause 20.8 of the General Conditions of the EPIC Contract. Regardless of the lack of detail as to progress, the fact of the existence of these cases underlines the fact that to protect itself from future allegations of breaches of IIA standards, it would be in Ghana's best interests to undertake an overhaul of its IIAs as proposed in this thesis.

5.8 CONCLUSION

Following on from the research set out above, the findings of this thesis are as follows:

Firstly, Ghana presently does not have a dedicated team of Specialists tasked with negotiating (or renegotiating) and drafting IIAs as well as keeping a record of the innovative clauses presently in the International Investment Arena which could be of great assistance to Ghana in its bid to reclaim RA.

Secondly, Ghana has had several proceedings brought against the country under the ISDS regime by foreign private investors resulting in substantial sums of taxpayers' monies being spent on defending claims and also on servicing Awards that have been imposed upon the state.

Thirdly, Foreign private investors are continuing to invest in a wide range of industries, and Ghana's programme of encouraging investors also continues apace as evidenced by pronouncements on the GIPC website[1141] and by the contents of the Ghana Investment Promotion Centre Act 2013 (GIPC Act).[1142]

[1139] Save as to Costs, inviting the Parties to directly confer on the issue of costs of the arbitration to date and failing such agreement, to inform the Tribunal of their agreed format and timetable of their costs submissions within thirty days of receipt of the Award
[1140] See Final Award on Jurisdiction (Save as to Costs) - https://www.italaw.com/cases/10145 accessed on 17.08.2023.
[1141] https://www.gipc.gov.gh/about-gipc/ accessed on 15.07.2023.
[1142] https://www.gipc.gov.gh/wp-content/uploads/2023/04/GHANA-INVESTMENT-PROMOTION-CENTRE-GIPC-ACT-865.pdf accessed 15.07.2023.

Fourthly, Ghana's BITs are all old generation[1143] IIAs with none of the new innovative provisions available that could assist Ghana in protecting its RA and redefining the country's economic sovereignty.

Additionally, the empirical evidence set out in this Chapter shows the existence of two known cases[1144] pending against Ghana presently where the underlying Treaty Agreement is one of Ghana's old-style BITs.[1145] This fact, together with the trends in other developing country Host States, indicates that there is a very high likelihood that unless Ghana's BITs are re-negotiated and drafted with new-generation innovative clauses as per the examples previously referred to in this thesis, there is a high probability of more cases being brought against Ghana by foreign investors under the auspices of any of the BITs presently in force. This will result at the very least, in Ghana having to spend taxpayers' monies to defend the cases, or if there is a finding in favour of the foreign investor and an Award against Ghana, the result will be that the government will have to spend even more taxpayers' monies in paying off an Award and costs.

In the next chapter an analysis of the findings of this chapter will be provided, together with an examination of the potential implications for Ghana if the status quo is retained and nothing changes. Chapter Six will also set out possible solutions and recommendations aimed at resolving the problem that forms the rationale of this thesis.

[1143] Also referred to in Table Two [5.3] as First and Second-Generation BITs.
[1144] *Beijing Everyway Traffic and Lighting Tech. Co Ltd v. Ghana*, and *Beijing Everyway Traffic and Lighting Tech. Co Ltd v. Ghana*
[1145] China - Ghana BIT (1989) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub accessed 17.08.2023.

Chapter Six – A Case for a Specialist Team for Ghana

6. INTRODUCTION

In the previous chapter, this thesis used a Case Study methodology to provide empirical evidence in support of the contention that the provisions of the domestic legislation as well as the processes in place for the negotiation and drafting of IIAs in Ghana presently, coupled with the provisions of its current old- generation BITs do not afford adequate protection for the regulatory autonomy of Ghana as a Host State. Due to this situation, there is a very high probability that more cases will be brought against Ghana by private foreign investors under the umbrella of the old- generation BITs that Ghana has entered into with the Home States of these foreign private investors.

Following on from that, this chapter will be presented in two parts. The first part will provide an analysis of the findings of the previous chapter and explain the potential implications for Ghana if the status quo is retained and nothing changes. The second part of this chapter will set out possible solutions and recommendations aimed at resolving the problems identified in the findings by presenting examples from some of the RECs in Africa as well as from some developing and developed countries to inform the recommendations to be proposed in this thesis, utilising the comparative methodology referred to in Chapter Three. This will be with a view to finding a potential solution to the research problem and related questions identified in Chapter One.

Furthermore, of relevance with regards to possible solutions and recommendations is the emerging importance of the AfCFTA[1146] and the Protocol on Investment annexed to the AfCFTA. The creation of the AfCFTA, reported as being the largest Free Trade Area in the world to date,[1147] could bring about a marked increase in intra-African trade and intra-African investment. This could in turn encourage BITs between African states where there would not be such a stark power imbalance because most of the states would be at similar stages of development. This is a course of action worthy of consideration by Ghana as intra-African BITs may result in less asymmetrical agreements for both signatory states. This thesis has previously examined some South-South BITs presently in existence, such as the Nigeria-Morocco BIT[1148] which has some very innovative provisions that will be considered when reviewing the possible solutions to be incorporated into the proposed toolkit available to a Specialist Team. Any recommendations will be tested against comparable solutions or proposals already in existence, such as the UNCITRAL WG III Multilateral Advisory Centre proposal which is based on the WTO Advice Centre model.

6.1. AN ANALYSIS OF THE FINDINGS IN CHAPTER FIVE

This first part will provide an analysis of each of the findings of the previous chapter and explain the potential implications for Ghana if the status quo is retained and nothing changes. A fully considered conclusion will be provided at the end of the discussion.

6.1.1 LACK OF A DEDICATED TEAM OF SPECIALISTS IN GHANA

The lack of a dedicated team of Specialists tasked primarily with negotiating or renegotiating and drafting IIAs as well as keeping track of the innovative clauses presently in the International Investment Arena means that there is no concerted overview of the legislative landscape with regards to Ghana's IIAs. The potential implications for Ghana if the status quo is retained and nothing changes are that Ghana will retain its IIAs and its BITs in the outmoded format in which they presently are. As previously outlined, the provisions in these BITs are problematic in that firstly, they lend themselves

[1146] Home - AfCFTA (au-afcfta.org) accessed on 28.07.2023.
[1147] Michael Asiedu, 'The African continental free trade agreement (AfCFTA)' (2018) Global Political Trends Center (GPoT) 1; See also Hippolyte Fofack, 'Making the AfCFTA work for 'The Africa we want' (2020) Brookings Africa Growth Initiative Working Paper 2
[1148] Morocco - Nigeria BIT (2016) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub accessed 14.07.2023. This BIT was signed on 03.12.2016 but is not yet in force.

to foreign private investors utilising those provisions to challenge regulatory actions by the Government, including actions that are in the public interest. Secondly, the provisions are problematic in that all the BITs in existence allow private foreign investors to have recourse to ISDS without any filter requiring them to first utilise national courts or national arbitral institutions. Thus, a private foreign investor who believes (rightly or wrongly) that the value of their investment has been negatively impacted by the actions of the government seeking to exercise its RA, can bring proceedings against the Government of Ghana with impunity.

Additionally, another potential implication of the lack of the existence of a team of Specialists as set out above is that there is no single body tasked with checking up on those BITs whose initial terms are approaching their expiration date. The norm in most of these old-style BITs is that at the expiration date, it is open to the Host State to either cancel the BIT, allow it to roll over on the same terms as before, or open negotiations with the Home State in relation to the BITs, which would give the Host State the opportunity of reviewing the BITs. Without dedicated oversight and the type of overview that such a team of Experts could provide, the government does not have a systematic operation in place to conduct a full and regular review of BITs coming up for renewal in a timely manner, nor does it have a system in place to conduct a proper review of the provisions of the BITs in place through the lens of the Strategic Investment Objectives of the government.

Finally, yet another potential implication, should the status quo be retained, is that there is no identifiable group of Specialists with the joined-up thinking and expertise needed to be on the lookout for innovations taking place elsewhere in the world that could potentially be beneficial to Ghana. The present position according to information received from the Ministry of Justice is that the responsibility for drafting of IIAs are split between different Ministries depending upon whether the IIA in question is a BIT (negotiated by GIPC, the Office of the Attorney-General, the Ministry of Finance and the Ministry of Foreign Affairs), a DTA (negotiated by officials of the Ghana Revenue Authority and the Ministry of Finance) or an FTA (negotiated by officials from the Ministry of Trade). As a result of this fractured method of negotiating, Ghana's Model BIT has none of the new and innovative provisions that have previously been discussed in this thesis and which could exponentially increase the ability of Ghana to protect its Regulatory Autonomy and redefine its sovereignty. There are new and innovative BIT provisions being introduced around the world (both on the African continent and also further afield in the Global North) that would be immensely helpful to Ghana. Additionally, other developing world Host States are using new and innovative provisions in their own national legislation and removing ISDS provisions from all BITs to which they are signatory, which is a route that Ghana could potentially adopt if it had a team actively looking out for such innovations.

6.1.2 GHANA HAS HAD SEVERAL PROCEEDINGS BROUGHT AGAINST IT BY FOREIGN INVESTORS

The fact that Ghana has had several proceedings brought against the State under the ISDS regime by foreign private investors as set out in Chapter Five, resulting in substantial sums of taxpayers' monies spent on defending claims and on servicing Awards that have been imposed on the state, is problematic for the government of Ghana for several reasons.

Firstly, although Ghana may not have suffered as many defeats at the hands of foreign private investor claimants in Arbitral Tribunals as other developing countries have, the research shows that the cost of having to defend a case takes its toll on the coffers of the State, even if the State eventually wins the case.[1149] Additionally, the potential of a regulatory chill, although difficult to quantify, is one that

[1149] For example, *Vacuum Salt Products Ltd case. See* http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C143/DC679_En.pdf accessed on 09.10.2022.

cannot be under-estimated. As has been noted by several eminent commentators,[1150] the result of the existence of the potential of a foreign investor or transnational corporation instituting an Arbitration case against a State, is often enough to prevent the State from pursuing policies that are clearly for the benefit of its citizens. Although this thesis is focussed on IIAs and BITs, there is evidence in support of the fact that the problem of regulatory chill could be more widespread than previously thought. In a recent paper which considered whether international trade and investment agreements were responsible for generating regulatory chill in public health policymaking, the authors Milsom, Smith, Walls and Modisenyane,[1151] using SA as a single case study, concluded that although SA's trade obligations currently seemed to play a more prominent role in inhibiting action with regards to policies pertaining to nutrition and alcohol than BIT-related concerns, that given the potential for wider use of the ISDS mechanism by transnational health commodity corporations in the future, it was important to ensure that there were strategies in place to protect the public health policy space in the context of both international trade as well as the context of investment treaty and dispute settlement.[1152] This conclusion echoes previous findings by other authors.[1153] Shekhar, for instance, describes the concept of 'Regulatory Chill' as 'a restraint of States to enact certain regulatory or public policy measures as a result of arbitration, or a fear thereof, under ISDS provisions, thereby constraining the States' right to regulate',[1154] concluding that the effects of 'Regulatory Chill' are clearly detrimental to general public welfare.[1155] He describes how a State's obligation to manage its natural, economic and social reserves for the benefit of present and future generations could be negatively impinged upon if the State's policy space to regulate in the area of Sustainable Development for instance, was directly constrained because of the fear of facing arbitral proceedings under ISDS, for example. Regulatory Chill could also result in governments desisting from promulgating domestic legislation that would benefit their citizens for fear of retribution via arbitration. Potential solutions to this crippling issue will be discussed later in this chapter.

6.1.3 GHANA'S PROGRAMME OF ENCOURAGING FOREIGN INVESTORS COULD BE PROBLEMATIC

The issue of foreign private investors continuing to invest in a wide range of industries, and Ghana's programme of encouraging investors as portrayed by pronouncements on the GIPC website evidenced earlier in this thesis could potentially be extremely problematic for Ghana if pursued without robust oversight. This is because although on the face of it, being a welcoming destination seems to be a very positive position for a developing country looking to attract FDI to be in, this must be seen in the round. The 'Welcome Message' on the GIPC website from the President of Ghana begins with the pronouncement that 'There is a new Ghana that is emerging with a sense of urgency and purpose. We have set our sights on becoming self-reliant and moving beyond aid, and we need you our investors

[1150] Penelope Milsom, Richard Smith, Simon Moeketsi Modisenyane *et al.,* 'Do international trade and investment agreements generate regulatory chill in public health policymaking? A case study of nutrition and alcohol policy in South Africa' (2021) Globalization and Health 17, 1.
[1151] Penelope Milsom, Richard Smith, Simon Moeketsi Modisenyane *et al.,* 'Do international trade and investment agreements generate regulatory chill in public health policymaking? A case study of nutrition and alcohol policy in South Africa' (2021) Globalization and Health 17, 1
[1152] Penelope Milsom, Richard Smith, Simon Moeketsi Modisenyane *et al.,* 'Do international trade and investment agreements generate regulatory chill in public health policymaking? A case study of nutrition and alcohol policy in South Africa' (2021) Globalization and Health 17 1, 15
[1153] See Ashley Schram, Sharon Friel, J. Anthony VanDuzer, Arne Ruckert & Ronald Labonté, 'Internalisation of international investment agreements in public policymaking: developing a conceptual framework of regulatory chill' (2018) Global Policy, 9.2 193; See also Eckhard Janeba 'Regulatory chill and the effect of investor state dispute settlements' (2019) Review of International Economics 27. 4 1172; See also Anna Sands, 'Regulatory chill and domestic law: Mining in the Santurban Paramo' (2023) World Trade Review 22.1 55
[1154] Satwik Shekhar, 'Regulatory chill: taking right to regulate for a spin' (2016) New Delhi2016
[1155] Satwik Shekhar, 'Regulatory chill: taking right to regulate for a spin' (2016) New Delhi2016

as partners on this journey'.[1156] The additional information on the "About Ghana" portion of the webpage states amongst other things that:

> …Ghana's economy is one of the most diversified on the continent, with a strong agricultural sector, thriving manufacturing industry, and growing services sector. The government has also made significant efforts to promote tourism and attract foreign investment, which has resulted in a range of exciting opportunities for businesses and individuals looking to expand their horizons.[1157]

Whilst these are all very positive and encouraging messages for foreign investors wishing to invest in the country, it is crucial that there is enough oversight over these opportunities, to ensure that the domestic legislation and equally importantly, the BITs under which these foreign investors enter the economy, have robust protections in place for the national economy and for the Republic and Government of Ghana, in relation to dispute resolution provisions. It is noteworthy that the Key Sectors for investment, according to the GIPC website[1158]are Agriculture and Agro-Processing, Oil & Gas, Health, ICT and Fintech, Manufacturing, Mining and Mineral Processing, Property Development, Recreation and Tourism, Energy, Education, Financial Services, and Transport Infrastructure. Interestingly, according to the 4th Quarter Report which covers Oct to Dec 2021 (the most recent Quarterly Report available on the website)[1159] the sectors that received the most FDI from January to December 2021 were[1160] Agriculture (17.42), Export Trade (67.72), Oil & Gas/ Petroleum[1161] (265.82), Building / Construction (55.46), General Trading (69.51), Manufacturing (131.42) and Services (689.91). Additionally, the sectors that were expected to provide the most jobs for local citizens[1162] were Agriculture (366 jobs), Export Trade (704 jobs), Oil & Gas / Petroleum (1 job), Building / Construction (3292 jobs), General Trading (1274 jobs), Manufacturing (2426 jobs), Services (5927) and Liaison (350). Without a follow-up report however, it is not clear whether or not the anticipated employment opportunities for the citizens in-country ever materialised or indeed to what extent "knowledge transfer" was achieved for the benefit of the citizens. It would be problematic for the future of Sustainable Development in the country if the vast majority of jobs created were either unskilled or semi-skilled and did not entail any form of "knowledge transfer" to citizens which could benefit Ghana in the long term. Also, there does not seem to be a clear correlation between the sectors that foreign investors are interested in investing in, and the sectors that the Government of Ghana has designated as being of greatest interest to the country and to the country's economic aims, which is also problematic for the future development of the country's economy.

Tangentially but of great relevance, with regards to global FDI, the UNCTAD WIR 2023[1163] shows that global FDI to developing countries fell by 12% in 2022 and analyses how Investment Policy and Capital Market trends impact investment in Sustainable Development Goals, (SDGs), particularly clean energy. The UNCTAD WIR 2023 goes on to make a point with regards to SDGs, namely that developing countries face a widening annual investment deficit as they work to achieve the SDGs by the decided date of 2030, which is less than a decade away. According to the UNCTAD WIR 2023, when the SDGs were initially adopted in 2015, the gap was 2.5 trillion USD per year. This gap is now in the region of 4 trillion USD per annum, and it is anticipated that this gap will continue to widen. The UNCTAD WIR 2023 highlights that although developing countries need renewable energy investments of about 1.7 trillion USD each year, they attracted only 544 billion USD in clean energy FDI in 2022 and calls for

[1156] https://www.gipc.gov.gh/why-ghana-2/ accessed on 15.07.2023.
[1157] https://www.gipc.gov.gh/why-ghana-2/ accessed on 15.07.2023.
[1158] https://www.gipc.gov.gh/why-ghana-2/# accessed on 15.07.2023.
[1159] https://www.gipc.gov.gh/wp-content/uploads/2023/03/4th-Quarter-2021-Investment-Report.pdf accessed 15.07.2023.
[1160] https://www.gipc.gov.gh/wp-content/uploads/2023/03/4th-Quarter-2021-Investment-Report.pdf - Fig 2b: Sector breakdown projects registered by FDI value (US$ M): January – December 2021. Accessed on 19.07.2023.
[1161] NB: Oil and gas includes petroleum (upstream) services. Petroleum (upstream) refers to petroleum exploration and production.
[1162] https://www.gipc.gov.gh/wp-content/uploads/2023/03/4th-Quarter-2021-Investment-Report.pdf - Figure 5: Expected jobs to be created for Ghanaians & Non-Ghanaians per sector: January – December 2021. Accessed on 19.07.2023.
[1163] https://unctad.org/publication/world-investment-report-2023 accessed on 15.07.2023.

urgent support to developing countries to enable them to attract significantly more investment for their transition to clean energy. The UNCTAD Secretary General, Rebecca Grynspan, states in the same report that 'a significant increase in investment in sustainable energy systems in developing countries is crucial for the world to reach climate goals by 2030'.[1164] The report concludes by proposing a "Compact" which would set out priority actions, which could range from financing mechanisms to investment policies, with a view to ensuring sustainable energy for all. This is very relevant to this thesis because according to the Chief Executive Officer (CEO) of GIPC speaking at an event in Ghana in July 2023, it is very important for Ghana to attract FDI as a route to attaining her SDGs, making particular reference to the sectors of Agro-processing, Manufacturing, Tourism, Infrastructure, Education, Health and Creative Arts, where enormous opportunities [presumably for foreign investors] exist.[1165] Speaking on the theme "Promoting bilateral investment: Igniting growth and strengthening economic partnerships", the CEO of GIPC called for stronger bilateral partnerships and investments aimed at assisting with the attainment of the SDGs, and in particular, in relation to the acceleration of the attainment of the first SDG, which is poverty reduction and alleviation, through government projects and programmes such as the Free Senior High School (Free SHS) and Livelihood Empowerment Against Poverty (LEAP).

All the above, when coupled with the fact that a panel comprising members of the investing community and diplomatic missions present at the event, called upon the Government of Ghana to give consideration to 'the enhancement of bilateral and multilateral agreements by removing tariffs and quotas to enhance market access and facilitate the flow of goods and services'[1166] a move that it was claimed would drive the attainment of the SDGs and more FDI into the country, it is clear that it is essential to have in place a team of Specialists with the relevant expertise to provide an overview of the global position where FDI is concerned and feed that into the discussion about whether or not moves such as reduction of trade tariffs, expansion of market access etc., are really the best way to drive / attract more FDI into the country to attain the SDGs. Additionally, the question needs to be addressed as to which method of attracting FDI is in the best interests of the country and its citizens.

In conclusion in respect of this finding, the CEO of GIPC declared at this discussion with foreign investors[1167] that the Government of Ghana was in the process of undertaking structural reforms to add value to its natural resources, with a clear focus on manufacturing and export. This thesis supports this change of narrative in Ghana. The focus to date has been on the export of Ghana's rich resources such as Gold, Diamond, Bauxite, Iron Ore, Lithium and Manganese in its raw form, and a shift to one of added value to the resources, would allow for increased export and productivity as well as the growth of both local of foreign businesses in the country via, inter alia, Public Private Partnerships (PPP)[1168] which could help redefine Ghana's sovereignty by embedding economic sovereignty. To obtain the best advantage for the country's RA however, a team of Specialists as proposed by this thesis would be of great value to the country.

6.1.4 GHANA'S BITS ARE OLD-GENERATION BITS WITH HARDLY ANY INNOVATIVE PROVISIONS

The final finding in Chapter Five was that Ghana's BITs are all old generation BITs with none of the new innovative provisions available that could assist Ghana in protecting its RA and redefining the country's economic sovereignty. Since all of the cases that have successfully been brought against Host States by private foreign investors have been brought under the auspices of old generation BITs that contain provisions to those contained in Ghana's BITs, it makes Ghana vulnerable to challenges to policies and actions of the government, however well-intentioned these policies and actions might be, if foreign

[1164] https://unctad.org/publication/world-investment-report-2023 accessed on 20.07.2023.
[1165] Ghana calls for stronger partnership, investments for SDGs attainment - Ghana Business News accessed on 19.07.2023.
[1166] Ibid
[1167] Ghana calls for stronger partnership, investments for SDGs attainment - Ghana Business News accessed on 19.07.2023.
[1168] Ghana calls for stronger partnership, investments for SDGs attainment - Ghana Business News accessed on 19.07.2023.

private investors contend that such actions have resulted in a loss or detriment to their investments. The implications of the existence of these provisions in the old generation BITs has been well documented earlier on in this thesis, but in particular, the most problematic provisions are: FET (Fair and Equitable Treatment), FPS (Full Protection and Security), MFN (Most Favoured Nation), Expropriation (Direct and Indirect) and the ISDS clause, which allows foreign investors to unilaterally submit a claim to an Arbitral Tribunal, citing a Host State as Respondent so long as there is an ISDS clause in the BIT.

