UNIVERSITY OF THE WESTERN CAPE, SOUTH AFRICA

FACULTY OF LAW

TOWARD HUMAN RIGHTS-COMPATIBLE BILATERAL INVESTMENT TREATIES: THE CASE OF GHANA

A mini-thesis submitted in partial fulfillment of the requirements for the degree of Master of Laws (LLM) in International Trade, Investment and Business Law

By

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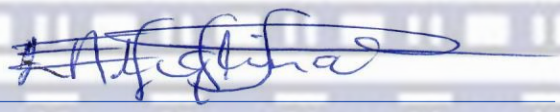
DECLARATION

I, Lambert LUGUNIAH, declare that the thesis titled '**Toward Human Rights-Compatible Bilateral Investment Treaties: The Case of Ghana'** is my original work and that all other works used or quoted have been indicated and acknowledged as complete references. This work has not been submitted to any University, College, or other institution of learning for any academic or other awards.



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This Mini-Dissertation has been submitted for examination with my approval as supervisor.

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Prof. Riekie Wandrag

January 2023

ABSTRACT

The legal structure of the existing bilateral investment treaties (BITs) of Ghana consists of the title, preamble, scope, most-favoured-nation rule, national treatment, fair and equitable treatment, full protection and security, expropriation, compensation, and dispute settlement. Save the title and the preamble, the rest of the elements of the structure constitute the substantive clauses of the BITs. These clauses do not contain substantive human rights dimensions in their text. Meanwhile there is proven evidence of human rights violations associated with foreign businesses, especially in the gold mining sector in the country. The nature and character of the structure of Ghana's BITs is akin to the structure of BITs generally. There is, however, a wave of new generation BITs which provide for substantive human rights provisions, and this is grounded in both regional and international human rights and related instruments and declarations as well as national legislation.

The study makes the strongest recommendation for Ghana to lawfully terminate its existing BITs and to negotiate new treaties which would be human rights compatible. This process should commence with development of a well-crafted Model BIT anchored on a National Action Plan (NAP) on Business and Human Rights (BHR). The preparation and implementation of the NAP on BHR should not only be inclusive but also assume a national character. The inclusive processes would be key to promoting national buy-in and ownership of the new investment aspirations of the country to maintain human rights consistent BITs independent of the political party in power or government of the day. The study concludes that constitutional and legislative amendments are necessary to guarantee success in the pursuit of making Ghana's BITs human rights compatible; and further developed a prototype Model BIT in furtherance of this objective.

DEDICATION

This thesis is dedicated to my parents, Mr Ashio-Kutu Luguniah of blessed memory and Madam Kapiu Mary Kutu. I also dedicate the study to my spouse, Mary Wetani Agoriwo (Mrs), and children for their immense support and sacrifice.

ACKNOWLEDGEMENT

The successful completion of the thesis would not have been achieved without the support and guidance of certain personalities.

My profound gratitude goes to Prof. Riekie Wandrag, my Supervisor and Course Coordinator, for availing her rich expertise, assistance, pieces of advice, guidance, and constructive comments that spurred me on to complete the thesis on time. Prof. Riekie has also been very instrumental in arranging experienced teaching faculty to effectively handle the various models and organising private meetings with some of the faculty as well as trips to some institutions for experiential learning. I have also benefitted from several extra curricula activities spearheaded by Prof. Riekie. These activities have collectively enriched my experience of South Africa beyond the walls of the lecture halls. Thank you for all your efforts. May your energy and resources be replenished in many folds.

My further appreciation goes to all the lecturers who taught me in the LLM Programme. Specific mention is made of Prof. Patricia Lenaghan, Prof. Kenneth Mwenda, Dr Edwini Kessie, Dr Edward Kwakwa, Dr Sunduzwayo Madise, Dr Jimcall Pfumorodze, Dr Enga Kameni, Dr Tinsahe Kondo, Dr Magalie Masamba, Kholofelo Kugler, Mr Robert Kirunda, Mr Hilton Zunckel, Mr Lambert Botha, and Mr Johann Human. I also appreciate DLA Piper/New Perimeter in a similar regard.

My appreciation also goes to Messrs Albert Chris Puja and Lawrence K. Lartey for their various contributions to the thesis, Mr and Mrs Francis A. Luguniah for their invaluable contribution and support to the care of my children during the period of my studies, and Mary Wetani Agoriwo (Mrs) for her unflinching support and contribution to the success of the Programme.

