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Bilateral Investment Treaties and the Host State's Right to Regulate Investments in the Public Interest: Lessons Learned and Implications for South Africa

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Bilateral Investment Treaties and the Host State's Right to Regulate Investments in the Public Interest: Lessons Learned and Implications for South Africa

ABSTRACT

Bilateral investment treaties (BITs) emerged in the 1950s and 1960s as an economic diplomacy and foreign policy instrument to facilitate trade and international investment. However, the uneven safeguards and asymmetric nature of treaty networks embedded in old-fashioned BITs continue to be a source of political and legal controversy hindering the independence of host countries' domestic policy. This paper seeks to provide a three-dimensional approach to understanding the changing landscape of the BIT universe. First, it traces the history, evolution and significance of treaty practices. Second, it assesses the policy shift of BITs from North–South investment to new models of South–South investment. Third, it presents opportunities, challenges and policy implications for host countries right to regulate investment policies in the public interest. To conceptualise BITs and contextualise the policy shift from North–South to South–South investment flows, this paper uses a novel database on investment treaties called the Electronic Database of Investment Treaties and applies a multidisciplinary methodological approach and an eclectic mix of disruptive innovation and rational choice theoretical frameworks to understand treaty practices. The research design is qualitative and the case study of South Africa provides a compelling example of the host country's right to regulate investment in the public interest. By terminating several BITs signed with various countries and promulgating the Protection of Investment Act 22 of 2015, South Africa set a bold precedent that is considered both disruptive and innovative. It symbolises the country's commitment to challenging outdated, one-sided treaties long criticised for mirroring colonial-era institutional structures. The paper asks critical questions about BIT epistemologies and a global search for treaty practices that are designed to be more equitable, fair and transparent, and promote sustainable development policies. Thus, the ongoing calls by countries of the Global South, including South Africa, for the transformation of the international investment rule-making system present a critical opportunity for developing countries to actively shape treaty reforms and global governance, ensuring that investment practices better reflect their development priorities.

KEYWORDS

Bilateral Investment Treaties, Policy Shift, Asymmetric Treaty Networks, Public Interest, Investment Policies, Global South, Global North, Disruptive Innovation, Rational Choice

1. INTRODUCTION

This research paper is timely, as it marks over 65 years since the first BIT was introduced (Germany-Pakistan BIT signed in 1969[1]), signals the10 year review (2015-2025) since South Africa promulgated the Protection of Investment Act 22 of 2015[2], 30-year review of South Africa's constitutional democracy (1994-2024) and the 30th celebration (1995-2025) of the establishment of the World Trade Organisation (WTO)[3]. Furthermore, it signals a historic milestone in addressing the shortcomings of treaty practice and socioeconomic challenges of trade and investment in the twenty-first century. Worth noting is that the contemporary trade wars, driven by nationalistic interests, present both challenges and opportunities to the global trade and investment architecture, thus requiring careful consideration on the part of host states to do cost benefits analysis prior, during and after negotiating, terminating and developing future investment agreements. Within international trade and investment, we are currently witnessing the emergence of new regulations and patterns of behaviour that portend a shift of orders (Moraes and Ferguson, 2019). In addressing the challenge confronting the current international investment regime, Alschner and Hui (2018) suggest fixing dispute settlement once and for all by rewriting the terms of delegation between contracting states and adjudicators by changing the proportion of old and new investment treaties. Setsile (2025) posits that best practices in BITs reflect a shift towards more inclusive and collaborative agreements that addresses not only

[1] Germany is on record the first country to sign BIT in 1959 with the German-Pakistan (BIT) followed by the signing of the Treaty of Friendship, Trade and Navigation Germany-Dominican Republic (TFTN) in 1959. See EDIT [Dominican Republic - Germany FCN (1959) - Electronic Database of Investment Treaties (EDIT)] [Accessed 18.07.2025]

[2] On 13 December 2015, the President of South Africa, Jacob Zuma signed into law the Protection of Investment 22 of 2015. This follows the South African government's refusal to renew bilateral investment protection treaties with several EU member countries. Upon termination of BITs and conducting policy review South Africa introduced what was then known as the Promotion and Protection of Investment Bill in 2013.

[3] The Marrakesh Agreement establishing the World Trade Organization was signed by 123 countries on 15 April 1994, leading to the birth of the WTO on 1 January 1995. Thus, the WTO is the only global international organization dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations and ratified in their parliaments. See [WTO | 30th Anniversary of Signing of Marrakesh Agreement] [Accessed 18.07.2025]

investment protection but also complementarity by aligning the domestic policy objectives of the host state with broader United Nations Sustainable Development Goals (UNSDGs).

For the longest of time, signing BIT was touted as an economic diplomacy and foreign policy instrument by developed countries when investing in risky and volatile markets. Thus, Poulsen (2015) argues that due to the active involvement of the United Nations Conference on Trade and Development (UNCTAD, 2014, UNCTAD, 2015) in trade negotiations led many countries of the Global South to sign BITs en masse. To illustrate the point of UNCTAD active involvement in promoting the signing of BITs by developing countries, Elkins *et al* (2006: 818) observed that during a meeting jointly sponsored by UNCTAD, the Swiss, and a group of fifteen developing countries (G15), signed eight bilateral investment treaties among themselves.

It would therefore be argued that developing countries continues to sign BIT on the basis that they suffer from the fear of missing out (FOMO), thus in the process incur unintended consequences for their action.

Treaty practice has often been criticised for applying double standards, inconsistencies and contradictions. One could therefore make reference to the observation indicating that OECD countries rarely sign BITs with each other, suggesting that these instruments are designed to facilitate and promote one directional foreign investments modelled along the traditional North-South. However, over the past decade (2015-2025) the BIT universe has gone through systematic, rigorous and often controversial policy reviews. Currently, the international investment regime suffers from the following weaknesses: (i) inconsistent interpretations by arbitration panels, (ii) undermining the predictability of investment law, (iii) lack of transparency (information asymmetry). Of concern is that investment arbitration cases are shrouded in secrecy and are conducted under confidential proceedings. Generally, the Global South raised objections that arbitration decisions and awards have been unpredictable, inconsistent and contentious, thus compounding concerns about the fairness of the arbitration system. In the worst case scenario, rulings are not published and affect not only governments (contracting parties) but also other interested parties.

In view of all these past and current developments, it is deemed necessary that this paper reflects on various BIT epistemologies and a search for a global investment regime that is equitable, fair and addresses the developmental needs of developing countries. Be that as it may, there has been some pushback in favour of maintaining the status quo, which is skewed in favour of the Global North. The proliferating scope and changing patterns of BITs has led to some scholars characterising it as phenomenal and the most important international legal mechanism (Elkins, Guzman and Simmons 2006: 811).

