UiO : Faculty of Law
University of Oslo

One who is unconscious of history is likely to repeat it

An analysis of the challenges that limited the success of the New International Economic Order in Africa.

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1. Introduction

1.1 Introduction and Background

This thesis examines the limited success of the New International Economic Order (NIEO) in Africa. The NIEO championed by the African states, is an expression of the full permanent sovereignty of the State and provides for the right to expropriate. Parallel to the adoption of the NIEO by in 1974, African states simultaneously entered into Bilateral Investment Treaties (BITs) that limited this right to expropriate. This thesis therefore aims to analyze this contradiction by exploring the challenges that African states faced that limited the successful implementation of the NIEO in their BITs. It does so by examining substantive provisions of selected BITs'. The substantive provisions discussed are limited to the following clauses of a BIT that relate to the right to expropriate: the definition of investment, the standards of treatment, expropriation, and the dispute resolution clause.

To understand this better, it is important to give a brief background of the NIEO reforms. In the latter half of the 20th century, as countries across the African continent gained independence from colonial rule, they found themselves grappling with numerous economic challenges. The global economic landscape during this period was dominated by powerful western nations, leaving African states often marginalized, their economies exploited, and their voices drowned out in international forums.[1]

In response to these inequities, African states engaged in a collective effort with the Non-Aligned Countries, to restructure the global economic system and reshape the rules governing foreign investments within their territories by fostering greater equality and empowering nations to exercise control over their natural resources.[2]

In pursuit of this reform, African states adopted the 'African Declaration on Co-operation; Development and Economic Independence' during the tenth Anniversary of the OAU in May 1973.[3] The main objective of the OAU Declaration was to ensure the cooperation of African countries in pooling their resources together for their development. The OAU Declaration

[1] Eric Engle, '*The Failure of the Nation State and the New International Economic Order: Multiple Converging Crises Present Opportunity to Elaborate a New Jus Gentium*' (21 October 2007), 187–206.
[2] Zdenek Červenka, 'Africa and the New International Economic Order' (1976 9 Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America), 194.
[3] Organization of African Unity, *African Declaration on Co-Operation, Development and Economic Independence* (1973) <https://archives.au.int/handle/123456789/5947> accessed 11 January 2024.

expressed concern about the deteriorating economic and social position of African countries and the constantly widening gap between developed and developing countries. It buttressed the African Head of States and Government's belief that this was a great opportunity to establish a harmonized approach to participate fully in the establishment of a more equitable international economic order.[4]

The collective efforts culminated in the Declaration on the Establishment of a New International Economic Order by the UN General Assembly Resolution 3201 of May 1, 1974.[5] The NIEO resolution declared:

> *Full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right*."[6]

The NIEO Declaration was further strengthened by Resolution 3281, the Charter of Economic Rights on Duties of States (the Charter), passed by the UN General Assembly on 12th of December 1974.[7] The Charter reintroduced the obligation of Host states to pay compensation upon expropriation. In addition, it introduced a provision requiring that disputes on compensation be determined in accordance with the national laws and jurisdiction of the Host State. It stipulated that every State had:

> *the right to nationalize, expropriate or transfer ownership of foreign property in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to controversy, it shall be settled under the domestic law of nationalizing State and by its tribunals unless it is freely and mutually agreed by all states concerned that other*

[4] Ibid, Preamble.
[5] United Nations General Assembly Resolution 3201 (S-Vi): Declaration On The Establishment Of A New International Economic Order (1974) 13 International Legal Materials 715.
[6] Ibid, Clause 4(e).
[7] United Nation General Assembly, 'Charter of Economic Rights and Duties of States General Assembly (The Charter) Resolution 3281 (XXIX) New York' (12 December 1974).

peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principles of free choice of means.[8]

The NIEO provisions were subsequently adopted by African states through a Resolution by the Council of Ministers on the 'Implementation of the Programme of Action on the Establishment of a New International Economic Order' in 1975.[9] This marked the earliest attempts of African reform in International Investment Law (IIL).

During the period that NIEO was adopted, the existing IIL system comprised of several forms of regulation. Other than investment laws, that are beyond the scope of this thesis, BITs included the most prevalent form of FDI regulation.[10] The first BIT was signed in 1959 between Germany and Pakistan.[11] African States like the rest of the world entered into BITs as early as the 1960s and has since signed 1059 BITs to date which is almost half of the BITs signed worldwide.[12] The BITs entered into by these African states however encompassed substantive provisions that limited the sovereign right of states to expropriate contrary to the NIEO provisions.[13] As this thesis will illustrate, subsequently in practice the NIEO and the Charter were accorded little to no weight and were largely disregarded in determining the scope of property protection offered to foreign investors. The BITs instead reflected the interests of the developed countries whose main aim was to safeguard their investment.

1.2 Rationale, Scope, and Research Question

To understand the importance of this research topic and its potential contribution to the literature on IIL in Africa, it is important to briefly discuss its current status. Since early 2000s there has been mounting critical scholarship and civil society reports on the critiques of the investment treaties and their substantive rules and the legitimacy of the IIL system.[14] In response to the crisis, reforms on the IIL have been had been at all rage on all levels from the multilateral institutions like UNCITRAL to national levels.[15] Africa has not been left behind and has been

[8] Ibid, Clause 2.2(c).
[9] East African Community Resolution 256(XII), African Plan for the Implementation of the Programme of Action on the Establishment of a New International Economic Order. (February 1975).
[10] Zachary Elkins, Andrew T. Guzman & Beth Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties*, 1960–2000, (2008) U. ILL. L. REV, 265
[11] Treaty for the Promotion and Protection of Investments (Germany- Pakistan 1959 BIT) (457 UNTS 6575)
[12] UNCTAD. International Investment Agreement Database. http://investmentpolicyhub.unctad.org/IIA
[13] Pieter HF Bekker, Rudolf Dolzer and Michael Waibel (eds), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts*.
[14] Daniel Behn, Ole Kristian Fauchald and Malcolm Langford (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (Cambridge University Press 2022), 7–10.
[15] James Thuo Gathii and Harrison Otieno Mbori, *Reform and Retrenchment in International Investment Law: Introduction to a Special Issue* (2023), 24.

initiating reforms on various fronts—national, bilateral, regional, and continental. The inception of the African Continental Free Trade Area Investment Protocol (AIP) stands as a testament to its contemporary aspirations.[16] Presently, Africa stands at a pivotal juncture in mapping out its trajectory as it grapples with the ramifications of its postcolonial decisions.

Current research has extensively highlighted the development and the reform of investment treaties and investor arbitration.[17] However, there is a significant lack of attention given to the implementation initiatives of these reforms taken by individual countries through their bilateral relations. Considering the prevalence of BITs, evaluating their implications becomes a critical necessity.[18] Overlooking this facet could potentially undermine the effectiveness of the reforms in the long run, mirroring challenges observed in contexts such as the European Union.[19] This moment therefore demands a critical examination of Africa's existing investment treaties. One who is unconscious of history is likely to repeat it. This thesis therefore argues that understanding the challenges that African states faced in the implementation of the NIEO in their bilateral relations is therefore pivotal in comprehensively assessing the success of the ongoing IIL African reforms. This will contribute valuable insights that could inform future policy frameworks and decision-making processes to ensure its success. Therefore, this thesis seeks to answer the following research question: what are the challenges that limited the successful implementation of the NIEO in Africa?

1.3 Research Methodology

In addressing the research question, this thesis employs a desktop study and utilizes a holistic body of primary sources mainly comprising of 29 BITs to conduct a doctrinal analysis. It relies on the Vienna Convention Law of Treaties as this thesis concerns itself with the analysis of BITs as the legal source. The thesis adopts a temporal and geographic model in its analysis. In selecting the BITs, the temporal model was utilized to focus on the evolution of the BITs signed by African states with the aim to determine whether the BITs evolved over time. This involved

[16] Hamed El-Kady and Mustaqeem De Gama, *The Reform of the International Investment Regime: An African Perspective* (2019) 34 ICSID Review - Foreign Investment Law Journal), 483–485.

[17] See for example Makane Moïse MBENGUE and Stefanie Schacherer, 'The "Africanization" of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18 Journal of World Investment and Trade 414; Olabisi D Akinkugbe, 'Reverse Contributors? African State Parties, ICSID, and the Development of International Investment Law' (17 March 2019) <https://papers.ssrn.com/abstract=3354059> accessed 13 January 2024; Makane Moïse Mbengue, 'Special Issue: Africa and the Reform of the International Investment Regime' <https://brill.com/view/journals/jwit/18/3/article-p371_2.xml> accessed 13 January 2024.

[18] Elkins *(2008)*, 256.

[19] Konstantina Georgaki, 'Conflict Resolution between EU Law and Bilateral Investment Treaties of the EU Member States in the Aftermath of Achmea' (2022) 41 Yearbook of European Law 374.

dividing the periods into three, the post-colonial period, the period between 1990 to 2015, and the period after 2015. The geographical model was also employed to compare the BITs signed by African states with different regions. This entailed dividing the BITs into two, Extra-African BITs, these being BITs signed between African states and non-African states and Intra-African BITs, those signed between two African states. The thesis is therefore structured as follows: Chapter 2 analyses the Extra-African BITs signed during the post-colonial period between 1974 after the adoption of NIEO to 1989. Selection of these Extra-African BITs involved going through the list of BITs signed during this period on the UNCTAD investment database. The Extra-African BITs selected represent the regions of Europe, the United States of America and China because of their impetus in the evolution of IIL and their contribution to IIL in Africa. Chapter 3 then discusses Extra-African BITs signed between 1990 to 2015, a period that foresaw the proliferation of BITs worldwide. The BITs selected during this period mirror those selected in Chapter 2 utilising the temporal model to assess whether the BITs evolved. Chapter 4 then examines Intra-African BITs signed from the post-colonial period to the present. Some BITs have also been selected because they are the most recent contemporary BITs signed post 2015. Chapter 5 finally discusses the challenges that African states faced that limited the success of NIEO during these periods as delineated in Chapters 2-4.

Furthermore, the study also draws on existing literature in the fields of international investment law as well as international economic law. It will also rely on policy documents and declarations.

1.4 Limitations

Given the variety of investment treaties, the span of time and number of countries involved it would be difficult to design categories that cover all the BITs in Africa. This thesis does not purport to discuss the BITs exhaustively, but it provides a comprehensive analysis through the select few that is sufficient to draw inferences and provide a valid understanding. It is important therefore to note that within the periods examined, there might be BITs that contain different provisions, this does not however affect the general conclusion drawn.

Further, the study only focuses on the substantive provisions of international investment law, and for this reason, investment dispute resolution institutions will not be covered in this study. The study will also not look at particular domestic investment laws of any African states, as this needs a separate detailed study, and will unreasonably broaden the scope of this study, which fall outside the problem statement and research question identified.