Finally, I express my sincere gratitude to Mr. Joseph Whittal (Chairman, Commission on Human Rights and Administrative Justice, Ghana), for his invaluable support.

KEY WORDS
Access to justice

Bilateral investment treaties

Human rights

Human rights-based approach

International investment treaties

Investor obligations

Host-state obligations

New generation treaties

Old generation treaties

Human rights violations

Mining

ACRONYMS AND ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
AU	African Union
BCTs	Bilateral Commercial Treaties
BITs	Bilateral Investment Treaties
BHR	Business and Human Rights
CHRAJ	Commission on Human Rights and Administrative Justice
ERP	Economic Recovery Programme
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FPS	Full Protection and Security
ICC	International Chamber of Commerce
ICJ	International Court of Justice
IIAs	International Investment Agreements
ILO	International Labour Organisation
IMF	International Monetary Fund
IRIs	Investment-Related Instruments
ISDS	Investor-State Dispute Settlement
LCIA	London Court of International Arbitration
MFN	Most-Favoured-Nation
NAPs	National Action Plans
NAFTA	North American Free Trade Area
NDPC	National Development Planning Commission

OECD	Organisation for Economic Cooperation and Development
OHCHR	United Nations Office of the High Commissioner for Human Rights
PCA	Permanent Court of Arbitration
PNDC	Provisional National Defence Council
SAPs	Structural Adjustment Programmes
SDGs	Sustainable Development Goals
TIPs	Treaties with Investment Provisions
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNGPs	United Nations Guiding Principles on Business and Human Rights
USA	United States of America
UWC	University of the Western Cape
VCLT	Vienna Convention of the Law of Treaties
WTO	World Trade Organisation

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CHAPTER ONE: INTRODCUTION AND OVERVIEW OF THE STUDY

1.1 Introduction and research background

1.1.1 Brief country context

Ghana is a middle-income country located in West Africa with a total population of 30 832 091 in 2021.[1] The country gained independence on 6 March 1957 led by the inspirational Pan-Africanist Osageyfo Dr Kwame Nkrumah. From 1957-1982, the country's economic development trajectory mimicked socialist and nationalist states with many import-substituting state-owned enterprises.[2] The country also witnessed an era of almost three decades of protracted political and economic instability characterised by spiralling inflation, adverse balance of payments as well as military adventurism in political governance. These issues together with poorly designed and implemented investment-related policies caused a decline in the flow of foreign direct investment (FDI) into the country.[3] The overwhelming economic crisis compelled Ghana in 1983 to become the first country in the African continent to undergo Comprehensive Structural Adjustment Programmes (SAPs)[4] under the auspices of the International Monetary Fund (IMF) and the World Bank.[5] Among others, the SAPs/Economic Recovery Programme (ERP)[6] did not only succeed in restoring foreign-investor confidence in the economy but also helped Ghana to diversify its foreign investment portfolio from the United Kingdom to include other countries like China, Germany, Malaysia, and South Africa.[7] New regulations and opportunities, especially in the mining sector, attracted the investors thereby resulting in increased FDI inflow into the Ghanaian economy.[8]

Flowing from this contextual analysis, the next section examines the historical antecedents of BITs in Ghana.

[1] Ghana Statistical Service Report *2021 Population and housing census: General report volume 3A (2021) 25.*
[2] Grant R '*Liberalisation policies and foreign companies in Accra, Ghana*' (2001) 33 *Environment and Planning A* 999 (hereinafter 'Grant (2001)'); Williams J 'The "Rawlings revolution" and rediscovery of the African diaspora in Ghana (1983–2015)' (2015) *74(3) African Studies* (hereinafter 'Williams *(2015)')*.
[3] Tsikata GK, Asante Y, & Gyasi EM *Determinants of foreign direct investment in Ghana* (2000) (hereinafter 'Tsikata, Asante & Gyasi (2000)'*)*.
[4] This was the era of a military regime, Provisional National Defense Council (PNDC) led by Ft. Lt. Jerry John Rawlings (as he then was). See Williams (2015).
[5] Aryeetey E, Harrigan J & Nissanke M. *Economic reforms in Ghana: The miracle and the mirage* (2000).
[6] The SAPs was operationalized in three phases and the ERP was the first phase (phase I).
[7] Nikoi E 'Ghana's Economic recovery programme and the globalization of Ashanti Goldfields Company Ltd' *(2016) 28 Journal of International Development* (hereinafter 'Nikoi (2016)'.
[8] Nikoi (2016).