In conclusion, the analysis above shows clearly that unless a course of action is embarked upon whereby Ghana can articulate a clear strategic overview of the economic aims of the country, coupled with any targets that the country may have been signed up to internationally (for instance, SDGs), there will continue to be a fragmented agenda and the possibility of the continued erosion of Ghana's RA. This situation, together with the possibility of many more disputes being submitted to International Arbitration by foreign investors under ISDS clauses in the BITs in existence, does not augur well for the short to long-term outlook of the economic interests of Ghana or for any chance for Ghana to reclaim its RA and redefine its sovereignty.

6.2 POTENTIAL SOLUTIONS TO THE FINDINGS IN CHAPTER FIVE

After providing an analysis of the findings arrived at in Chapter Five and examining the potential implications for Ghana if the status quo in respect of those findings remains unchanged, the second part of this chapter will examine IIAs and legislation from selected countries in the Global North and the Global South as well as from some of the RECs in Africa to inform the proposed recommendations which are aimed at finding a possible solution to the Research Question posed in this thesis.

This section of the chapter will discuss examples of innovative domestic legislation on the African Continent such as South Africa's Protection of Investment Act, 2015 (SA Act No. 22 of 2015),[1169] and the Namibian Investment Promotion Act, 2016[1170] (the Namibian Act) which were introduced as part of a review of each country's response to perceived encroachment by International Arbitral Tribunals under the ISDS regime upon their ability to regulate in the interests of their citizens. Following on from that, RECs with examples of Investment Agreements which will be highlighted as worthy of consideration are SADC,[1171] EAC[1172] and COMESA.[1173] Additionally, Ghana is a member state of another REC which has an example of Best Practice worthy of emulating or at least considering, namely ECOWAS,[1174] and in particular her Supplementary Act on Investment[1175] which was signed by the Heads of State of the ECOWAS countries in December 2008 and entered into force in January 2009. To conclude the collection of examples from the African Continent this section will briefly discuss the PAIC[1176] (which has previously been discussed in Chapter Four) and also the concept of a Pan African Investment Court, both of which could contain potential solutions to the Research Question posed in Chapter One.

In respect of examples from the Global North, this chapter will also consider the provisions of the Agreement that replaced NAFTA between the USA, Canada, and Mexico to provide an insight into how a dedicated team of Specialists advising a country (or in this case, three countries) can produce an

[1169] Protection of Investment Act 22 of 2015 (www.gov.za) accessed on 08.07.2023.
[1170] Namibia Investment Promotion Act 9 of 2016 (lac.org.na) accessed on 08.07.2023.
[1171] Home | SADC accessed on 27.07.2023.
[1172] East African Community (eac.int) accessed on 27.07.2023.
[1173] Common Market for Eastern and Southern Africa (COMESA) accessed on 27.07.2023.
[1174] Economic Community of West African States (ECOWAS) accessed on 27.07.2023.
[1175] ECOWAS Supplementary Act on Investments (2008) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub accessed on 08.07.2023.
[1176] Pan African Investment Code (PAIC) | African Union (au.int) accessed 29.07.2023.

Agreement which reflects their concerns in direct response to the perceived encroachment on the regulatory space of a country via Arbitration Awards imposed in proceedings brought under ISDS clauses. The examples listed above will be examined as part of an analysis of how to reclaim Ghana's regulatory autonomy and redefine Ghana's sovereignty.

6.2.1 REPLACING BITs WITH DOMESTIC LEGISLATION WHOSE PRIMARY FOCUS IS THE PROTECTION OF INVESTMENT AND WHICH IS ANCHORED UPON THE CONSTITUTION OF THE COUNTRY.

South Africa chose to deal with the issue of the encroachment upon her regulatory space by terminating several IIAs and then drafting a piece of domestic legislation whose primary focus was the protection of investment. This is the South Africa Protection of Investment Act 2015 (Act No. 22 of 2015).[1177] Whilst allowing for international Arbitration, this option in Act No. 22 of 2015 is predicated upon two important conditions, namely 'the exhaustion of domestic remedies' and secondly, that 'such arbitration will be conducted between the Republic and the home state of the applicable investor'.[1178] Furthermore, section 13(5) of Act No. 22 of 2015 states that 'the consideration of a request for international arbitration will be subject to the administrative processes set out in section 6', which makes it clear that such a request will not be automatically granted but will be the subject of consideration. These provisions are all aimed at the protection of the regulatory autonomy of the Host State, in this case South Africa (SA), and this could be a viable way forward for Ghana to reclaim its Regulatory Autonomy and redefine its Sovereignty. The reason why SA decided to undertake a risk assessment and total review of its BITs in 2007 with the aim of assessing the impact of the BITs on its economic growth and its ability to freely regulate its own internal matters was because of the result of certain arbitral proceedings initiated against SA.[1179] The results of the review, which were published in 2009, stated *inter alia* that:

> The current system had opened 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.[1180]

The most famous of the 'legitimate, constitutional and democratic policy-making'[1181] issues was one of South Africa's most notable apartheid-correcting policies, the Broad-Based Black Economic Empowerment Act, which was brought into effect in 2003 to 'advance economic transformation and enhance the economic participation of Black people …in the South African Economy'.[1182] It transpired that the implementation of this important Policy, which was supported by national legislation, would create, in effect, two classes of South African citizens, as some citizens would receive economic preference, whilst others would not. This meant that South Africa could fall foul of the National Treatment Standard in her BITs under which SA must treat foreign investors as well as they treat their own nationals. Although the preamble to the South African Constitution made reference to 'achieving equality and remedying past wrongs',[1183] the BITs to which SA was signatory were old-style BITs, so most of the preambles did not reserve any right to SA to rectify apartheid through domestic legislation, nor was there any indication of this aim in any of SA's IIAs. Because this was not incorporated into

[1177] Protection of Investment Act 22 of 2015 (www.gov.za) section 13(5) accessed on 08.07.2023.
[1178] Protection of Investment Act 22 of 2015 (www.gov.za) section 13(5) accessed on 08.07.2023.
[1179] retrieve (ebscohost.com) accessed on 28.07.2023. See also Engela C. Schlemmer, 'An overview of South Africa's bilateral investment treaties and investment policy' (2016) ICSID Review-Foreign Investment Law Journal 31.1 167,185
[1180] Xavier Carim, 'Lessons from South Africa's BITs review' (2013) No. 109 Columbia FDI Perspectives; See also Tarcisio Gazzini, 'Rethinking the Promotion and Protection of Foreign Investments: The 2015 South Africa's Protection Investment Act' (2017) SSRN 2960567
[1181] Xavier Carim, 'Lessons from South Africa's BITs review' (2013) No. 109 Columbia FDI Perspectives
[1182] https://www.nortonrosefulbright.com/en-za/knowledge/publications/fe87cd48/broad-based-black-economic-empowerment-basic-principles accessed on 28.07.2023.
[1183] Taylor Bates, 'Will They Stay or Will They Go? An Examination of South Africa's International Investment Arbitration Policy' (2020) 46 Brook J Int'l L 149,169

SA's international agreements at the time of negotiating the IIAs and BITs, SA found itself exposed to international arbitration for a breach of the National Treatment Standard. Following on from the findings of the review, SA decided to terminate her BITs with Austria, Belgium-and Luxembourg Economic Union, Denmark, France, Germany, the Netherlands, Spain, Switzerland and the United Kingdom, and then adopt domestic legislation where the priority was the protection of investment.[1184] The only BITs to which SA is a signatory that remain in force are those with the Republic of Korea, Cuba, the Islamic Republic of Iran, Mauritius, China, Senegal, Sweden, Finland, the Czech Republic, the Russian Federation, Nigeria, Zimbabwe.[1185]

Another noteworthy aspect of the South African Investment Protection legislation is that it is firmly intertwined with and anchored upon the Constitution of the country and extends to foreign investors the same level of protection as provided to nationals of SA, including provisions dealing with regulatory powers and expropriation. It also states in Section 3[1186] that foreign investments are to be protected 'in accordance with and subject to the Constitution'.[1187] The basing of such an important piece of legislation on the Constitution accords with Dagbanja's declared position,[1188] namely that if governments of Host Countries enter into IIAs that are to the detriment of their citizens and not compatible with their Constitution, there is a case for declaring the IIA invalid.[1189]

Tanzania has also made changes to its legislation in a bid to protect its RA. The Tanzanian Parliament passed three pieces of legislation in 2017 aimed at increasing the control of the Tanzanian government over the management of the country's natural resources such as mining, oil and gas. These were the Natural Wealth and Resources (Permanent Sovereignty) Act 2017[1190] which requires precludes permanent sovereignty over Tanzania's natural wealth and resources from being dealt with via proceedings in foreign courts or international tribunals[1191], and the Natural Wealth and Resources (Review and Re-negotiation of unconscionable terms) Act 2017[1192] whereby the government was mandated to renegotiate or remove any terms from investor–State contracts that Parliament deems 'unconscionable' including those that subject the State to the jurisdiction of foreign courts and fora.[1193]

The following year, the Public–Private Partnership (Amendment) Act No 9 of 2018[1194] was passed, which mandated that any dispute arising during a Public–Private Partnership (PPP) agreement be resolved through mediation and arbitration adjudicated by arbitral bodies established within Tanzania and in accordance with Tanzanian laws. This was meant to ensure that investor disputes are resolved locally, and that the government is not subject to international arbitration fora such as ICSID. Furthermore, Tanzania terminated its BIT with the Netherlands on 01.04.2019, a situation

[1184] See Tarcisio Gazzini, 'Rethinking the Promotion and Protection of Foreign Investments: The 2015 South Africa's Protection Investment Act' (2017) Available at SSRN 2960567

[1185] South Africa | International Investment Agreements Navigator | UNCTAD Investment Policy Hub accessed 29.07.2023.

[1186] https://www.gov.za/sites/default/files/gcis_document/201512/39514act22of2015protectionofinvestmentact.pdf See Section 3. Accessed on 28.07.2023.

[1187] https://www.gov.za/sites/default/files/gcis_document/201512/39514act22of2015protectionofinvestmentact.pdf See Section 3. Accessed on 28.07.2023.

[1188] Dominic Dagbanja, *The Investment Treaty Regime and Public Interest Regulation in Ghana: Perspectives in Constitutionalism and General International Law*. Diss. ResearchSpace@ Auckland, 2015. See also Dominic Npoanlari Dagbanja, *The Investment Treaty Regime and Public Interest Regulation in Africa* (Oxford University Press 2022)

[1189]Dominic Dagbanja, *The Investment Treaty Regime and Public Interest Regulation in Ghana: Perspectives in Constitutionalism and General International Law*. Diss. ResearchSpace@ Auckland, 2015. See also Dominic Npoanlari Dagbanja, *The Investment Treaty Regime and Public Interest Regulation in Africa* (Oxford University Press 2022)

[1190] ACT NO. 5 THE PERMANENT SOVEREIGNTY-BLM 24-06 CHAPA FINAL 3 JULY, 2017.pdf (osg.go.tz) accessed on 13.08.2024

[1191] https://www.herbertsmithfreehills.com/insights/2017-07/significant-recent-changes-to-tanzanias-mineral-law-regime accessed on 13.08.2024

[1192] https://www.madini.go.tz/media/Regulation-57.pdf accessed on 13.08.2024

[1193] https://www.herbertsmithfreehills.com/insights/2017-07/significant-recent-changes-to-tanzanias-mineral-law-regime accessed on 13.08.2024

[1194]https://www.parliament.go.tz/polis/uploads/bills/1532416217-Amendment%20of%20PUBLIC%20PRIVATE%20PARTNERSHIP.pdf accessed on 13.08.2024

which some commentators have attributed to a series of international arbitration cases brought against Tanzania.

Namibia is another African State that has pursued the path that South Africa pioneered in respect of reclaiming its RA.[1195] Although it has been passed by its Parliament, the Namibia Investment Promotion Act 9 of 2016 (the Namibian Act) has not yet been brought into force as at the time of writing. It is however worthy of consideration because under that piece of legislation, the proposed means of dispute settlement between a foreign investor and the State is mediation.[1196] The Namibian Act, under the section heading 'Resolution of post establishment disputes', makes it clear that 'an investor or investment may choose to directly approach the courts of Namibia for remedy instead of using the mediation procedures referred to in subsection (2)'.[1197] In addition to this, the Namibian Act also gives exclusive jurisdiction over disputes arising in relation to the Act to the courts in Namibia, which is another bold step in redefining the sovereignty of the Host State in this arena. Section 28(4) states:

> The jurisdiction over disputes relating to this Act lies *exclusively*[1198] with the courts of Namibia, but the Minister and investor or investment, as required by the circumstances of the alleged breach of rights or obligations, may, by written agreement, agree to arbitration in accordance with the Arbitration Act, 1965 (Act No. 42 of 1965) in Namibia.[1199]

This provision makes it clear that even in circumstances where the representative of the Host State and the [foreign] investor agree to arbitration after an alleged breach,[1200] any arbitration must be pursued in accordance with the national laws of Namibia, namely their Arbitration Act 1965, and must take place via Arbitration not outside the country, but in Namibia, another example of an African Host State taking pre-emptive steps to redefine and reclaim their RA and thus their sovereignty.

Although there was an outcry by foreign investors and predictions in the literature[1201] that investors were likely to react negatively to the lack of the availability of investor-state arbitration under the SA Protection of Investment Act,[1202] there is no empirical evidence to support the dire predictions in the nearly ten years since the Act was passed, that SA has suffered from a loss in FDI. In fact, a recent

[1195] Tanzania is evaluating the implications of the ISDS mechanism, after several recent very expensive Arbitral Awards against the country. See commentary - https://thechanzo.com/2023/12/28/transforming-tanzania-a-call-for-reform-in-investor-state-dispute-settlement-mechanisms-isds/ accessed on 29.12.2023; See also https://www.thecitizen.co.tz/tanzania/oped/-investor-state-dispute-settlement-in-tanzania-2670464 accessed on 29.12.2023; See also https://afaa.ngo/page-18097/10382568 accessed on 29.12.2023; See also https://www.iisd.org/itn/en/2020/10/05/the-need-for-africa-focused-arbitration-and-reform-of-tanzanias-arbitration-act-amne-suedi/ accessed on 29.12.2023.

[1196] Namibia Investment Promotion Act 9 of 2016 (lac.org.na) sections 28(1) & 28(2) accessed on 08.07.2023.

[1197] Namibia Investment Promotion Act 9 of 2016 (lac.org.na) section 28(3) accessed on 08.07.2023.

[1198] Italics mine

[1199] Namibia Investment Promotion Act 9 of 2016 (lac.org.na) section 28(4) accessed on 08.07.2023.

[1200] Note that this reference to an "alleged breach" imposes yet another limitation upon the availability of Arbitration as a method of settling disputes with the Namibian government, which is another example of reclaiming sovereignty.

[1201] For example, Mtandazo Ngwenya, *'The promotion and protection of foreign investment in South Africa: a critical review of promotion and protection of Investment Bill 2013'* (2015 Thesis) recommended that the DTI should withdraw the Promotion and Protection of Investment Bill (PPIB) and seek a more holistic, continent-driven foreign investment regulatory framework. See also Tarcisio Gazzini, 'Rethinking the Promotion and Protection of Foreign Investments: The 2015 South Africa's Protection Investment Act' (2017) Available at SSRN: http://dx.doi.org/10.2139/ssrn.2960567 accessed 22.07.2023. It argues that the Act offers a level of protection definitely lower of that normally provided by international investment treaties from both substantive and procedural standpoints. See also: This bill won`t protect or promote investment - EU Chamber of Commerce - DOCUMENTS | Politicsweb accessed on 22.07.2023. See also: Stephen Hurt, 'Why South Africa has ripped up foreign investment deals' (2013) The Conversation http://theconversation.com/why-south-africa-has-ripped-up-foreigninvestment-deals-20868; Leandi Kolver, 'SA proceeds with termination of bilateral investment treaties' (2013) PoLITY https://www.polity.org.za/article/sa-proceeds-with-termination-of-bilateralinvestment-treaties-2013-10-21 referenced by Taylor Bates in Taylor Bates, 'Will They Stay or Will They Go?: An Examination of South Africa's International Investment Arbitration Policy' (2020) 46 Brook J Int'l L 149

[1202] This piece of legislation is largely pegged to the Constitution and based on the extension to foreign investors of the protection granted to nationals, including the provisions on expropriation and regulatory powers.

UNCTAD Report[1203] suggests quite the opposite, and this is in spite of the historical perception, alluded to by some authors that there is 'the rarely articulated but ever-present feeling that African national courts are inappropriate for the resolution of international commercial disputes, leading investors and traders to insist upon arbitration or alternative dispute resolution (ADR) mechanisms'.[1204] The concluding statement of Gazzini, that 'It remains now to be seen what impact the Act will have upon the flow of foreign investment to South Africa'[1205] appears to be robustly answered by the 2023 UNCTAD World Investment Report (WIR 2023)[1206] which reports that FDI inflows to South Africa returned to prior levels after an anomalous peak in 2021 caused by a large corporate reconfiguration in South Africa. WIR 2023 reports show that FDI in South Africa was $9 billion. Although this was well below the 2021 level, it was actually double the average of the last decade. Additionally, UNCTAD reported that cross-border M&A sales in SA reached $4.8 billion, a giant increase from $280 million in 2021. Thus, history has shown that despite the dire predictions in the Investment Treaty Arena about the negative impact that the passage of the Protection of Investment Act 2015 would have on FDI inflows into SA, the results have instead been resoundingly positive and have vindicated the decision of SA to terminate so many BITs with countries from the Global North and to present their own domestic legislation as a viable alternative to ISDS. Some might say that was a huge gamble, but if so, it has paid off and SA has successfully redefined its sovereignty, at least in the arena of Investment Treaty Arbitration and secured its regulatory autonomy.

It would seem therefore that whilst there is clearly a feeling of discontent against the ISDS regime as evidenced by the implementation of UNCITRAL WG III and the continued deliberations of that Working Group[1207], there is no unified position amongst African states as to whether to reject ISDS in their IIAs and no consideration of the establishment of Specialist Teams, which makes this thesis unique and timely.

SA, Tanzania and Mozambique's actions could be viewed as a possible roadmap for the protection of Ghana's RA and the redefining of Ghana's sovereignty. SA took the decision to abandon ISDS after a detailed review of the economic benefits of the country's BITs and their impact on its RA. Such a review could be undertaken by the Government of Ghana as the first step towards exploring a possible solution to protect its RA by renegotiating BITs based on the outline Model BIT set out in this thesis. This author believes however that total abandonment of the ISDS regime and/or termination of all BITs is not a realistic option for Ghana at this time, considering the position of the government of Ghana on attracting foreign investment as evidenced by the webpages content of the GIPC and the close relationship of Ghana with UNCITRAL. Future researchers may have a different viewpoint.

6.2.2 AMENDING BITS - EXAMPLES OF INNOVATIVE INVESTMENT AGREEMENTS FROM RECS

Certain RECs have been identified as having examples of Investment Agreements worthy of consideration, namely SADC,[1208] EAC[1209] and COMESA.[1210] The innovative legal instruments enacted by the RECs referred to above, have already been examined in great detail in Chapter Four[1211] and are only referred to in this chapter to provide examples of the type of legal instruments that can be

[1203] Investment flows to Africa reached a record $83 billion in 2021 | UNCTAD accessed 15.07.2023.
[1204] Amazu A Asouzu, *International commercial arbitration and African states: Practice, participation and institutional development*. (Cambridge University Press 2001) 1
[1205] Tarcisio Gazzini, 'Rethinking the Promotion and Protection of Foreign Investments: The 2015 South Africa's Protection Investment Act' (2017). Available at SSRN: http://dx.doi.org/10.2139/ssrn.2960567 accessed 22.07.2023.
[1206] World Investment Report 2023 | UNCTAD accessed 15.07.2023.
[1207] See Agenda for January 2025 session of WG III accessed on 07.12.2024 - v2407711.pdf
[1208] Home | SADC accessed on 27.07.2023.
[1209] East African Community (eac.int) accessed on 27.07.2023.
[1210] Common Market for Eastern and Southern Africa (COMESA) accessed on 27.07.2023.
[1211] See Chapter Four of this Thesis – Lessons from Negotiators and Drafters in the African Regional Economic Communities

considered Ghana in a bid to reclaim its Regulatory Autonomy and to redefine its sovereignty. In particular, some legal instruments which merit highlighting are the SADC's Protocol on Finance and Investment (FIP) which was produced in 2006 and amended in 2016, removing access to ISDS and limiting some substantive protections,[1212] secondly, the non-binding Model BIT that the SADC adopted in 2012 as a template for future IIAs produced by its Member States,[1213] and thirdly the Model Investment Code (EAC MIC) adopted by the EAC in 2006[1214] to assist the partner states 'in improving their national investment codes and policies through capturing the best international investment practices while working towards harmonisation'[1215] thereby providing them with guidance and best practice, whilst remaining non-binding.[1216] The fourth noteworthy offering in this list of innovative Agreements produced by African RECs which could be of immense assistance to a Ghana is the COMESA Common Investment Area Agreement (CCIA Agreement),[1217] concluded in 2007, the aim of which was to establish the COMESA Common Investment Area. Although the agreement has not yet entered into force,[1218] the inventive provisions are worthy of note. Another important instrument is the Agreement on a Tripartite Free Trade Area (TFTA)[1219] signed in 2015 by the EAC, COMESA and SADC, and aimed at promoting the harmonization of trade and investment between them, which also has several novel provisions that have previously been discussed in Chapter Four.