2 Post-Colonial Extra-African BITs

2.1 Introduction

The majority of states in Africa began gaining independence from the 1960s to the 1970s. The most prevalent issue during this time was the need for African states to exercise sovereignty over their natural resources that was previously under the colonial rule. There was a dire need to take back control of resources that had been subject to colonial rule.[20]

The existing state of international law, which reflected a lack of consensus on the applicable standards in the international investment law field, seemed insufficient for the African states. The Customary International Law standard commonly referred to as the Hull Formula provided for expropriation only under the condition of prompt, adequate and effective compensation thereby protecting the value of property against host state interference.[21] In opposition, the Calvo Doctrine was endorsed by several Latin American countries and supported by socialist and communist states. It provided for national treatment as opposed to the international minimum standard under the Hull Formula and the exclusive jurisdiction of national courts of the host state to determine disputes.[22] Further, there were several attempts to multilateralize investment law. The United Nations negotiated the Havana Charter in 1948, which emphasized the right of a Host state to take any appropriate safeguards necessary to ensure that foreign investment is not used as a basis for interference in its internal affairs or national policies.[23] The Havana Charter was not ratified by the United States which had instead opted to prioritize its interests in international trade under GATT over interests in international investment. Since the participation of the US was considered vital, the Havana Charter failed to receive support from other developed countries and was not adopted.[24] In 1962, there was another attempt at multilateralization by the OECD through its Draft Convention that provided for the now common standards of treatment including fair and equitable treatment, most constant protection and security, protection against direct and indirect expropriation and investor state dispute

[20] Engle *(2007)*, 187-206.
[21] Stephan W Schill, *The Multilateralization of International Investment Law* (Cambridge University Press) (2009), 27.
[22] Donald R Shea, *The Calvo Clause: a problem of inter-American and international diplomacy* (University of Minnesota Press 1955), 9-10.
[23] *Havana Charter for an International Trade Organization* (Department of State 1948), Article 12(1) (c).
[24] William Diebold, 'The End of The I.T.O' [1952] Essays in international finance, 99.

settlement.[25] It failed and was never opened for signature. However, through a resolution adopted in 1967, the Council of OECD commended the Draft Convention to member states as a model BIT. These two attempts of multilateralization failed due to the ensuing North-South conflict on the appropriate level of protection to be accorded to foreign investment under international law.[26]

The adoption of NIEO in 1974 foresaw an increase in the number of expropriation in numerous newly independent states that were emerging from the process of decolonization. For many of these countries, expropriation was part of their newly gained independence complementing formal political independence with substantive control over their economies, which were previously under the control of colonial powers. A notable example is Libya's expropriation of Western oil interests that led to the famous oil and gas cases. [27]

Noting the challenges posed in having a multilateral treaty that governed investment in foreign countries, Germany began negotiating bilateral investment treaties with individual states. [28] In 1959, Germany signed the first BIT with Pakistan. This was followed by a proliferation of BITs over the years, making them a prevalent mode of regulating foreign investment. [29]

African States signed a total of 77 BITs between the year 1974 and 1989 a period referred to as the post-colonial period in this thesis. 67 of these BITs signed were Extra-African.[30] The post-colonial period consisted of Extra- African BIT activity primarily involving Germany, Switzerland, France, the Netherlands, and to a lesser extent, the United Kingdom.[31] The earliest African BITs are therefore unsurprisingly with these powers and saw more BIT activity, with Western Europe dominating the landscape.[32] With few exceptions, most notably the 1980s first-generation China BITs with Ghana (1989), the BIT pattern of the initial decades almost exclusively North– South. The United States entered the BIT field later than the European states and in 1983 by signed a BIT with Senegal which was the first African–US BIT.

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[25] OECD, Resolution of the Council on the Draft Convention on the Protection of Foreign Property, OECD/LEGAL/0084 http://legalinstruments.oecd.org/
[26] Schill, (2009), 31-39.
[27] Robert B von Mehren and P Nicholas Kourides, 'International Arbitrations between States and Foreign Private Parties: The Libyan Nationalization Cases' (1981) 75 The American Journal of International Law, 476.
[28] More comprehensive overview of the history IIL can be found in Schill, (2009).
[29] Elkins, (2008), 265.
[30] See the number of BITs https://investmentpolicy.unctad.org/international-investment-agreements/advanced-search.
[31] See a chronological listing of all known BITs at https://investmentpolicy.unctad.org/international-investment-agreements.
[32] Ibid.

In light of the African states' reform efforts under the NIEO, and the North- South conflict on the appropriate investment protection standards as discussed above, it would therefore be expected that the BITs signed by African states provided for the right of the Host state to expropriate subject to its own national laws. To examine this hypothesis, this Chapter discusses the following three BITs in examining their substantive provisions to determine whether they limit the right to expropriate pursuant to the NIEO. First and foremost, the Germany- Egypt BIT (1974) is discussed It was the first BIT to be signed post NIEO and is an accurate representation of the Germany- Africa BITs comprising majority of the Extra-Africa BITs signed during the post-colonial period.[33] Additionally, it bears semblance to BITs established between African states and former colonial European powers such as Germany, Switzerland, Netherlands, United Kingdom, and France. The Germany-Egypt BIT (1974) is therefore discussed in this thesis as an example of the African- European BITs. Secondly, the chapter examines the Senegal- United States BIT (1983). This is the first Africa-US BIT signed after the NIEO, serving as an experimental prototype of the US Model BIT of 1984. It is analysed as an example of the African-US BITs. Lastly, the China-Ghana BIT is examined. It is the first Africa –China BIT signed during the post-colonial period and is used as an example of the South-South BITs during this period. It should be noted that China during the post-colonial period was still considered as a developing country and therefore fits as an South- South BITs example.

2.2 Germany- Egypt BIT (1974)

Togo was the first African country to sign a BIT with Germany in 1961. Subsequently, thirty African States entered into BITs with Germany between 1962 and 1989 making Germany the country with the most bilateral relations with Africa during this period. Out of the 30 African States with BITs with Germany, 12 of them had been under the colonisation of Germany.

The Germany- Egypt BIT signed in 1974 is the first BIT signed by African States post the NIEO Declaration and the Charter's adoption. It is important to note that Egypt was not colonized by Germany and this discussion therefore provides meaningful insight on the differences between the provisions of Extra- African BITs signed with previous colonial powers and those signed with non- colonial powers.

[33] Burundi-Germany BIT (1984), Germany-Mauritania BIT (1923), Germany-Lesotho BIT (1982), Germany-Somalia BIT (1981) and Benin-Germany BIT (1977).

The BIT starts by establishing a principle on investment admission, deferring primarily to the domestic laws of the host state as outlined in Article 1. This provision mandates Fair and Equitable Treatment (FET) to the invested capital. This clause stands out as one of the few BITs rules that has remained remarkably consistent across various agreements and is consistently included in nearly all BITs today, barring specific modifications introduced through supplementary instruments like investment agreements.

The National Treatment (NT) and Most-Favoured Nation (MFN) standards of treatment are bifurcated in the same provision requiring the Host state to offer the same treatment to the investor of the other contracting state. Article 2 provides:

> N*either Contracting Party shall in its territory subject investments completely owned by nationals or companies of the other Contracting Party or in which nationals or companies of the other Contracting Party have a substantial interest, to treatment less favourable than it accords to investments of its own nationals or companies or to investments of nationals or companies of any third country.*
>
> *Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their activity in connection with investments, to treatment less favourable than it accords to its own nationals or companies or to nationals or companies of any third country.*

This particular provision exhibits a broad scope, encompassing not only wholly foreign-owned investments but also extending such treatment to partially owned foreign investments, albeit contingent upon possessing a substantial interest. Notably, it lacks a specific definition of what constitutes a "substantial interest," thereby mandating the involved parties to mutually agree upon this criterion. Moreover, it broadens the applicability of the provision to encompass both nationals and corporate entities.

The provisions regarding NT and MFN treatment exhibit a degree of vagueness, applying to a spectrum of investment activities encompassing management, maintenance, use, and enjoyment of an investment. The BIT further does not contain any minimum protection or set a minimum level of compensation in cases of expropriation. This inherent vagueness allows for considerable discretion in interpreting the scope of their applicability, thereby affording a wide margin for varying interpretations in arbitration disputes.

Something peculiar about the BIT and only seen in the Germany-Africa BITs, is the explanatory note to Article 2 of the BIT that provides,

> *The following measures shall, in particular, be deemed "treatment less favourable" within the meaning of paragraph 2 of Article 2 if directed in a discriminatory way against nationals or companies of the other Contracting Party:* ***restricting the purchase of raw or auxiliary materials, of power or fuel or of means of production or operation of any kind****, impeding the marketing of products inside or outside the country, as well as any other measures having similar effects. Measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed "treatment less favourable" within the meaning of Article 2.*[34]

Its notable emphasis on natural resources when delineating what constitutes "less favorable treatment" stands out starkly, particularly in contrast to the overarching goals of the NIEO. The NIEO sought to emancipate the natural resources of newly independent states from the legacy of colonization. This focus within the provision arguably undermines the NIEO's objectives by potentially perpetuating unequal treatment in the management and utilization of these resources, running counter to the envisioned liberation emphasized in the NIEO framework. However, the exceptions that provided for measures taken for reasons of public security and order, public health or morality make the BIT more nuanced to this extent.

Article 3 combines the Full Protection standard and Expropriation in the same provision. It provides for the obligation of the Host state to provide full protection to foreign investment. Expropriation is provided for in subsection, (2):

> *investments by nationals or companies of either Contracting Party shall not be expropriated in the territory of the other Contracting Party except for the public interest and against compensation. Such compensation shall represent the equivalent of the investment expropriated; it shall be actually realizable, freely transferable, and shall be made without delay. Such compensation shall be fixed at the date of expropriation, nationalisation or dispossession. The legality of any such expropriation and the amount of compensation shall be subject to review by local judicial remedies*.

The Protocol to the BIT under Ad Article 3 clarifies that the expropriation is both direct and indirect and means the taking away of any property rights, which in itself or in conjunction with

[34] Paragraph 2 of Protocol to the Germany- Egypt BIT 1974.

other rights constitutes an investment. Although using different terminology, this provision portrays the Hull Formula that required prompt, adequate, and effective compensation.

The treaty, however, introduces a procedural clause facilitating the review of expropriation legality and the assessment of compensation adequacy, based on local judicial remedies aligning with the principles articulated in the Charter. This is a significant milestone. However, this achievement is swiftly undermined by the subsequent Article 3(4), which extends the "most-favored-nation treatment" to nationals or companies of either Contracting Party within the realm of the aforementioned provisions:

> *Nationals or companies of either Contracting Party shall enjoy most-favoured-nation treatment in the territory of the other Contracting Party in respect of the matters provided for in the present Article.*

This particular clause, when subjected to the most-favored-nation treatment, inadvertently allows contracting states to sidestep this obligation. Consequently, states can potentially circumvent addressing expropriation disputes through local judicial remedies, by importing substantive protection from other treaties diluting the intended legal oversight and accountability outlined within the treaty itself.