1.1.2 Historical context of Ghana's BITs

Following the success of implementation of the SAPs/ERPs resulting in the restoration of investor confidence and the necessity to maintain such momentous confidence in the economy; coupled with the rising popularity of BITs at the time concerning their ability to attract FDI, the government of Ghana concluded its first BIT with the United Kingdom in 1989.[9] In the same year (1989), Ghana concluded additional four BITs with the Netherlands, Bulgaria, China, and Romania; and thereafter the country continued to conclude such treaties with several other countries, the latest being the Ghana-Turkey treaty of 2016.[10] Currently Ghana has 27 BITs with nine in force.[11]

The negotiation and conclusion of the first set of BITs in 1989 must have arguably contributed to increasing the country's FDI in the 1990s.[12] However, while this narrative supports the primary classical reasoning that developing countries like Ghana enter BITs mainly to attract FDI, others have a reason to doubt the authenticity of this view.[13] To this end, it has been established that there are multi-variate factors determining the flow of foreign capital (investment) into any economy and for that matter BITs have no special effect on FDI flows to Ghana.[14] For instance, Dagbanja established that Germany which had no BIT with Ghana at the time had more foreign investments in the country than those that had BITs.[15]

BITs, as the name suggests, are a specie of international investment agreements (IIAs) involving two countries, usually a capital-exporting country and the other a capital-importing country such as Ghana, where the contracting state parties (countries) make reciprocal commitments to treat each other's foreign investors or investments in their respective territories favourably.[16]

[9] See the United Nations Conference on Trade and Development (UNCTAD) investment agreements navigator (hereinafter 'UNCTAD Navigator') available at https://investmentpolicy.unctad.org/international-investment-agreements (accessed 16 July 2022).
[10] See UNCTAD Navigator available at https://investmentpolicy.unctad.org/international-investment-agreements (accessed 16 July 2022).
[11] See UNCTAD Navigator available at https://investmentpolicy.unctad.org/international-investment-agreements (accessed 16 July 2022).
[12] While many scholars agree that BITs have a positive impact of FDI others disagree.
[13] Butler N & Subedi S 'The future of international investment regulation: Towards a World Investment Organisation?' (2017) 64(1) *Netherlands Int'l Law Review* (herein after 'Butler & Subedi (2017)').
[14] Dagbanja DN 'Can African countries attract investments without bilateral investment treaties? The Ghanaian case' (2019) 40 *Australasian Review of African Studies* (hereinafter 'Dagbanja (2019)'). Also see Tsikata, Asante & Gyasi (2000).
[15] Dagbanja (2019) 85.
[16] Yackee JW 'Conceptual difficulties in the empirical study of bilateral investment treaties' (2008) 33 *Brooklyn Journal of International Law* 405 (hereinafter 'Yackee (2008)').

The ensuing section presents the legal and institutional setting that empowered communities, indigenous people, civil society organisations, and the public to challenge the *status quo* through series of advocacy and demands for foreign investors to not only respect rights of individuals and communities, and the environment but also have an obligation to remedy any business-related human rights violations suffered by such stakeholders arising out of their operations in Ghana.

1.1.3 BITs and human rights violations in the Ghanaian mining sector

Ghana returned to the path of democracy in 1992 and has remained an enviable democratic nation in Africa and the world at large due to its strong self-governing credentials including establishing independent state institutions[17] and guaranteeing media pluralism and civil society activism over the past three decades. This situation has created conducive opportunity for the public to question the net-benefits of foreign businesses (investments) in the country, especially those in the mining sector, considering the innumerable human rights violations suffered by communities, indigenous people and the environment.[18] For instance, gold mining in Ghana which is dominated by foreign interests (investments) is bedevilled with environmental and social issues such as destruction of farmlands and farms as well as pollution of water bodies and raising serious concerns about the right to private property, the right to water, and the right to health.[19] This phenomenon, which is not different from the global context, calls for the government of Ghana to do more to protect the fundamental rights of the communities, indigenous people, and the environment against powerful international corporations.[20]

Ghana's experience with BITs in furtherance of its genuine national development objectives is consistent with other capital-importing countries (that is that BITs are essentially concluded at the expense of domestic policy and regulatory space to protect human rights and the environment).[21] This is traceable to either the legal structure of the BITs not expressly including substantive

[17] National Media Commission and Commission on Human Rights and Administrative Justice are examples of the said institutions.