Thus, BIT offered developed countries legal protection and assurance over political risk and expropriation in developing countries. The period from 1960 and 1970 became popularly known as the first development decade, as many developing economies gained independence and decolonisation ensued. Similarly, this period saw the significance of multilateral agreement through the establishment of the United Nations Conference on Trade and Development (UNCTAD)[4] in 1964. Notably the membership of the United Nations continued to expand and issues of development came to the attention of the international community. Additionally, the United Nations recorded a growing number of expropriation policies, with the total number increasing to 659 nationalisation of foreign assets across 62 countries. The countries that were leading the expropriation and nationalisation pact include Iran 1951, Libya 1955, Egypt 1956, and Cuba 1959. In essence, BIT emerged as a reaction to the popularity of expropriation and nationalisation policies in the emerging markets during the 1950's and 1960's.

As Schemikau and Smith (2023) observe, investment is to modern civilisation what blood is to the human body. This implies that governments across the world, irrespective of their status of developed, developing, emerging or frontier markets needs investments to survive and fund infrastructure projects. Proponents tend to argue that BITs encourage foreign direct investment (FDI) and strengthen the rule of law, particularly in jurisdictions where macroeconomic policies and legal systems are weak. However, research conducted by Hallward-Dreimer (2009) concluded that BITs are neither necessary nor sufficient to attract FDI. As a vibrant and functioning democracy, South Africa has developed strong institutions and arguably has investment friendly policies. To mitigate against the risk presented by BITs, South African policy makers developed local remedies in the form of Protection of Investment Act 22 of 2015. Gazzini (2020) argues that from both substantive and procedural standpoints, the Act offers a level of protection definitely lower than normally provided by international investment treaties. This paper provides a critical analysis of the patterns, trends and trajectories of investment treaty practice as well as unprecedented treaty reforms unfolding at the global level. Notably, it has been argued that when such policies are used constructively with measured determination and well-informed norms of rulemaking, they will no doubt improve the living conditions of citizens and build a future based on social justice and equitable distribution of resources (Setsile,

[4] 23 March - 16 June 1964, First session of [UN Conference on Trade and Development](#) [Accessed 12.07.2025]

2025). The complexity and legal doctrine within which BITs are drafted require extensive research to analyse, interpret and make sense of why countries sign such treaties, what ratification or non-ratification means to a policymaker and to an ordinary person, as well as responding to the question of what can be done to improve the efficacy and utility of the global investment regime (Setsile, 2025).

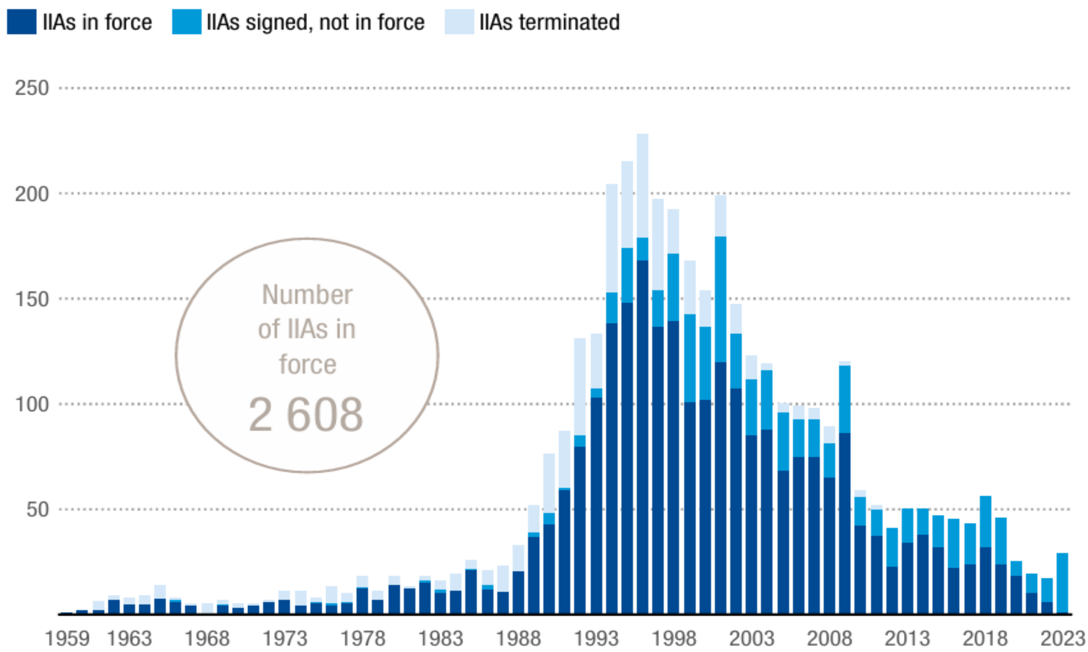
2. WHY COUNTRIES SIGN BITS

Bonnitcha *et al.* (2017) suggested four motivating factors for the unprecedented proliferation and signing of BIT on the part of developing countries as follows:

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

With the popularity of BITs increasing, the United Nations Conference on Trade and Development (UNCTAD: 2014) noted in 1990 that there were nearly 470 treaties that had been signed and the numbers continue increasing exponentially to 2 857 by 2012 (UNCTAD, 2014).

Figure 1: The number of IIAs in force to date 1959-2023.



Source: UNCTAD, IIA Navigator database, accessed 25 March 2024.
Note: The UNCTAD IIA Navigator is updated continuously as new IIA-related information becomes available.
Abbreviations: IIA = international investment agreement.

Treaty based agreements in the form of BITs gained cumulative and nominal increase suggesting that countries still prefers bilateral agreements over multilateral agreements. In context, it is inevitable that, out of 192 member states of the World Trade Organisation (WTO), every individual country, irrespective of the status of being developed or developing, has experienced the process of negotiating, signing and or terminating IIAs in one form or the other, including BITs (Setsile, 2025). Poulsen (2015:121) argues that signing BITs were considered for practical economic diplomacy reasons wherein "BITs were pushed by embassies and foreign affairs officials as photo-ops for state visits or ambassadors initiated the treaties at the end of their posting to finish with a bang". Bandelj and Tester (2020) highlight a differentiated approach on the use of BIT to include the following:(i) a legal treaty for property rights protection after World War to guard against nationalisation during the decolonial period, (ii) an economic instrument to complete for foreign direct investment, (iii) a political instrument for outward looking communist countries to forge geopolitical alliance outside the Soviet Union during the Cold War, and (iv) a cultural policy script of neoliberal globalisation by UNCTAD, and(v) adopted by developing countries to perform a legitimate globalisation development strategy. Consequently, the global widespread and footprint of BIT was undoubtedly promoted and facilitated by respective countries from the Global North along with the UNCTAD, OECD, IMF and the World Bank as multilateral institutions providing development finance to developing countries. It therefore stands to reason that treaty practice facilitated bilaterally became the preferred mode of conducting trade and investment, albeit with mixed results.