6.2.3 ECOWAS SUPPLEMENTARY ACT ADOPTING COMMUNITY RULES ON INVESTMENT

This is a Regional Investment Agreement (RIA) adopted by the Economic Community of West African States, (ECOWAS), of which Ghana is a Member State. ECOWAS has adopted the 'Supplementary Act adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS (ECOWAS Supplementary Act)',[1220] which is one of the regional agreements of relevance to investment, collectively known as Regional Investment Agreements (RIAs). The ECOWAS Supplementary Act is legally binding on ECOWAS member states, investors, and investments.[1221] With an avowed objective to 'promote investment that supports sustainable development of the [ECOWAS] region',[1222] the ECOWAS Supplementary Act has been described as 'one of the most advanced investment treaties that is conscious of the distinctive context of African countries and adopts rights-based approach to development'.[1223] Examples of the manner in which the objective plays out in practice can be seen from Article 20, which prohibits member states from 'relaxing their labour, public health, safety, or environmental standards to lure investment into their territories'[1224] and Article 24, which allows Host

[1212] Pursuant to Article 22 of the SADC Treaty, Member States are required to conclude Protocols in each area of co-operation to stipulate the objectives and scope of, and institutional mechanisms for, co-operation and integration. It entered into force on 22 August 2017.
[1213] SADC Model BIT Template (iisd.org) accessed on 06.04.2022.
[1214] https://investment-guide.eac.int/index.php/the-regional-framework/legal-framework accessed 06.04.2022
[1215] Preamble to the EAC MIC
[1216] Article 3(1) EAC MIC
[1217] https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3092/download accessed on 06.04.2022
[1218] This is because the required threshold of ratification by at least six Member States has not been met.
[1219] TRIPARTITE-FREE-TRADE-AREA-AGREEMENT.pdf (comesa.int) accessed on 06.04.2022.
[1220] Supplementary Act Adopting Community Rules on Investment and the Modalities for Their Implementation with ECOWAS was adopted and signed in December 2008. Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS, ECONOMIC COMMUNITY OF WEST AFR. STATES, Dec. 19, 2008, ECOWAS Supplementary Act on Investments (2008) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub accessed on 08.07.2023. [hereinafter ECOWAS Supplementary Act]
[1221] See generally, ECOWAS Supplementary Act on Investments (2008) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub accessed on 29.07.2023.
[1222] Article 3 of the ECOWAS Supplementary Act on Investments (2008) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub accessed on 29.07.2023.
[1223]Chidede Talkmore, 'The Right to Regulate in Africa's International Investment Law Regime' (2019) 20 Or Rev Int'l L 437, 456. See also Fola Adeleke, *International investment law and policy in Africa: exploring a human rights-based approach to investment regulation and dispute settlement* (Routledge 2017)
[1224] Article 20 of the ECOWAS Supplementary Act on Investments (2008) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub accessed on 29.07.2023.

States to 'impose performance requirements to promote domestic development benefits from investments'. Such performance requirements could be, 'to export a given level or percentage of goods or services,[1225] to achieve a given level or percentage of domestic content',[1226] or 'to relate the volume or value of imports to the volume or value of exports or to the amount of foreign exchange flows associated with such investment'.[1227]

Additionally, Article 33 of the ECOWAS Supplementary Act provides for ISDS and interstate dispute settlement using 'good offices, conciliation, mediation, or any other dispute resolution process' as agreed upon in the six months between the date of a Notice of Intention to initiate a dispute and the formal initiation of a dispute. If, however, a dispute between an investor and a member state is not settled through the routes mentioned above, then it may be submitted to Arbitration, but not International Arbitration. The Act states that in those circumstances, 'it may be submitted to arbitration under a domestic court; any national machinery for settling investment disputes; the relevant national court of the member states; or referred to the ECOWAS Court of Justice'.[1228] Some commentators have surmised that whilst the ECOWAS Court of Justice would not necessarily be a better forum than International Arbitral Tribunals for the protection of their investments against actions of host states, it would have considerable advantages over national courts.[1229] It has been further argued that extending the investment jurisdiction of the ECOWAS Court of Justice would render it more effective and would also assist in developing the role of African States as "investment rule makers" rather than their presently perceived role of being merely "rule takers" and this would further ECOWAS's mission to promote economic integration within West Africa.[1230] Article 35 deals with transparency of proceedings and provides that whereas documents, pleadings etc. shall be available only to the disputing parties, procedural and substantive oral hearings shall be open to the public.[1231]

In respect of National Security, the ECOWAS Supplementary Act makes it clear that nothing therein shall be construed to, inter alia:

> Preclude a Member State from applying measures that it considers necessary for the fulfilment of its obligations under the United Nations Charter[1232] with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.[1233]

Chapter III of the ECOWAS Supplementary Act sets out obligations and duties of investors, which include a requirement to conduct an environmental and social impact assessment of the potential investment prior to the establishment of the investment, refrain from involving themselves in corrupt practices as defined in Article 30 of the Act, and after establishment of the investment, to uphold human rights in the workplace and community, as well as 'to comply with corporate governance and corporate social responsibility practices'. Another unusual aspect of the ECOWAS Supplementary Act is that it contains rights and obligations for home states enjoining them to 'ensure that their

[1225] Article 24(2)(a) of the ECOWAS Supplementary Act on Investments 2008
[1226] Article 24(2)(b) of the ECOWAS Supplementary Act on Investments 2008
[1227] Article 24(2)(e)
[1228] Article 33(7)
[1229] Matthew Happold and Relja Radović, 'The ECOWAS Court of Justice as an investment tribunal' (2018) The Journal of World Investment & Trade 19.1 95
[1230] Matthew Happold, 'Investor–State Dispute Settlement using the ECOWAS Court of Justice: An Analysis and Some Proposals' (2019) ICSID Review - Foreign Investment Law Journal Vol 34 Issue 2 496 https://doi.org/10.1093/icsidreview/siz028 accessed 31.07.2023.
[1231] Article 34
[1232] United Nations Charter, Oct. 24, 1945, 1 U.N.T.S. XVI.
[1233] Article 37 (b)

administrative, legislative and judicial processes do not operate in a manner that is arbitrary or that does not deny administrative and procedural fairness to investors and their investments.'[1234]

These innovative provisions in the ECOWAS Supplementary Act have been discussed in some detail here to draw attention to the kind of innovative provisions available to Ghana, since the ECOWAS Supplementary Act is legally binding on ECOWAS member states, investors, and investments and could be of immense assistance to Ghana in redefining its sovereignty and reclaiming its RA.

6.2.4 THE UNIQUE REFORMULATION OF THE BALANCED PAN AFRICAN INVESTMENT CODE (PAIC)

As stated in Chapter Four, the uniqueness of the PAIC is to be found not only in the manner in which it 'reformulates traditional treaty language, adds new provisions, [and] omits certain provisions completely'[1235] but also in the manner in which it adds some innovative features, resulting in a legal framework that showcases not only an IIA that is more balanced than pre-existing legal instruments, but one that addresses specific aspects of development that are important to developing Host States, especially those on the African continent. The PAIC has been described as a piece of legislation that recognises how important it is to craft legislation that imposes human rights obligations on investors, a piece of the puzzle that has to date not been given enough attention, and how the situation of investment regulation within the framework of sustainable development objectives has resulted in a 'gold standard law for investment regulation' in Africa.[1236] These unique elements of the PAIC, already discussed in detail in Chapter Four, would be invaluable to Ghana's aim of reclaiming its RA and redefining its sovereignty if Ghana embraced the provisions of the PAIC.

6.2.5 THE PROTOCOL ON INVESTMENT ("THE PROTOCOL") TO THE AFCFTA

Presently, Africa's investment protection framework which regulates investment on the continent comprises bilateral instruments[1237] as well as regional initiatives such as the RECs referred to earlier, and national investment laws. It is anticipated that the Protocol on Investment will govern investment in the AfCFTA and set out the rights and obligations of Member States and investors, although according to the final draft (Draft Protocol)[1238] it will not apply to such areas as property acquired for non-business purposes and lawful taxation measures[1239], which is understandable. This thesis will only be commenting on the Draft Protocol, since the final Protocol has not yet been made available to the public. In June 2021, at their Annual Investment Meeting (AIM), the Economic Commission for Africa (ECA) made a pre-launch presentation of a report entitled 'Towards a Common Investment Area in the African Continental Free Trade Area: Levelling the Playing Field for Intra-African Investment'.[1240] This report was which presented by the ECA's Director of Regional Integration and Trade, offered policy recommendations to member states who wished to take advantage of the economies of scope and scale of the AfCFTA[1241] Investment Protocol once it had been concluded, to attract foreign direct investment. The AfCFTA which has been signed by 54 African states, entered into force in May 2019

[1234] Article 19, Chapter IV
[1235] Makane Moise Mbengue & Stefanie Schacherer, 'The Africanization of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18 J World Investment & Trade 414, 420
[1236] Fola Adeleke, *International investment law and policy in Africa: exploring a human-rights based approach to investment regulation and dispute settlement* (Routledge 2017)
[1237] Of the 852 bilateral investment treaties concluded involving African states, 515 are currently in force, and 173 are intra-African.
[1238] en - draft protocol of the afcfta on investment.pdf (bilaterals.org) accessed 02.08.2023.
[1239] See Article 3.4 of the Draft Protocol. en - draft protocol of the afcfta on investment.pdf (bilaterals.org) accessed 02.08.2023.
[1240] Proposed AfCFTA investment protocol should be simplified to attract foreign direct investment into Africa, says ECA's Karingi | bilaterals.org accessed on 02.08.2023.
[1241] African Continental Free Trade Area Agreement

and created the largest free trade area in the world in terms of geographical size and population.[1242] The objective of the AfCFTA is to spur economic development on the continent by facilitating intra-African trade and investment Additionally, it is envisaged that the agreement will expand intra-African trade, boost industrialization, increase job opportunities, and enhance the global competitiveness of African industries.[1243] Subsequently, after some years of negotiation, the African Union (AU) Heads of State adopted the Protocol on Investment ("The Protocol") to the AfCFTA on 19th February 2023. In furtherance of its objectives, Member States have concluded protocols regulating intellectual property, competition policy and investment in the free trade area.

The only one of these protocols under consideration in this thesis is the Draft Protocol on Investment ("The Draft Protocol"). The Draft Protocol covers investments made by investors in a Member State and defines the terms 'investments' and 'investors' more restrictively than the definitions contained in the older BITs in existence. The BITs to which Ghana is a signatory have the older, more expansive definitions. As examples of more restrictive definitions, the Draft Protocol's requirement for investors to maintain substantial business activity in the Host State, and the additional requirement that investments must involve a commitment of capital, expectation of profit, certain duration, assumption of risk and contribution to Host State's sustainable development,[1244] is substantially more restrictive than the provisions of the present BITs to which Ghana is a signatory. In addition to the more restrictive definitions, the Draft Protocol allows Host States to deny investors the benefit of the Protocol if amongst other grounds their investment is 'owned or controlled, directly or indirectly, by persons of a non-State Party that has no substantial business' in the Host State[1245] which is clearly beneficial to the Host State in that it gives the State more agency over who is allowed to invest in their territory, all of which is positive for a Host State wishing to redefine her Sovereignty. In the context of Regulatory Autonomy, the Draft Protocol preserves the Host State's right to regulate, and states that measures taken by the Host State in furtherance of her right to regulate cannot give rise to any claim by an investor for compensation.[1246] The exceptions to expropriation include measures aimed at protecting and enhancing 'legitimate policy objectives, such as public morals, public health, safety and the protection of the environment'.[1247] It is noteworthy that breaches of the transfer of funds obligation are not considered discriminatory if they are due to specified reasons in the Draft Protocol.[1248]

The Draft Protocol still retains substantial protections for the covered investors, such as the right to:

- be treated in a manner no less favourable than investors of the Host State and other Member/Third States.[1249]
- not be subjected to arbitrary treatment in administrative matters and judicial proceedings.[1250]
- be and have their investments physically protected by the Host State.[1251]
- not have their investments or assets unlawfully seized by the Host State[1252]
- freely transfer funds relating to their investments (subject to Article 23)[1253]

[1242] The-promise-of-the-African-Continental-Free-Trade-Area-AfCFTA-Political-Economy-Dynamics-of-Regional-Organisations-in-africa.pdf (researchgate.net) accessed on 04.08.2023.
[1243] Proposed AfCFTA investment protocol should be simplified to attract foreign direct investment into Africa, says ECA's Karingi | bilaterals.org accessed on 02.08.2023.
[1244] See Article 1 of the Draft Protocol- en - draft protocol of the afcfta on investment.pdf (bilaterals.org) accessed 02.08.2023.
[1245] See Article 5 of the Draft Protocol- en - draft protocol of the afcfta on investment.pdf (bilaterals.org) accessed 02.08.2023.
[1246] See Article 24 of the Draft Protocol- en - draft protocol of the afcfta on investment.pdf (bilaterals.org) accessed 02.08.2023.
[1247] See Article 20(2) of the Draft Protocol - en - draft protocol of the afcfta on investment.pdf (bilaterals.org) accessed 02.08.2023.
[1248] See Article 23 of the Draft Protocol - en - draft protocol of the afcfta on investment.pdf (bilaterals.org) accessed 02.08.2023.
[1249] See Articles 12 &14 of the Draft Protocol - en - draft protocol of the afcfta on investment.pdf (bilaterals.org) accessed 02.08.2023.
[1250] See Article 17 of the Draft Protocol- en - draft protocol of the afcfta on investment.pdf (bilaterals.org) accessed 02.08.2023.
[1251] See Article 18 of the Draft Protocol -en - draft protocol of the afcfta on investment.pdf (bilaterals.org) accessed 02.08.2023.
[1252] See Article 19 of the Draft Protocol - en - draft protocol of the afcfta on investment.pdf (bilaterals.org) accessed 02.08.2023.
[1253] See Article 22 of the Draft Protocol -en - draft protocol of the afcfta on investment.pdf (bilaterals.org) accessed 02.08.2023.

In addition to the substantial protections in place for covered investors, there are innovative provisions in the Draft Protocol, that place certain obligations upon investors. These include the obligation to:

- comply with national and international law.[1254]
- comply with business ethics, human and labour rights.[1255]
- respect and protect the environment.[1256]
- respect the rights of indigenous people and communities.[1257]
- refrain from interference with Host State's internal affairs.[1258]
- refrain from corrupt practices.[1259]
- contribute to the Host State's sustainable development.[1260]

It is important to note that the Draft Protocol's stated intention is to replace bilateral investment instruments between Member States and to that end it requires that Member States align all regional instruments with the Protocol.[1261] Also, under Article 2, the Draft Protocol's stated objectives include the protection of sustainable investment, the balancing of investor and state interests, protection of indigenous communities, and efficient dispute resolution[1262] and directs that the investor and the Host State initially seek to resolve their dispute amicably through 'consultations, negotiations, conciliation, mediation or other amicable dispute resolution mechanisms available in the Host State',[1263] following which they may seek to resolve their dispute in accordance with the Protocol's dispute resolution mechanisms.[1264] The Draft Protocol states[1265] that provisions relating to the dispute resolution mechanisms will be included in an Annex to the Protocol, which is expected to be finalised within 12 months from the adoption of the Protocol. Although there is no draft of such Annex publicly available, an earlier version of the Draft Protocol[1266] provides for arbitration under the UNCITRAL arbitration rules, or the rules of any arbitral institution, after attempts to settle the matter amicably have failed. This is a unique opportunity for African States to become "rule makers" and "trail blazers" rather than "followers", so it will be interesting to see what the Annex introduces as a dispute resolution mechanism, whether the provisions of the Draft Protocol will be adopted in the Protocol and if they are, how these will be implemented once the Protocol is in force.

6.2.6 A CASE FOR A PAN-AFRICAN INVESTMENT COURT

The idea of replacing arbitral tribunals (as provided for in ISDS clauses in most of the IIAs in existence) with a court system has been suggested by Mann and von Moltke who agree that existing dispute settlement institutions 'were not designed to address complex issues of public policy that now routinely come into play in investor-state disputes'.[1267] Other academics,[1268] UNCTAD,[1269] and most recently in a paper presented by the European Commission when representing the EU and its Member

[1254] See Article 32 of the Draft Protocol- en_-_draft_protocol_of_the_afcfta_on_investment.pdf (bilaterals.org) accessed 02.08.2023.
[1255] See Article 33 of the Draft Protocol - en_-_draft_protocol_of_the_afcfta_on_investment.pdf (bilaterals.org) accessed 02.08.2023.
[1256] See Article 34 of the Draft Protocol - en_-_draft_protocol_of_the_afcfta_on_investment.pdf (bilaterals.org) accessed 02.08.2023.
[1257] See Article 35 of the Draft Protocol - en_-_draft_protocol_of_the_afcfta_on_investment.pdf (bilaterals.org) accessed 02.08.2023.
[1258] See Article 36 of the Draft Protocol - en_-_draft_protocol_of_the_afcfta_on_investment.pdf (bilaterals.org) accessed 02.08.2023.
[1259] See Article 37 of the Draft Protocol- en_-_draft_protocol_of_the_afcfta_on_investment.pdf (bilaterals.org) accessed 02.08.2023.
[1260] See Article 38 of the Draft Protocol - en_-_draft_protocol_of_the_afcfta_on_investment.pdf (bilaterals.org) accessed 02.08.2023.
[1261] See Article 49 of the Draft Protocol - en_-_draft_protocol_of_the_afcfta_on_investment.pdf (bilaterals.org) accessed 02.08.2023.
[1262] See Article 2 of the Draft Protocol - en_-_draft_protocol_of_the_afcfta_on_investment.pdf (bilaterals.org) accessed 02.08.2023.
[1263] Mmiselo Freedom Qumba, 'The exhaustion of local judicial remedies in investor-state dispute settlement: a proposal for the African Continental Free Trade Agreement on Investment Protocol' (2022) Law, Democracy & Development 25.1 156
[1264] See Article 46.1 of the Draft Protocol - en_-_draft_protocol_of_the_afcfta_on_investment.pdf (bilaterals.org) accessed 02.08.2023.
[1265] See Article 46.3 of the Draft Protocol - - en_-_draft_protocol_of_the_afcfta_on_investment.pdf (bilaterals.org) accessed 02.08.2023.
[1266] See First Draft afcfta_protocol_on_investment_first_draft.pdf (bilaterals.org) accessed on 03.08.2023.
[1267] See Howard Mann and Konrad von Moltke, 'A Southern Agenda on Investment - Promoting Development with Balanced Rights and Obligations for Investors, Host States and Home States' (2005) International Institute for Sustainable Development at A Southern Agenda on Investment? Promoting Development with Balanced Rights and Obligations for Investors, Host States and Home States (wisc.edu) accessed on 19.08.2023.
[1268] Gus Van Harten, 'A Case for International Investment Court' (2008) Inaugural Conference of the Society for International Economic Law; See also Chrispas Nyombi, 'A Case for a Regional Investment Court for Africa' (2018) 43 NC J Int'l L 66
[1269] UNCTAD, Reform of Investor-State Dispute Settlement: In Search of a Roadmap (June 2013) IIA Issue Note No. 2 9

States at the WG III intergovernmental talks at UNCITRAL[1270] have also suggested this course of action. Prior to the presentation of this paper to the UNCITRAL WG III talks, the European Commission in May 2015,[1271] had announced its intention of replacing international arbitral tribunals with a public investment court system which had an appellate chamber, populated by judges who had been publicly appointed, along the lines of the judges of the ICJ[1272] or the judges of the Dispute Settlement Appellate Body[1273] of the WTO. An indication of the determination of the EU to forge ahead with such an Investment Court and Appellate Mechanism is the fact that this option has already been incorporated into the EU-Vietnam Free Trade Agreement[1274] that entered into force on 1 August 2020 and the CETA[1275] which entered into force provisionally on 21 September 2017. The fact that five EU Member States signed and submitted a document in 2016 which referred to the creation of a permanent appeal mechanism[1276] gives credence to the fact that the idea of an appeals mechanism as envisaged by the EU-Vietnam FTA and the CETA is increasing in popularity.

The pivotal basis of this proposal of an Investment Court is the viewpoint that a system of arbitration (private justice) is inappropriate when one is seeking to resolve matters involving the public policy of states.[1277] An example of such a court is the Arab Investment Court, which has over thirty years of jurisprudence to its credit, created under the auspices of the Unified Agreement for the Investment of Arab Capital in the Arab States, which came into force in September 1981.[1278] The argument in support of a court system in place of Arbitral Tribunals is that such a system would ensure the independence and impartiality of judges who would have been elected by their National States on a fixed term, or on a permanent tenured basis, ensuring that they were free from any potential bias towards the party that appointed them.[1279] It is also perceived as potentially resulting in considerable cost and time savings.[1280] It has been acknowledged that such a system might be very challenging to achieve, as it would require a buy-in from several countries, which might only be achievable on a staggered basis.[1281] In light of the fact that according to the UNCTAD IIA Issues Note of July 2022,[1282]

[1270] https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf accessed on 19.08.2023.
[1271] European Commission Conceptual paper, Investment in TTIP and beyond – the path for reform. See Catharine Titi, 'The European Union's proposal for an international investment court: Significance, innovations and challenges ahead'. Transnational Dispute Management 1 (2016): 2017; See also Hannes Lenk, 'Something Borrowed, Something New: The TTIP Investment Court: How to Fit Old Procedures into New Institutional Design.' in *Institutionalisation beyond the Nation State: Transatlantic Relations: Data, Privacy and Trade Law* (2018): 129-147
[1272] Cour internationale de Justice - International Court of Justice | INTERNATIONAL COURT OF JUSTICE (icj-cij.org) accessed on 19.08.2023.
[1273] WTO | Dispute settlement - Appellate Body accessed on 19.08.2023. Unfortunately, the Appellate Body is unable to review appeals, due to the unfilled vacancies and political wrangling. Urgent talks are underway to resolve this crisis. See the-wto-appellate-body-crisis-a-way-forward.pdf (cliffordchance.com) accessed on 19.08.2023.
[1274] EU-Vietnam Free Trade Agreement | Access2Markets (europa.eu) accessed on 19.08.2023. Note that The EU-Vietnam Investment Protection Agreement under which investors will have the option of resolving disputes involving investment via a permanent investment Tribunal of First Instance and an Appellate Tribunal for appeals, will enter into force after all EU Member States have given it their formal consent. The introduction to this option states that "The institutional nature of the Investment Court System and the possibility to appeal against decisions will ensure that the investment agreement is interpreted in a legally correct and predictable manner". The investment agreement also includes a provision on the transition from the bilateral Investment Court System established under the agreement to a multilateral investment court as and when such a court comes into existence.
[1275] EU-Canada Comprehensive and Economic Trade Agreement | Access2Markets (europa.eu) accessed on 19.08.2023. One of the areas that has not yet entered into force is the investment protection and the investment court system (ICS). The agreement will take full effect once all Member States' parliaments have formally ratified it.
[1276] Council of the European Union, General Secretariat, Trade Policy Committee, Intra-EU Investment Treaties: Non-paper from Austria, Finland, France, Germany and the Netherlands, 7 April 2016, p. 5, para 12.
[1277] Gus Van Harten, 'A Case for International Investment Court' (2008) Inaugural Conference of the Society for International Economic Law
[1278] The Unified Agreement was signed on 26 November 1980 in Amman, Jordan, and entered into force on 7 September 1981. See Walid Ben Hamida, The development of the Arab Investment Court's case law: new decisions rendered by the Arab Investment Court (2014) International Journal of Arab Arbitration, 6, 12.
[1279] Gus Van Harten, 'A Case for International Investment Court' (2008) Inaugural Conference of the Society for International Economic Law
[1280] Gus Van Harten, 'A Case for International Investment Court' (2008) Inaugural Conference of the Society for International Economic Law Saving on the costs of searching for potential arbitrators.
[1281] Eduardo Zuleta, 'The Challenges of Creating a Standing International Investment Court (2014)' reprinted in Jean E. Kalicki and Anna Joubin-Bret (eds.) Reshaping the Investor-State Dispute Settlement System: Journeys For the 21st Century (Vol. 4 Hotei Publishing, 2015)
[1282] IIA Issues Note, No. 1, 2022 - Facts on Investor-State arbitrations in 2021: With a special focus on tax-related ISDS cases (unctad.org) accessed 19.08.2023. This IIA Issue Note expands on research published in UNCTAD's World Investment Report 2022.

the majority of new cases under the ISDS regime[1283] were brought against developing countries, including Ghana[1284] it is crucial that developing states consider an alternative to the ISDS regime.