[18] The United Nations Human Rights Council *Report of the Working Group on the issue of transnational corporation and other business enterprises -Ghana (2014) (hereafter called 'UNHRC Report* (2014)).

[19] Commission on Human Rights and Administrative Justice *Ghana: National baseline assessment on business and human rights report (2022)* (hereafter 'CHRAJ NBA Report 2022).

[20] Kwakyewah C & Idemudia U 'Canada-Ghana engagements in the mining sector: Protecting human rights or business as usual?' *(2017)* 4 *Transnational Human Rights Review*.

[21] George E & Thomas E 'Bringing human rights into bilateral investment treaties: South Africa and a different approach to international investment disputes' (2018) 27 *Transnational Law and Contemporary Problems* (hereinafter 'George & Thomas (2018)').

provisions (clauses) in their text or the unbridled judicial discretion of arbitrators to accept or reject human rights arguments during investor-state dispute settlement (ISDS) mechanisms.[22]

Accordingly, the next section discusses the human rights problem with BITs generally and the case of Ghana that makes such treaties human rights inconsistent.

1.2 Problem statement

Many of the BITs by their nature do not integrate human rights into their text due to their inherent design to protect investors and their investments in the host country.[23] Unsurprisingly, BITs characteristically 'create only rights for investors without obligations, and only obligations for host states seemingly unaccompanied by any substantive rights'.[24] This breeds a situation where there is usually a disproportionately higher protection given to investors' rights to the detriment of other equally important human rights.[25] The investor focused nature of the BITs makes them unfit to protect the interest of many other major stakeholders that international investment agreements (IIAs) ought to protect.[26] The unbridled protection for foreign investors in such agreements in which they have no privity[27] could potentially make BITs affect investor-state negotiations.[28] This is because BITs provide irrevocable protection and safeguards to investors in a manner that they would not have had in an independent direct negotiations with the host state.[29] By their public international law nature, BITs are designed to limit certain types of state actions, yet such state actions could largely be based on legitimate human rights concerns.[30] Thus, some institutions have argued that it is not prudent for any state to try to gain investment advantage by excluding human,

[22] Kube V & Petersmann E-U 'Human rights law in international investment arbitration' (2016) 11 (1) *AJWH* (hereinafter 'Kube & Petersmann (2016)').
[23] See generally Kube & Petersmann (2016).
[24] Goldstein JS 'Bringing BITs back from brink' (2017) 45 *Denver Journal of International Law and Policy* (hereinafter 'Goldstein (2017)').
[25] Kube & Petersmann (2016) 75.
[26] George & Thomas (2018).
[27] BITs are agreements between sovereign states which confer benefits on investors of the contracting parties.
[28] Yackee (2008) 33.
[29] Yackee (2008).
[30] Jacob M *International Investment Agreements and Human Rights* ((2010), in INEF Research paper series on human rights, corporate responsibility and sustainable development (Institute for Development and Peace 03/2010) (hereinafter 'Jacob (2010)') available at http://humanrights-business.org/international_investment_agreements_and_human_rights.pdf (accessed 5 July 2022).

labour and environmental rights in the host country.[31] This is because states are enjoined by both national and international law to protect such rights.

Again, BITs are mostly not generous in providing policy space to enable capital importing countries like Ghana to introduce domestic legislation to protect legitimate matters such as sustainable development, environment protection, public health, human rights, and labour issues.[32] This power imbalance between investors and host states is partly attributable to the 'conventional wisdom'[33] that BITs are designed to increase foreign direct investment (FDI) inflows,[34] and that any domestic measures taken to include human rights provisions in such agreements could produce disastrous FDI outcomes for the host state.[35] However, there is no scholarly consensus on the classical thinking that BITs have an unquestioned capacity to deliver foreign investment in the host country.[36] Dagbanja asserts forcefully that attracting foreign investment in Ghana is based on multiplicity of factors and so any intention to attract foreign investment through BITs is *illusory;* and thus any country, through BITs, contracting out the right to regulate in the public interest is not justifiable.[37] Notwithstanding the uncertainty surrounding investment benefits of BITs, legal scholars have long recognized the impact that investment treaties, primarily IIAs and BITs, have on human rights globally, especially less-developed capital-importing countries such as Ghana.[38]