The traditional BIT models typically reflected a one-way flow of investment from North to South, however, due to China's Outward Foreign Direct Investment (OFDI) and the emergence of BRICS economic bloc[5], there has been a policy shift toward South-South investment cooperation. Alvarez (2020) posits that many countries from the Global South, including BRICS countries, are increasingly becoming capital exporters (home states) as well as capital importers (host states). This trend is now new, worth noting is that the US has gone from being primarily concerned with protecting its investors as a home state to also being concerned with protecting its regulatory freedom as a host state. (Roberts, 2015). The policy shift in the new BIT models acknowledges measures related to developing countries' needs to pursue not only economic development policies, but also other public policy choices such as improved labour relations, public health and safety, environmental protection, financial stability, national security, and transparency in

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

information exchange as well as in rulemaking (Setsile, 2025).

3. LINKING TREATY PRACTICE WITH PUBLIC INTEREST AND THE HOST STATE RIGHT TO REGULATE

A key research gap was identified in the literature, thus to fill that gap this paper draws the link between investment treaty practice, in the form of BIT and its implications on the ability of a host state to regulate investment in the public interest. The debate on public interest and the right of host state is under researched. Thus, this paper probes this under researched field of study with the hope of contributing towards public interest regulation theory and the constitutionality of investment treaties. Current debates on investment policy change express the view that the sovereign power of the host state, which will regulate investment, should be respected (Setsile, 2025). Moreover, Setsile (2025) further argues that traditional North-South BITs are preferential legal-political instruments that have historically granted advantages to foreign investors over host countries, creating asymmetrical treaty networks and power imbalances, thus often constraining host states' right to regulate in the public interest. This view is further supported by Simmons (2014), Sachs and Sauvant (2009), and Neumayer and Spess (2015), who argue that, under the current global economic order, developing countries face a political and economic climate that restricts their flexibility to act autonomously regarding their economic development trajectories. Thus, UNCTAD (2023) reports that new-generation international investment agreements (IIAs) included innovative provisions (disruptive innovative framework) on investment facilitation and cooperation and tended to safeguard States' right to regulate. This is a new trend in treaty practice, thus reflecting a significant policy shift.

The BIT universe has been going through some policy changes and transition, a situation that has been described by Bandelj and Tester (2020) as institutional multivalence that led to amplified decoupling. Recent developments in investment treaty practice further revealed that in the post-BREXIT era the United Kingdom has enjoyed complete freedom to negotiate new investment agreements with non-European Union states. This developing trend is indicative of the ongoing policy shift, which are also directed towards the Global North. Invariably, there is a realisation amongst countries of the Global North that treaty practice ought to embrace the changing dynamics of the 21st century as maintaining the status quo is tantamount to be undertaken by events.

The approach to regulate investment policies constitute divergent views from both the legal and political perspectives. While many developed countries benefited from the protections provided by BITs, a great deal of developing countries have long called for policy change and transformation of the international investment regime (IIR). Global calls for policy shift and promoting economic rights of developing countries is not a new phenomenon. It was during the new international economic order (NIEO) of the 1970s that leaders from the Global South, President Gamal Abdel Nasser of Egypt and Prime Minister Jawaharlal Nehru of India, were vocal and instrumental at the United Nations in promoting the rights of developing countries to participate in the global economy.

According to Schultz and DuPont (2025: 4) the original neglect in the design of the international investment regime was interfering in the host state policy space, further impinging on national policy autonomy and creating public dissatisfaction. In theorising the policy shift in the BIT universe Schultz and Dupont (2025: 6) characterise this phenomenon as a move from quite politics with expected dominance of interest groups to loud politics with expected dominance of public opinion.

Classical liberal thinking assumed that international flow of investments in the form of FDI would lead to economic growth. However, recent debates on the link between treaty practice and the host state right to regulate posits that international investment regime is suffering from legitimacy crisis to the extent that it tends to escape social control mechanism, thus increasing greater risk of a low level of sociological legitimacy (Schultz and Dupont, 2025: 5). Considering that neoliberalism and Washington Consensus framework calls for outright rejection of state intervention, Hatke-Domas (2003) postulates that microeconomic literature speaks of two divergent theories of regulation. The first, being the Public Interest Theory, which in general terms explain that regulation seeks to safeguard and benefit the public interest at large. The second, Chicago theory claims that regulation does not safeguard the interest of the public at large, but only pursue the interest of limited groups (Hakte-Domas, 2003). Roberts (2015) observes that the US has gone from being concerned with protecting its investors as a host state to also being concerned about protecting its regulatory freedom as a home state.

While there are contending views on the existence of Public Interest Theory, there is consensus among scholars that historically politics uses the concept to justify government regulation of business (Joskow and Noll, 1981, Viscusi, Vernon and Harrington Jr, 1985, Aranson, 1990, den Hertog, 2000 and Hatke-Domas, 2003). The controversies on public interest continues to this day and the countries of the Global South has elevated it in their developmental and transformative agenda in both bilateral and multilateral engagements.

In her seminal work States and Markets, Susan Strange (1989) highlights four key elements that are essential to balance the value of a state, which has been argued that they represent public interest or public goods. The identified values are (i)wealth, (ii)security, (iii)justice, and (iv) freedom to choose. Essentially, they all represent global public goods that all countries irrespective of their status as developed or developing have obligations to provide for their citizens. It has been argued that the contradictions and inconsistencies in treaty practice has had unintended consequences as it continues to limit and constrain policy space for host states, a situation which has ultimately led to entrenched public dissatisfaction. In describing the unintended consequences of treaty practice, Meyer *et al* (1997) posited that if BITs and related instruments are not used effectively they will exhibit multivalence and decoupling.

The BIT architecture continues to receive criticism on its rigidity towards limiting policy space for host states. In this regard, Alshner and Hui (2018) argue that general public policy exceptions have been introduced in the treaties, which on paper increase policy space and decrease foreign investor protection, but the exceptions have gone missing in action. From Schultz and Dupont (2025:3) perspective, the international investment law's regime procedural problem is its dis-embeddedness, its lack of responsiveness to public opinion and society and its undemocratic character. In addition, its substantive problem is its unbalancedness, which is described as lack of consideration for justice and freedom, and its near monism in the values it seeks to promote (Schultz and Dupont, 2025: 8). Moreover, this very criticism implies that traditional BITs limit and constrains the host state rights to regulate investment in the public interest cannot go on like this without being challenged. It therefore stands to reason that countries of the Global South should not get tired, but pursue the agenda of ensuring that the right to regulate is respected.