Nyombi's proposal for a Pan-African Investment Court draws its inspiration from the EU's actions set out above whereby the references to an Investment Court in the EU-Vietnam FTA and the CETA would be the first steps towards a multilateral Investment Court to replace the current ISDS regime.[1285] The courts set out under the bilateral schemes referred to above could thus be the building blocks for a permanent multilateral court, operating on the basis of an opt-in system allowing states to opt-in to the new system similar to the procedure used in the case of the Mauritius Convention.[1286] Gabrielle Kaufmann-Kohler and Michele Potestà believe that 'the Mauritius Convention could provide a useful model if States wish to pursue such broader reform initiatives at a multilateral level'.[1287] It has been suggested that a Pan-African Investment Court, with an Appellate Chamber along the lines of the proposal being promulgated by the EU but based on the principles and innovative provisions of the Pan-African Investment Code (PAIC), would help African states attain their goal of self-determination and economic independence.[1288] With the coming into force of the AfCFTA and the anticipated Investment Protocol, this would be an ideal time in history for serious consideration to be given to the establishment of such an institution as proposed by Nyombi. A Pan-African Investment Court would have the cumulative advantage of an increased predictability of Awards through stable bodies and precedents, transparency of the process for the betterment of investors, states and civil society, and legitimacy which eluded the ISDS regime via an appeals mechanism. Whether or not African states can overcome their political differences to bring this idea to fruition remains to be seen.

6.2.7 NIGERIA-MOROCCO BIT

The 2016 Nigeria-Morocco BIT deserves a special mention due to its innovative Human Rights approach to the promotion and protection of FDI whereby 'Human Rights permeates its approach to the regulation of investment in a manner which is most unusual in international investment agreements (IIAS)'[1289] This agreement between two countries from the Global South, although not yet in force, has several innovative provisions worth highlighting as provisions that could inform any review of Ghana's BIT regime by a team of Specialists as proposed by this thesis, aimed at restoring the country's RA and redefining its sovereignty.

This BIT has been described variously as 'the most socially responsible BIT currently concluded',[1290] and 'a valuable response from two developing countries to the criticism raised in the last few years against investment treaties, most prominently unbalanced content, restrictions on regulatory powers

[1283] About 65 per cent. The total count of known investor–State dispute settlement (ISDS) cases reached 1,190 at the end of 2021. At least 68 ISDS cases were initiated under international investment agreements (IIAs) in 2021. These are the known cases, so there are most likely many more not known.

[1284] *Everyway v. Ghana* | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub accessed on 19/08/2023.

[1285] Chrispas Nyombi, 'Towards a New World Economic Order: Proposal for a Pan-African Investment Court' in Emilia Onyema (ed) *Rethinking the Role of African National Courts in Arbitration* (Wolters Kluwer Law & Business 2018) Available at SSRN: https://ssrn.com/abstract=3241159

[1286] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (the "Mauritius Convention on Transparency") | United Nations Commission On International Trade Law accessed on 19.08.2023. See also Lise Johnson, The Mauritius Convention on Transparency: Comments on the treaty and its role in increasing transparency of investor-State arbitration' (CCSI Policy Paper, September 2014).

[1287] Gabrielle Kaufmann-Kohler and Michele Potestà, 'Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? Analysis and roadmap'(2016) Geneva Centre for International Dispute Settlement 98

[1288] Chrispas Nyombi, 'Towards a New World Economic Order: Proposal for a Pan-African Investment Court' in Emilia Onyema (ed) *Rethinking the Role of African National Courts in Arbitration* (Wolters Kluwer Law & Business 2018) Available at SSRN: https://ssrn.com/abstract=3241159

[1289] Niccolò Zugliani, 'Human Rights in International Investment Law: The 2016 Morocco–Nigeria Bilateral Investment Treaty' (2019) International & Comparative Law Quarterly 68.3 761

[1290] Niccolo Zugliani, 'Human Rights in International Investment Law: The 2016 Morocco–Nigeria Bilateral Investment Treaty' (2019) International & Comparative Law Quarterly 68.3 761, 770

and inadequacies of investment arbitration'.[1291] One of the most innovative provisions of this Nigeria-Morocco BIT[1292] is the introduction of a number of obligations upon foreign investors, such as an obligation to carry out Environmental and Social Impact assessments at the outset and at interim periods during the currency of the Agreement, an obligation to ensure that labour and human rights are adequately protected, and an obligation to comply with internationally accepted standards of Corporate Governance and Corporate Social Responsibility. In exchange, the foreign investors are granted adequate substantive and procedural protection, but clearly no longer at a detrimental cost to the Host State. These innovative provisions make this BIT a particularly good example[1293] of a package that a Specialist Team as envisaged in this thesis might want to consider when examining solutions aimed at redefining Ghana's sovereignty and reclaiming its RA.

6.2.8 EXAMPLE FROM THE GLOBAL NORTH: UNITED STATES-MEXICO-CANADA AGREEMENT (USMCA)

This sub-section will examine the provisions of the USMCA[1294] that replaced NAFTA, between the USA, Canada, and Mexico, as an example from the Global North, to provide an insight into how a Team of Specialists advising a country can result in an Agreement produced in direct response to the perceived encroachment on the regulatory space of a country via Arbitration Awards imposed in proceedings brought under ISDS clauses. The details of the USMCA have previously been discussed in Chapter Four, but this section will provide some additional insight into the Agreement and its relevance to this thesis. Under NAFTA,[1295] the USA, Canada and Mexico were parties to a Free Trade Agreement which had dispute resolution provisions that (like those in the old-style BITs to which Ghana is presently signatory) allowed investors direct access to the investor-State dispute settlement mechanism under Chapter 11 of NAFTA. Chapter 11 had mixed reviews from the outset but turned out eventually to be the bane of the existence of the NAFTA signatory countries.[1296] ISDS provisions have been stated to be particularly helpful 'when they can substitute for weak domestic legal and regulatory institutions in the host country'[1297] which was not the case in relation to the USA and Canada, at least. At the time of the conclusion of the NAFTA negotiations in 1992, it was heralded as the most comprehensive free trade agreement ever negotiated, and it created the world's largest market for goods and services at the time.[1298] On June 30, 2020, a new era of International Investment Law in the Global North begun, with the entry into force of the USMCA.[1299] Although the NAFTA's 27-year tenure came to an end in 2020, there was a sunset clause in respect of Canada, which chose not to be a party to the ISDS mechanism provided for in Chapter 14 of USMCA. Because Canada had eschewed the ISDS regime, investors had three years in which to institute any legacy claims under the NAFTA regime, and that window was closed on July 1, 2023. Unlike NAFTA, under the USMCA only the USA and Mexico have

[1291] Tarcisio Gazzini, 'The 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties' (2017) Investment Treaty News 8.3 3

[1292] Morocco - Nigeria BIT (2016) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub accessed 14.07.2023. This was signed on 3 December 2016 but not yet in force.

[1293] Although there are several other BITs with similarly innovative provisions. See also BIT between Japan and Mozambique (2013); the BITs by Canada with Benin (2013), Cote d'Ivoire (2014), Mali (2014), Senegal (2014) and Tanzania (2013); the BIT between the United States and Rwanda BIT (2008). See also the SADC Model Bilateral Investment Treaty Template with Commentary, at https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf accessed on 28.07.2023

[1294] USMCA, called other acronyms by Canada and Mexico

[1295] Examples of such claims include Loewen Group, Inc. et al. v. United States (ICSID Case No. ARB(AF)/98/3), Methanex Corp v. USA (UNCITRAL) and Eli Lilly and Company v. Canada (ICSID Case No. UNCT/14/2)

[1296] Ray C. Jones, 'NAFTA Chapter 11 investor-to-state dispute resolution: A shield to be embraced or a sword to be feared' (2002) Brigham Young University Law Review 527

[1297] Matthias Busse, Jens Königer & Peter Nunnenkamp, FDI Promotion Through Bilateral Investment Treaties: More than a Bit?' (2010) Rev. World Econ; See also Lindsey Oldenski, 'What Do the Data Say about the Relationship between Investor-State Dispute Settlement Provisions and FDI?' (2016) Peterson Institute for International Economics. (Accessed on 18 May 2016) https://piie. com/blogs/trade-investment-policy-watch/what-dodata-say-about-relationship-between-investor-state (2015).

[1298] Mary E. Burfisher, Frederic Lambert, and Troy D. Matheson, 'NAFTA to USMCA: What is Gained?' (2019) International Monetary Fund

[1299] USMCA, called other acronyms by Canada and Mexico

signed up to the investor–state arbitration aspect of the agreement. Article 14.2(4) of the USMCA provides that an investor may only submit a claim to arbitration under Chapter 14 as provided for in the USMCA's annexes, and Annex 14-D addresses investment disputes for only the USA and Mexico. Therefore, under USMCA, investors from the USA and Mexico will still be able to avail themselves of the benefits of investor–state arbitration. Canada, however, chose not to sign up to Annex 14-D. As a result of this decision, United States investors in Canada and Canadian investors in the United States will no longer have the option to bring proceedings against the state in which they have invested via direct recourse to international arbitration.

In surmising why Canada elected not to join Annex 14-D, some scholars have suggested that it was perhaps because Canada had not only been subject to more investor-state claims under NAFTA Chapter 11 than either of the other two signatories, Mexico or the United States, but to compound matters, Canada had lost eight such cases.[1300] Additionally, Canadian investors who brought claims against foreign states had a low success rate. The United States on the other hand, is reported to have never lost a NAFTA Chapter 11 case. Looked at in the light of an accounting mechanism, it is not surprising that Canada chose not to sign up to the ISDS provisions in Annex 14-D, when one considers how much Canada received by way of Awards in cases against other states in comparison to how much they paid to foreign investors in the cases they lost. Additionally, and relevant to this thesis, Canada's withdrawal from the USMCA Annex 14-D ISDS provisions is symptomatic of the wider issues of legitimacy of the ISDS regime which prompted the institution of UNCITRAL's WG III.[1301]

The relevance of the USMCA for this thesis is that although the NAFTA was in place for three decades, the states parties who were signatories to that Agreement decided at some point to conduct a review of their Agreement, with the result that a new Agreement that was "fit for their purposes" was negotiated, drafted and signed, ending the NAFTA regime under which both the US and Canada were the respondents in Investor-State disputes before International Tribunals and resulting in several Awards against Canada in particular. Whilst it could be argued that the main reason for NAFTA being abandoned (particularly by the US) was the protectionist foreign policy attitude of the Trump administration[1302], Canada and Mexico were willing parties to the process of renegotiation which culminated in a signing ceremony at the G20 Summit in Buenos Aires. Canada in particular, had no desire to continue to be bound by ISDS clauses and successfully negotiated terms to that end that suited her. By April 2020, all three parties had ratified the new agreement, known as USMCA.

Although it is still very early days and therefore unclear what the future holds, the point of this illustration is that regardless of the length of time that an Agreement may have been in existence, it is never too late to rectify it if it transpires that its existence was more harmful than helpful to the interests of the signatories. In this case, the USMCA's ISDS mechanism has been described as one that 'strikes a balance between the need to facilitate cross-border investment, especially between Mexico and the United States, and the need to minimize the controversies that surround ISDS in academic and political circles'.[1303] It is therefore a timely reminder to Ghana when considering whether or not the old BITs to which it remains signatory are "fit for purpose" or whether they might need some concerted action to renegotiate them in order to introduce new innovative provisions in new BITs that are truly "fit for purpose" in its bid to reclaim regulatory autonomy and redefine its sovereignty.

[1300] Jerry L. Lai, 'A Tale of Two Treaties: A Study of NAFTA and the USMCA's Investor-State Dispute Settlement Mechanisms' (2021) 35 Emory Int'l L Rev 259, 274

[1301] https://uncitral.un.org/en/working_groups/3/investor-state

[1302] NAFTA_USMCA_Three-years-and-three-decades-on-reflecting-on-the-final-sunset-of-NAFTA-and-USMCA-sunrise.pdf accessed on 04.08.2023.

[1303] See Marcia J. Staff & Christine W. Lewis, 'Arbitration Under NAFTA Chapter 11: Past, Present and Future' (2003) 25 Hous J. Int'l L 301, 302

It is also noteworthy that under the CETA concluded between Canada, the European Union and its Member States in 2016, CETA makes a number of reforms. The most relevant to of those reforms to this thesis is a new adjudication system, whereby instead of an arbitral tribunal which was previously the norm, CETA creates a standing investment court wherein tribunal members are expected to have qualifications which would qualify them for appointment to judicial office in their respective countries. Also, they must show an expertise in public international law,[1304] all of which are points worthy of consideration by Ghana.

6.3 EXISTING MODELS AND INITIATIVES.

There are existing models and initiatives that have previously been introduced by various bodies to assist developing countries meet the challenges of defending themselves in the ISDS arena. Some of these will be discussed below, and a circumspect conclusion drawn as to whether any of these could be of assistance to Ghana in reclaiming its Regulatory Autonomy in the Investment Treaty arena.

6.3.1 THE FINANCIAL ASSISTANCE FUND OF THE PERMANENT COURT OF ARBITRATION (PCA)

The PCA established a Financial Assistance Fund (FAF) for the Settlement of International Disputes in 1994 to provide financial assistance to certain States with the aim of helping Contracting Parties meet the costs of dispute settlement procedures administered by PCA according to the terms of reference and guidelines as approved on 11 December 1995. States requesting assistance need to be party either to the 1899 Hague Convention for the Pacific Settlement of International Disputes or of the 1907 Convention for the Pacific Settlement of International Disputes, or any institution or enterprise owned and controlled by such State, which has submitted an agreement for the settlement of its dispute under the PCA and which is listed on the 'DAC List of Aid Recipients'[1305] prepared by the OECD. There is a strict criterion for costs that are eligible to be covered, and the funding is assured by voluntary financial contributions by States, intergovernmental organizations, national institutions, as well as natural and legal persons. It must be noted that requests for financial assistance are accepted only to the extent that funding is available. This Fund established by the PCA is relevant to the argument raised in this thesis because it is a multilateral initiative offering assistance to developing countries like African countries and this Fund[1306] might be considered by some as an option for African states.

6.3.2 THE SECRETARY-GENERAL'S TRUST FUND OF THE ICJ

The Secretary-General's Trust Fund (funded by voluntary contributions from states) to assist States in the Settlement of Disputes through the International Court of Justice (ICJ),[1307] was established in 1989 under the Financial Regulations and Rules of the United Nations. Applications may be submitted by States when they do not have the necessary financial resources. Financial assistance is provided for expenses incurred in relation to a pre-determined set of criteria and requests for financial assistance are accepted only to the extent that funding is available. This ICJ initiative is relevant to this thesis as it offers funds to assist developing countries (including African countries) appearing before the ICJ.

[1304] Graham Coop & Gunjan Sharma, 'Chapter IV: Investment Arbitration, Procedural Innovations to ISDS' in C. Clausegger et al. (eds)(2019) Recent Trade and Investment Treaties: A Comparison of the USMCA and CETA, Austria Y.B. Int. Arb. 467

[1305] The DAC List of ODA Recipients shows all countries and territories eligible to receive official development assistance (ODA)

[1306] https://pca-cpa.org/en/about/faf/ accessed 10.06.2020.

[1307] Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the ICJ accessed on 19.08.2023.

6.3.3 THE UNCTAD-IADB-OAS PROJECT (2006)

This initiative for establishing an advisory centre for the Latin American States was undertaken with the support of UNCTAD[1308], the Inter-American Development Bank (IADB) and the Organization of American States (OAS) in 2006. A steering committee prepared a draft treaty for establishing an advisory centre in May 2009, providing a legal foundation to the proposed centre. It was agreed inter alia that the centre would: - Be an intergovernmental entity; - Be based on the ACWL model and provide assistance to developing and least developed countries; - Carry out two functions: firstly, an advisory function, ranging from assisting countries in negotiations, drafting, prevention of disputes, early settlement, capacity-building and sharing of experience, keeping database of cases and arbitrators, offering secondment and trainee positions; secondly, a defence function, to help countries in the defence of investment disputes either through direct representation or as part of the defence team representing the State by providing legal advice, capacity-building and technical assistance in ISDS and working in a financially self-sufficient manner. Its headquarters was initially meant to be in Washington D.C. and later in Panama City, for which funds were pledged by various countries. This project was funded by IADB through a Regional Public Good window. It engaged a team of lawyers funded by a trust fund contributed to equally by all the member States. This project was discontinued because of several government transitions and changes in the teams participating in the steering committee, and the launch of the UNASUR project[1309] which was based on similar objectives.

6.3.4 THE UNION OF SOUTH AMERICAN NATIONS (UNASUR) PROJECT

The UNASUR project was launched in 2008 along the lines of the UNCTAD-IADB-OAS negotiations through the signing of a Constitutive Treaty[1310] by the leaders of several South American States. Due to their concerns with the ISDS regime, the UNASUR countries sought to replace it with 'a regional dispute advisory centre on investment law and investor-State disputes for UNASUR member countries',[1311] referred to as the Southern Observatory on Investment and Transnational Corporations, along with the creation of UNASUR investment arbitration rules and an UNASUR investment arbitration court. The purpose of the centre was to primarily create 'equal conditions between investors and states',[1312] to 'promote sustainable investment that respects State sovereignty',[1313] and to provide 'a source of information and generate debate, discussion, reflection and exchange of knowledge and experiences on investment and international investment arbitration, in order to promote clear and transparent rules.'[1314] Its focus was on consultations or mediation instead of arbitration. At the Second Ministerial Meeting in Sept 2015, it was reported that "nearly 80 per cent" of the proposed legal framework had been agreed. However, UNASUR has been described as 'inactive and paralyzed'.[1315] This is because between 2017 and 2020, several governments chose to leave the organisation, in part perhaps due to a lack of consensus amongst members on the nomination of a new Secretary General. As a result, this organisation that aimed to provide legal and financial assistance on a regional basis, was unsuccessful in its aim.

[1308] The United Nations Conference on Trade and Development. See About UNCTAD | UNCTAD accessed on 07.08.2023.
[1309] See next section below.
[1310] Microsoft Word - Tratado-constitutivo-version-ingles.doc (gsdrc.org) accessed on 07.08.2023.
[1311] Ibid
[1312] Ibid
[1313] Ibid
[1314] Ibid
[1315] Toward a New UNASUR: Pathways for the Reactivation of South American Integration - Center for Economic and Policy Research (cepr.net) accessed on 07.08.2023.

6.3.5 THE ANZ-ASEAN FORUM (2012)

In the context of the Australia-New Zealand and Association of Southeast Asian Nations (ANZ-ASEAN) Forum in 2012, a regional investment advisory centre was proposed, but not pursued.

Although the last three initiatives set out above were not pursued for different reasons, mainly due to limited political as well as financial support, it is notable that the Latin-American initiatives made good progress initially and even produced a Draft Treaty, which is why they have been included in the possible initiatives which could be considered by Ghana, mainly because they are options initiated by developing states themselves, which is what this thesis is exploring for Africa in general, and Ghana in particular. This thesis will aim at integrating the lessons learned from the initiatives that were unsuccessful in the next chapter, when discussing the possible limitations of any proposed solution.

6.3.6 THE AFRICAN LEGAL SUPPORT FACILITY (ALSF OR "THE FACILITY")

Of all the existing initiatives and Models that have been discussed in this section, the ALSF is the only initiative based on the African continent and initiated by an African institution. It is an international organisation hosted by the African Development Bank (AfDB) Group, in Abidjan, Côte d'Ivoire, and has as its stated ambition, 'a dedication to providing legal advice and technical assistance to African countries in the structuring and negotiation of complex commercial transactions, creditor litigation and other related sovereign transactions'. This award-winning[1316] Facility was established on 22 December 2008 by the AfDB Group, in response to requests by members of the African Ministers of Finance group, who had been calling since 2003 for the establishment of an institution that would provide legal assistance to African States, in particular those recognised as 'heavily indebted Poor Countries' (HIPCs).[1317] ALSF became operational in 2010 and aims to meet the challenge of litigations that African states might have with creditors (especially vulture funds) and to provide tools to assist in the negotiation of complex commercial transactions.[1318] Additionally, ALSF develops and proposes innovative tools for legal capacity building[1319] as well as knowledge management on the African continent, all of which is invaluable for the needs of developing countries. All African countries are eligible to request assistance from ALSF, and additionally, membership is open to all sovereign nations and international organizations or institutions.[1320]

Very much aligned to the ethos of this thesis, which aims to redress the asymmetric relationship between developing Host States and developed Home States (and their investors) around BITs, is the stated goal of the Facility, which is the removal of 'asymmetric technical capacities and level the field of legal expertise among parties to litigation and negotiations'.[1321]

Additionally, the ALSF's unique mandate which centres on the provision of practical, hands-on support to governments of African States during negotiations with foreign investors,[1322] resonates with the proposed solution in this thesis of the creation of an in-country team of Specialists with the requisite

[1316] The ALSF was recognized as the **Best Legal Department of the Year** (Large teams' category) at the 2018 African Legal Awards held in Johannesburg, South Africa. The Facility also received special mention for its support to African governments in negotiating investment-related transactions essential for their economic development at the same event. Earlier in 2018, during the African Energy Forum, the ALSF was distinguished **as an innovative tool impacting energy development in Africa.**

[1317] See https://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-legal-support-facility accessed on 20.12.2023

[1318] See https://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-legal-support-facility accessed on 20.12.2023.

[1319] See https://alsf.academy/ accessed on 20.12.2023. This is the ASLF Virtual Academy, a portal dedicated to continuing training and capacity building for African lawyers and government officials, launched in 2017.