The problem is compounded because most published ISDS decisions do not address critical human rights law questions.[39] This is because such ISDS arbitration tribunals are not only unwilling to admit *human rights-based arguments* in their proceedings but also have not 'developed a coherent methodology for evaluating the human rights dimensions of investment disputes'.[40] Again, excessive arbitral awards against host states have resulted in many states being afraid of instituting domestic policies in the nature of human rights, which may trigger such claims.[41] Thus, it is argued

[31] Jacob (2010).
[32] Chidede TC *Entrenching the right to regulate in the international investment legal framework: The African experience* (Unpublished PhD Thesis, University of the Western Cape, 2019) [hereafter 'Chidede (2019)'].
[33] Butler & Subedi (2017).
[34] Goldstein (2017).
[35] Goldstein (2017).
[36] Sornarajah M *The international law on foreign investment* 3 ed (2010).
[37] Dagbanja (2019) 85.
[38] Goldstein (2017).
[39] Kube & Petersmann (2016).
[40] Kube & Petersmann (2016).
[41] Goldstein (2017).

that this phenomenon could be a demotivating factor for host states to freely introduce domestic measures aimed at strengthening labour laws, environmental protection, and human rights.[42]

The textual non-integration of, and the judicial discretion of arbitrators to disregard, human rights provisions is perceived as emboldening investors to undermine human rights in the host states without any legal consequences.[43] To this end, evidence of business activities impacting negatively on the fundamental human rights of individuals and communities abound.[44] For instance, gold mining in Ghana -- dominated by foreign investment -- is bedevilled with environmental and social issues such as destruction of farmlands and farms as well as pollution of water bodies and raising serious concerns about right to private property, right to water and right to health.[45] Nevertheless, it is generally recognized that investment should neither be made at the detriment of human rights, including labour rights and environmental protection nor such rights be diminished or suspended as a result of BITs.[46] This problem is accentuated by the preference of international arbitration to municipal court system as dispute settlement mechanism. Yet, the said arbitration system has not lived up to expectation for largely ignoring public policy/interest issues, including public health in such disputes.[47]

This phenomenon calls for greater policy attention to human rights in international investment governance going forward.[48] The literature suggests that there appears to be some consensus on the need to reform the BITs regime to make them human rights compatible.[49] However, there is no such consensus on the most suitable path to reform. There are varied proposals, including intentionally incorporating human rights non-derogation provisions into the text of BITs, like limiting resort to ISDS arbitration, exhaustion of local remedies or a hybrid thereof, reforming the ISDS arbitration system, creating entry points for human rights arguments, and establishing a

[42] Goldstein (2017).
[43] United Nations Human Rights Council Report *Human rights-compatible international investment agreements* (2021) (hereinafter 'UNHRC Report (2021)') available at https://www.ohchr.org/en/documents/reports/a76238-report-human-rights-compatible-international-investment-agreements (accessed July 5, 2022).
[44] George & Thomas (2018).
[45] CHRAJ NBA Report 2022.
[46] International Organisation of Employers *IOE position paper: International investment agreements and human rights (2021)* available at https://www.ohchr.org/sites/files/documents/issues/business/wg/submissions/others/ioe.pdf (accessed 6 July 2022).
[47] Kube & Petersmann (2016) 85.
[48] UNCTAD WIR (2022).
[49] UNCTAD WIR (2022).

multilateral forum for the settlement of investment disputes.[50] The rest comprise changing the purpose of investing, preserving space to exercise the duty to regulate, including human rights obligations for investors, and providing access to remedies for affected communities.[51] The role of National Action Plans (NAPs) on Business and Human Rights (B&HR) to policy coherence and commitments to human rights compatible BITs has also been acknowledged.[52] Yet, Ghana and other African countries (except Kenya and Uganda) have no such NAPs on B&HR more than 11 years after the adoption of the United Nations Guiding Principles on Business and Human Rights in 2011.

This study argues that the most suitable approach for Ghana is to design its domestic investment legislation expressly providing that no legislation or treaty shall derogate from the human rights injunctions enshrined in the 1992 Constitution of the Republic of Ghana;[53] and further states that any such legislation or treaty made in contravention of the said enactment is null and void. This proposed constitutional amendment will then be incorporated into the substantive provisions of all future BITs (through a well-crafted Model BIT) and be made effective 'in accordance with local law'.