Article 8 provides for the definition of investment within the core of the Treaty, rather than its typical placement at the beginning, a departure from contemporary treaty structures. The definition of investment in the BIT takes the asset-based definition expressed with the formula 'every kind of asset' followed by an illustrative, non-exhaustive list comprising all types of properties and contractual rights capturing most types of economic value.

The dispute settlement provision is limited to state-to-state disputes through ad hoc arbitration with the default appointing authority granted to the president of the ICJ as with most BITs signed during this period. It also lays out procedural provisions to be adopted during the arbitration proceedings.[35] Notably the BIT requires that Local judicial remedies should be exhausted before any dispute can be submitted to an arbitral tribunal mirroring the provisions of the Charter further making this BIT a bit more nuanced than the other post-colonial African-European BITs.

[35] Article 10 Germany- Egypt BIT 1974.

2.3 Senegal - United States of America BIT (1983)

The Senegal-United States of America BIT (1983) served as an experimental prototype aligned with the US Model of 1982 that was later formalized as the US Model BIT of 1984.[36] This Model was later used in the subsequent Africa-US BITs during the post-colonial period including the Congo, Democratic Republic of the-United States of America BIT (1984), Morocco- United States of America BIT (1985) and Egypt- United States of America BIT (1986).[37] While the United States entered bilateral relations later than its western counterparts, it notably contributed core principles of investment law, such as the Hull Rule.

The preamble of Senegal-United States of America BIT (1983) underscores the non-discrimination principle, emphasizing the mutual agreement that any discrimination based on nationality by either party against investments in their territory is incompatible with fostering a stable investment framework or optimizing the effective utilization of economic resources.

Article I adopt the wide definition similar to the African-European BITs as highlighted above in section 2.2. It adopts an asset-based definition expressed with the formula 'every kind of asset' followed by an illustrative, non-exhaustive list.

Article II similarly bifurcates the NT and MFN in one provision:

> *Each Party shall endeavor to maintain a favorable environment for investments in its territory by nationals and companies of the other Party and shall permit such investments to be established and acquired on terms and conditions that accord treatment no less favorable than the treatment it accords in like situations to investments of its own nationals or companies, and no less favorable than the treatment it accords in like situations to investments of nationals or companies of any third country*.

The BIT introduces a noteworthy departure from broad nondiscrimination principles by allowing for sector-specific exceptions, provided these exceptions are formally communicated to the other contracting party. This mechanism, while seemingly aligned with the principles articulated in the NIEO declaration, primarily serves to safeguard the interests of the United States within the treaty framework. This exception represents a strategic measure aimed at

[36] Valerie H Ruttenberg, '*The United States Bilateral Investment Treaty Program: Variations on the Model Comment*' (1987) 9 University of Pennsylvania Journal of International Business Law, 121–122.
[37] UNCTAD https://investmentpolicy.unctad.org/international-investment-agreements/advanced-search.

securing specific sectors or industries in alignment with the United States' economic and strategic priorities within the bilateral agreement. [38]

Embedded within the NT and MFN provisions lies the concept of Fair and Equitable Treatment (FET), articulated in its conventional formulation:

> *Investments of nationals and companies of either Party shall consistently receive fair and equitable treatment and comprehensive protection and security within the territory of the other Party*.

This includes ensuring that the standards of treatment on protection, and security accorded to investments align with national laws and, do not fall below the minimum standard in international law. The provision further stipulates that neither party should impede the management, operation, or any aspect related to investments made by nationals or companies of the other party through arbitrary or discriminatory measures. Additionally, the BIT provides for an Umbrella Clause, requiring both parties to honor any commitments made concerning the investments of each other's nationals or companies.[39]

Article III of the Senegal-United States of America BIT (1983) delineates the classic expropriation rule in its most detailed form rooted in the extensive lineage of the Hull Formula. It stipulates:

> *No investment or any part of an investment of a national or a company of either Party shall be expropriated or nationalized by the other Party or subjected to any other measure or series of measures, direct or indirect, tantamount to expropriation (including the levying of taxation, the compulsory sale of all or part of an investment, or the impairment or deprivation of its management, control or economic value), all such measures hereinafter referred to as "expropriation," unless the expropriation; (a) is done for a public purpose; (b) is accomplished under due process of law; (c) is not discriminatory; (d) does not violate any specific provision on contractual stability or any specific provision on expropriation contained in an investment agreement*

[38] Emily A. Arakaki, U.S. Department of Commerce, International Services Division, Memorandum: Treaties of Friendship, Commerce and Navigation and their Treatment of Service Industries 3 (February 2, 1981) 7 "… the public interest in the functioning of the banking system distinguishes investment in banking from many other kinds of private investments because it implements the nation's monetary system and the credit structure supporting the economy. Insurance is also highly susceptible to government regulations because of its dual role in capital formation and in safeguarding individual and corporate welfare."

[39] Article II (2).

between the national or company concerned and the Party making the expropriations; and (e) is accompanied by prompt, adequate and effective compensation.

This particular clause stands out not only for its explicit articulation of the Hull Formula, emphasizing the necessity for timely, sufficient, and efficient compensation, but also for incorporation elements defining indirect expropriation. Furthermore, it provides for, four exceptions on expropriation: public purpose, due process, nondiscrimination, and non-breach of contract. It is important to note that not all these criteria have garnered equal adherence over time. For example the factor of stability, that was initially considered a vital component, has evolved into what is now recognized as the stabilization clause losing prominence within the contemporary discourse on expropriation in BITs over time.

Article VII is the one of the first attempts to provide for Investor-State Dispute Settlement (ISDS) in the post-colonial BITs. The provision, however, incorporates escalation clauses intertwining international and domestic remedies, ultimately culminates in arbitration under the International Centre for Settlement of Investment Disputes (ICSID), lacking clarity. This reflects an initial attempt at navigating investor-state disputes and complexities owing to its early conceptualization. Notably, the BIT does not provide for exhaustion of domestic remedies before instituting the dispute before the ICSID.

Article VIII provides for State-State dispute settlement similar to the conventional practices by designating the President of the ICJ as the default appointing authority, aligning with prevalent norms among BITs during that period.

2.4 China-Ghana BIT (1989)

It should be noted that China during the post-colonial period was a developing country[40] and in this chapter the China-Ghana BIT is examined as an example of the South-South BITs. In light of the NIEO reforms propagated by the Non-Aligned countries, later known as the G77 one would therefore expect that the BITs signed between South-South countries were aligned with the NIEO provisions elucidating the sovereign right of states to expropriate.

Article 1 of the BIT provides for the definition of an investment similar to the North-South models discussed above. It adopts the asset-based definition expressed with the formula 'every kind of asset' followed by an illustrative, non-exhaustive list.

[40] Nina Bandelj and others (eds), 'Post socialist Trajectories in Comparative Perspective', *Socialism Vanquished, Socialism Challenged: Eastern Europe and China, 1989-2009* (Oxford University Press 2012).

Article 2 provides for the promotion of investments in accordance with the laws and regulations of the Host state effectively, barring specific modifications introduced through supplementary instruments like investment agreements.

Article 3 provides for the provision of MFN under the standard of FET similar to the Afro-European BITs during this period providing for preferential treatment allowed to third states with an agreement relating to the avoidance of double taxation and for facilitating frontier trade is peculiar to this BIT. It further provides:

> *the treatment and protection as mentioned in Paragraphs 1 and 2 of this Article shall not include any preferential treatment accorded by the other Contracting State to investments of investors of a third State based on customs union, free trade zone, economic union, agreement relating to avoidance of double taxation or for facilitating frontier trade.*[41]

The compensation provision within Article 4 closely resembles the Hull Formula, mandating the prompt, adequate, and freely transferable compensation for expropriated assets. However, it introduces a noteworthy provision allowing for a review of compensation if deemed incompatible with the laws of the Host state. [42]

Article 4 of the BIT presents an unconventional approach to the Expropriation provision compared to the prevailing norms in BITs of that era. It permits host states to undertake expropriation actions in cases related to national security or public interest, contingent upon adherence to the Host state domestic legal procedures. Importantly, this expropriation must be devoid of discriminatory practices and necessitates the payment of compensation.

Furthermore, Article 10 provides for Investor-State Arbitration limiting the dispute settlement for matters concerning the quantum of compensation. It mandates ad-hoc arbitration, with the Chairman of the Stockholm Chamber of Commerce designated as the default appointing authority. Notably, the applicable laws are the laws of the Host state, including its conflict laws the provisions of the BIT as well as the generally recognized principle of international law

[41] Article 3(2).
[42] Article 4(3).

accepted by both Contracting States.[43] This provision reflected China's interests during this period to include a very restrictive ISDS provision, limited to amount of compensation.[44]

Article 9 provision for state-to-state dispute settlement is ordinary and clear and gives the default appointment authority to the president of the ICJ like the North-South BITS.

A notable observation worthy of mention lies in the absence of the National Treatment provision within this BIT. This is particularly intriguing given the treaty's recognition of the Host state's imperative to provide preferential treatment to its own nationals. The absence of this provision seems to be a deliberate omission, as it is congruent with China's interest in its bilateral relations limiting any interference with its sovereignty in recognition of the Host state's need for specific provisions to address internal disparities.[45]

2.5 Conclusion

The post-colonial BITs were generally characterized by their broad-based provisions that allowed a wide scope of foreign investment that qualified for protection under the BITs. The series of substantive protection guarantees found in these BITs entail obligations including, traditional standards of treatment, NT, MFN, FET, full protection and security, expropriation and the duty to pay compensation, imposed on the Host state effectively limiting its right to expropriate. The BITs reflected the interests of the developed countries whose main aim was to protect their investment.[46] It is also important to note that there is no material difference between BITs signed by African states with their former colonies and those signed with other developed countries. South- South BITs similarly through their substantive provisions are contrary to NIEO and limiting the right to expropriate.

Further nuances exhibited in the BITs that were aligned to the NIEO provisions reflected the interests of the other contracting states and were not actively sought by the African states.

Contrary to the hypothesis developed at the beginning of this Chapter, we find that in practice, the NIEO resolution and the Charter was accorded little to no weight and largely disregarded in defining the extent of investment protection within the post-colonial Extra-African BITs

[43] Article 10 (5).
[44] More about China's Policies see Norah Gallagher and others, *Chinese Investment Treaties: Policies and Practice* (Oxford University Press 2009).
[45] Ibid.
[46] Chester Brown and Chester Brown (eds), *Commentaries on Selected Model Investment Treaties* (Oxford University Press 2013).