[1320] At the end of 2021, the Facility had 60 members, including 53 countries (including five non-African countries) and seven international organizations. Among the 48 African member countries, 26 have signed and ratified the ALSF Agreement; 22 have signed but not ratified it, while 6 have neither signed nor ratified it.

[1321] See Who are we | ALSF (africanlegalsupportfacility.com) – Our Goal. Accessed 20.12.2023.

[1322] See https://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-legal-support-facility accessed on 20.12.2023

expertise and knowledge to undertake negotiations that result in BITs that are balanced, fair and equitably reflect the needs and requirements of both the Host State and the investors.[1323] This will ultimately result in better governance and responsible stewardship by the government in respect of the environment as well as its citizens,[1324] leading eventually to "the Africa we want".

In concluding this section on the ALSF, it is worth noting that there are five sectors in which the Facility operates[1325]. These are firstly, extractives and natural resources, secondly infrastructure & Public-Private Partnerships (PPP), thirdly energy, fourthly Sovereign debt and finally, Investment Treaties & Dispute Resolution.

Of these five sectors, the sector of most relevance to this thesis is the sector relating to Investment Treaties & Dispute Resolution. Once a team of Specialists as envisaged by this thesis is created, an alliance with the ALSF could be mutually beneficial to both the ALSF and the government of Ghana, especially in relation to continuing professional development via the ALSF Virtual Academy, a course of action that could well be replicated throughout the continent in other African States.

6.3.7 THE ADVISORY CENTRE ON WTO (THE WORLD TRADE ORGANISATION) LAW

The Advisory Centre on WTO[1326] Law was established to provide developing states with legal advice on WTO law and support during WTO dispute settlement proceedings as well as training to their government officials.

6.3.8 THE MULTILATERAL ADVISORY CENTRE AS PROPOSED BY UNCITRAL WG 111

The idea of a WGIII Advisory Centre was put forward by UNCITRAL's WG III [1327] as one of the possible solutions to the "legitimacy crisis" being faced by the ISDS regime. This suggestion as it stands presently is for the establishment of a WGIII Advisory Centre along the lines of the WTO Advisory Centre. WG III is considering the provision of the following services by the Centre - a) assistance in organizing the defence; b) support during dispute settlement proceedings; c) advisory services; d) alternative dispute resolution (ADR) services; and e) capacity-building and sharing of best practices. In its Note[1328] to the Working Group, the UNCITRAL Secretariat makes the point that services proposed to be rendered by the WGIII Advisory Centre would, in turn, have an impact on its form, structure and budget i.e., the cost to the proposed beneficiaries of the WGIII Advisory Centre. These proposed beneficiaries would be in the main, developing (including African) states which do not have the necessary expertise in-country and therefore would need the services of the Multilateral Advisory Centre. The rationale behind the proposed provision of assistance in organising the defence of a case, is that whilst a minority of States have a dedicated in-house team or a combination of an in-house team working with outside Counsel, the vast majority of States outsource their defence to outside Counsel, for the obvious reason that unless a State has several ongoing cases, it might not be cost-effective to have a dedicated in-house team working at less than full capacity. It has also been suggested that assistance provided by such an Advisory Centre to poorer countries could help them get better prepared to handle investors' claims, organise their defence strategy and coordinate

[1323] The ALSF's unique mandate focuses on providing practical, "hands-on" support during the negotiation of contractual arrangements between governments and investors. See https://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-legal-support-facility accessed on 20.12.2023.
[1324] The ALSF empowers governments with the necessary knowledge and resources to ensure balanced, fair and equitable outcomes, to ultimately improve good governance and environmental and social stewardship. See https://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-legal-support-facility accessed on 20.12.2023.
[1325] See https://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-legal-support-facility accessed on 20.12.2023.
[1326] World Trade Organisation - https://www.wto.org/ accessed 14.09.2023.
[1327] Multilateral Advisory Centre | United Nations Commission On International Trade Law accessed on 03.08.2023.
[1328] Ibid

information among various ministries and agencies in-country with the attendant knock-on effect of shorter cases and less cost.[1329]

Some commentators[1330] have pointed out that there is without doubt a great need for assistance for 'under-resourced' developing States on a range of issues relating to International Investment Law, in particular, in relation to the dispute-settlement mechanism. This is because, without proper access to or understanding of the intricacies of this mechanism, by way of experienced personnel, Host states will be unable to mount the best possible defence when cited as respondents before Arbitral Tribunals. This is particularly crucial in light of the substantial potential (as has been pointed out in this thesis) for many more disputes being brought against them and the potentially crippling cost of defending such disputes. The detailed suggestion presently, is for the WGIII Advisory Centre to assist with the technical expertise, means and resources required to research arbitrator profiles by establishing a comprehensive database of potential arbitrators and make this available to respondent States and promote the exchange of experience and expertise relating to the evaluation of arbitrator services, as well as advice and support in the case of arbitrator challenges. It is also suggested that co-ordination services could be provided to states for representation at hearings and that throughout the process, representatives of the respondent State could be included in the advisory centre's team, as a capacity-building measure. Additionally, it is suggested that in addition to defence services, WG III could consider a range of advisory services, including providing assistance to States for the review of, and potentially amendment to, their international investment instruments; assistance in relation to the setting-up of conflict management systems, including early dispute prevention policies and alert procedures and assistance regarding the establishment of a lead agency that would ensure proper attention to potential disputes, provide adequate responses to problems with foreign investors, and defend the interests of the State at each stage.[1331]

Although the idea of the WGIII Advisory Centre has several positives, this thesis posits that a novel approach such as the creation of a team of Specialists tasked with (re)negotiating and drafting IIAs would be a much better answer to the challenges faced by Host States in the Global South, of which Ghana is one. This is because, firstly the issue of the cost implications to a developing country such as Ghana are immense. A study conducted by a group of experts in 2020 found that a Multilateral Advisory Centre such as suggested by UNCITRAL WG III would cost in the region of 16 million USD to establish a Centre with 15 lawyers and secure its operation for five years, or 10 million USD for a Centre with 8 lawyers.[1332] These sums would, according to the present proposal, be sourced mostly from wealthier countries in the Global North, with contributions by the developing countries that it was set up to support.

Following on from the study referred to above, the UNCITRAL Secretariat, at the request of WG III and based on the figures produced by the group of experts in 2020[1333] produced a document setting out sample budget figures for financing and establishing such an Advisory Centre. The report concluded in summary that:

> '…it is estimated that an initial funding of USD 5.3 million would be required for the establishment (USD 422,528) and the operation of the Advisory Centre for the first year (USD 4,870,001). Afterwards, the annual budget of the Centre would be USD 4.87 million. If one regional office is to be established with the installation cost of USD 148,653, the total annual budget of the Advisory Centre is estimated to be USD 5.19 million'[1334]

[1329] See https://documents-dds-ny.un.org/doc/UNDOC/LTD/V21/090/91/PDF/V2109091.pdf?OpenElement accessed on 21.07.2023
[1330] Karl P. Sauvant, 'An Advisory Centre on International Investment Law: Key Features'(2019) Academic Forum on ISDS Concept Paper 11
[1331] See Note from UNCITRAL Secretariat produced for the Thirty-eighth session of WGIII Vienna, 14–18 October 2019. Accessed from V1907888.pdf (un.org) accessed on 21.07.2023.
[1332] See hypothetical costs calculations in N Angelet, N Kamau, B REMY, K.P. Sauvant, C.J. Valderrama, & D. Wallace, 'Note on the costs and financing of an Advisory Centre on International Investment Law' (2020) International Law Institute
[1333] Ibid
[1334] See pages 6/10 and 7/10 of https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/budget_and_financing_of_an_advisory_centre__1.pdf accessed on 21.12.2023.

The report also stated in para 26 and 27 that the main source of funding to cover the annual operational costs of USD 4.87 million would be from contributions of Member States and from fees charged by the WGIII Advisory Centre. The report projects that Member States will be divided into three categories (presumably based upon their level of development i.e., Least Developed Countries – Annex I, Developing Countries – Annex II and Developed Countries – Annex III), with Annex I countries paying a minimum annual contribution of USD 50,000, Annex II a minimum annual contribution of USD 250,000 and Annex III a USD 500,000 minimum annual contribution.[1335]

Over and above these annual contributions, it is envisaged that the WGIII Advisory Centre will charge for its services in order to 'cover its budget, which would ensure financial sustainability'.[1336] These fees are foreseen to range from a charge to Annex I countries of retainer fee of USD 5,000 + USD 250 per hour for Legal advice and support for ISDS proceedings, to Annex III countries paying a retainer fee of USD 5,000 + USD 550 per hour for the same service.[1337]

This thesis would posit that despite the substantial cost burden on developing Host States, the WGIII Advisory Centre would not result in a team representing Host States that would be totally dedicated to the interests of that particular Host State, whereas an in-country team of Specialists would be patently dedicated to fiercely protecting the interests of its Host Country without any split allegiances.

Secondly, such an Advisory Centre would more likely than not be populated by lawyers from the Global North rather than lawyers from the developing countries, with the result that there would be no significant (or any) "knowledge transfer" in respect of the countries who were respondents in these cases. Even if a small cohort of government officials from the Host Developing State was identified to work alongside the WGIII Advisory Centre team, the fact that these officials would not have that as their main focus upon their return to their country, as well as the cost and logistics of having government officials shadow an Advisory Centre team based in the Global North, makes this idea less than optimal for poorer states. A Team of Specialists sourced from within the ranks of Experts in-country on the other hand, would give the Team a sense of ownership unlike the idea of the WGIII Advisory Centre which has neo-colonial undertones and similarities to the concept of "overseas development aid" (ODA).

6.4 A TEAM OF SPECIALISTS TASKED WITH inter alia (RE)NEGOTIATING AND DRAFTING IIAS

A dedicated core Team of Specialists such as is envisaged by this thesis will be able to provide the Government of the Republic of Ghana with a clearly set out overview of the country's International Investment obligations and any domestic legislation or stated priorities which either underpin or clash with these International Investment obligations. This will in turn enable the Specialist Team to deal with the asymmetrical provisions of the present BITs in a targeted manner. In addition to its main role of (re)negotiating and drafting IIA, in time the Specialist Team could also assist in dispute avoidance, Mediation, Conciliation and other forms of ADR, and knowledge transfer by offering training to other Ghanaian public entities on how to deal with investors, in cooperation with GPIC and other relevant organisations.

This thesis chooses not to be prescriptive, but a suggestion is that the Team of Specialists be comprised of a core Team of say, five individuals based in-country, and that this core Team could be supported by International Consultants mainly from the African Continent. To ensure a realistic

[1335] Ibid
[1336] Ibid
[1337] See pages 8/10 of https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/budget_and_financing_of_an_advisory_centre__1.pdf accessed on 21.12.2023.

impartation of knowledge and skills transfer, officials from relevant Ministries and the GIPC should be seconded to join the core Team as and when Agreements relevant to their areas of expertise are being negotiated. Such a dedicated Team of Specialists could be recruited from the ample and growing pool of talent both in-country and on the continent. In-country, the Chapter Executives of the Ghana Chapter of the Chartered Institute of Arbitrators[1338] as well as the members of the ICSID Panels of Arbitrators and Conciliators (see recently updated list)[1339] would make an appropriate starting point for a pool of lawyers (both Arbitrators and Counsel) experienced in International Arbitration to be interviewed as a potential core Team of Specialists. The Ghana Arbitration Centre could also be a possible fertile ground for identifying some in-country talent. On the continent, there is a plethora of talent to be harnessed, either on a Consultancy basis or as part of the core team of in-Country Specialists. An ideal starting point for the procurement of extremely talented Arbitrators on the continent could be the Membership Directory of the African Arbitration Association (AfAA),[1340] for example.

Clearly the criteria for the appointment of such a team of Specialists should be carefully thought through to ensure that the team is not only "fit for purpose" but also comprises Experts and Practitioners who are all capable of "hitting the ground running". To ensure that the team can deal with the plethora of issues facing Ghana's Investment Treaty landscape, it is essential that each member of the team has genuine experience as having acted as Counsel or Arbitrator on cases with an International Dimension, or experience of Investment Treaty Arbitration either as an Arbitrator, Counsel or Academic. Before being appointed, these Experts must be interviewed by a panel highly experienced both in terms of length of practice as a Legal Practitioner, but also in terms of length of practice as an Academic and/or Arbitrator. Such a team of Specialists and Experts would be well placed to be the correctors and mitigators of the potential problems identified as part of the analysis of the findings articulated earlier. This team of Specialists would be able to carry out an audit of the IIAs (particularly BITs) to which Ghana is presently a signatory, with a view to ensuring that they are "fit for purpose". This would entail firstly, a review of those BITs that Ghana has signed but never ratified and are therefore not in force, namely the BITs that Ghana has with the following countries[1341] – Turkey, Barbados, Spain, Botswana, Zimbabwe, Mauritania, Zambia, Benin, Guinea, Cuba, France, South Africa, Italy, Egypt, Bulgaria and Romania. It is clear from this list of countries that out of the 28 BITs that Ghana is signatory to, the majority have not been ratified and are therefore not in force. In relation to those countries with which Ghana has a BIT in force, the Team of Specialists can, as part of the audit, ensure that any BITs that are due for renewal are scheduled for re-negotiation to ensure that any provisions that are identified as not in the best interests of Ghana, are flagged up for discussion and renegotiation. E.g., it might be deemed in the best interests of Ghana that any clauses in BITs allowing private foreign investors to avail themselves of international arbitration without first exhausting national remedies, be these via the national courts or via the Ghana Arbitration Centre[1342] be flagged up for negotiation and redrafting to ensure that private foreign investors were obliged to utilise national legal avenues in the first instance. This is crucial because lack of such oversight allows private foreign investors to continue to avail themselves of their preferred option of proceeding directly to International Arbitration, to the detriment of the Host State, in this case, Ghana.

6.5 FEASIBILITY OF THE PROPOSAL OF A SPECIALIST TEAM

Earlier in this chapter, this thesis provided examples of several potential options which could be used by Ghana as a solution to the findings arrived at in Chapter Five from the Case Study. Whilst some of these potential options were methods used by other countries to reclaim their regulatory space,

[1338] Ghana Chapter – CIArb (ciarbnigeria.org) accessed on 21.07.2023.
[1339] Database of ICSID Panels | ICSID (worldbank.org) accessed on 21.07.2023.
[1340] African Arbitration Association - Home (afaa.ngo) accessed on 21.07.2023.
[1341] Ghana | International Investment Agreements Navigator | UNCTAD Investment Policy Hub accessed on 26.07.2023.
[1342] https://arbitrationcentregh.com/ accessed on 08.08.2023.

others related to draft legislative instruments from various RECs in Africa and yet others were existing models and initiatives that had been introduced by various bodies to assist developing countries meet the challenges of defending themselves in the ISDS arena. Three of these possible options related to ideas that are prototypes, in that they are presently in the conceptual stage and have not yet been tried and tested. These are firstly the UNCITRAL WGII Advisory Centre idea, secondly the idea of a Pan African Investment Court promulgated by Nyombi, and thirdly, the concept of an in-country Specialist Team of experts conceived in this thesis.

The following sections will critically evaluate the proposed solution of a Team of Specialists to ascertain if it is "fit for purpose" in an African setting. Given the present economic and political situation, the social norms at play and the issues of power politics between Host States and Home States, can such a proposed solution actually work? As part of this evaluation, this thesis will consider whether Ghana is ready for such a body of Experts tasked with the (re)negotiating and drafting of IIAs, what the potential limitations of such a proposal might be and how feasible the proposed solution is. If the conclusion is that Ghana is not ready for this next step, the following sections will examine any internal and external stumbling blocks. This thesis will also conduct a "reality check" to consider whether the asymmetrical power imbalance between Ghana as a developing Host State and potential Home States, (which are usually developed states), will result in a stalemate situation with the status quo being maintained and Ghana unable to reclaim its RA and therefore unable to redefine its sovereignty.

Additionally, it is worth noting that one external stumbling block that has derailed previous promising initiatives such as the PAIC initiative is the issue of (dis)unity of African States. However, this stumbling block of disunity amongst states may turn out not to be a problem since the proposed solution of a team of Specialists to be created in Ghana (with the possibility of a roll-out to other developing states if successful) would not require co-operation with other states to ensure their successful implementation.

Finally, it must be borne in mind that Regional Economic Communities (RECs) have uniquely individual characteristics in terms of development and the political will required to move forward, so the influence of RECs (such as ECOWAS[1343] in the case of Ghana) will need to be factored into any proposals.

6.6 BENEFITS TO GHANA OF THE PROPOSAL IN THIS THESIS FOR A SPECIALIST TEAM

Before conducting a critical evaluation of the proposed solution of the institution of an in-country Team of Specialists in Ghana to rectify the findings arrived at in Chapter Five in answer to the research question in this thesis, it would be prudent to examine the potential benefits that this proposal would bring to the Republic of Ghana.

As evidenced throughout this thesis, developing countries, who form the vast majority of Host State signatories to IIAs, have historically borne the brunt of foreign investors bringing claims against them for alleged breaches of provisions in old-style BITs. This is firstly because due to the asymmetrical nature of these old-style BITs, foreign investors are the only parties who can instigate proceedings, and secondly, because there are no investor obligations in the old-style BITs. In addition to this, and perhaps of most concern, is the effect of Regulatory Chill, which has been raised as a concern by several academics[1344] as well as the Developing States Members of UNCITRAL who have been taking

[1343] The Economic Community of West African States - https://ecowas.int/ accessed on 21.10.2023.
[1344] Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in Chester Brown, Kate Miles (eds.), *Evolution In Investment Treaty Law And Arbitration* (Cambridge University Press, 2011) Available at

part in the deliberations of UNCITRAL's WG III.[1345] The regulatory chill effect of ISDS arises when the mere threat of the use of ISDS by a foreign investor is enough to discourage a Host State from undertaking regulatory measures which would be beneficial to the Host State and its citizens. These are typically measures aimed at protecting economic, social, and environmental rights, as well as regulating economic activities in the State.[1346] Regulatory chill arises when states desist from carrying out any or all of the legitimate and necessary activities outlined above from a fear of the repercussions that could be visited upon them if a foreign investor chooses to initiate arbitral proceedings against the state. Examples of such repercussions are the very expensive costs associated with defending ISDS proceedings, (regardless of whether the tribunal finds for or against the state), and the cost of damages and reputational loss suffered if an Award is imposed upon the state. This situation arises from the inherently asymmetric nature of the ISDS system and greatly undermines the freedom of a state to regulate in its own territory, which is the reason why this thesis refers to the need to reclaim RA and economic sovereignty. It has been noted by Adeleke that in revising existing BITs or negotiating future BITs, as proposed in this thesis, emphasis should be placed not on developing new international arbitration structures, but on modifying the language of the BITs, which will in turn enable the development of a system incorporating principles of human rights norms and the rule of law.[1347] This accords with the aims of the creation of a Specialist Team, as envisaged by this thesis.

The main benefit of having an in-country Specialist Team as proposed in this thesis is that such a Team would have an in-depth knowledge of the Investment aspirations of Ghana as identified by the Government of Ghana as well as the knowledge, expertise, and awareness of the global world view of the Investment Treaty Arbitration regime. This combination would result in the ability to make targeted recommendations for changes to policy decisions proposed by the Government as well as an ability to craft, (re)negotiate and draft IIAs incorporating innovative provisions such as sustainable development provisions, investor obligations, human rights, a cooling-off period that encourages the use of negotiation and or conciliation, state to state dispute settlement, human rights mechanisms, and deference to national legal systems, all of which would be geared towards more transparency and equity in investor-state relationships rather than the asymmetrical situation that presently pertains. This would have the additional effect of protecting the RA of the state. Alongside improving Ghana's approach to new treaties and modernizing existing treaties, it would be the responsibility of the Specialist Team not only to ensure internal coherence of their IIAs with each other, but also coherence with national investment policies and with external bodies to which Ghana has international responsibilities.[1348]

Another benefit would be the ability to utilise and nurture in-country talent, as well as the opportunity for real knowledge transfer within the country in respect of expertise in this field. This would in turn have a positive knock-on effect on individuals acting as Counsel, Arbitrators, and members of the Judiciary, with in-country lawyers being equipped for those roles via knowledge transfer.

SSRN: https://ssrn.com/abstract=2065706; See also A Schram, S Friel, J Anthony VanDuzer, A Ruckert, R Labonté, Internalisation of International Investment Agreements in Public Policymaking: Developing a Conceptual Framework of Regulatory Chill (2018) Global Policy 193; See also Eckhard Janeba, 'Regulatory chill and the effect of investor state dispute settlements' (2019) Review of International Economics 27 No. 4 1172

[1345] See paragraphs 36-37 of Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019) - https://documents-dds-ny.un.org/doc/UNDOC/GEN/V19/024/04/PDF/V1902404.pdf?OpenElement accessed on 21.12.2023

[1346] See references to Regulatory Chill in UNCITRAL WG III papers - A/CN.9/1124, para. 103 and A/CN.9/970, para. 36. V1902404.pdf (un.org) and 2222853E.pdf (un.org) both accessed on 24.08.2023.

[1347] Fola Adeleke, *International investment law and policy in Africa: exploring a human rights-based approach to investment regulation and dispute settlement* (Routledge, 2017) 215

[1348] See Phase III of UNCTAD IIA Reform in https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf accessed on 21.12.2023

Finally, an additional benefit would be that Ghana would become recognised as a developing country with robust International Investment legislation and governance structures that ensure that foreign investors abide by fair and transparent IIA rules that do not work to the detriment of Host States and stifle the RA and the overall Investment programme of the Host State.

It is therefore clear that the benefits which the proposal outlined in this thesis offers to the Government of Ghana are not merely theoretical but practical. They are also grounded in current concerns as evidenced by the deliberations at the level of the United Nations, particularly in respect of Draft Provision 12 relating to the "Right to Regulate" as identified by UNCITRAL WG III as part of the cross-cutting issues being debated and which are on the Agenda for the 47th session of WGIII scheduled to be held on 22-26 January 2024 in Vienna.[1349] Additionally, academics have noted that recent developments in the International Investment Regime have provided a strong indication that even states from the Global North are placing more emphasis on the sovereign right of states to regulate their own interests and to protect their national interests. For instance, Sornarajah comments that the contents of the 2012 model BIT of the USA show a retreat towards 'a sovereignty-centred approach born out of their experience of being at the wrong end of several NAFTA arbitrations'.[1350] This trajectory mirrors the theme of this thesis in respect of protecting the erosion of Ghana's RA and redefining the sovereignty of Host States generally.