This takes the study to discussing the significance of the problem necessitating this thesis.

1.3 Significance of the problem justifying the study

The textual non-integration of, and the judicial discretion of arbitrators to disregard, human rights provisions have emboldened investors to undermine human rights in the host-state without any legal consequences.[54] Also, judicial discretion of arbitrators to exclude human rights submissions in ISDS arbitration procedures has most times resulted in awkward arbitral awards against host states. Payments of such huge compensations diverts scarce public resources to the private investor thereby depriving the host states of the much-needed resources to invest in critical sectors of the economy, including health and education. These far-reaching ISDS and related consequences have generated huge public condemnation and an unending call to either reform the system or desert it

[50] Kube & Petersmann (2016).
[51] UNHRC Report (2021).
[52] UNHRC Report (2021).
[53] Chapter five of the Constitution of the Republic of Ghana, 1992 contains elaborate provisions on fundamental human rights and freedoms of all persons in Ghana.
[54] UNHRC Report (2021).

altogether.[55] Also, ongoing massive termination of BITs by countries and development of new BIT models with substantive human rights provisions lend credence to the importance of the problem.

Again, the conduct of investors that threatens the sovereignty of host states to be able to introduce new regulations to propel economic growth and sustainable development is evident. Meanwhile BITs do not necessarily attract foreign investment and so it makes no public policy sense for a sovereign state such as Ghana to give up its regulatory autonomy in such agreements.[56] This is more important because it is crucial for Ghana, capital importing less-developed country, to have sufficient policy space to progressively introduce domestic measures to meet its national policy objectives and to promote sustainable development in furtherance of the United Nations 2030 agenda for sustainable development.[57] Additionally, the host country's role to ensuring that investors meet their responsibility to protect human rights under the United Nations Guiding Principles on business and human rights of 2011 (hereinafter 'UNGPs') is apposite.[58]

Moreover, some states are not doing enough to protect the rights of citizens in investment-related human rights violations, meanwhile the national constitutions of Ghana[59] and many others expressly provide for protection of human rights and access to remedy. Thus, a human rights compatible BIT will help to curb state complicity[60] in human rights violations of businesses by such unscrupulous politicians who may pursue BITs for their parochial interest.

The thesis is accordingly significant because it is a contribution to making BITs human rights compatible in the specific case of Ghana. The study also serves as a blueprint for other countries to adopt in making their BITs to comply with international human rights norms and standards for purposes of maintaining policy space and protecting the rights of individuals and communities.

The aim, main research question, and the specific objectives of the research study are presented in the following section.

[55] Butler & Subedi (2017).
[56] Dagbanja (2019) 85.
[57] See the United Nations *Transforming our World: The 2030 agenda for sustainable development*, 2015 (hereinafter 'UN Agenda 2030').
[58] George & Thomas (2018).
[59] See chap. 5 of the Constitution of the Republic of Ghana, 1992.
[60] Bantekas I 'The linkages between business and human rights and their underlying root causes' (2021) 43 *Human Rights Quarterly Report* 119.

1.4 Research objectives and question

The main aim of the research is to contribute to the raging debate that the quest of capital importing countries like Ghana using BITs to attract foreign investment in furtherance of genuine economic development must not be done in a manner that is inconsistent with such countries' human rights obligations under both national and international law.

The specific objectives of the study are to:

i. Review the global legal framework on BITs with a view to establishing common features.
ii. Examine selected BITs in Ghana, including identifying the main features and drawing any commonalities with BITs globally; bringing out factors that could make them human rights incompatible.
iii. Analyse selected approaches to making BITs human rights compatible, including using selected BITs with human rights dimensions to illustrate the point and make a case for human rights compatible model BIT for Ghana.
iv. Present conclusions and recommendations.

These above four objectives dissolved or transformed into chapters two, three, four, and five respectively. Addressing these chapters collectively answers the main research question, namely: What are the legal and policy considerations necessary to making bilateral investment treaties (BITs) human rights-compatible in Ghana?

This leads to a discussion of the methodology of the research study, which details the techniques and approaches to undertaking the thesis.