3. Extra-African BITs between 1990s to 2015

3.1 Introduction

During the period between 1990 and 2015, there was an influx in the number of BITs signed worldwide including by African countries.[47] By 2015, African countries had signed a total of 303 BITs, which is a growth of more than 4 times compared to the post-colonial period discussed in Chapter 2. 183 of these BITs were Extra-African.[48] This influx period (1990-2015), saw BIT activity in almost all directions, but the North–South character remained salient.[49]

Concurrently, during the influx period, there were major reforms that were happening in Investment Treaties internationally, including in the western world. These reforms were spearheaded by organizations like OECD or by States like the United States of America. Some of these reforms discussed below were the Multilateral Agreement on Investment (MAI) by the OECD negotiated between 1995 and 1998, the North American Free Trade Agreement (NAFTA) reforms by the United States of America and the cooperation between China and Africa through the China - Africa summit held in 2006.

In the US, the NAFTA award in *Metaclad* v *Mexico* and other awards triggered a vivid debate about the proper scope of the concept of indirect expropriation and its influence on the State's regulatory power. Against this background, the United States included some more specific language in its 2004 Model BIT and in recent investment treaties in order to clarify that *bonafide* general regulation not regularly constitute a compensable indirect expropriation. [50] As a reaction to the decision in *Maffezini* v. *Spain*, the United States introduced a clause in some subsequent investment treaty negotiations aiming specifically at excluding the application of MFN clauses to investor-state dispute settlement.[51] Further, the interpretation of the fair and equitable treatment standard in Pope & Talbot v. Canada prompted the United States to enhance the clarification of this concept in its recent investment.[52] The changes implemented through these reforms included provisions on exceptions to the standards of treatment that reflected

[47]See a chronological listing of all known BITs at https://investmentpolicy.unctad.org/international-investment-agreements.
[48]See a chronological listing of all known BITs at https://investmentpolicy.unctad.org/international-investment-agreements.
[49] See https://investmentpolicy.unctad.org/international-investment-agreements/advanced-search
[50] Mirian Kene Omalu, *NAFTA and the Energy Charter Treaty: Compliance with, Implementation and Effectiveness of International Investment Agreements*, vol. 5 (Kluwer Law International 1998) 226.
[51] Anqi Wang, 'Applying the MFN Clause to Avoid Procedural Preconditons', *The Interpretation and Application of the Most-Favored-Nation Clause in Investment Arbitration* (Brill Nijhoff 2022) 150.
[52] Alexander Orakhelashvili, 'The Normative Basis of "Fair and Equitable Treatment": General International Law on Foreign Investment?' (2008) 46 Archiv des Völkerrechts 74, 79.

Article XX of the General Agreement on Tariffs and Trade. There were also reforms that provided for security exceptions, amendment on the transfer of funds and indirect expropriation to limit broad interpretation.[53]

MAI on the other hand built on the achievements of previous OECD instruments like the 1962 Draft Convention, regional Agreements like NAFTA, and sectorial Agreements like the Energy Charter Treaty. Its objective was to create a free- standing treaty open to accession of other non-OECD countries in creating a strong and comprehensive legal framework for FDI. It provided for Non-discrimination under both National Treatment and MFN Treatment with the objective to contain states measures and eliminate them which was essential for liberalization objective of the MAI.[54]

Simultaneously, during this period, the World Bank and the IMF played a vital role in the signing of the BITs by African states. This was achieved by the recommendation of measures on trade liberalization policies and privatization to promote the flow of FDI into developing countries. [55]

Further this period was 30-year post independence, African states had now adopted Model BITs and investment policies and negotiating frameworks that outlined their objectives or provided for a policy framework that reflected their interests.[56]

In light of these reform efforts by other States and international organizations, and the development of the legal framework governing FDI in the African states one would therefore expect that African states would sign BITs that reflected their interests under NIEO providing for the right to expropriate.

To examine this hypothesis, this Chapter analyses 4 BITs. The first three BITs draw from the discussion in Chapter 2 following a similar structure to showcase the reforms if any implemented during this period. The Egypt- Germany BIT is a renegotiated BIT between Germany and Egypt to replace the terminated Germany- Egypt BIT (1974) that was discussed in Chapter 2.2. This BIT was selected to examine whether when African States renegotiate post-colonial BITs, they take the opportunity to ensure that the BIT aligns with their interests. The

[53] U.S. Model BIT (2012).
[54] William H Witherell, '*Developing International Rules for Foreign Investment: OECD's Multilateral Agreement on Investment*' (1997) 32 Business Economics, 38.
[55] Demba Moussa Dembele and Jean McMahon, '*The International Monetary Fund and World Bank in Africa: A "Disastrous" Record*' (2005) 35 International Journal of Health Services, 389-393.
[56] AM Akiwumi, 'A Plea for the Harmonization of African Investment Laws' (1975) 19 Journal of African Law, 134.

Rwanda- United States BIT analyzed next, showcases the reforms adopted in the new generation BITs that were based on the US Model BIT 2004 and in light of the US reforms discussed above. Lastly, the China- Tanzania BIT is examined to showcase whether there are changes in the Africa- China BITs given that at this period China's position had changed from a capital importer to capital exporter. This BIT will be compared to the China–Ghana BIT discussed in Chapter 2.4. South- South BITs signed during this period are discussed in Chapter 4 below.

The Chapter will then conclude by examining the Burkina Faso - Canada BIT as an example of contemporary BIT signed by African states post 2015 in pursuit of the right to expropriate under the NIEO.

3.2 Egypt-Germany BIT (2005)

The Egypt- Germany BIT (2005) replaced the Germany-Egypt BIT 1974(terminated BIT) discussed in Chapter 2.2 above. One could therefore anticipate substantial alterations given the opportunity for renegotiation between the parties involved.

Article 1 of the Egypt- Germany BIT (2005) provides for an asset-based definition expressed with the formula 'every kind of asset' followed by an illustrative, non-exhaustive list in accordance with the laws of the Host state similar to the terminated BIT.

Article 2 of the treaty delineates provisions for the admission of investments, contingent upon compliance with the laws and regulations of the host state. This Article further notably amalgamates the Fair and Equitable Treatment (FET) and Full Protection within a singular provision. Additionally, it emphasizes these standards of treatments by stipulations on prevention on arbitrariness and discrimination in the management, maintenance, utilization, enjoyment, or disposal of investments.

Similarly, Article 3 closely mirrors the language employed in the terminated BIT bifurcating the MFN and NT principles within a singular provision. The reforms worth highlighting is the addition of public security and order as an exception for the in determining 'treatment less favourable'. Further the Article permits preferential treatment to be accorded to third states with a double taxation agreement or other agreement regarding taxation.[57]

[57] Article 3(4)

Article 4 briefly provides for Full Protection and Security without any exceptions or definitions allowing a wide scope of interpretation to be adopted in case of a dispute before an arbitral tribunal.

Further Article 4 provides for Expropriation to encompass direct and indirect forms. It stipulates that expropriation is only permissible solely for public benefit and upon compensation. Notably, this provision adheres to the Hull formula, specifying compensation standards. The legality of any such expropriation, and the amount of compensation shall be subject to review by due process of law. This is a change from the 1974 BIT that subjected the review to local judicial remedies. Additionally, it extends the application of the MFN treatment to the provisions outlined within this article.[58] This has created a similar consequence like the 1974 terminated BIT where states can potentially circumvent addressing expropriation disputes within the treaty framework by importing substantive protection from other treaties diluting the intended legal oversight and accountability outlined within the treaty itself.

Article 7 of the treaty provides for the MFN treatment with no notable reforms to the terminated BIT.

Article 8 provides for State-State dispute settlement in matters concerning the interpretation or application of the BIT with the default appointing authority being the president of the ICJ.

Article 9 of the treaty outlines the mechanism for Investor-State dispute resolution, a prevailing practice during this period. It is notable that the majority of BITs during this era incorporated provisions for dispute resolution via mandatory investor-state arbitration, with the International Centre for Settlement of Investment Disputes (ICSID) being one of the options. This inclusion of ICSID as an arbitration avenue aligns with the widespread ratification of the Washington 1965 Convention, particularly among African states.[59] Among the fifty-four African nations, forty-eight have signed the Convention, with forty-six of them proceeding to ratify it. The six countries yet to sign ICSID Convention are Angola, Djibouti, Equatorial Guinea, Eritrea, Libya, and South Africa. This extensive ratification demonstrates a significant adherence to the ICSID framework within the African continent.

[58] Article 4(4)

[59] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966) [hereinafter ICSID Convention].

Surprisingly, the discussion above reveals a lack of significant changes, contrary to expectations, as elaborated above. The BIT is actually regressive in terms of the nuances observed in the Germany-Egypt BIT (1974) that reflected the NIEO reforms. The substantive provisions of the BIT limit the right to expropriate similar to the NIEO provisions. This observed pattern mirrors the trend observed in BITs established between Germany and various African nations during this period. Moreover, is observed in BITs signed among African nations and other European countries.[60]

3.3 Rwanda-United States BIT (2008)

This BIT was the first BIT between the United States and Africa based on the revised US-Model BIT 2004, a revision of the US Model 1983 discussed in Chapter 2.3.

Article 1 of the BIT adopts an asset-based definition expressed with the formula 'every kind of asset' followed by an illustrative, non-exhaustive list similar to the post-colonial BITs.

The BIT separates the standard of treatment and offers more clarification and interpretation as opposed to the earlier BITs that bifurcated several standards of treatment together in one provision. Article 3 provides for the NT applicable to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of its investment in its territory. The scope is extended to cover measures taken by regional level of government.

Article 4 provides for the MFN treatment to be accorded to both the investors and investment with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.

Article 5 stipulates that the minimum standard of treatment is customary international law and includes fair and equitable treatment and full protection and security. It clarifies that the FET and full protection and security do not require treatment in addition to or beyond that which is required by that standard and do not create additional substantive rights. The obligation of FET is defined to include the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with principles embodied in the principle legal systems of the world. Full protection is defined as the obligation to provide the level of police protection required under customary international law. Annex A of the BIT defines ‘customary international law’ to result from a general and consistent practice of states. It also

[60] Won L Kidane, ‘Africa’s BITs with Its Traditional Partners of the West’ in Won L Kidane (ed), *Africa’s International Investment Law Regimes* (Oxford University Press 2024), 373–375.

defines minimum standard under customary international law to refer to customary international law principles that protect the economic rights and interests of aliens.

Article 6 on expropriation is to no surprise the encapsulation of the Hull Formula requiring expropriation only under the conditions that it is taken for a public purpose, in a non-discriminatory manner and in accordance with due process of law and on the payment of prompt, adequate and effective compensation.