6.7 BENEFITS OF A MODEL BIT TO GHANA

Ghana's Model BIT was formulated over fifteen years ago, in 2008.[1351] The International Investment Treaty arena has changed almost beyond recognition since then with Model BITs having been produced by countries and organisations both in the Global South and the Global North which reflect the changes that have taken place in this arena. Whilst Ghana's 2008 Model BIT includes a few clauses that were innovative in 2008, such as the reference to the establishment of a Joint Commission on Investment comprising cabinet-level representatives to inter-alia, 'give joint interpretations of the Agreement if required',[1352] most of the problematic provisions that have been identified earlier on in this thesis remain in Ghana's 2008 Model BIT.

As an additional point of originality, this thesis has produced an **outline** Draft Model BIT for Ghana incorporating innovative provisions related to reclaiming Regulatory Autonomy, aimed at balancing the relationship between the promotion of inward investment and sustainable development which have either been tried and tested, or have been suggested but not yet implemented, and which Ghana would benefit from having as part of her negotiating arsenal or toolbox. Such a new Model BIT would not only address the expectations of foreign investors, but also the right of Host states parties to freely introduce new measures which might impinge upon existing investments in the jurisdiction if such measures were deemed by the Host State to be necessary to meet policy objectives of the Host State in accordance with established principles of international law. Such a Model BIT could be used as the basis of negotiations for new BITs or the re-negotiation of existing BITs. The outline provisions of a Draft Model BIT such as envisaged here and annexed to this thesis, have been crafted using ideas and concepts from various innovative pieces of legislation, such as the Pan African Investment Code (PAIC)[1353], the USMCA Free Trade Agreement[1354], the SADC Model BIT Template[1355], the ECOWAS

[1349] See UNCITRAL WGIII Working Group III: Investor-State Dispute Settlement Reform | United Nations Commission On International Trade Law accessed on 07.12.2023. See also deliberations at UNCTAD's World Investment Forums discussed in *UNCTAD's Reform Package for International Investment Regime 10, Introduction, accessed on 28.08.2023.

[1350] M Sornarajah, *The International Law on Foreign Investment* (3rd edn., Cambridge University Press New York 2010) 175

[1351] Ghana Model BIT (2008)en (unctad.org) accessed 08.08.2023.

[1352] Article 13 of Ghana Model BIT 2008.pdf accessed on 03.09.2023.

[1353] See https://au.int/en/documents/20161231/pan-african-investment-code-paic accessed on 21.12.2023.

[1354] See https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement accessed on 21.12.2023.

[1355] See SADC-Model-BIT-Template-Final.pdf accessed on 03.09.2023.

Supplementary Act[1356], the IISD Model International Agreement on Investment for Sustainable Development[1357], the cross-cutting issues identified by UNCITRAL WG III,[1358] the Nigeria-Morocco BIT[1359] and the Model BIT for African States introduced by the African Arbitration Academy (the AAA Model BIT).[1360] Several of the new treaties and regional investment policy initiatives[1361] listed above contain key reform elements which mirror elements set out in UNCTAD's 2020 Investment Reform Accelerator (also referred to as the UNCTAD Road Map)[1362] which was itself built upon UNCTAD's 2015 Investment Policy Framework for Sustainable Development.[1363] Thus these documents as well as UNCTAD's 2018 Reform Package for the International Investment Regime[1364] could be used by the Specialist Team as resource materials in their unique role. The added originality of the idea of incorporating an outline Draft Model BIT in this thesis lies in the fact that such an outline Draft Model BIT will clearly be "fit for purpose" with regards to the unique challenges facing Ghana, but also incorporating the various strands of the several pieces of innovative provisions available in the International Investment Treaty arena globally. The outline Model BIT annexed to this thesis, can form the basis for negotiations and drafting of future BITs by the Government of Ghana and provide the Specialist Team with a good indication of the type of provisions that it would be prudent to include in a 21st century Model BIT to ensure that it is "fit for purpose" for Ghana and for other developing states, should they wish to learn lessons from it.

6.8 EVALUATION OF THE PROPOSAL OF A SPECIALIST TEAM IN LIGHT OF THE AfCFTA

Trading under the AfCFTA,[1365] a multilateral trade agreement signed by 54 of the 55 African states, commenced in January 2021. The general objectives of the AfCFTA are varied, with strong goal setting towards creation of a single market for goods and services aimed towards promoting industry growth across the continent. Additionally, there is a core focus on the creation of a more sustainable and inclusive socio-economic development across all States and RECs, with a view to establishing a Continental Customs Union in the future for the benefit of all. It is anticipated that this will help to overcome the present challenging situation that has arisen due to the myriad of REC memberships and help to progress the integration of States parties in the AfCFTA.[1366]

One of the specific objectives set out in Article 4 of the AfCFTA is for the States Parties to 'cooperate on investment, intellectual property rights and competition' policy. A Specialist Team in-country would be able to assist Ghana in meeting that objective.

[1356] See https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3547/ecowas-supplementary-act-on-investments-2008- accessed on 21.12.2023.
[1357] Howard Mann, Konrad Von Moltke, Luke Eric Peterson, and Aaron Cosbey. IISD Model International Agreement on Investment for Sustainable Development (2005) See IISD Investment_model_int_handbook.pdf accessed on 03.09.2023.
[1358] See UNCITRAL WGIII Working Group III: Investor-State Dispute Settlement Reform | United Nations Commission On International Trade Law accessed on 07.12.2023.
[1359] See https://investmentpolicy.unctad.org/international-investment-agreements/treaties/tips/3711/morocco---nigeria-bit-2016- accessed on 21.12.2023.
[1360] Africa Arbitration Academy – Investing in the legal future of Africa accessed on 30.08.2023.
[1361] Such as the 2016 Amendments to the SADC Protocol on Finance and Investment and the Pan-African Investment Code
[1362] International Investment Agreements Reform Accelerator (unctad.org) accessed on 28.08.2023.
[1363] Investment Policy Framework for Sustainable Development [2015 Edition] | UNCTAD accessed on 28.08.2023.
[1364] UNCTAD's Reform Package for International Investment Regime accessed on 28.08.2023. Some parts of the Reform Package have shaped global reform efforts, such as efforts to foster transparency in investment dispute settlement or initiatives for an international investment court system/multilateral investment court. They have also found reflection in key investment policy instruments, such as the G20 Guiding Principles for Global Investment Policymaking, the draft Joint ACP-UNCTAD Guiding Principles for Investment Policymaking, or the draft Guiding Principles for Investment Policymaking for OIC countries.
[1365] 36437-treaty-consolidated_text_on_cfta_-_en.pdf (au.int) accessed on 24.08.2023.
[1366] 36437-treaty-consolidated_text_on_cfta_-_en.pdf (au.int) page 4. Accessed on 24.08.2023.

The Secretariat of AfCFTA is situated in Accra, the capital city of Ghana.[1367] Its role in relation to the Investment Protocol of the AfCFTA was to draft the initial Investment Protocol and send this out to all the signatory states of the AU for their comments. These comments were collated via the various RECs with individuals being nominated by each government more based on political affiliations rather than expertise in the Investor-State Dispute arena, although there were some experts also present. This fact is relevant to this thesis because it is on the same basis that IIAs are negotiated in-country. The negotiators around the table are often-times appointed more based on political affiliation or by virtue of the fact that they are employed in certain government departments, rather than by virtue of their expertise. A Specialist Team with the requisite experience as outlined in this thesis, would therefore be a unique and valuable addition to the work of the Secretariat in respect of critiquing the AfCFTA Investment Protocol which is still under discussion, as well as providing the expertise required for the (re)negotiating and drafting of new IIAs on behalf of the Government of Ghana to ensure that Ghana is able to protect its RA by being able to make new laws and/or to amend or repeal existing laws in response to changing political, economic or social conditions without the fear of a foreign investor instituting arbitral proceedings on the basis that their rights have been breached via the asymmetrical provisions in an old-style BIT.

6.9 HOW ACCEPTABLE WOULD THE PROPOSAL OF A SPECIALIST TEAM BE TO GHANA – CHALLENGES

The Ghana Investment Promotion Centre (GIPC)[1368] is the institution tasked with promoting investments in Ghana and tasked with leading on investment negotiations. To quote the CEO of GIPC, 'At the GIPC, our vision is to be a one-stop-shop for all the information you need about investing in Ghana. Our goal is to provide you with the tools and resources you need to make informed investment decisions and succeed in Ghana'[1369] Whilst this is a very positive message for investors and the GIPC clearly does a sterling job in promoting the advantages of investing in Ghana, the GIPC is obviously aware that it has limitations and gaps to plug when it comes to actual negotiations of documents such as BITs. This is because in June 2023, the GIPC advertised for a consultant[1370] to assist with training staff in Investor-Deal-Making. The Terms of Reference[1371] state that the project, including developing and delivery of training as well as developing a Training Manual, is expected to be concluded within a maximum of sixteen weeks. The training is required because a need has been identified for 'the Business Development team to develop capacity in managing leads generated, chaperoning the negotiations and deal making process between project sponsors and prospective investors to the successful realization of investments in the projects.'[1372] This might be a challenging situation to overcome, because the essence of this thesis is that a Specialist Team is required in order to have an in-country Team of Experts with an overview of the national and international Investment Treaty arena. The role of the Specialist Team would be not merely to execute the logistics of converting leads into deals, but to understand the requirements of the national investment programme and so ensure that any BITs or IIAs entered into are negotiated with oversight and cohesion so that Ghana is able to

[1367] About The AfCFTA - AfCFTA (au-afcfta.org) accessed on 24.08.2023.
[1368] https://www.gipc.gov.gh/about-gipc/ accessed on 28.08.2023.
[1369] https://www.gipc.gov.gh/about-gipc/ CEO's Message - accessed on 28.08.2023.
[1370] https://www.gipc.gov.gh/recruitment-of-a-consultant-at-the-gipc/ accessed on 28.08.2023.
[1371] https://www.gipc.gov.gh/wp-content/uploads/2023/06/Final-TOR-TRAINING-ON-INVESTOR-DEAL-MAKING-FOR-BD-TEAM-OF-GIPC-.pdf accessed on 28.08.2023.
[1372] https://www.gipc.gov.gh/wp-content/uploads/2023/06/Final-TOR-TRAINING-ON-INVESTOR-DEAL-MAKING-FOR-BD-TEAM-OF-GIPC-.pdf page 2. Accessed on 28.08.2023.

adhere to its contractual obligations with foreign nationals and states, thus limiting and/or eliminating the chances of incurring costs arising from adverse decisions of arbitral tribunals.[1373]

Moreover, at present, there is evidence of a desire by Ghana to conclude as many Investment agreements as possible with countries both in the Global South[1374] and the Global North.[1375] Whilst commendable on the face of it, as has previously been noted, Ghana's Model BIT was crafted over fifteen years ago, and without the oversight of a Specialist Team as proposed in this thesis, it is very likely that any new BITs entered into will have the same problematic provisions as before, with the attendant potential looming problems. It is therefore imperative that a Specialist Team be created before any new BITs or IIAs are entered into by Ghana.

Furthermore, as mentioned by Oppong in his 2017 Inaugural Lecture[1376] at the Ghana Academy of Arts and Sciences, there appears to be a rise in the number of disputes being brought by foreign investors against the Government of Ghana, which should be a matter of significant concern to the state, since the financial cost of defending such proceedings (win or lose), can be extremely costly. Whilst he advocates for the need for the Government of Ghana to rethink various aspects of its engagement with the international arbitration, such as a review of the myriad of domestic statutes, multilateral and bilateral investment treaties via which Ghana is vulnerable to international arbitration, as well as an enhanced role for the Attorney General's Department, Parliament and the Ghana Bar in scrutinising agreements and participating in international arbitration as Counsel and Arbitrators, Oppong makes no mention in his lecture of how these issues can be remedied in a co-ordinated manner. Without a co-ordinated approach, such the creation of a Specialist Team as proposed in this thesis, there remains the very real possibility that Ghana will continue to run the great risk of an increasing number of disputes being brought against her before international arbitration tribunals with the resulting financial burdens on the state.

It is worth noting that the idea of a team of experts in this area in Ghana is not entirely novel, as the idea was trialled with some success in the 1970's according to Nana Dr S.K.B. Asante, former Solicitor General (SG) of Ghana.[1377] In 1969 when he was appointed SG, he secured the Government's consent to establish formal procedures for negotiating public agreements, especially international agreements. The inter-ministerial negotiating team was composed of representatives of the Ministry of Finance, External Aid Division, Bank of Ghana, SG, the Accountant General and the Ministry or Department responsible for the project.[1378]

Following on in 1971 the Government of the Second Republic established a Cabinet Committee on Public Agreements to scrutinize negotiated transactions before cabinet approval. This had a short six-month lifespan before the government was overthrown by military coup in January 1972. After the coup, the Government established a committee comprising the SG, the Principal Secretary of Economic Planning, and the Principal Secretary of External Aid. Upon the recommendation of the

[1373] For example, an arbitral tribunal appointed under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules awarded $US 134m to an independent power company with respect to the termination of an emergency purchase agreement between the company and Ghana, ruling the state must pay, inter alia, the full value of an early termination payment under the contract plus $US 3m in arbitration costs. This was reported in 2021, but due to restrictions of confidentiality, there is no more information readily available.

[1374] https://www.gipc.gov.gh/ghana-and-trinidad-tobago-work-on-partnership/ accessed on 28.08.2023.

[1375] https://www.gipc.gov.gh/ghana-engages-japanese-investors-in-ghana/ accessed on 28.08.2023.

[1376] Inaugural Lecture published as Richard Frimpong Oppong, The Government of Ghana and International Arbitration (Wildy, Simmonds & Hill, 2017) 1, ISBN: 9780854902286

[1377] Nana Dr. S.K.B. Asante, 'Taking International Negotiations Seriously (2022) Ghana Association of Former International Civil Servants (GAFICS)' (Public Lecture, Accra, Ghana, 19 October 2022) 30 https://citinewsroom.com/2022/11/ghana-must-do-better-in-international-negotiations-s-k-b-asante/ accessed on 07.12.2023. .

[1378] Ibid. 30-36

Committee, a permanent mechanism, known as the Public Agreements Review Commission (PARC) was established to review and scrutinise all negotiated agreements between government agencies and international bodies which involved the commitment of substantial budgetary or foreign resources, prior to their approval by the governing National Redemption Council (NRC). PARC was chaired by the Solicitor General and its membership comprised the Deputy Governor of the Bank of Ghana, the Senior Principal Secretary for the Ministry of Finance, the Principal Secretary for Economic Planning, the Senior Principal Secretary for External Aid, Trade & Industry, the Accountant General, the Commissioner of Income Tax, a member of the Faculty of Law, University of Ghana, and a Secretary from the Ministry of Justice. PARC worked well from 1972-1974, then was re-designated as the Public Agreements Review Board until 1992, when it was abolished upon the promulgation of the Constitution. The reasoning behind this may have been that the constitutional provision for Parliamentary Approval of International Economic Agreements dispensed with the need for a Review Committee or Board – which seems very short-sighted.

Another major development worth mentioning is the re-negotiation of the VALCO (Volta Aluminium Company Limited, Ghana) Agreements in the early 1980's which involved the establishment of an elaborate negotiating team headed by the then Vice Chancellor of the University of Ghana and comprised experts from within and without the public sector. The team was supported by two international agencies, the Commonwealth Secretariat, and the UN Centre on Transnational Corporations. From these negotiations there developed a level of expertise in certain pockets of the Public Sector, but these were never mobilized into a fully functioning dedicated team as is envisaged here and the expertise was dissipated as public officials were transferred to other schedules or left for other institutions.[1379]

Presently, however, civil society is beginning to feel more and more empowered and has begun to agitate against contracts being signed without transparency, with consequences that affect all citizens when there is a case brought against a developing state that can ill afford the burdensome costs of defending a case before an International arbitral tribunal, the crippling costs associated with an Award and the interest that accrues if the Award is not settled promptly.

Moreover, as stated by Nana Dr SBK Asante, 'Africa should over time acquire the necessary skills and resources to play a meaningful role and reap the full benefits of our natural resource endowment. We cannot accept the status quo and complain about foreign control of our natural resources.'[1380] This author could not agree more.

Additionally, details of the Investment Protocol of the AfCFTA are yet to be revealed, and once the details are in the public domain, that would be an ideal time for each African State to undertake a review of their International Investment obligations. A Specialist Team with the requisite expertise and international oversight would be the perfect vehicle for such a review by Ghana.

Further afield, the fact that countries and regional blocks from the Global North have begun taking steps to reclaim their regulatory autonomy, reassert their sovereignty and redress the imbalance that existed in favour of foreign investors makes it obvious that this is not simply the case of African or developing states complaining, but a situation whereby it is clearly time for a recalibration of the status quo in International Investment Regime in favour of transparency and equity for all parties,

[1379] Nana Dr S.K.B. Asante, 'Negotiating International Business Transactions' (2012 Address by Nana Dr. S.K.B. Asante, Chairman of the Ghana Arbitration Centre and President of the Institute of International Negotiations at Conference hosted by the Ghana Arbitration Centre) 12

[1380] Nana Dr. S.K.B. Asante, 'Taking International Negotiations Seriously (2022) Ghana Association of Former International Civil Servants (GAFICS)' (Public Lecture, Accra, Ghana, 19 October 2022) 40 https://citinewsroom.com/2022/11/ghana-must-do-better-in-international-negotiations-s-k-b-asante/ accessed on 07.12.2023

which can best be done by a Specialist Team in-country. Additionally, there is the legitimacy crisis being faced by the ISDS regime, which has been discussed in some detail, and which caused the UNCITRAL Commissioners to set up WG III. This thesis has introduced a further dimension into the discourse surrounding the reform of the Investor State Dispute Resolution System presently being conducted formally at UNCITRAL WG III and by several academics. This discussion has been given more impetus by this suggestion of the creation of an in-house Team of Specialists in Ghana to undertake an in-depth assessment of Ghana's BITs and other international investment obligations, in a bid to stave off potential cases being brought against the State. This is part of a bid to reclaim its RA and attain economic sovereignty.

Furthermore on the international level, there has been agitation for reform in the ISDS Regime, as a result of which a great deal of effort has been expended by UNCTAD, as the United Nations' focal point for investment and development[1381] in the formulation of a Road Map for IIA Reform, which has been followed by several countries, but which seems to have escaped the attention of the Government of Ghana, perhaps because there is no such entity as a Specialist Team with the requisite expertise and oversight as is envisaged in this thesis. UNCTAD's World Investment Report 2018[1382] (WIR18) concluded that:

> … strengthening cooperation between national and international investment policymakers, improving interaction, and ensuring cross-fertilization between the national and international regimes (including by identifying lessons learned that can be transferred from one policy regime to the other) were crucial tasks for countries striving to create a mutually supporting, sustainable development-oriented investment policy regime.[1383]

Whilst the ethos of 'strengthening cooperation between national and international investment policymakers'[1384] resonates with the ethos of a Specialist Team as envisaged by this thesis, the originality of this thesis is that it goes a step further by advocating not merely cooperation between various policymakers, but the establishment of a Team of Experts with the ability to maintain an overview of the national investment policies, whilst simultaneously being aware of the international arena in which the country operates and having a good grasp of the changes taking place in the International Investment Treaty arena. This will benefit Ghana in its bid to reclaim RA and redefine its sovereignty. This can be achieved by the Team utilising more focussed negotiation techniques, clearer and more innovative treaty drafting and providing guidance on the likely interpretation that arbitral tribunals may accord to specific IIA provisions.

Although Presidential elections in Ghana are scheduled for December 2024, there is presently no indication that either of the two main political parties has an overhaul of the BIT regime on their political Agenda or that they are even aware of the potential problems on the horizon due to the provisions of the BITs presently in force. Ghana, although the first African country south of the Sahara to attain political independence, has not yet achieved economic independence. There is presently no indication on the political horizon of any desire by Ghana to follow the example of South Africa, with regards to taking radical steps to reclaim its RA and regain economic sovereignty.

Additionally, Ghana has in recent years become heavily involved with the activities of UNCITRAL. Ghana was elected as the Vice-Chairman of UNCITRAL for 2020- 2021 during the 53rd Session held on July 6, in New York, USA and is represented in that role by Professor Paul Kuruk, an International Trade

[1381] *UNCTAD's Reform Package for International Investment Regime – Introduction. Accessed on 28.08.2023.
[1382] World Investment Report 2018 - Investment and New Industrial Policies (unctad.org) accessed on 28.08.2023
[1383] Quoted in *UNCTAD's Reform Package for International Investment Regime page 11 accessed on 28.08.2023.
[1384] *UNCTAD's Reform Package for International Investment Regime page 11 accessed on 28.08.2023.

Law Expert and the Deputy Chairman of the Ghana International Trade Commission (GITC).[1385] Further to this, Ghana hosted the Launch Event of the inaugural UNCITRAL Days in Africa in Accra in September 2022.[1386] This could be a challenge in that if Ghana is heavily invested in UNCITRAL and the recommendations of UNCITRAL WG III, including the establishment of an Advisory Centre, then it might not be interested in the proposal of an in-country Specialist Team. On the other hand, the involvement of the Government of Ghana in UNCITRAL might be an indication of an openness to review the International Investment obligations of Ghana, including the possibility of an in-depth review of the country's IIAs as soon as possible, and the creation of a Team of Specialists to assist in such an endeavour.

Regarding the incorporation of the provisions of the ECOWAS Supplementary Act, although mandatory to ECOWAS member states, there is no evidence that Ghana has made any attempt to incorporate the very innovative provisions therein into her BITs, although these provisions would be extremely helpful to Ghana's negotiating stance and her BITs. This could be an indication that there is no real awareness of the potential problems ahead, nor an appetite for robust negotiations or an overhaul of the Investment Treaty Regime in Ghana, which would make it quite a challenging proposition to promote this idea of a Specialist Team. In addition to there being no indication of an awareness in Ghana of the ECOWAS Supplementary Act or the ECOWAS Court of Justice which as stated earlier in this thesis, could potentially be more acceptable to investors than domestic courts, there does not seem to be any inclination towards the Multilateral Investment Court (MIC) concept being proposed by the EU at UNCITRAL WG III either. The author agrees with commentators who surmise that the MIC is a bad idea for African states, as it would only reinforce the inequities of the ISDS regime.[1387] The MIC is only referenced here for the sake of completeness in relation to possible alternatives to a Specialist Team.