The political economy of trade and investment is rapidly and radically changing and therefore limitations imposed on the regulatory autonomy of host states has been elevated to the extent that it can no longer be ignored. Contrary to popular belief, the implementation of the Protection of Act in South Africa was in line with constitutional imperatives of addressing past injustices, achieving developmental goals of the country and implementing a public goods approach to policy making Furthermore, this innovative and disruptive approach further sought to strike a balance between the rights and obligations of investors and of government. Notably, the argument could further be extended to justify such action is justified and aligned to constitutional obligations to safeguard the public interest. In view of these developments, Moraes and Ferguson (2019) observe that the international economic order[6] is transitioning away from the neoliberal order and flourishing towards a new geoeconomic order. In more ways than one, the policy shift will

[6] An 'order' can be conceptualised as a relatively predictable set of behaviours, interactions and outcomes within a particular social system. Shiping Tang, 'Order: A Conceptual Analysis', 1 Chinese Political Science Review 30 (2016: 34).

likely see the rules, norms, and institutions of international trade and investment law undergoing significant change. The impending shift is characterised by a growing securitisation of economic policy and economisation of strategic policy (Moraes and Ferguson, 2019). Recent changes towards the promotion of South-South investment models are undeniably gravitating towards sustainable development oriented policies and this trend is gaining momentum in the Global South. A typical example is Article 14 of Brazil-Ethiopia 2018(BIT), which stipulates as follows:

(a) Investors shall endeavour to contribute to the economic, social and environmental progress aiming at achieving sustainable development.
(b) Respect the international human rights of those involved in the investors' activities.

The core principles highlighted in the Brazil-Ethiopia (2018 BIT) is a welcome development, highlighting a policy shift and a new wave of treaty practice which now include predictability, transparency, and administrative efficiency, which are fairly new concepts a deviation from the previous asymmetrical treaty network.

With the dawn of democracy and the proliferation of BITs in the 1990s and early 2000s, the rule-making investment regime witnessed significant and comprehensive transformation supported by regional, interregional and multilateral institutions such as the OECD, UNCTAD, the AU-PAIC and SADC, championing the rights of host countries to regulate investment policies in the public interest (Setsile, 2025). In the final analysis, Frieden (1989) argues that countries at the lower end of development may be characterised by a preponderance of foreign primary investments and a propensity on the part of the home country to intervene. Going forward, this pattern and trajectory are likely to change, as economic development has led to diversification of foreign investment.

4. RESEARCH DESIGN AND METHODOLOGICAL APPROACH

This paper used qualitative methodology, survey of literature and case study of South Africa. The logic behind the use of a qualitative methodology is that it is open, flexible and inductive, as it allows the researcher to begin with general observations. As Babbie and Mouton (2006) point out, case studies can inform best practice on issues relating to policy implementation, organisational culture, process of change and re-engineering.

To conceptualise and contextualise treaty practice, the researcher applied a multidisciplinary approach by using the Electronic Database for International Treaties (EDIT) and additional information from UNCTAD, IMF, OECD and South African government departmental websites, particularly DIRCO, dtic, and national planning commission. In addition, the UNCTAD University IIA Mapping Project database was used to analyse trends in IIA drafting, assess the prevalence of different policy approaches and interpret treaty practice. Historical and text analysis of treaty practice shows that context matters, to that extent the circumstances of South Africa emerging from the bottom of the pyramid (pariah state) to a democratic stat since 1994 fairly explains how the country acted beyond its weight by adopting rational choice and disruptive innovative frameworks to navigate the asymmetrical treaty network. The researcher gained valuable knowledge through the use of EDIT[7], which is considered an evidence-based tool that provides an informed public discourse on treaty practice in five different ways: (i)comprehensive, (ii)uniform, (iii)machine readable, (iv)annotatable, and(v) freely accessible to researchers and the public (Alschner, Elsig and Palanco, 2020).

Thus, it was because of a novel use of EDIT database that the researcher was able to access information that is not easily available and in the process made a determination that South Africa's approach and termination of its BITs is considered disruptive and innovative. To its credit, as a data analysis tool, EDIT is useful in making unknown information on treaty practice known, such as computational analysis, trend analysis and automated key word search. Furthermore, EDIT is able to define concepts such as BIT and policy space and to identify common language in treaties. In assisting researchers with translation and interpretation of languages, EDIT uses various languages such as English, French, Spanish, German, Russian and Arabic. Link and Haftel (2019) observe that by using EDIT in analysing treaty practice, countries with an Islamic legal tradition were found to have systematically opted for more informal dispute settlement arrangements.

5. CONCEPTUAL AND THEORETICAL FRAMEWORKS FOR UNDERSTANDING TREATY PRACTICE

5.1 Conceptual Framework

At the conceptual level, BITs are known by other names, such as bilateral investment protection agreements (BIPAs) and reciprocal investment promotion agreements (RIPAs). Disierto (2014) contends that the conceptual differences between trade and investment explain the difference approach in regulations as each regime is responding

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

differently to particular policy purposes and challenges. For the purposes of this paper and to remain consistent, BIT and IIAs are the preferred concepts that will be used interchangeably throughout. Worth noting is that the conceptual clarity in this paper single out four aspects that are essential in understanding treaty practice ranging from (i) timing of investment (where and when was the agreement signed, ratified or in force, (ii) type of investment (bilateral or regional free trade agreement), (iii) period of investment (10-20 years), and (vi) relationship between contracting parties (North-South, East-West, or South-South).

As articulated by UNCTAD (2014), the purpose of definitions in legal instruments such as BITs is to determine the object to which the rules of the agreement shall apply and the scope of the applicability. Conceptually, BITs are defined as agreements signed between two countries concerning the reciprocal promotion and protection of investments in each other's territories by companies based in either country (UNCTAD, 2020, De Gregorio, 1994). As a general principle, investment treaty provisions typically cover the following key areas (i) scope and definition of investment, (ii) admission and establishment, (iii) national treatment, (iv) most favoured national treatment, (v) fair and equitable treatment, (vi) compensation in the event of expropriation, (vii) guarantees of free transfer of funds, and (viii) dispute settlement mechanism (UNCTAD, 2020, UNCTAD, 2023a, UNCTAD, 2023b, UNCTAD, 2023c). In addition to the above provisions, some states in the Global North (US 2004 BIT Model) included the rights and responsibilities of both the host state and private investors (MNC). Roberts (2015) observes that in 2004 the US and Morocco terminated their investment treaty and replaced it with a free trade agreement. Subsequent actions that followed include the suspension of substantive and procedural benefits or right granted to investors under the investment treaty.