This is interpreted further under Annex B of the BIT that emphasizes the customary international law standard based on the minimum standard of treatment of aliens. Annex B goes further to distinguish between direct and indirect expropriation and state factors that should be considered. It provides that indirect expropriation requires case- by- case, fact-based inquiry that considers among other issues: the economic impact of the government action, the extent to which the government action interferes with distinct reasonable investment backed expectations and the character of the government action. It also provides exception to measures undertaken to protect legitimate welfare objectives like public safety and environment.

This was a major reform from the Senegal- United States BIT discussed in Chapter 2.3 and although it reflected the provisions of the NIEO, it was not actively sought by Rwanda. As discussed above, this BIT was based on the US Model 2004 BIT after NAFTA.

Article 24 provides Investor-States dispute settlement under several institutions including ICSID, ICSID additional facility, UNCTITRAL and any other arbitration institution that the parties might have agreed on. Article 25 provides for the consent of the parties to submit to arbitration making arbitration compulsory for Rwanda a deviation from the Senegal-United States BIT that allows the parties to mutually agree on the arbitration.

3.4 China-Tanzania BIT 2013

China's position as both a major importer and exporter of capital puts it in a serious theoretical dilemma as to the aforementioned rationale. As a recipient of capital, it has all the incentives of a developing country to be protective; while as an exporter of capital, it has all the incentives to seek the most expansive rights for its nationals. This BIT reflects China's position as a capital exporter.

The China-Tanzania BIT is the most recent China-Africa BIT and was signed on 24 March 2013. Right off the bat the BIT list ambitious objectives in the preamble to include:

Recognizing that the reciprocal encouragement, promotion and protection of such investment on the basis of equality and mutual benefit will be conducive to stimulating the business initiative of the investors and will increase economic prosperity in both States;

Respecting the ***economic sovereignty*** *of both States; Encouraging investors to respect corporate social responsibilities; and*

Desiring to intensify the cooperation between both States, to promote healthy, stable and sustainable economic development, and to improve the standard of living of nationals.

Article 1 defines the term "investment" in essentially similar terms to the China-Ghana BIT as discussed in Chapter 2.4 with notable additions. It adds the provision in determining what qualifies as an investment.

An investment has the following characteristics: the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.

Article 3 introduces the NT. This Article is notable for leaving a significant leeway for the host state to limit National Treatment through laws and regulations.

Each Contracting Party, in accordance with its laws and regulations, may grant incentives or preferences to its nationals for the purpose of developing and stimulating local entrepreneurship provided that such measures shall not significantly affect the investments and activities of the investors of the other Contracting Party.

The first subsection subjects NT to applicable laws and regulations while subsection 2 allows for preferential treatment to nationals of the Host State with a caveat that as long as such incentives "shall not significantly affect" investments and activities of the investor of the other contracting party. This marked departure from the established NT clause significantly.

The inclusion of this provision appears strongly influenced by Tanzania's demands, given its prominent role as a primary recipient of investments. Notably, China's agreement to this is noteworthy considering that Tanzania's concerns, particularly its aspiration to promote local industries, could have been better addressed at the investment admission stage. This could have been achieved through other mechanisms aligned with well-established principles in IIL,

which typically afford host states broad discretion in certain domains. This is such a monumental stage in realizing the efforts under the NIEO.

The MFN provision under Article 4 is standard and does not contain any notable modifications. Consistent with the latest models, the MFN provision does not apply to dispute settlement provisions.

Article 5 provides for the FET provision, however, with new additions. The meaning adopted in "fair and equitable treatment" is limited to denial of judicial proceedings by the other Contracting Party or be treated with an obvious discriminatory or arbitrary measure.[61]

Full protection and security requires that:

> *Contracting Parties take reasonable and necessary police measures when performing the duty of ensuring investment protection and security. However, it does not mean, under any circumstances, that investors shall be accorded treatment more favourable than nationals of the Contracting Party in whose territory the investment has been made.* [62]

These two provisions are quite innovative as they limit the interpretation of the two standards of treatment. FET is limited to mean denial of judicial proceedings and Full Protection and Security is limited to police protection and security. Further, the Article limits the standard applicable in determining Full Protection and Security contrary to that accorded to national of the Host State. This is a deviation of the common customary international law minimum standard of BITs signed during this period.

Expropriation is provided for under Article 6. It starts of by listing provisions that must be met to permit expropriation to include that it was in public interest, in accordance with domestic legal procedures and relevant due process, non-discriminatory and compensation was given.

Further, it separately provides that for a government measure to constitute indirect expropriation, it had to be determined on a case-to-case, fact-based inquiry taking into consideration the economic effects of the measure, the scope of the measure against investment of the other contracting state, the extent that the measure interferes with reasonable

[61] Article 5(2).
[62] Article 5 (3).

investment expectation and the character of the measure whether it was adopted in public interest, in good faith and proportionate to its purpose. The Article concludes by providing exceptions to indirect expropriation to include measures necessary for maintaining reasonable public welfare, are non-discriminatory. [63]

Article 13 provides for State-State dispute settlement through ad-hoc arbitration with the President of the ICJ as the default appointing authority.

Article 14 provides for ISDS via arbitration under any of the four listed institutions: domestic court litigation in the host state, ICSID arbitration, ad hoc arbitration under UNCITRAL Rules, and ad hoc arbitration under any other agreed rules. One notable addition to ISDS under Article 14(2) is that the Host state retains the right to require the exhaustion of local administrative remedies before the investor can exercise the right to resort to international arbitration.

This BIT reflected the outcome of the China – Africa 2006 summit that promoted co-operation between China and African states. It illustrates China taking a new role in relation to African states and is commendable for its alignment to the provisions of NIEO.[64]

3.5 Burkina Faso- Canada BIT (2015)

After 2010, the number of Extra-African BITs signed decreased significantly. As a matter of fact, there are no more than 15 Africa– West BITs, with nine of them concluded by Canada and two by Switzerland.[65] Canada signed the same model BIT with Benin and Tanzania in 2013; Cameroon, Nigeria, Senegal, Mali, and Cote d'Ivoire in 2014; and Guinea and Burkina Faso in 2015. Switzerland signed one with Tunisia in 2012 and Egypt in 2010. The Canada-Africa BITs have been hailed for being the most- contemporary BITs at present.[66] The Canadian BITs with African States show a high degree of similarity with the Canadian Model BIT of 2004.[67] To examine these BITs, Burkina Faso- Canada BIT (2015) is taken as an

[63] Article 6(3)

[64] Cyril Obi and Fantu Cheru, *The Rise of China and India in Africa: Challenges, Opportunities and Critical Interventions* (2010) <http://urn.kb.se/resolve?urn=urn:nbn:se:nai:diva-799> accessed 15 January 2024.

[65] See https://investmentpolicy.unctad.org/international-investment-agreements/advanced-search

[66] Won L Kidane and Won L Kidane, *Africa's International Investment Law Regimes* (Oxford University Press 2024), 377.

[67] J Anthony VanDuzer, '*Canadian Investment Treaties with African Countries: What Do They Tell Us About Investment Treaty Making in Africa?*' (2017) 18 The Journal of World Investment & Trade, 556, 556-584,576.

example. This particular BIT has, more than the others, a strong emphasis on the right to regulate of host States as well as on the need for sustainable development.[68]

Article 1 provides for an exclusive list in defining the term ‘investment’ as any kind of assets that an investor of a Party owns or controls that involves the commitment of capital or other resources, the expectation of gain or profit or the assumption of risk. This BIT provides for an exclusive list of forms that the investment must take to be covered under the Agreement. This is a reform from the prior BITs discussed above that adopted the asset-based definition expressed with the formula 'every kind of asset' followed by an illustrative, non-exhaustive list.

Article 4 provides for NT and adds the condition that the treatment is applicable in like circumstances and extends the scope of NT to the measures taken by sub-national governments.

Article 5 providing for MFN has no significant changes to the older BITs other that the introduction of the condition to be applicable to ‘like circumstances.’ and extends to measures taken by sub-national governments. Annex III provides for exception to MFN to include bilateral or multilateral international agreements in force or signed prior to the date that the Burkina Faso- Canada (2015) BIT came into force. Further it provides that MFN does not apply to existing or future bilateral or multilateral agreements of a free trade area or custom union, or relating to aviation, fisheries or maritime matters.

These exceptions are quite ground-breaking because it prevents contracting states from Treaty shopping by importing substantive protection from other treaties diluting the intended legal oversight and accountability outlined within the treaty itself as was observed in the Germany-Egypt BIT (1974) discussed in Chapter 2.2.

Article 6 provides that the minimum standard of treatment is in accordance with customary international law, the minimum standard of treatment of aliens including FET and Full Protection and Security.

Expropriation is provided for under Article 10 and interpreted in Annex I of the BIT. It allows for expropriation on the condition that it is taken for a public purpose, in accordance with due

[68] Canada-Burkina Faso BIT (2015), Preamble, recital 2.

process of law, in a non-discriminatory manner and upon the payment of compensation. It basically encapsulates the Hull Formula.

Annex I define indirect expropriation in a similar manner to the definition adopted by the Rwanda-United States BIT and the China- Tanzania BIT discussed above. It provides that indirect expropriation should be determined on a case-by-case, fact-based inquiry considering the economic impact of the measure, the extent which the measure interferes with distinct reasonable investment backed expectation and the character of the measure. It further provides for exceptions on non-discriminatory measures taken for legitimate public welfare objective in good faith.

Article 17 provides for reservations and exceptions to include non-conforming measures adopted by the parties that are listed in Annex II of the BIT as not subject to the standards of Treatment, NT and MFN.

Annex II contains the reservation for future measures in listed sectors for both countries and for Burkina Faso these sectors include, social services, preference to socially economically disadvantaged minorities, government securities, licensing agriculture, telecommunication, the priority of use of local products and services among others. This reform is instrumental in implementing NIEO provisions by recognizing the sovereign right to regulate of Burkina Faso. It is therefore a surprise when examining the Canada-Guinea BIT 2015[69] based on the similar model, to note that it does not have a similar Annex for reservation for future measures despite Canada having its own Annex.

Article 18 provides for General exceptions that are inspired if not copied from the WTO General exceptions under GATT Article XX, to include measures taken by the parties to protect human, animal or plant life of health, ensure compliance with domestic law, conserve living or non-living exhaustible resources provided that the measures are not applied in a manner that is arbitrary or unjustifiably discriminatory, or is a measure that is a disguised restriction on investment or investment related international trade.