In remarks at the 2022 annual Ghana Association of Former International Civil Servants (GAFICS) lecture referred to earlier,[1388] however, the Deputy Attorney General of Ghana stated that the Attorney General is keen on increasing capacity in the AG's department in respect of International Negotiations, concluding that in her view, it was 'a process and not an event'.[1389] It may well be that even though there might not be an awareness of the problems ahead in respect of BITs, a desire to increase expertise in respect of international negotiations might mean that the Government of the Republic of Ghana would be open to the idea of a team of Specialists as envisaged by this thesis.

6.10 RECOMMENDATIONS

Having examined the potential implications for Ghana if the status quo is retained and nothing changes, the recommendation in this thesis is that the best and most efficient way for Ghana to reclaim its regulatory autonomy and ensure its economic sovereignty would be by the creation of a Team of Specialists tasked solely with (re)negotiating and drafting Ghana's BITs, ensuring that they contain new-style innovative clauses including sustainable development at the core of all efforts to attract foreign investors. This will in turn ensure that the only investments prioritised are those which encourage sustainable and inclusive growth for the economy, in line with the specific investment goals of the nation. Additionally, the experts in the Specialist Team could avail themselves of the capacity-

[1385] Ghana Elected Vice Chair Of UNCITRAL | General News | Peacefmonline.com accessed on 03.09.2023.
[1386] UNCITRAL Days in Africa | United Nations Commission On International Trade Law accessed on 03.09.2023.
[1387] Akunwumi Ogunranti, 'Why the Multilateral Investment Court Is a Bad Idea for Africa' (2024) 47 Dalhousie LJ 159, 194
[1388] See remarks by Deputy Attorney General Diana Dapaah re International Negotiations in https://citinewsroom.com/2022/11/ghana-must-do-better-in-international-negotiations-s-k-b-asante/ accessed on 07.12.2023
[1389] Ibid

building expertise offered by the ALSF and the ALSF Academy[1390] and also to utilise UNCTAD's Investment Policy Framework,[1391] which comprises detailed guidance for the production of National Investment Policies, for the design and use of IIAs, and a Menu with specific actions related to the promotion of investment in sectors that are related to sustainable development goals directly related to the unique Investment goals of Ghana. This would only be possible if the expertise of Specialists and Experts is harnessed by Ghana in the manner recommended by this thesis and alluded to by other commentators.[1392]

6.11 CONCLUSION

As noted in the discussions above, one of the options available to Ghana as a response to the findings made in Chapter Five is the concept of a Team of Specialists operating within Ghana and with the ability to provide an oversight to the government in respect of the types of IIAs that would enable Ghana to reclaim its regulatory space and redesign its sovereignty. This is because at present there is no single point of contact in respect of IIAs and BITs, which are negotiated by an ad hoc selection of functionaries from various Ministries as well as the Attorney General's Department. This does not provide the targeted overview required to ensure that Ghana's Investment Agenda, and its international obligations are taken into consideration fully when IIAs are being negotiated. This chapter has provided examples of responses by other countries, both in the Global South and the Global North to perceived encroachments upon their regulatory space, as well as examples of IIAs from various RECs, which could all be taken into consideration by the proposed team of Experts. This chapter also evaluated the proposed solution of a Team of Specialists, to consider what the potential limitations of such a proposal might be and how feasible the proposed solution is.

Additionally, whilst the focus of this thesis is the examination of the viability of the concept of a Team of Specialists to protect the RA of Ghana, as an additional point of originality, this thesis has produced an **outline** Model BIT (annexed). This outline Model BIT focusses on those provisions that would directly assist Ghana in its bid to halt the further erosion of its RA due to the types of provisions of contained in Ghana's old-style BITs arising from inherited colonial bias. It could also serve as a roadmap to be utilised by the proposed Team of Specialists when considering the production of a Model BIT for Ghana because the only Model BIT[1393] in existence in Ghana was produced in 2008 and given the many initiatives in the Investment Treaty Regime in the nearly two decades since that date, it is fair to say that the provisions of the 2008 Model BIT are not optimal. The country would benefit greatly from a new Model BIT[1394] which encapsulates innovative provisions relating to Sustainable Development, Human Rights, and Investor Obligations, etc.

[1390] See https://alsf.academy/ accessed on 21.12.2023.
[1391] UNCTAD INVESTMENT POLICY FRAMEWORK for Sustainable Development.pdf accessed on 03.09.2023.
[1392] Samuel K.B. Asante, 'The Perspectives of African Countries on International Commercial Arbitration' (1993) 6 LJIL 331, 353
[1393] Ghana Model BIT (2008)en (unctad.org) accessed 08.08.2023.
[1394] New model bit for African states facilitates counterclaims against foreign investors | bilaterals.org accessed 08.08.2023; See also The African Arbitration Academy's Model Bilateral Investment Treaty for African States - Kluwer Arbitration Blog accessed 08.08.2023; See also The Africa Arbitration Academy's Model BIT: a new era for Africa?, Hannah Eckhoff, Gregorio Pettazzi (freshfields.com) accessed 08.08.2023; See also Africa Arbitration Academy publishes model BIT - Global Arbitration Review accessed on 08.08.2023.

Chapter Seven – Conclusion and Final Remarks

7. INTRODUCTION

This section will bring together the various strands of this thesis and set out a few concluding remarks as well as possible areas for further research in the future. In chapter One of this thesis, the research question, "*What is the solution to the potential problem of the further erosion of Ghana's Regulatory Autonomy due to the types of provisions of contained in Ghana's old-style BITs arising from inherited colonial bias?"* together with three sub-questions were posed.

This research question and the sub-questions have been fully examined, addressed and answered in this thesis. The conclusion reached from this examination is that due to the number of cases that could potentially be brought against Ghana by foreign investors under the auspices of the old-style BITs presently in force, which would challenge its RA, a Specialist Team with the remit of (re)negotiating and drafting IIAs should be created. In relation to the potential of even more cases being brought by foreign investors, and the effects that could have on the economy of a developing country like Ghana, Sauvant succinctly sums up the situation thus:

> 'Given the growth of FDI, the number of MNEs and their foreign affiliates, the intrusiveness of FDI (involving all aspects of the production process), the great number of IIAs, the broad definitions of "investment" and "investors", the broad protections enshrined in IIAs, and the fact that infringements on investor rights can take place at any level in a given country (that is, not only at the national level but also at various sub-national levels), the potential for disputes is substantial. It is a situation that can involve considerable costs for host governments, as disputes are expensive to litigate and the awards that may be rendered can be high. In addition, there is the possibility that certain actions by governments may lead to disputes with investors that, in turn, lead to regulatory chill in national policymaking.'[1395]

Sauvant's words mirror the conclusion that this thesis has arrived at. After an examination and analysis of relevant literature and global events, this thesis has shown that this is not a problem solely for Ghana, but one that has been recognised by commentators as well as the UN[1396] as a part of the legitimacy crisis facing the investor-state dispute settlement regime worldwide.

7.1 SUMMARY OF CHAPTERS AND INTROSPECTIVE OVERVIEW

This thesis, as previewed in the Abstract, set out to examine the impact that the provisions of the old-style BITs to which most developing Host States are signatory, was having on the regulatory autonomy and sovereignty of these Host States, using Ghana as a Case Study and to propose a solution to this problem which arises from inherited colonial bias. To that end, this thesis has examined some of the cases that have been brought against Ghana by foreign investors and the way in which other states, both from the Global South and the Global North have tried to mitigate against the erosion of their regulatory autonomy, concluding with a proposed solution aimed at empowering Ghana (and potentially other developing country Host States) in its bid to redefine its sovereignty by reclaiming its regulatory autonomy.

In the first chapter, the historical background to this thesis was set out, showing the historical reasons for the inherited colonial bias towards the rights of foreign investors, placing the Investment Treaty

[1395] Karl P. Sauvant, National FDI Policy Competition and the Changing International Investment Regime (August 27, 2016). Richard Frimpong Oppong and William Kissi Agyebeng, eds., *A Commitment to Law: Essays in Honour of Nana Dr. Samuel Kwadwo Boaten Asante*. London: Wildy, Simmonds & Hill Publications (2016) 12. Available at SSRN: https://ssrn.com/abstract=2830917

[1396] See UNCITRAL WG III and UNCTAD World Investment Reports referred to throughout this thesis.

Regime in context and setting out the rationale for this thesis and the research question to be addressed in this thesis. Additionally, chapter one set out why Ghana was chosen as a Case Study, explaining that although it is true that Ghana has not had as many cases brought against it or as many Awards imposed upon it as other developing states, the potential for arbitral challenges to Ghana via the ISDS mechanism in the old-style BITs to which Ghana is a signatory, remains high, citing the example of the two cases presently pending against it before two separate Arbitral Tribunals, instituted by the same claimant, the Beijing Everyway Traffic & Lighting Tech. Co. Ltd. The potential problem of a further erosion of Ghana's RA was identified and the suggestion introduced that the root of the problem could be identified from the negotiation and drafting stage and so should be tackled at that point, rather than much later, when a case had been instituted before an international arbitral tribunal. Furthermore, chapter one explained that this lack of negotiating power had contributed greatly to the global challenges to the provisions of the BITs in existence and the ISDS regime generally which allows tribunals to interpret the clauses of these BITs expansively to the detriment of Host States. The chapter concluded that a solution to this problem by this thesis would be a significant practical contribution to the process of redefining their sovereignty and protecting the RA of Host States generally and of Ghana in particular, as well as being an immense original contribution to knowledge development and very relevant to the deliberations of UNCITRAL WG III.

Chapter two examined the existing literature relating to the research question and is divided into two parts. The first part dealt with the key issues discussed in the existing literature relating to the issue of states from the Global South being thwarted by the clauses of their old-style BITs from being able to exert RA over their affairs, and the second part dealt with the conundrum of the rights of foreign investors versus the autonomous right of a Host State to regulate freely in the interests of its citizens. The first part has seven sections. In the first section, Poulsen's thesis on the proliferation of BITs and its effect on the RA of Host States is examined, which suggests from the contents of his not-for-attribution interviews that a lack of legal expertise and relevant experience caused developing countries to sign up to BITs which had considerably more "teeth" than the representatives of the states appreciated. The second section examines the views of scholars such as Vattel, de Wolf and Adam Smith who espoused a Eurocentric Westphalian bias in respect of the development of international law which can clearly be identified as the cornerstone of the evolution of those provisions in BITs relating to the protection of foreign investors and their investments. The third section introduced a non-Eurocentric approach to international law, citing the writings of du Bois, Morris, Said and Halperin. This thesis showed that whereas the dominant narrative in this area of IL had been the Eurocentric narrative, non-European academics like Du Bois widened the discussion, challenging the role that history played in settling a Eurocentric narrative in this field and proving via scientific analysis, oral tradition, and cultural norms that merely because it was in written form and had been repeated ad infinitum, did not make the Eurocentric historical narrative true. It is this alternative perspective of IL that this thesis has sought to present as a foundational element of its argument that the Eurocentric view presented in literature as the true hegemonic perspective of IL is deeply flawed and must therefore be re-examined, redefining sovereignty. This view was further examined in the next two subsections by analysing the concept of "Good Governance" as well as the underlying reality of the UN Charter. Anghie argued that the project of "Good Governance" was not actually a new advance in the development of IL but had a very old lineage going as far back as the sixteenth century, when IL started devising various doctrines aimed solely at shaping and reforming the governments of non-European states into something that suited the interests of the more powerful European states. In the next sub-section, Otto shows how the UN is based on a Eurocentric foundation which rather than being inclusive, frustrates the participation, and limits the power, of non-European states, based on the old paradigms. The final two subsections analyse the relationship

between the IIL regime and Multinational Corporations, Foreign Investors and Arbitral Tribunals, examining the work of greats like Sornarajah, van Harten, Osterwalder, Chung and Odumosu as well as TWAIL scholars like Anghie, Chimni, Koskenniemi, Gathii, Pahuja and Eslava and identifying an essential missing link in the existing literature, which this thesis then proceeds to build upon and rectify. The second part of the chapter has five sections, each of which explores an important issue in the existing literature pertaining to the conundrum of Investor Rights versus the RA of Host States and explores possible innovative solutions to the erosion of RA in Host developing States. The chapter concludes by pointing out the perceived gap in the existing literature and setting out the original contribution that this thesis will make to knowledge development by advancing a unique solution and developing scholarship in this area.

The doctrinal methodology to be utilised in this thesis is outlined in chapter three, starting with an overview of the methodologies and approaches to be utilised in this thesis, namely a qualitative method, using a reflective yet critical methodological lens, starting with a Positivist approach to identify the issues, followed by a critical TWAIL approach to situate the problems in a relevant historical context, and finally, utilising a Critical Comparativist approach to identify the proposed solution. Having laid bare the problem of asymmetrical old-style IIAs between powerful western states and poorer developing states, with an emphasis on Ghana, chapter three concludes with an examination of the framework within which the proposed solution would be advanced.

In chapter four, this thesis conducts an examination of the ILF relating to IIAs, together with practices both current and past relating to the negotiation and drafting of these legal instruments. This chapter examined the Law regulating and governing the negotiation and drafting of IIAs and the enforcement of the Awards made by the arbitral tribunals under the ISDS. The various sources of the ILF were identified in chapter four, providing a comprehensive picture of the law as it stands, in the positivist traditions, thus providing a preliminary step in the examination of the research question and the argument of this thesis and identifying inherent weaknesses in the framework responsible for the problems. The chapter showed that the ILF for treaty drafting had barely changed since the first BIT was signed in the 1950s, even though the focus of Host States and the International Investment climate had clearly changed in that period. The chapter concluded that to make the ILF for treaty drafting fairer to the needs of both parties, the asymmetric relationship between the parties, arising from the inherent flaws and weaknesses that had been identified in respect of the developed home states and developing Host states would need to be reconceptualized and addressed. This would have a profound effect upon the ILF for treaty drafting making it more relevant to the needs of developing Host countries such as Ghana as they seek to reclaim their RA and economic sovereignty.

Following on from that, chapter five, a Case Study of Ghana, examined the International Investment Regime as it pertains to Ghana, by examining the problems that had been identified earlier in this thesis, as well as some of the cases brought against Ghana by foreign investors. This was to demonstrate the impact of Ghana's old-style BIT provisions on its RA and its economic sovereignty and to provide empirical evidence in support of the statement that there is a serious problem looming in relation to foreign investors bringing cases (some spurious) against Ghana under its old-style BITS, unless the problem is addressed imminently. After a detailed examination, chapter five concluded by setting out findings which were then examined in chapter six.

Finally, in response to the findings set out in chapter five, a critical examination of some instruments produced by RECs and selected countries was conducted in chapter six, and the results formed the basis of recommendations aimed at finding a potential solution to the research question articulated at the beginning of this thesis. These recommendations were tested against comparable solutions or proposals already in existence, such as the UNCITRAL WG III Advisory Centre proposal, and

consideration was given to whether Ghana was ready to implement the potential solution arrived at, evaluating what internal and external stumbling blocks there might be. Additionally, an outline Model BIT that could redress and mitigate the issue of the erosion of Ghana's RA is produced as an Annex to this thesis, an additional area of originality. As stated in chapter six, the idea of a team of Specialists as proposed by this thesis is not entirely novel. The crucial difference between the arrangements that existed previously, and the Specialist Team being proposed in this thesis lies in the proposed composition of the Team, which will be composed of Specialists and not merely politicians and high-ranking civil service functionaries, and the proposed remit of the Team, which will be to (re) negotiate and draft IIA, not merely to review them, and finally, in the timing of this proposal. This proposal comes at a time discussions in the Global North and at the UN make this an ideal time for serious consideration to be given to the creation of such a team of in-country Experts.

By the creation of a team of Specialists as envisaged by this thesis, Ghana will be galvanizing the immense skill set and resources available in-country to enable the country to reap the full benefits of its natural resources, protect its regulatory autonomy and eventually ensure that the country and its citizens enjoy real economic sovereignty.

7.2 RECOMMENDATIONS FOR FUTURE RESEARCH

To quote Berge and Stiansen, we still do not know enough of what goes on inside 'the black box of BIT negotiations'.[1397] There is not enough data available to determine, for example, what sequences are followed in negotiations, how deliberate the discussions are, which of the arguments used carry the most weight, how structural power resources are leveraged by the party with more power, what role does expertise and experience actually play, etc.[1398] More detailed research spanning these questions could form the basis of the first recommendation for future research. This would be enlightening and could positively inform the outcome of negotiations by developing states, strengthening their negotiating stances, and enabling them to conclude negotiations that result in IIAs with provisions that reflect the interests of both parties rather than the present asymmetric IIAs in existence.

A second possible future Research project would be to widen the net to a country in each of North, East, South and Central Africa, using them as Case Studies as to how the idea of a Specialist Team would work in each of those Host States and how such a team would effectively work to bring their Investment Treaty Regimes up to a level that is fit for purpose in their jurisdictions, whilst working alongside the Investment Protocol of the AfCFTA Agreement.

Thirdly, UNCITRAL WG III is anticipated to conclude its deliberations and provide recommendations by the end of 2026. If a Specialist Team as envisaged by this thesis is successfully implemented in Ghana, it could inform the conclusions of WG III with regards to the Advisory Centre being suggested for both Member States and non-Member States of UNCITRAL, with an emphasis on aiding Least Developed Countries and Developing States. A comparison of these two entities would be an interesting and valuable Research project, comparing an institution fully staffed, resourced, and run in-country by a developing country, with an Advisory Centre funded with donations from the Global North, set up ostensibly for the benefit of developing and least-developed countries, which seems to have persistent neo-colonial undertones.

[1397] Tarald Gulseth Berge and Øyvind Stiansen. "Bureaucratic capacity and preference attainment in international economic negotiations." *The Review of International Organizations* 18.3 (2023), 467, 493.
[1398] Tarald Gulseth Berge and Øyvind Stiansen. "Bureaucratic capacity and preference attainment in international economic negotiations." *The Review of International Organizations* 18.3 (2023), 467, 493

A fourth possible additional area of research could be the creation of a toolkit to be used by Ghana in its bid to reclaim its RA and sovereignty. This toolkit could encompass a team of Specialists as envisaged by this thesis. Additionally, the expanded research could consider the possibility of expanding the remit of the Specialist Team to include experts not only in negotiating and drafting of IIAs but also with the expertise to act as Counsel, conducting all the advocacy required as and when cases are instituted against Ghana.

It is submitted that these four topics would make for very interesting projects for further research in this arena, building upon the concept of Specialist Teams proposed in this thesis.

Appendix:

Annex A – Outline Considerations for a Model BIT for Ghana 2024

(i) **Preamble** – This should set out the main objective of the BIT, which should be to "promote, encourage and increase foreign direct investment into the country, whilst simultaneously ensuring sustainable development in the country". Due to the recent developments pertaining to the African Continental Free Trade Agreement (AfCFTA), any preamble will need to refer to the aims of the AfCFTA and its Investment Protocol.

(ii) **Overriding Treaty Principle** – In a bid to ensure that cognisance is accorded to the particular transnational and communal issues within Africa, the AAA Model BIT makes reference to the African principle of Ubuntu, which "accords respect to human dignity and equality to any person irrespective of status,… recognising that each person has a corresponding duty to accord respect to human dignity and equality to other members of the community within which such a person operates."[1399] The relevance of this in the context of new BITs is that a foreign investor will be considered as part of the wider community that encompasses both the Host State and the foreign investor, who is therefore expected to undertake to apply the principle of Ubuntu in their dealings with all communities, Host State nationals and third parties affected by the Investment of the Investor within the jurisdiction of the Host State. This ensures that in the event of a dispute, all parties as well as potential arbitrators are aware of the parameters that the parties had agreed at the outset and the overarching philosophy for the interpretation, performance, and enforcement of the provisions of the BIT. This should be reflected in any new BITs that Ghana signs up to.

(iii) **Definitions –** This is very important, as a lack of clarity or a vagueness in defining terms used in IIAs has historically been a particularly fertile ground for disputes.

1. The definition of "Investment" is perhaps the most critical since that is the determinant factor in whether a foreign investor may or may not be able to instigate proceedings (before an international arbitral tribunal or otherwise) against a Host State if a dispute arises. The definition of "Investment" in the Model BIT should adopt an enterprise-based approach, whereby an "Investment" would require the Investor to have established or acquired an enterprise as part of its foreign direct investment, in which case the assets of the enterprise would be included in the assets of the investor that are covered by the definition.

2. Another important definition would relate to "Measures", since it is crucial that the Specialist Team responsible for (re)negotiating and drafting the BITs determine from the outset, what levels of government should be covered, and whether judicial decisions would qualify, in order to avoid a potential loophole.

[1399] See p. 13 of AAA-Model-Bilateral-Investment-Treaty-for-African-States-202-2.pdf accessed on 03.09.2023 - The principle of Ubuntu was derived from popular African idiom "Umuntu ngumuntu nga bantu" literally translated as "a person is a person because of what other members of the community have done for him".

3. Issues of Third-Party Funding are highly topical at the moment, and relevant to whether or not a foreign investor will accede to a reasonable offer, so that definition must be properly considered.

4. Finally, in the context of the fact that Ghana is an African State, this would be a perfect opportunity to incorporate clear definitions of terminology that would not usually be found in template BITs from the Global North, such as "Traditional Knowledge" and "Traditional Cultural Expression", both of which are featured in WIPO (World Intellectual Property Organisation)[1400] and UNESCO (United Nations Educational, Scientific and Cultural Organisation)[1401] to ensure that the rights of indigenous peoples and ethnic communities are accorded the internationally recognised global standards of protection, and are protected from exploitation by foreign investors, learning from the unfortunate lessons of many areas of foreign investment in developing countries.

(iv) **Promotion of Investments** – This is the one area in which Ghana is actually ahead of the game, in that the GIPC has a comprehensive programme of promoting investments and supporting investors. These activities are however not reflected in the existing BITs, nor are they explicitly reflected in the Model BIT, and this would therefore be a good opportunity to set out the mutual obligation for contracting parties to promote investments in their respective jurisdictions, together with some specific tools that may be utilised should the parties so agree.