5.2 Theoretical Framework

The rational choice theory and the disruptive innovation theory are two theories chosen to guide this paper as explained below.

The rational choice theory was chosen on the basis that it would explain the behaviour of state actors (developed and developing countries) as well as non-state actors (MNCs) in relation to regulating and protecting investments in risky environments. There is a sense among scholars who have studied BITs that there has been a rush by developing countries to sign BITs. Such haste could be viewed as a rational choice, considering that state behaviour is influenced and motivated by self-interest, such as survival and competitive advantage, as countries need investment to boost economic growth. Proponents of rational choice argue that the interest of both states and markets to do public goods, such as investing in infrastructure and socially acceptable programs as witnessed during Covid-19.

In terms of the disruptive innovative theory (DIT), Christensen *et al* (2006) and Rayno (2011) posited that "innovation can be disruptive regardless of its outcome". This theory comes from Harvard Business School's Professor Clayton Christensen;[8] it was chosen on the basis of bringing a fresh perspective and a multidisciplinary approach to International Relation scholarship. The theory is applied to facilitate and examine the interactions and relationships between states, people, institutions and technology. It is considered appropriate for assessing how South–South BIT models are, in a way, disrupting the traditional approach of the BIT model, which has existed since the 1960s. According to Christensen (2011), the theory's core concepts remain "widely misunderstood" and are commonly applied to businesses that are not "genuinely disruptive". Christensen (2018) further notes that disruption theory is likely to occupy a prominent position in any assessment of relevance. Recently the disruptive innovative framework has gained scholarly attention in ways that advances multidisciplinary approach.

Over the past two decades, besides being an influential business theory, the DIT has inspired extensive scholarly work. However, the theory has also inspired divergent views and critique among academics and researchers. It has largely invoked and evoked debates on its evolution and applicability, thus suggesting refinement and broadening perspectives (Ansari and Krop, 2013). Currently there is no research done on the application of disruptive innovative framework in policy space and treaty network. Dzimba and Van der Poll (2020) argue that the disruptive innovative framework is a model of development that brings in low-income consumers who have been underserved, from the fringes into new networks of inclusive capitalism. One would therefore argue that South Africa's trade negotiators and policy makers demonstrated a disruptive innovation capability in treaty practice when terminating BITs and exiting from

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

the ICSD. Such approach has disrupted the status quo through transforming knowledge and ideas into competitively viable disruptive innovations.

Lile, Ansari and Urmetzer (2022) observe that the widespread use of terms such as disruptive in popular culture and corporate jargon may have inadvertently led to their diluted application in academic research. Considering that the concept of innovation is complex and has a long history, Schumpeter (1942) states that innovation is "creative destruction, which leads to the dynamic changes in employment and market competitiveness in firms". From a practical and policy perspective, Dai (2016) relates innovation to the social and political environment within which state actors operate as follows: "Innovation policies should reflect the differences in the existing systems historically and/or geographically, so that concrete empirical and comparative analysis are the ways to identify problems and design policies." As a late comer in signing BITs (UK-SA BIT signed in 1994), post-Apartheid South Africa emerged from the bottom of the pyramid (pariah state) and as a new entrant started gaining market share (influence and reputation) by presenting a unique value proposition (terminating BITs) by developing domestic legislation (Promotion of Investment Act 2015), which was unparalleled and unheard of for an emerging economy.

6. SOUTH AFRICA'S PERSPECTIVE AND POLICY POSITION ON BITS

South Africa's experience and journey in treaty practice should be understood within the broader theoretical and analytical frameworks of the geopolitical and geostrategic threats, vulnerabilities and opportunities during each presidency.

The country's experience in the negotiated settlement, geographic location and shared history of the Global South in trade negotiations at the WTO necessitated a shift in its investment policy. When assessing the trajectory of South Africa's experience in signing BITs, Poulsen (2015) argues that governments in developing countries typically overestimated the economic benefits of investment treaties by ignoring the inherited risks and its unintended consequences. All these developments have shaped and influenced the country's policy position on international investment, and provided lessons and best practices on the impact of treaties and conventions.

Thus, following the policy decision of the South African government to review the country's trade and investment policy framework, it did not come as a surprise that the Promotion of Investment Act was enacted in 2015. The government terminated all its BITs with OECD countries, withdrew from the ISDS, and replaced its BITs with domestic legislation and policies. In ensuring that this approach is congruent with international law, the preamble of the Promotion of Investment Act highlights the following key objectives (Mbengue and Schacherer, 2017):

- The goal of achieving a balance between rights and obligations, applicable to all investors.
- The need to promote rights enshrined in the South African constitution.
- Promotion of sustainable development.
- Obligation to take measures to protect and advance persons or categories of persons historically disadvantaged due to discrimination.
- The government's right to regulate in the public interest.
- The government's commitment to international laws through the protection and promotion of human rights, fundamental freedoms and people's resources.
- Provide for fair administrative treatment in which the government is obliged to ensure that administrative, legislative and judicial processes are not arbitrary and do not deny administrative or procedural justice.
- Investment must be created in full compliance with South African laws.
- Provide national treatment specific to deriving benefits from tax agreements or government procurement services.
- Foreign investors have a right to security for their investment in accordance with minimum standards under international law.
- Investors may have recourse to mediation and domestic courts and tribunals.

It is clear that while the BIT system was globally deemed a necessary tool to promote and protect investment, its asymmetric treaty network was not universally accepted. In the medium to long term, South African policy-makers saw the need to withdraw from the BIT system, as it did not adequately provide effective solutions to the pressing and unique development goals, risks and vulnerabilities South Africa faces in terms of achieving sustainable goals. The distinct policy challenges identified in BITs by South Africa needed to be addressed in order to best harness the benefit of investments while ensuring sustainable economic growth.

Over the past 10 years (2015-2025), South Africa's position in the BIT universe has shifted radically from being a capital-importing country to being a capital-exporting country. Since the start of the democratic dispensation, a number of South African firms have invested across the continent as well as globally, particularly in the financial, manufacturing, services and retail sectors. Similarly, a number of leading global firms in mining and auto manufacturing continued to expand their presence and investments in the country, such as VW, Ford and BMW. Investment, in whatever form and shape, has become a necessary tool for political leaders to build their own legacy project. Thus, President Ramaphosa initiated the Presidential Investment Summit associated with public–private partnership, particularly in infrastructure investment and development finance.