It also provides that the BIT does not prevent a Party from adopting or maintaining reasonable measures for prudential reasons, such as: protecting investors, depositors, financial market participants, policyholders, policy-claimants, or persons to whom a fiduciary duty is owed by

[69] Canada-Guinea BIT (2015).

a financial institution; maintaining the safety, soundness, integrity, or financial responsibility of financial institutions; and ensuring the integrity and stability of a Party's financial system.[70]

Article 18 provides that if a right or obligation duplicates one under the WTO Agreement, the Parties agree that a measure adopted by a Party in conformity with a waiver decision granted by the WTO pursuant to Article IX of the WTO Agreement is deemed to be also in conformity with the present Agreement. Such conforming measure of either Party may therefore not give rise to an ISDS claim.

Article 18 goes a long way to emphasize the sovereign right of the Host state to take regulatory measures and is also a notable implementation of the NIEO reform.

While the ISDS provision is elaborated across several detailed provisions, under Section C at the end it has not changed its fundamental ICSID arbitration model[71], perhaps with the exception of the addition of transparency as a default rule and permission of the submission by third parties of amicus briefs[72], provided they are not disruptive of the process. The governing law during a dispute is international law and the BIT does not provide for a requirement to exhaust local judicial remedies before submitting the case to arbitration. This provision is therefore not in line with NIEO and the Charter reforms.

3.6 Conclusion

The African-European BITs maintain the same substantive provisions as the BITs signed during the post-colonial period. It is noted in dismay that even with the opportunity to renegotiate a BIT, 30 years post- independence, there are no efforts to implement the NIEO and the Charter's provisions in the BITs signed by African states.

In light of the above, it is important to note that, an overwhelming majority of African BITs to date still maintain the existing stock of old-generation African BITs that promote the protection of foreign investors from developed countries, materially contrary to efforts of reforming IIL in Africa to foster development.

Further, reforms happening in the western world like the United States, have led to reforms in the Extra-African BITs that are in line with the NIEO provisions to an extent. However, it is

[70] Article 18(2).
[71] Article 25.
[72] Annex IV.

noted that these reforms are not sought by African states but are a spillover effect of the reforms by the developed countries because the BITs adopt the model BITs of the developed countries.

The China-Tanzania BIT exhibited notable reforms in line with the NIEO provisions reflecting by the mutual agreement and the cooperation entered into by the two states through the China-Africa Summit in 2006.

The Canadian BITs most notable contemporary Africa–West BITs. Although by no means revolutionary, they set forth the substantive principles and dispute settlement rules with more clarity than ever. They are a huge step towards the implementation of the NIEO reforms. Similarly, however, these reforms are initiated by the Canada in a bid to advance their interests.

4 Intra-African BITs

4.1 Introduction.

The first BIT between two African countries post NIEO was signed in 1982 by Egypt and Somalia. At that time, African countries had already signed 110 BITs with non-African countries. Presently, there are 180 signed Intra-African BITs roughly representing one fifth of the total number of BITs signed by African Countries.[73] Although intra-African BITs picked up later than the other BITs, they grew drastically during the 1990s period and have tripled in number since 2000. This is in contrast to the extra-African BITs growth that has slowed down since 2002 as illustrated in Figure 1. However, it is important to highlight that, 132 of these BITs, which is 70 percent of the signed intra-African BITs are not in force, as the state parties have not ratified them.[74]

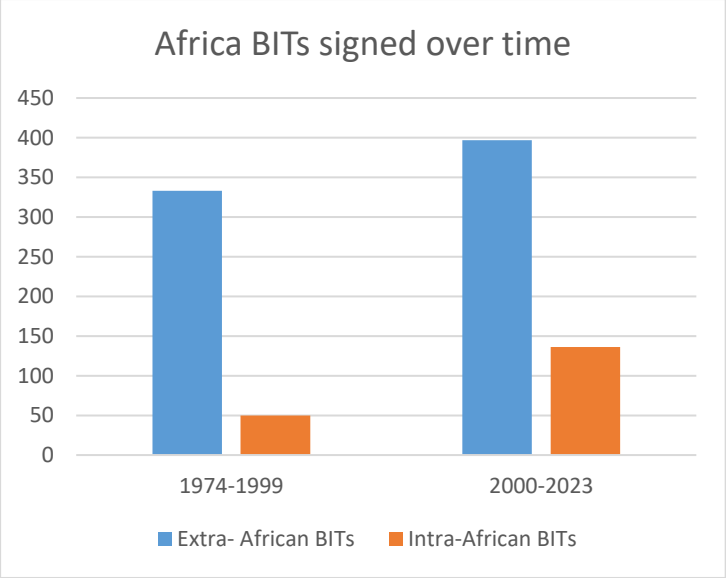

Figure 1

The motivating factor of signing intra-African BITs was the need to deepen regional integration and attract greater investment and the common need to regulate investment through domestic and international legislation.[75] Post the colonial period, African countries started developing their investment domestic laws and incorporating FDI into their policy

[73] See the number of BITs https://investmentpolicy.unctad.org/international-investment-agreements/advanced-search.

[74] See a chronological listing of all known BITs at https://investmentpolicy.unctad.org/international-investment-agreements.

[75] Laura Paez, '*Bilateral Investment Treaties and Regional Investment Regulation in Africa: Towards a Continental Investment Area Special Issue: Africa and the Reform of the International Investment Regime*' (2017) 18 Journal of World Investment & Trade, 386.

frameworks and national development plans.[76] It is therefore reasonable to expect that the Intra-African BITs implemented the NIEO and the Charter provisions having been adopted by the Resolution by the African Council of Ministers on the 'Implementation of the Programme of Action on the Establishment of a New International Economic Order' in 1975.

This section gives a brief overview of intra-African BITs and their provisions in light of the right to expropriate before analyzing the three selected BITs. The first intra-African BIT was the Libya-Tunisia BIT signed in 1973 was quite brief with the purpose to strengthen the bonds of brotherhood between the two countries and fulfill the hopes of people in the greater convergence and cooperation in all field based on mutual benefits and common interest. This BIT was however not ratified. It however provided that invested capital should not be expropriated or nationalized except in cases of extreme necessity required by public interest for fair compensation without undue delay. It also provided for national treatment requiring that capital invested in the other country to be treated the same as national treatment. Dispute resolution was state-state arbitration whose decision was final and binding. The second BIT between Egypt and Morocco ratified in 1978 had standards of treatment similar to those espoused in North-South BITs. It provided for full protection of investment requiring investment to be granted fair and equitable treatment. It clarifies this by providing for both NT and MFN. Dispute resolution was through ad-hoc arbitration failure of which one of the parties would refer the matter to the International Court of Justice. The above brief outline of the earliest Intra-African BITs signed demonstrate a contradiction from the NIEO and the Charter reforms in limiting the right of states to expropriate.

This chapter examines three BITs. Two of the BITs are between Sudan and Egypt which are examined to find out whether African States reform BITs during renegotiation of initial BITs that fell short of the NIEO reforms. Further, this Chapter also discusses the Morocco-Nigeria BIT that has been hailed to be the most doctrinally sound embodiment of Africa's reform efforts under NIEO.

4.2 Egypt-Sudan BIT (1977)

This was a very short BIT with only 8 Articles not uncommon to the structure of BITs signed during this period. The preamble provided for the main purpose of the BIT, which was to promote and protect investment.

[76] AM Akiwumi, 'A *Plea for the Harmonization of African Investment Laws*' (1975) 19 Journal of African Law, 134.

Article 1 adopted the broad-based definition of investment of an asset-based definition expressed with the formula 'every kind of asset' followed by an illustrative, non-exhaustive list, similar to the North-South BITs.

Article 2 provides for the admission of investment subject to the host state laws effectively barring specific modifications introduced through supplementary instruments like investment agreements like the post-colonial BITs discussed in Chapter 2.

Article 3 provides for the standards of treatment. It provides for fair treatment, NT, MFN with no notable exceptions or differences similar to the Post-colonial Extra BITs signed at the same time.

Article 6 provides for State-State dispute settlement in matters concerning the interpretation or application of the BIT through ad-hoc arbitration with the Secretary General of the Leagues of Arab States having the default appointing powers.

This BIT notably lacks any provisions pertaining to expropriation, an unusual omission within such agreements. Furthermore, it also lacks guidelines or regulations governing Investor-State dispute resolution. These two omissions are commendable as they align the BIT to the NIEO provisions enhancing the sovereign right of states to expropriate.

4.3 Egypt- Sudan BIT (2001)

The Egypt- Sudan BIT (2001) replaced the Egypt-Sudan BIT of 1977 that was terminated in 2003. One might anticipate that this revised BIT therefore maintains the novel provisions exhibited in the terminated BIT in line with the NIEO reforms.

The preamble of the BIT start by underscoring the objective of the BIT to promote and protect investment similar to the terminated BIT.

Article 1[77] adopts the same broad asset-based definition expressed with the formula 'every kind of asset' followed by an illustrative, non-exhaustive list, similar to the terminated BIT.

Article 2 provides for the promotion and protection of investment subject to the applicable laws of the Host state and adds a provision barring specific modifications introduced through supplementary instruments like investment agreements.

[77] Ibid.

Article 3 on the standard of treatment bifurcated the FET, NT and the MFN in one provision. Notably the BIT introduces an exception to MFN on agreements for the avoidance of double taxation or multi frontier trade arrangements.

Article 4 provides for Expropriation acquiescent to the Hull Formula without any exceptions, similar to the Extra- African BITs discussed in Chapter 2. This introduction of this provision was also a regression from the terminated Egypt- Sudan BIT (1977) discussed in section 4.2 above.

Article 8 provides for ISDS under several institutions including the Host state competent courts, ICSID, ad-hoc arbitration under the UNCITRAL rules. It further provides for the applicable law during the dispute to include the provisions of the BIT, domestic law of the Host state, and the rules of international law.

Article 9 provides for the State-State dispute settlement for the interpretation or application of the BIT through ad-hoc arbitration and places the default appointing powers to the president of the ICJ.

Surprisingly, the discussion above reveals significant changes, contrary to expectations, as elaborated above. The BIT is actually regressive as compared to the terminated BIT providing for expropriation. Another notable difference is the referral of investor-state disputes to ICSID and UNCITRAL despite the fact that these countries are in the same regional economic community that provides for dispute settlement under the Leagues of Arab States as incorporated in the terminated BIT discussed above.

4.4 Morocco- Nigeria BIT (2016)

Morocco-Nigeria BIT (2016) has been hailed for balancing the rights of the Host state and that of the investor, effectively enforcing the sovereign right of the host state in line with the NIEO. The BIT is based on the Nigerian Model BIT 2016.

In defining ‘investment’, it adopts an enterprise approach that limits the definition to an exclusive list of forms that the investment must take to be covered under the Agreement. It further provides for what does not include investment to ensure clarity when interpreting. The provision also adds condition that the investment has to contribute to the sustainable development of the host state.