(v) **Non-Discrimination Standards** – Most BITs include standards or provisions that ensure that foreign investors are not discriminated against. The most common of these are the Most Favoured Nation Treatment standard (MFN) and the National Treatment (NT) standard, both of which have traditionally been used by foreign investors as the basis of their claims. It is therefore important that the Specialist Team considers carefully whether to include either or both of these standards in the Model BIT. Both standards are included in the Draft Pan African Investment Code (PAIC), however the Southern African Development Community (SADC) for example, takes the view that MFN should be excluded from BITs on the basis that the MFN provision has the potential effect of "unintended multilateralization", i.e., the potential importation of dispute resolution provisions from other treaties. MFN has often been interpreted very broadly by arbitral tribunals, which makes incorporation both risky and unpredictable for Host Developing States. The other consideration is whether to extend these non-discrimination standards or protections to the phase before the establishment of the investment, also known as the pre-establishment phase. The overwhelming wisdom from all the innovative instruments earlier referred to, is that these investment protections must only be accorded foreign investors at the post-investment stage, thus providing a balanced position for both parties to the Investment Agreement.

[1400] See https://www.wipo.int/portal/en/index.html accessed on 01.12.2023.
[1401] See https://www.unesco.org/en accessed on 01.12.2023.

(vi) **Minimum Standard of Treatment** – This relates to the FET standard, which, together with the FPS standard, has also been a firm favourite of foreign investors wishing to invoke a standard of investment protection against a state alleged to have violated a treaty. With regards to the FPS standard, this could be limited to physical security, to prevent expansive interpretation by arbitral tribunals. With regards to FET, whilst most African States as per the consensus for the Draft PAIC and the SADC Protocol seem to favour doing away with FET mainly because of the overly broad meaning that arbitral tribunals have usually given that standard, as well as the continuing debate as to whether it is independent from the customary international law minimum standard,[1402] or higher,[1403] the Specialist Team will need to give careful consideration to this issue and balance the Draft PAIC and SADC Protocol against recently negotiated and drafted IIAs[1404] which have retained the FET, as well as recently drafted legislation, such as the South African Protection of Investment Act and others[1405], which have abandoned the FET in favour of a new concept, namely Fair Administrative Treatment (FAT). Commentators[1406] have suggested that the proposed FAT standard offers inadequate tangible protection for investors because it focusses on procedural fairness of the conduct of the Host State and not on substantive fairness and equity, thereby excluding executive actions of the Host State.[1407] Perhaps a solution protecting the regulatory autonomy of Host States whilst also providing foreign investors with reassurance would be to retain FET whilst making it clear in precise drafting that this protection would be subject to the customary international law minimum standard of treatment of aliens, and nothing more.[1408]

(vii) **Expropriation and Compensation** – Although foreign investors were initially primarily concerned with direct expropriation, recent disputes have been based upon indirect expropriation, and without clear standards that tribunals must consider when assessing claims of expropriation, there is a great danger of expansive interpretation of provisions to the detriment of the Host State. The Specialist Team would therefore be well advised to include in the BITs, a clear definition of both direct and indirect expropriation, as well as factors that must be assessed by a tribunal on a case-by-case basis in the case of indirect expropriation. It would also be prudent to make provision to allow for the exercise of regulatory autonomy in respect of expropriation relating to land that might be peculiar to Ghana's domestic situation and colonial history.[1409]

[1402] Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania (ICSID Case No. ARB/05/22)

[1403] CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8

[1404] The as yet unratified Federal Republic of Nigeria and the Kingdom of Morocco BIT concluded in 2016 includes the minimum standard of treatment under customary international law with reference to FET. See also The Republic of Rwanda and United Arab Emirates BIT concluded in 2017, which includes an FET standard in article 4 thereof. See also The Morocco and Japan BIT concluded in January 2020, which includes the minimum standard of treatment under customary international law with reference to FET.

[1405] For example, the SADC Model BIT. See also the as yet unratified BIT between the Federal Democratic Republic of Ethiopia and the State of Qatar dated 14 November 2017, which appears to have adopted this standard from the SADC Model BIT as the wording is similar.

[1406] Explanatory Note p.21 of AAA Model BIT - AAA-Model-Bilateral-Investment-Treaty-for-African-States-202-2.pdf accessed on 03.09.23.

[1407] This is because the focus of the FAT is on "*administrative, legislative and judicial actions*" and in most common law African States, administrative actions are fundamentally different from executive actions taken by a State. See p. 21 of AAA-Model-Bilateral-Investment-Treaty-for-African-States-202-2.pdf accessed on 03.09.2023.

[1408] See OECD (2004), "Fair and Equitable Treatment Standard in International Investment Law", OECD Working Papers on International Investment, 2004/03, OECD Publishing. http://dx.doi.org/10.1787/675702255435 See page 8 and Note 32.

[1409] For example, the South African Constitution, contains a specific provision to deal with compensation for land reform purposes aimed at rectifying the excesses of apartheid. Likewise, the constitutions and laws of other African jurisdictions acknowledge the scars of colonialism

(viii) **Right to Regulate** - As is clear from the title of this thesis, the issue of the right of a Host State to Regulatory Autonomy is of paramount importance to Ghana (and all Host States). As has been stated elsewhere in this thesis, this issue has exercised several Host States as well as the International Community at the level of the UN. As part of the Report of WG III on the work of its thirty-ninth session held in Vienna, from 5–9 October 2020, prepared by the UNCITRAL Secretariat[1410], it was noted that States ought to remain free to regulate within their jurisdictions if this were necessary in the public interest. It was also noted that in order to ensure that Host States are not subjected to a fear of regulating in the public interest (also referred to as Regulatory Chill), an appropriate balance would need to be found between settlement through ADR methods designed to ensure consistency and good governance, and a Host State's right to regulate. Such a provision would need to be factored into the Model BIT, ensuring that if a matter ends up before an Arbitral Tribunal, the Tribunal is cognisant of the following point as noted in the latest iteration of Draft Provision 12(2), that-

'When assessing the alleged breach by a Contracting Party of its obligation under the Agreement, the Tribunal shall give a high level of deference that international law accords to Contracting Parties with regard to the development and implementation of domestic policies, the right to regulate in the public interest and the right to adopt, maintain and enforce measures sensitive to the protection of public health, public safety or the environment, the promotion and protection of cultural diversity, or [...].'[1411]

(ix) **Frivolous Claims** - Such claims are particularly harmful to a Host State as they may cause a government to desist from undertaking measures required in the public interest for fear of repercussions, which is the very definition of Regulatory Chill, as discussed earlier in this thesis. The gravity of Frivolous Claims has been discussed at an international level and as one of the cross-cutting issues being deliberated by UNICTRAL's WG III, general support was expressed by delegates for developing a more predictable framework which would make it possible to dismiss such claims at an early stage of the proceedings and to provide an expedited process of dealing with such claims. A Specialist Team would be well advised to incorporate such a provision in its Model BIT.[1412]

(x) **Essential Security Measures** – This provision has not been the norm in BITs but as stated earlier, topics in the global landscape in International Investment Treaty Regime have undergone several changes in the 15 years since Ghana's Model BIT was produced and the rights of a Host State to regulate in a bid to protect their essential security interests for the maintenance of national and international

that need to be remedied and, in such instances, market related compensation may not be just compensation and therefore domestic legislation must be deferred to. See also the approach adopted by Singapore and Vietnam with reference to the ASEAN Comprehensive Investment Agreement, where the compensation requirement for land is carved out and linked to domestic law. Finally, the Model Indian BIT has a similar carve-out, where it provides that: "For the avoidance of doubt, where India is the expropriating Party, any measure of expropriation relating to land shall be for the purposes as set out in its Law relating to land acquisition and any questions as to "public purpose" and compensation shall be determined in accordance with the procedure specified in such Law."

[1410] See V2006467.pdf (un.org) accessed on 07.12.2023.

[1411] See V2305971.pdf (un.org) accessed on 07.12.2023.

[1412] See https://documents-dds-ny.un.org/doc/UNDOC/GEN/V20/064/67/PDF/V2006467.pdf?OpenElement accessed on 08.12.2023.

peace and security, and to protect essential public infrastructure is one such topic. The Specialist Team might want to consider incorporating such a clause, as have been incorporated in several recent international investment agreements.[1413]

(xi) **Transfer & Repatriation of Funds and Denial of Benefits** – This is a staple of all IIAs, since the main reason why investors invest money is to make a profit and therefore the ability to repatriate their profits from their investments is of great importance to them. The AAA Model BIT, which is one of the instruments that this thesis has suggested that a Specialist Team should consider, has introduced scenarios under which a Host State may legitimately prevent the transfer or repatriation of funds in accordance with its laws without such actions being considered discriminatory. Another prudent consideration for the Specialist Team would be the incorporation of the proviso that the need for compliance with the Articles of Agreement and request of the IMF would be valid grounds for a Host State to restrict or prevent the free transfer/repatriation of funds and earnings by an Investor.[1414] Additionally, the Specialist Team might wish to consider the inclusion of a clause that would deny the benefits of a BIT to a person or entity that has not made any substantial investments in the country, but is only trying to take advantage of the benefits of the Agreement or even trying to use the threat of an arbitration to paralyse the government by virtue of the effect of Regulatory Chill referred to earlier in this thesis. Such persons or entities should not be allowed to succeed in such a charade and a properly drafted provision can ensure that ruse does not succeed.

(xii) **Entry and Exit of Foreign Nationals -** The issue of repatriation of profits is related to the entry and exit of foreign nationals into the Host State. As stated earlier, one of the roles of the GIPC is to promote Ghana as a welcoming venue for foreign investors and to improve the ease of doing business in Ghana. This position could be recognised in a Model BIT with a reference to the fact that this is not meant to provide preferential treatment to foreign investors, as they will still be required to act in conformity with the laws of Ghana.

(xiii) **Investment & Environment, Labour, Human Rights Protection & Gender Equality** Whilst it is not the norm for BITs to incorporate provisions dealing with these topics, good global practice encourages the incorporation of provisions relating to these topics. The problem of Global Warming is high on the agenda of most governments and the inclusion of provisions relating specifically to the protection of the environment as well as ongoing environmental diligence and improvement will assist Host State governments in rebuffing persistent requests from foreign investors for environmental stabilization clauses in IIAs, which would be to the detriment of Host States, and the indigenous populace. These issues are priority

[1413] See the Pan African Investment Code (PAIC), the SADC Model Bilateral Investment Treaty Template; ECOWAS Common Investment Code (ECOWIC), the Investment Agreement for the COMESA Common Investment Area, to mention a few. Note that the AAA Model BIT allows a Contracting Party to request the reasons for the measures taken, with the Contracting Party taking such measures being required to respond to the request for information within n90 days. The duty on Contracting Party to respond to request for information is however not an obligation to provide reasons for measures taken, as some measures may impact national security and disclosure of the underlying reasons may be restricted by the Government of that Contracting Party.

[1414] This is necessitated by the fact that African States form part of the 190 Members States of the IMF, and they are required to adhere to the IMF Articles of Agreement and requests of the IMF for the purpose of addressing balance of payment concerns.

areas for the AU in its Agenda 2063[1415] and in particular, its aim of attaining environmentally sustainable and climate resilient economies and communities,[1416] as well as the aim of full Gender Equality in all spheres of life, in recognition of the fact that gender parity could be a crucial element in achieving economic growth and development of a state.[1417] In respect of Human Rights, the Specialist Team might wish to make it obligatory for investors to eschew complicity in breaches of human rights by others, whilst actively respecting human rights themselves. The Specialist Team might also wish to take note of the requirements under the International Covenant on Economic, Social and Cultural Rights (ICESCR)[1418], the globally recognised minimum labour standards set by the International Labour Organization Declaration[1419] as well as the requirements of the AfCFTA when crafting standards pertaining to these headings in a Model BIT.

(xiv) **Corporate Social Responsibility (CSR)** – As in the case of the environment and Gender Equality discussed above, a provision dealing with CSR has not previously been the norm, but a Specialist Team will be aware of the OECD Guidelines for Multinational Enterprises[1420] and therefore the inclusion of a clause encouraging investors to positively contribute to the growth and development of the jurisdiction wherein their investment is located would be sending a clear message as to how seriously the Government of Ghana views CSR and the development of local Host communities.

(xv) **Intellectual Property and Indigenous Peoples** – This topic is also one that is not a staple of IIAs. However, its importance is being increasingly recognised, in light of the fact that most Host States are developing countries, and some IIAs have historically infringed upon the rights of indigenous peoples, who unfortunately did not have any locus in arbitral hearings. As a result of this, some developed states who have a significant proportion of their citizens identifying as indigenous people, have attempted to recognise this in their Free Trade Agreements.[1421] It therefore behoves a Specialist Team based in an African State, to seriously consider the incorporation of provisions that would protect indigenous peoples' rights to lands and resources, since these are usually inextricably linked to traditional knowledge, which falls within the broader framework of intangible indigenous rights.[1422] Unfortunately, due to the lack of protection in IIAs, foreign investors have in some instances been able to appropriate and use indigenous knowledge, innovations, and practices about medicinal, cultural, cosmetic and

[1415] https://au.int/en/agenda2063/sdgs accessed on 01.09.2023.
[1416] Goal # 7 of https://au.int/en/agenda2063/sdgs accessed on 01.09.2023.
[1417] Goal #17 of https://au.int/en/agenda2063/sdgs accessed on 01.09.2023.
[1418] See https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights accessed on 08.12.2023.
[1419] See https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_467653.pdf accessed 08.12.2023
[1420] OECD Guidelines for Multinational Enterprises See https://www.oecd.org/corporate/mne/ accessed 08.12.2023.
[1421] For example, New Zealand includes in its Free Trade Agreements (FTAs) a Treaty of Waitangi exclusion, which enables the government to take measures to give effect to its obligations to Māori under the Treaty of Waitangi, even if the measures are incompatible with New Zealand's obligations under the FTAs. The Canada-U.S.- Mexico Agreement (CUSMA) includes protections of indigenous rights by way of the inclusion of an exception, which carves out measures adopted or maintained by states to fulfil the State's legal obligations to indigenous peoples, is a significant development. There is also a recognition of the importance of indigenous rights and traditional knowledge in the preamble to the Comprehensive & Progressive Agreement for Trans-Pacific Partnership (CPTPP) – a free trade agreement between Canada and ten other countries in the Asia-Pacific.
[1422] See sample article in AAA Model BIT pages 31-33

other such forms of intellectual property with impunity and with no attribution or compensation to the sources of such knowledge. This can be rectified by the incorporation of appropriate clauses based upon international legal standards and best practices,[1423] such as those set out in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[1424], the Convention on Biological Diversity (CBD)[1425] and the UNESCO Convention on the Diversity of Cultural Expressions.[1426]

(xvi) **Anti-Corruption, Anti-Money Laundering and Counter Terrorism Financing** – Whilst such a provision, which relates to Investor Obligations, may not have been in the contemplation of the drafters of the 2008 Ghana Model BIT, prominence has been given to this issue in international and regional instruments such as the UN Convention against Corruption,[1427] the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,[1428] the International Convention for the Suppression of the Financing of Terrorism,[1429] and the African Union Convention on Preventing and Combating Corruption.[1430] Due to the importance of these issues both in Africa and internationally, a new Model BIT should include a provision that not only imposes a positive obligation on the Host State to put in place measures for the prevention and combating of Investor activities such as corruption, money laundering and terrorist funding/financing , but the provision should also make it clear that any breach constitutes a breach of the national laws of the Host State and means the Host State is no longer bound by any of the protection obligations towards the Investor or their investments under the BIT.

(xvii) **Taxation** – This could be a thorny issue for a Host State to grapple with in an IIA, especially where parties have entered into a double taxation agreement, which will of necessity take precedence over national laws. Since the exercise of control over one's Tax Regime is such an important aspect of economic Sovereignty, the Specialist Team will need to draft a clause which makes it crystal clear that Investors and their Investments are required to abide by the tax laws and other measures of the Host State and that actions taken by the Host State to ensure compliance with its national tax laws shall not be treated as expropriation requiring the Host State to pay compensation to such an investor. Finally, the Model BIT will need to set out clearly that the Host State is free to utilise such legal measures as it wishes, to prevent Investors from avoiding or evading their tax obligations to the Host State, another example of Investor Obligations.

[1423] See also TRIPS, the agreements concluded and administered under the auspices of the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO), the Convention on Biological Diversity, the International Agreement on Plant Genetic Resources and other international instruments against undue infringement of the rights of indigenous peoples.
[1424] See https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf accessed 08.12.2023. Article 31 of the UNDRIP recognises indigenous peoples' right to: "maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts".
[1425] See https://www.cbd.int/ accessed on 08.12.2023.
[1426] See https://www.unesco.org/creativity/en/2005-convention accessed on 08.12.2023.
[1427] UN Convention against Corruption
[1428] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
[1429] International Convention for the Suppression of the Financing of Terrorism
[1430] The African Union Convention on Preventing and Combating Corruption

(xviii) **Dispute Prevention, Alternative Dispute Resolution and Dispute Settlement Mechanism** – The prevention of disputes arising from IIAs is not the norm in the ISDS regime but drawing upon practices in other international organisations[1431] the Model BIT could incorporate a clause that prioritises a spirit of co-operation and dialogue as the first step once a dispute arises. The Model BIT could state that if all efforts to de-escalate or resolve the dispute are unsuccessful, the next step must be Mediation or Conciliation,[1432] and only if all these steps fail will the parties have recourse to Arbitration. The decision about which innovative clauses to include in the chapter on Dispute Settlement, for example, whether arbitration (if that is the desired method of dispute resolution) should take place at the Ghana Arbitration Centre as a default, whether third party interventions such as amicus curiae submissions are allowed, whether there will be a review mechanism, whether the composition of arbitrators should take diversity into account, the position relating to third party funding and whether or not that will be linked to any security for costs orders and the need for security of costs generally[1433], whether or not Host States will be allowed to counterclaim, etc., will need to be given careful consideration and any decisions made will need to be tailored to what is 'fit for purpose' for Ghana. During deliberations on cross-cutting issues at WGIII, delegates commented that one of the main reasons for the lack of counterclaims in ISDS was that there were no substantive obligations on the part of investors in investment treaties.[1434] The Specialist Team may wish to consider whether it wishes to device and incorporate a provision relating to counterclaim based on recent IIAs that impose certain obligations on investors[1435]

(xix) **Waiver of rights to initiate additional dispute resolution proceedings**[1436] - This is particularly relevant in light of the fact that as previously stated in this thesis, there are at present two cases against the Republic of Ghana instituted by the same Claimant, pending before two separate Arbitral Tribunals, namely *Beijing Everyway Traffic and Lighting Tech. Co Ltd v. the Government of the Republic of*

[1431] See WTO Dispute Settlement Body which appoints panels that decide if disputed Trade measures breach a WTO agreement or an obligation and then recommend measures; See also the UNCTAD Series on International Investment Policies for Development with an emphasis on dispute prevention and avoidance; See also AAA Model BIT Article of Dispute Prevention and the Joint Management Committee (JTMC); See also Nigeria-Morocco BIT (not yet in force).

[1432] Note recently concluded IIAs which make reference to Mediation and/or Conciliation as a pre-requisite to Arbitration - See for example Comprehensive Trade and Economic Agreement between Canada and the European Union (CETA), Articles 8.19–8.20, the provisions of the Trans-Pacific Partnership Agreement incorporated, by reference, into and made part of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Article 9.18 and Agreement between the United States of America, the United Mexican States, and Canada (USMCA), Article 14.D.2.. See also Draft provisions 1 & 2 of the cross-cutting issues raised as part of the deliberations of WG III which aim to promote the amicable settlement of investment disputes. Draft Provision 1 encourages disputing parties to settle their dispute through consultation or negotiation and Draft Provision 2 aims to incorporate the UNCITRAL Model Provisions on Mediation for International Investment Disputes as a first step.

[1433] As part of the deliberations of Working Group III on the work of its thirty-ninth session (Vienna, 5-9.10.20), WGIII reaffirmed the need to develop a more predictable and clearer framework for security for costs, which would protect States against a claimant's inability or unwillingness to pay and also discourage frivolous claims. It was also underlined that a balanced approach would need to be taken since security for costs could have the unintended consequences of limiting access to justice for certain investors, particularly small and medium-sized enterprises See A/CN.9/1044, paras. 64, 74–77. https://documents-dds-ny.un.org/doc/UNDOC/GEN/V20/064/67/PDF/V2006467.pdf?OpenElement accessed 08.12.2023.

[1434] See para 60 https://documents-dds-ny.un.org/doc/UNDOC/GEN/V20/064/67/PDF/V2006467.pdf?OpenElement accessed 08.12.2023.

[1435] See PAIC, Articles 21–24; Argentina-Qatar BIT (2016), Articles 11 and 12; Morocco-Nigeria BIT (2016), Articles 18 and 24; India Model BIT, Articles 9–12; Common Market for Eastern and Southern Africa (COMESA) Common Investment Area (CCIA) Revised Investment Agreement (2017), Part 4; Southern African Development Community (SADC) Model Bilateral Investment Treaty Template (2012), Part 3; Morocco Model BIT, Articles 18 and 28.

[1436] See para 15 of https://documents-dds-ny.un.org/doc/UNDOC/LTD/V23/060/62/PDF/V2306062.pdf?OpenElement accessed on 08.12.2023 relating to Draft Provision 7 of the cross-cutting issues which aims to avoid multiple proceedings by limiting an investor from seeking relief in multiple forums for the same breach.

Ghana, brought before the LCIA[1437] and *Beijing Everyway Traffic and Lighting Tech. Co Ltd v. the Government of the Republic of Ghana,* an ad hoc arbitration.[1438] In the ad hoc arbitration case, the arbitration arises from an Investment Treaty Claim brought by the Claimant under the Ghana-China Agreement concluded on 12 October 1989.[1439] The LCIA case was commenced after the Claimant had instituted the ad hoc arbitration case and had there been a waiver of rights clause in the Ghana-China Agreement, the Claimant would almost certainly have been prohibited from commencing the LCIA proceedings. The Specialist Team might also wish to consider a fork in the road clause whereby an investor would be required to choose a dispute resolution forum at the very beginning and thereafter would have no recourse to any other fora.[1440]

(xx) **Amendment, Entry into force, Periodic Review, Duration, Termination and Sunset Provisions** – These issues are dealt with in most old-style BITs in existence, and must be included in a Model BIT, specifying what the agreed length of time is for parties to be allowed to make amendments after a BIT has been signed, and what the agreed period of time for a sunset clause is.

[1437] https://www.lcia.org/LCIA/introduction.aspx accessed 20.08.2022.
[1438] Beijing Everyway Traffic and Lighting Company Limited v. Ghana, PCA 2021-15
[1439] China - Ghana BIT (1989) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub accessed 17.08.2023.
[1440] See United Nations Conference on Trade and Development (UNCTAD), Investor-State Dispute Settlement, UNCTAD Series on Issues in International Investment Agreements II. A Sequel, p. 86

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