In the case of South Africa, Poulsen (2011) notes that policy-makers only began to take BITs more seriously when a foreign investor challenged the country's post-apartheid legislation before international arbitration (*Piero Foresti Laura de Carli & Others vs The Republic of South Africa*, ICSID case number ARB(AF)07/01). From Muchilinski's (2010) perspective, South Africa's experience in the investor–state dispute was a reality check that called for the transformation of its BIT models. Thus, the encounter shaped and influenced the dti's (now the Department of Trade, Industry and Competition – dtic) policy shift, resulting in an in-depth policy review and ultimately the termination of some of its existing investment treaties. A summary of Cabinet decisions on the BIT policy shift include the following five key issues:

1) Develop a new Investment Act to codify and clarify typical BIT provisions into domestic law and strengthen investor protection.

2) Terminate first generation BITs and offer partners the possibility to re-negotiate.

3) Refrain from entering into BITs in future, unless there are compelling economic and political reasons.

4) Develop a new BIT model as a basis for re-negotiation.

5) Establish an Inter-Ministerial Committee to oversee the process (dti, DIRCO and National Treasury).

In May 2024, the dtic released its Industrial Policy and Strategic Review. Commenting on the implementation of industrial policy in the Sixth Administration, Minister Patel remarked "Global geopolitical tensions, fuelled by economic slowdowns and conflict around the world, will continue to challenge South Africa's economic growth. Rising protectionism in the Global North will require careful navigation to ensure that markets remain open for South African exporters". It is thus imperative for South Africa to identify both opportunities and risks presented by the geo-political dynamics. While there is consensus and global acceptance that there are asymmetric trade and investment relations between the Global North and the Global South, Hudleston (2025) argues that with its new role and standing in the international community, South Africa is poised to drive economic growth by exploiting and leveraging new international and regional trade relationships.

7. APARTHEID PARIAH STATE AND PARAGUAY-SOUTH AFRICA BIT (1974)

In a systematic analysis of South Africa's recent past, it is essential to put into context the role of disinvestment campaigns against the apartheid regime. According to data from the EDIT database, Apartheid South Africa signed its initial BIT with Paraguay in 1974. The agreement aimed at promoting economic cooperation and investment amongst the two countries. While this agreement took place at the twilight of the National Party rule, it did not attract international attention. The text and language of the treaty was in English, Afrikaans and Spanish. Article 10 of the agreement stipulate the following:

> This Agreement shall remain in force for a period of five years from the date on which it comes into effect, in terms of Article IX. It shall thereafter remain in force until the expiry of three months from the date on which either contracting party shall have given the other notice of his intention to withdraw from the Agreement.

The survival instinct of the apartheid regime was a priority through the maximisation of wealth creation for the white minority and external support, while internally the regime faced a legitimacy crisis. Similar to the international investment regime, the Apartheid regime suffered legitimacy crisis. In order to survive amid external pressure, the regime adopted policies of import substitution, focusing on building the domestic capacity to sustain itself, internal and external pressure. Such efforts saw the development of infrastructure and economies of scale in state owned enterprises targeting local manufacturing and industrial development in petrochemicals and sale of armaments Thus, Sasol, Eskom, Denel, Armscor and related industries become strategic sectors that sustained the economy when the regime was besieged by sanctions and isolation.

As changes continued to manifest, so too did investor perception, which started to shift and the apartheid government faced international isolation, economic embargoes and a domestic onslaught, resulting in the status of a pariah state. A great deal of effort and pressure were exerted by frontline states in Southern Africa and international partners that supported the African National Congress (ANC), with global[9] disinvestment campaigns to isolate apartheid South Africa in both bilateral and multilateral engagements.

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

The apartheid's regime brutality reached a new level in 1948, and one response came when the Free South Africa Movement engaged people from all works of life in daily demonstrations and in civil obedience for more than a year. The groundswell of opposition against apartheid led the US Congress to override President Reagan's veto of the Comprehensive Anti-Apartheid Act of 1986.

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

Disinvestment campaigns began to affect South Africa as corporations led apartheid leaders to know it had become too expensive to continue operating there. Some would argue that many corporations simply shifted to indirect investment, but when banks began to refuse to renew

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

loans it causes some real pain as the value of the rand fell.

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

8. Democratic South Africa's Journey and Experience in the BIT Universe

During the first democratic elections in South Africa on 27 April 1994, Nelson Mandela became president and ushered in the hope of "A better South Africa and a safer world". At the time, President Nelson Mandela (who had been released from prison on 10 February 1990) made a profound statement: "The white monopoly of political power must be ended, and we need a fundamental restructuring of our political and economic systems to address the inequality of apartheid and to create a genuine democratic South Africa." Thus, the inaugural post-apartheid BIT was signed between South Africa and United Kingdom in 1994 (EDIT, 2025).

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

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

While South Africa's policy making changed since 1994, some argue that the country is known for its schizophrenic foreign policy choices and unpredictable behaviour (Habib, 2009, Jordaan, 2010 and Needthling, 2010). From the economic perspective, critics argue that the country's tendency to posture aggressively against trading partners of the Global

North, who contribute significantly to the country's development through trade, foreign direct investment and official development aid, seems counterproductive and counterintuitive (Naude, 2022:21).

On policy shift, there are public sentiments that the country's strategic relations, economic diplomacy and foreign policy with other international actors are characterised more by consistency than by change. As Naude (2025: 21) points out, in practice South Africa's relationships with significant others follow strikingly similar trends across administrations, it is in this regard that former imperial powers are generally treated with suspicion and kept at a distance (Naude: 2022:21).

Conversely, South Africa demonstrated, through its behaviour and actions, that instead of adhering to the old and traditional investment arrangements that are harmful and detrimental, it is profitable and worthwhile to take the risk of innovative disruption by changing its approach to favouring regional cooperation as a model for trade and investment. At a theoretical level, if we create a scenario of disruptive innovation, South Africa would be in a bilateral agreement with Agent A (North–South BIT model) and switch strategy in a policy shift to Agent B (South–South investment cooperation). The next action would be disruption, given that the strategy would have changed from A to B, thus giving South Africa a comparative advantage in determining its policy position and short-circuiting the process, which would ultimately create cognitive dissonance for strategic partners. Dai (2016) surmises that disruptive innovation would be effected, as Agent A would profit and benefit from the change of strategy and would thus intuitively be ahead of the game. While the DIT is more compatible with business management, this paper takes the risk of applying it in IR, policy analysis, IIAs and treaty practice.