Article 6 provides for NT and MFN. NT is limited to like circumstances that the BIT clarifies to be determined on a case-by-case basis of all circumstance including but not limited to the

effects on the third person and the local community, local, regional or national environment, the sector of investment, aim of the measure and the regulatory process generally applied to the measure concerned. MFN is also limited to like circumstance but there is no clarification whether the same reference to like circumstance in NT is applicable.[78]

The NT and MFN treatment have exceptions in terms of national security, public security, public order or preferential treatment that results from membership in existing or future custom unions, monetary union, common market, free trade agreement; international agreement or domestic legislation relating mainly to taxation or other agreement for the avoidance of double taxation.

Article 7 provides FET and full protection and security in accordance with customary international law minimum standard of treatment of aliens. It clarifies that FET includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the Host state.

Full protection and security standards are defined as those required under customary international law. The treaty provides for FET equating it to the minimum standard requirement under customary international law. The standard of full protection and security maintains the police protection standard required under customary international law.

Article 8 provides for Expropriation espousing the Hull Formula with an addition that determination of indirect expropriation requires a case- to-case, fact-based inquiry into various factors not limited to the scope of the measures or series of measures and their interference with the reasonable and distinguishable concerning the investment.

Article 20 provides for investor liability in the judicial process of their Home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state.

Article 23 of the treaty recognizes the Host state's entitlement to regulate, a provision deemed progressive; however, its efficacy remains limited, offering nominal benefits. This article affirms the Host state's prerogative to regulate or employ measures ensuring that development aligns with sustainable development objectives and legitimate social and economic policies.

[78] Article 6(4).

However, it stipulates that this right must adhere to customary international law and general principles of international law.

Moreover, the article explicates that this regulatory right should be balanced within the framework of rights and obligations of both investors and investments, as well as Host states. It further clarifies that non-discriminatory measures enacted by a State Party to fulfill its international obligations under other treaties should not be considered a violation of the Agreement. While recognizing the Host state's regulatory authority, the provision lacks substantial enforcement mechanisms or tangible benefits, emphasizing a balance between investor rights and state regulations, yet possibly falling short of ensuring significant advantages for the Host state in practice an impediment to the realization of the NIEO reforms.

The BIT further provides for the exhaustion of local remedies before opting for arbitration.[79] Arbitration is through ICSID, ad-hoc arbitration under the UNCITRAL rules or any other arbitral institution with the default appointing power vested on the Secretary General or Vice-Secretary General of the PCIA. It further provides for the right of the host state to initiate civil proceedings against the investor in the host state if the investor occasions damage, personal injury, or loss of life.

Article 28 provides for State-State dispute settlement is through ad-hoc arbitration with the President of the ICJ having the default appointing power.

It is important to note that this BIT has however not been ratified. Further, Morocco and Nigeria have signed Intra-African BITs after the 2016 BIT that are not in congruent with this BIT, but instead maintain the old generation BITs that advanced the rights of the investor in expense of the rights of the Host state to regulate.

4.5 Conclusion

The exploration into intra-African BITs reveals a conspicuous trend wherein a majority of these agreements mirror the substantive provisions found in agreements established by capital-exporting nations. These intra-African BITs largely replicate the core provisions observed in Extra-African BITs, reaffirming the Hull formula as the benchmark for expropriation and encompassing investor-state arbitration mechanisms under institutions like ICSID. Further the provisions on standards of treatment are still broadly drafted without any

[79] Article 27.

exceptions, any obligation provisions for the investors nor do they guarantee the right of states to regulate.

Further, Intra-African BITs maintain broadly drafted standards of treatment without incorporating exceptions or imposing obligations on investors. Equally notable is the absence of guarantees affirming the Host states' right to regulate within these BITs.

However, the recent Morocco, BIT is an outlier to this observation, having incorporated exceptions to the standards of treatment. Its notable provision for the right of states to regulate however lacks substantial enforcement mechanisms or tangible benefits, emphasizing a balance between investor rights and state regulations, yet possibly falling short of ensuring significant advantages for the Host state in practice an impediment to the realization of the NIEO reforms. Further, its provision for exceptions to expropriation and the requirement that judicial local remedies be exhausted first is a reform worthy of highlight.

5. Challenges that limited the success of the NIEO

This Chapter discusses the challenges that African states may have encountered that limited their efforts in implementing the NIEO in their BITs. The chapter is divided into three parts. The first three parts adopt the same structure of the thesis as adopted in Chapters 2, 3 and 4 in discussing the challenges faced during these three periods. This is to determine whether the challenges faced by African states varied during these three periods. This structure also allows one to examine whether some of these challenges were resolved over time or they still persisted during the subsequent periods.

5.1 Challenges during the Post-Colonial Period.

Chapter 2 concludes by finding that majority of the BITs signed by African states during the post-colonial period conflicted with the NIEO reforms. The post-colonial period was marked by the African continent gaining independence from the European colonial rule and its administration which was keenly attuned to the interest of the colonial companies for their mutual benefit.[80] The colonial powers were interested in safeguarding their existing investment in these African states that has just acquired independence. On the other hand, African states found themselves grappling between the need to establish their newfound sovereignty vis a vis the need to maintain and attract the foreign investment which was vital for their development. This section proceeds to discuss this conundrum by analyzing 2 challenges that may have limited success of NIEO during the postcolonial period.

5.1.1 The historical "chains" of colonialism

Kojo contends that the investment treaties that African states entered into were heavily influenced by the existing colonial legal infrastructure and policy framework. [81] He attributes this on the argument that the post-colonial period for most of the African states was a period of transition from colonization to independence and was therefore far from linear in relation to developing investment treaties.

Pae`z further supports this aversion and states that the existing colonial capitalist infrastructure and policy framework remained virtually intact. This therefore meant that no significant or revolutionary legislative process could be undertaken by the inexperienced African legislatures in the immediate post-independence era.[82] In a way, it could be argued that the historical

[80] Lance E Davis, *Mammon and the pursuit of empire: the political economy of British imperialism, 1860-1912* (University Press 1986) 307.
[81] Kojo Yelpaala, 'In Search of a Model Investment Law for Africa' (2007), 22 <https://papers.ssrn.com/abstract=1011166> accessed 11 January 2024.
[82] Pae`z (2017), 382.

"chains" of colonialism found new form in the conclusion of the post-colonial Extra-African BITs.[83]

El-Kady and De Gama add that very few African states had an investment treaty model of their own let alone an investment policy strategy or a negotiating framework.[84] They conclude that this resulted in the adoption of BITs that are based on models developed by third parties that did not reflect the African states national development priorities or their reform efforts under NIEO.

This reasoning infers therefore that African States found themselves in a peculiar situation where they had no policy framework or legal infrastructure that would replace the existing colonial ones. They therefore resorted to signing BITs that reflected the interests of the European colonial countries contrary to NIEO.

This was the conclusion reached in Chapter 2 wherein African states were observed to adopt similar BITs, some copy-pasted word for word, in the African –Germany and African-United States BITs. As illustrated, the African-US BITs were based on the US Model 1984 BIT. In addition, the reasoning on lack of expertise implies that the nuances displayed by the Senegal-US and the China- Ghana BITs were not actively sought by the African states but instead reflected the interests of the other contracting party.

5.1.2 Competition to attract FDI.

As examined in Chapter 2, the thesis finds peculiarities exhibited in the Germany-Egypt BIT, Egypt not having been colonized by Germany. The BIT adopts substantive provisions that limit the right of states to expropriate similar to BITs signed between Germany and its African colonies. This peculiarity is also observed in Chapter 2.3 that examines the Senegal- United States of America BIT. The question that therefore rises is why there was no material difference between BITs signed by African states with their colonizers and those signed with non-colonial developed countries?

A study conducted by the United Nations Economic Commission for Africa (UNECA) answers this by concluding that the post-colonial Extra-BITs primarily sought to protect and lock in foreign investment of the colonial developed countries already present in the states of the

[83] For decolonization discussions, see generally Matthew Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (University Press 2007).
[84]El-Kady and De Gama (2019), 486.

African colonies. This was in in sectors with enclave economies, such as minerals and fuel in order to guarantee and sustain the export after independence.[85]

Pae'z further in support argues that African states also signed similar BITs with colonial powers as a strategic asset seeking FDI priorities to lock in market benefits and control competition of new entrants.[86]

Further, Elkins, Guzman and Simmons contend that host states are under competitive pressure to sign BITs when other host states have done so. Once a single developing country has entered into a BIT, the other developing countries are forced, as a matter of competition for foreign investment, to conclude similar treaties in order to receive any foreign investment inflows at all. [87]

Kojo concurs that the signing of the post-colonial Extra-African BITs is viewed as a competitive race to the bottom as African states have to give up their sovereign right to expropriate in return for receiving foreign investment. This he attests to the reasoning that African states with similar socio-economic, cultural conditions and investment needs pursue their interests and investment legislation not just in isolation but also often in active competition with one another. [88]

The competition to attract FDI as espoused above illuminates why African states BITs with similar substantive provisions contrary to NIEO regardless of whether it was with former colonial powers or not. The need to advance their individual interest to attract and maintain foreign investment overshadowed their common efforts to advance their common interest under NIEO.

5.2 Challenges during the Extra-African BITs between 1990s to 2015

This period as discussed extensively in Chapter 3 was marked with major reforms in investment treaties internationally spearheaded by the developed world. However as concluded in Chapter 3.6 African states did not borrow from the experiences of these western countries to negotiate BITs that provided for the right of expropriation in line with the NIEO.

In addition, it is important to highlight that this period was about 30-year post independence, and the colonial ties had weakened, African countries had adopted domestic investment policies

[85] UNECA *Investment Policies and Bilateral Investment Treaties in Africa : Implications for Regional Integration* (2015), 16–19.
[86] Paez (2017), 379,382.
[87] Zachary Elkins, Andrew Guzman and Beth Simmons, '*Competing for Capital: The Diffusion of Bilateral Investment Treaties*, 1960-2000' [2008] University of Illinois Law Review, 277.
[88] Kojo (2010), 22.

and some even had model treaties. The challenges they faced during the post-colonial period were therefore not imminent. So why was the success of NIEO still limited during this period? To address this, the subsection will analyze these three challenges: power asymmetry, influences by the World Bank and NIEO is not legally binding.

5.2.1 Power Asymmetry

First, the limited success of NIEO can be explained by the concept of power asymmetries between the developed countries and the African states. Morin and Gagne contend that the asymmetrical nature of bilateral negotiations between a strong, developed country, and a usually much weaker developing country, allows the developed country to use its power more effectively in a bilateral setting than in it does a multilateral setting.[89] These arrangements of the imbalance therefore favor investors of the developed world.