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

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

According to the World Economic Forum's 2015–2016 Global Competitiveness Report, South Africa is ranked 38th out of 140 countries for the strength of its institutions, including 24th for property rights and intellectual property rights (WEF, 2015). In addition, South Africa is ranked 15th for efficiency of legal framework in settling disputes, 9th for efficiency of legal framework in challenging regulations, 2nd for protection of minority shareholders, 10th for strength of investor protection, 6th for trustworthiness and confidence in its financial markets and 1st for the regulation of security exchanges (WEF, 2015).

9. Global discontentment with asymmetric nature of treaty practice

The shifting landscape of trade and investment across the world has created volatility, uncertainty and uncertainty, which does not augur well for investor confidence. While BIT has contributed in some ways to attracting FDI, albeit with mix results, the countries of the Global South, including South Africa raised concern with regard to levelling the playing field and continued discontentment with the pervasive asymmetric nature of treaty practice. Notably, old fashioned BITs imposes obligations on host states to protect the interest of foreign investors, while at the same time failed to protect MNCs accountable for their consequences of their economic activities on the environment, labour, social corporate responsibility and national security. Such double standards have been met with continued global discontentment and calls for sustainable development oriented policy making.

In their collective wisdom to transform the international investment regime, the African Heads of States endorsed and adopted the Investment Protocol to the Agreement Establishing the African Continental Free Trade Area (AfCFTA)[10], on February 2023. The Investment Protocol builds on existing investment treaty reform, objectives and best practices recognised by the African Union and the regional economic communities. Upon entry into force, the Protocol will consolidate the IIA regime in Africa. Under its terms, 183 intra-African BITs will be replaced and regional economic organizations in Africa undertake to harmonize regional IIAs with the content of the Protocol (UNCTAD, 2024).

Pursuant to addressing African development needs, the AU member states – with an overwhelming majority – adopted the PAIC in 2017.

[10]. The AfCFTA involves 54 countries with the exception of Eritrea.

While the PAIC was intended as a binding instrument, the lack of a coherent African approach to trade and investment meant that a compromise was reached that the PAIC would be implemented as a non-binding provision.

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

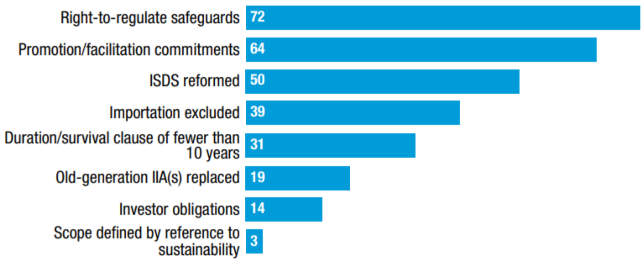
Despite coming late to the game, years after South Africa initiated the review of its BITs in 2009, the PAIC contains provisions for both state–state dispute settlement and ISDS. On matters of dispute settlement, the PAIC made profound commitments that state parties should seek to resolve the dispute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

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

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

There has been noticeable changes and reforms in treaty practice, reflecting a shift away from protection and increasingly acknowledging the old age concern of recognising the foreign rights of host state to regulate investment policies in the public interest. Thus, figure 3 bellow shows that recently signed investment agreement are acceding to that principle.

Figure 2: Reform trends in recently signed IIAs 2020-2023



Treaty based disputes are on the rise and UNCTAD (2024) estimated the figures amounting to 1, 300. And 11% are launched against African states. Learning with the case of South Africa, Nigeria embarked on the process of treaty review in 2015. Such efforts were intended to address the ongoing challenge of preserving policy space and balance the asymmetrical nature of treaty practice. In addition, Nigeria noticed the quality of investments were not translating and meeting development objectives. Drawing inspiration from the lessons learned from other jurisdictions, such as South Africa, Nigerian authorities initiated country specific assessments to review and amendments of old generation BITs. The process resulted in the updated 2017 BIT Model. In compliance with global demands to implement sustainable development oriented policies, the newly revised Nigerian BIT Model opted treaty language that embraces responsible, inclusive, balanced, beneficial and sustainable investment. Unlike South Africa, Nigeria did not terminate its BITs, rather it elected to make the following amendments:

- Introduced Joint /Inter-Ministerial Investment Committee to avoid escalation of disputes to the ICSD.
- Introduced investment facilitation a shift away from protectionism
- Harmonised and standardised local remedies

While Nigeria has made strides in treaty reform, it however encountered the challenge of information asymmetry to the extent that the revised BIT model remain confidential and not accessible to the public. Considering that countries from the Global South have raised concern regarding the asymmetrical and power dynamics when engaging with the Global North, they tend to suffer the same fate by not putting their own houses in order by being transparent, open and communicating effectively to their citizens on the content of BIT.

In response to the continued global discontentment of the asymmetrical nature of BITs and related treaty practices, in 2015 the IMF launched a seminal project called "Revisiting Global Asymmetries- Think Globally, Act Bilaterally". Going forward, the following were recommended:

- Addressing the increasing volume and complexity of international economic relations between developed and developed countries.
- Addressing the changing nature global production, trade and supply chains.
- Promoting financial inter-connectedness (IMF, 2015)

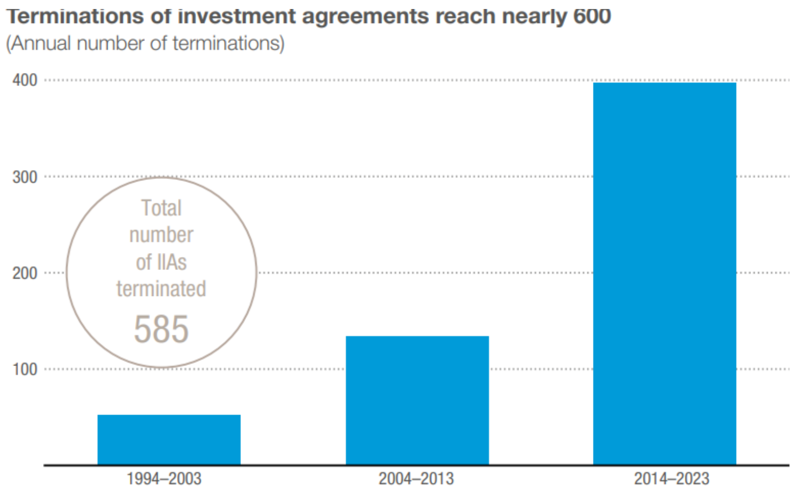
In furtherance of the decision to terminate the country's BITs, the South African Cabinet published the draft of the Promotion and Protection of Investment Bill for public comment in 2013. As the process unfolded, a revised version was passed by both Houses of Parliament, followed by the ultimate endorsement of the president published in the *Government Gazette* as the Protection of Investment Act No 22 of 2015. As required by law, President Cyril Ramaphosa activated the Investment Act 22 of 2015, by publication of a notice in the *Government Gazette* dated Friday 13, 2018.