Guzman further introduces the concept of the 'Prisoner's dilemma'. He argues that the Prisoner's dilemma explains why developing countries conclude investment treaties bilaterally while rejecting them when acting as a group. He infers those developing countries, when negotiating the BITs with developed countries, find themselves in a weaker position when they are acting individually.[90]

Schill disputes this argument by arguing that if this were the case, BITs could hardly be understood as a system of law. He further avers that the apparent convergence of international investment treaties would then simply conceal differences stemming from different understandings of the standards of treatment contained in the treaties but would nevertheless endorse preferential benefits of stronger vis-à-vis weaker capital-exporting States.

Schill's line of argument is countered by Salacuse who avers that the power asymmetry emanates from the implicit understanding that although the promises and concessions in the Extra-African BITs are theoretically reciprocal, in practice, virtually no investor of the African states invest in the western developed countries."[91]

The above arguments highlight the challenge that African states faced due to the imbalance of power exhibited in negotiating these BITs. However, what informs the nuances observed in the China- Tanzania BIT and the Rwanda-US BITs? Consideration should be given to the fact that

[89] Ibid.
[90] Andrew T Guzman, '*Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*' (1997), 639.
[91] Jeswald W Salacuse, '*The Emerging Global Regime for Investment*' (2010) 51 Harvard International Law Journal 427,464.

these BITs as discussed in Chapter 3, reflected the developed states interests albeit having more favorable provisions. The China-Tanzania BIT reflected the outcome of the China–Africa 2016 summit with China taking a new role in relation to African states. The Rwanda-US similarly formed part of the revision of the U.S. model BIT, which served as template for the negotiations of the U.S.-Rwanda BIT (2008). These nuances do not therefore negate the finding above.

5.2.2 Influences by the World Bank.

Secondly, Berge and St John contend that African states were also highly influenced by the advice issued by the Bretton wood institutions like World Bank through its Structural Adjustment Programmes (SAPs). The SAPs issued policy advice to sub-Saharan countries which advocated for the liberalization of markets through investment treaties in order to attract more FDI.[92] They further introduce the concept of asymmetric diffusion, which occurs when a policy is framed as international best practice but only recommended to a subset of states. They find that this international best practice was, however, not recommended to developed countries by the World Bank.

Mbori further concurs by stating that the external force of these Bretton Woods Institutions like the World Bank and IMF have made African states perpetual capital importers.[93] He adds that the notion that African countries are capital importers is tied to the history of extractive colonialism as highlighted in chapter 5.1.1 above and perpetuates the continuation of colonialism through neo-liberal imposition.

Neo-liberalism includes a set of economic policies that embed the thinking that markets will arrange economic affairs efficiently requiring state intervention in the market be kept at a minimum. The Neo-liberalism was promoted by World Bank and developed states as a way to increase the flow of FDI into the African states. It required IIL treaties to containing standards protecting liberalized trade, services, and capital and ring-fenced by international arbitration. African states therefore in a bid to attract more FDI to meet their economic challenges, adopted these BITs.[94]

Attention is drawn to the Egypt-Germany BIT (2005) discussed in Chapter 3.2. The BIT was found to be regressive in comparison to the Germany-Egypt BIT (1974) that it replaced and

[92] Tarald Laudal Berge and Taylor St John, 'Asymmetric Diffusion: World Bank "Best Practice" and the Spread of Arbitration in National Investment Laws' (2021) 28 Review of International Political Economy, 5-10
[93] Harrison Otieno Mbori, '*Benign and Radical Africanization in International Investment Law and Investor-State Dispute Settlement in Africa*' (2023) 24 The Journal of World Investment & Trade 632.
[94] Ibid.

was in contract with the NIEO reforms. Further, this is highlighted in the Rwanda- United States BIT discussed subsequently in Chapter 3.3. These BITs as highlighted overemphasized the liberation of markets, protecting the investors at the expense of the African states' interests in line with NIEO.[95]

Notably, it is unclear, however, whether the benefits of signing these BIT outweigh the corresponding sovereignty costs that African states incur. Studies on this have been contradictory. Empirical research has been unable to demonstrate reliably and consistently a co-relation between signing more BITs and the increase in flow of FDI into the countries.

Internationally, there has been contradictory studies on whether FDI offers benefits to both contracting parties. Some studies find that developing countries, especially countries with weak institutions, have increased FDI inflows by signing multiple BITs.[96] Other studies on the other hand have found little evidence that the BITs stimulated FDI inflows.[97] This is no different in Africa where the evidence is also lopsided with mixed and contradictory conclusions on the increase of FDI as a result of investment treaties.[98]

5.2.3 NIEO is not legally binding.

Lastly, a challenge that African states faced was that the NIEO was not legally binding hence unenforceable. The legal Sources of NIEO mostly derive from the United Nation General Assembly Resolutions and the Charter of Economic Rights and Duties of States. These became a challenge to rely on NIEO in light of the positive International Law system as it is not to be legally binding.

In comparison to the neo-liberal BITs as analyzed in Chapter 3 the substantive provisions contain a clear and independent set of investment laws that the contracting parties cannot ignore. The inclusion of mandatory arbitration through various institutions like ICSID ensures that investors can enforce their rights. African states in signing these BITs they are dissuaded

[95] Joseph E Stiglitz, '*Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Framework in a Globalized World Balancing Rights with Responsibilities Conference'*: The Ninth Annual Grotius Lecture Series: 2007 Grotius Lecture' (2007) 23 American University International Law Review 451, 451,457-458.

[96] Eric Neumayer and Laura Spess, '*Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries*?' (2005) 33 World Development, 1567, 27.

[97] Mary Hallward-Driemeier, '*Do Bilateral Investment Treaties Attract FDI? Only a Bit … and They Could Bite*' in Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press 2009) 22–23.

[98] Jonathan Bonnitcha, '*Assessing the Impacts of Investment Treaties: Overview of the Evidence*' (International Institute for Sustainable Development 2017), 3-4.

from altering their own investment policies encountering regulatory chill. This consequentially limits the success of NIEO in a perpetual cycle.

5.3 Challenges faced in the Intra-African BITs.

Chapter 4 on intra-African BITs reveals a conspicuous trend wherein a majority of these agreements mirror the substantive provisions found in Extra-African BITs largely replicating substantive provisions that limit the right of states to expropriate. This Chapter discusses the challenge of lack of expertise.

5.3.1 Lack of Expertise and bounded rationality.

Poulsen contends that developing countries often lack expertise within their bureaucracies. This is detrimental within their economic diplomacy, as negotiators and stakeholders may routinely make 'mistakes' by failing to grasp all the devils in the details when dealing with complex international economic rules and regulations. [99]

Further she opines that among African states, the degree of expert knowledge in ILL differs and is informed by different sources. In her research she finds that, many African states thought that BITs were simple agreements without any meaningful effect on the real world. She further argued that signing of BITs can be the result of the adoption of an extraneous treaty template without necessarily considering whether this particular template is well suited for the adopting country. This pattern was observed in the case for South Africa that opted into the UK model and developed expertise in negotiating treaties based on it without fully reflecting on its implications. When she interviewed South African negotiators, they confessed that they considered BITs as "pure signals" or "a symbolic gesture" rather than "real and serious legal instruments with teeth"[100]

Coming to the same conclusion Malik finds that "Southern countries have not taken advantage of the more 'equal' negotiating space, free of traditional political pressures associated with North-South, post-colonial relationships, to design more bespoke provisions

[99] Lauge N Skovgaard Poulsen (ed), 'Bounded Rationality and the Spread of Investment Treaties', *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (Cambridge University Press 2015), 29.

[100] Lauge Skovgaard Poulsen, 'The Politics of South–South Bilateral Investment Treaties' in Amelia Porges, Marc L Busch and Tomer Broude (eds), *The Politics of International Economic Law* (Cambridge University Press 2011), 202.

in their treaties due to the lack of expert knowledge and bounded rationality may have clouded the need to take advantage of the more favorable bargaining setting.[101]

This argument coupled with the fact that the FDI flow between Africa states is insignificant, explains why African states lack agency and do not take advantage of the negotiating space that they have that is unencumbered with colonization or power asymmetry as exhibited in the North-South BITs. Chapter 4 in its analysis, demonstrated this lack of expertise and bonded rationality, in the case of the Egypt-Sudan BIT (2005), adopting dispute resolution provision referring disputes to ICSID a blatant regression from the terminated BIT that referred the dispute to the Leagues of Arab States, which both parties are member states.

On a positive note, as mentioned in the Introduction in Chapter 1, Africa is reforming IIL both on the regional and the continental level. A notable recent reform is the adoption of the African Continental Free Trade Area on Investment Protocol (AIP) signed by the Heads of State and Government of Africa in February 2023 in Ethiopia. Within five to 10 years, the AIP will be the principal source of international investment law governing intra-Africa investment because the Contracting Parties have agreed to replace their bilateral and regional investment treaties within this period.

Article 49 of the AIP addresses the existing intra-African BITs. It provides:

> *Existing bilateral investment treaties concluded between the State Parties shall be terminated within five (5) years from the entry into force of this Protocol. Upon termination of existing bilateral investment treaties concluded between the State Parties, their survival clauses shall also be terminated."*

It anticipates that all existing BITs between any two African states that have ratified AIP will be replaced on the fifth anniversary of the entry into force of AIP, presumably regardless of when each state has ratified the AIP.

The replacement of Intra-African BITs with one regulation that provides for the right of states to expropriate harmonizes IIL within Africa and is a commendable first step towards the realization of the NIEO reforms. What African states now have address are the Extra-African BITs by taking stock of these challenges and resolving them in order to successfully implement the ongoing reforms in African IIL.

[101] Mahnaz Malik, '*South-South Bilateral Investment Treaties: The Same Old Story*? (International Institute for Sustainable Development) (2011), 3–5.

6 Conclusion

This thesis has examined the challenges faced by African states that limited the successful implementation of NIEO in their BITs. The analysis delved into both Extra-African and Intra-African Bilateral Investment Treaties (BITs) signed by these states from the post-NIEO era to the present day. The thesis argues that these BITs incorporated substantial provisions that limited the sovereign right of states to expropriate, in contradiction to the provisions outlined in the NIEO. Moreover, the thesis argued that there was no significant distinction between North-South and South-South BITs, as both categories limited the right to expropriate. Highlighting the historical context, the thesis posited that colonialism played an insurmountable role in IIL in Africa. It demonstrated that post-colonial BITs reflected the interests of developed countries rather than upholding the sovereign rights articulated in the NIEO. This enduring impact of colonialism persists in contemporary times, through neo-liberal BITs signed by African states as influenced by institutions like the World Bank. Additionally, the thesis identified lack of expertise by African states as a crucial factor hindering the limited success of NIEO, resulting in a diminished agency.

Looking ahead, the thesis proposes that for future research, it would be valuable to broaden the scope and conduct a comprehensive analysis of investment laws adopted by African states. This is to determine whether these investment laws counteract the conclusions drawn in the thesis. This broader examination would potentially provide invaluable insights for policy-making.

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