According to UNCTAD (2024), since 2012 IIA terminations and replacements have affected the IIA coverage of about 13 per cent of the total FDI stock. The analysis of the termination trends is based on 2,429 IIAs in force (2,220 BITs and 209 TIPs) with substantive investment commitments (UNCTAD, 2024). Thus, one could argue that South Africa's efforts to terminate BIT was not made out of malicious intentions, but to address socio-economic challenges facing the countries, including the triple challenges of poverty, unemployment and inequality.

Taken together, these data suggest that to date IIA reform has had a limited effect on mitigating the risk of ISDS in developing countries (UNCTAD, 2024). However, all is not lost as recent IIAs increasingly contain provisions aimed at improving the regulatory environment in host countries, through the following: (i) encouraging stakeholder engagement, (ii) setting up regular cooperation mechanisms between the contracting parties and facilitating investment for sustainable development (UNCTRAD, 2024).

The global trends showing termination of BITs is highlighted below:

Figure 3: Total number of terminations of International Investment Agreements 1994- 2023.



Source: UNCTAD, IIA Navigator database, accessed 25 March 2024.
Abbreviations: IIA = international investment agreement.

In its preamble, the Protection of Investment Act 22 of 2015 recognises "the importance that investment plays in job creation, economic growth, sustainable development, and the well-being of the people of South Africa". From Carim's (2013a) perspective, the Act is informed by the dti's vision of a "legal and policy framework for investment that learns from the lessons of the past and is better attuned to the challenges of sustainable development and inclusive growth". Essentially a policy shift occurred, indicating that South Africa had chosen a path to address socioeconomic development, ensuring that investment policies would be in furtherance of the constitution.

10. LESSONS LEARNED AND IMPLICATIONS FOR SOUTH AFRICA AND THE GLOBAL SOUTH

Gordon and Pohl (2015) caution that a considerable number of countries, including South Africa entered treaties with little prior analysis or awareness of their legal implications and economic costs and benefits. In addition, treaty compliance, as well as legal and economic analysis, may not have seemed warranted to some treaty adopters (Gordon and Pohl, 2015). At a continental level, South Africa signed 14 BITs but most were not ratified. In terms of efficacy, only three BITs were ratified and entered into force: The South Africa–Mauritius BIT, the South Africa–Mozambique BIT and the South Africa–Zimbabwe BIT (Disenyana and Sogoni, 2014). In assessing the demographic patterns of BITs on the continent, Disenyane and Sogoni (2014) highlight that out of the 767 African BITs, the North African region concluded 320 BITs, while the West African region concluded 205 BITs, the East African region concluded 178 BITs and the Southern Africa region concluded 124 BITs. The North Africa region has an advantage due to its proximity and geostrategic location close to Europe and the Middle East, and has attracted and signed more BITs than its contemporaries in West, East and

Southern Africa.

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

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

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

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

In view of the unfolding changes and in an effort to integrate the South African economy into the global economy, the NDP Vision 2030 stipulates that the country's existence is informed by its national interests. Furthermore, the NDP states that South Africa promotes and contributes to democracy, the rule of law, human rights, peace, and security within a safe and prosperous Southern Africa and rest of Africa as well as a fair and just world. With regard to trade and investment policies, the NDP states:

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

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

The dti believes the Promotion of Investment Act provides confirmation that South Africa remain open to FDI and provides effective protection while preserving the sovereign right of the government to pursue legitimate public policy objectives in line with constitutional requirements. The Act is informed by the dtic's vision of a legal and policy framework for investment that learns from the lessons of the past and is better attuned to the challenges of sustainable development and inclusive growth.

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

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

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

While our regional priorities are important, South Africa's policy making should not lose sight of the emergence and increased influence of countries of the Global South like Turkey, Indonesia, Mexico, Colombia and Venezuela in global political, economic affairs. As it goes, Turkey is expanding its presence in Africa at a rapid pace. It is also important to bear in mind that the tilt from West to East, will necessarily be a long-term process in the sense that Europe, North America and Japan may continue to be powerful economic forces in the world for at least the next 20 to 30 years.

As a host country, South Africa is confronted with the challenge of balancing its duty to protect foreign investment and exercising its sovereign right to regulate. Thus, the dti's policy review of BITs concluded as follows: "The current system opens the door for narrow commercial interests to subject matters of vital national interest to unpredictable international arbitration that may constitute direct challenges to legitimate, constitutional and democratic policymaking."

11. CONCLUSION

In an attempt to conceptualise and contextualise the debate on the host state right to regulate investment policies in the public interest, this paper moved beyond mainstream legalistic approach to a multidisciplinary approach. Thus, it presented a nuanced and measured policy decisions of South Africa's journey in the BIT universe and shared light on the experiences of treaty reform in selected countries of the Global South. Furthermore, the paper suggests further research to probe critical questions about BIT epistemologies and a global search for treaty practices that are equitable, fair and transparent. The discourse on the policy shift of BITs is noticeable across the political spectrum (North-South, South-South and East-West). With regard to linking treaty practice with the host state right to regulate in the public interest, a significant progress has been made as new investment agreements are now amendable to this principle. Consequently, there are calls to transform the IIR to reflect the needs of developing countries in formulating policies that address the emerging challenges of poverty, inequality and human rights in a more sustainable way than previous treaty practices.

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

- The South-South cooperation in the global system should promote ownership of the development process.
- Fortify self-help mechanisms and self-reliance.
- Promote a culture of dialogue.
- Foster responsibilities. African states and countries of the Global South must take full responsibility for their actions in the global order.

- The focus in any cooperation frameworks, including BITs, should be "home-grown" solutions.

During the 30th anniversary of the WTO, President Ramaphosa maintained South Africa's policy position and calls for the transformation of the global governance, stating the following:

> Over the past thirty years, the WTO has worked to ensure a level playing field in global trade that is free, predictable and governed by a rules-based system. The 30th anniversary of the establishment of the WTO takes place in a challenging and uncertain time. We are seeing unilateral and protectionist measures being implemented by some advanced economies that are outside the agreed-upon multilateral framework. It is incumbent upon us all to ensure that the multilateral system is strengthened or we risk the encroachment of a global trade regime based on power dynamics.

Thus, this paper finds that South Africa's termination of BITs and the promulgation of the Protection of Investment Act are both disruptive and innovative. It argues that the future viability of BIT models, whether North–South or South–South, will continue to be contested unless they are designed to strike a balance between choice and necessity. This entails considering the interests of foreign investors while respecting the host country's responsibility to regulate investment policies in the public interest.

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