1.5 Research methodology

This study applied the desktop research methodology, which involved collecting and examining existing information on the internet and libraries as well as published journals, periodicals, governmental/institutional reports, and theses. This entailed a review of primary and secondary literature concerning the research topic (BITs and human rights) sourced mainly from University of the Western Cape (UWC) library and the internet. Law specific databases, including HeinOnline and My LexisNexis, and additional databases such as Scopus, Sage Journals Online, and Google Scholar (advance research) are extensively used. The primary resources are from published reports of international institutions/organisations, including the UN Office of the High Commissioner for

Human Rights, the United Nations Conference on Trade and Development (UNCTAD), and the Organisation for Economic Cooperation and Development (OECD), which have developed standard guiding principles to ensure responsible contracts and investment while preserving policy space for the host states to protect and remedy any business-related human rights infractions. The other primary literature includes Constitution of the Republic of Ghana,1992, Constitution of the Federal Republic of Ethiopia, 1995, Ghana's Labour Act, 2003 (Act 651), Ghana's Minerals and Mining Act, 2006 (Act 703) as well as published reports of the Commission on Human Rights and Administrative Justice (CHRAJ), and the Ghana Statistical Service.

Additionally, descriptive, analytical, and prescriptive approaches are applied. The descriptive approach is used to provide an overview of the general legal framework of the existing BITs and describing their core features. The analytical approach will provide a comparative analysis of the old and new generation BITs in terms of human rights dimensions. This approach also covers a comparative analysis of key features of 17 selected Ghana's BITs vis-à-vis others to draw lessons and best practices. The inclusion criteria for the 17 BITs consist of three factors: first, the text of the BIT is publicly available and/or accessible on either the UNCTAD IIAs navigation database or other platforms; secondly, a copy of the document is in the English language; and thirdly, the BIT in question is not terminated.

The prescriptive approach is employed in the concluding chapter where conclusions and recommendations are presented toward making BITs in Ghana human rights compatible.

Defining the scope and limitations of the study is the next discussion item.

1.6 Scope and limitations of the study

This study first and foremost contextualizes and prioritizes the textual and the ISDS-related problem with existing BITs that make them to work against the protection of fundamental human rights of affected communities and individuals. The study covers a review of the legal framework and character of BITs generally for purposes of distilling their common features. Then, a detailed assessment of 17 concluded BITs in the specific case of Ghana is made to draw commonalities with the features of the general BITs. This further involves analysis of selected features (clauses) of the Ghana's BITs that are likely to incapacitate them from providing protection for human rights and access to domestic remedy in the wake of violations of such human rights. The study also identifies some business-related human rights violations with specific reference to the mining

sector in Ghana. An analysis of selected human rights-based approaches to BITs is undertaken. An issue-based comparative analysis with designated (Model) BITs in other jurisdictions is made; and finally, the research presents conclusions and recommendations toward making BITs in Ghana human rights compatible.

The specific case of Ghana's BITs as well as reference to human rights violations in the defined case of gold mining may limit generalisation of the research conclusions and recommendations. In addition, the conclusions and recommendations may not be applicable to capital exporting developed countries because of the mature character of such economies. Time and access to relevant material may also affect the study.

The succeeding section presents a brief outline of chapters two, three, four, and five of the study.

1.7 Chapter disposition of the research study

The research is organised into five chapters and structured in the following format:

1.7.1 Chapter one: Introduction and overview of the study

This is the introductory chapter of the study and covers foundational issues, including providing the country context and a brief background of BITs in Ghana, presenting the problem statement, significance of the problem, the research question, and the research objectives. The chapter also discusses the methodology as well as the scope and limitations of the research study. Finally, the chapter presents a brief outline of the disposition of the five chapters of the thesis.

1.7.2 Chapter two: Legal framework of BITs

Chapter two examines the general legal structure of BITs in the global context and the purpose for concluding such treaties from the perspectives of capital-exporting countries (mostly developed countries) and capital-importing countries (mainly coming from developing and least-developed countries). This includes examining the core features of the said BITs comprising preliminary issues and substantive clauses associated with the treaties. The chapter further examines the human rights implications of the legal structure giving rise to the core features of the BITs. Thus, the chapter provides the legal context to the research study and for readers to better situate BITs in Ghana within the broader international investment law regime. The chapter concludes that the existing legal structure of BITs globally makes them human rights incompatible. This necessitates

the examination of the specific case of BITs in Ghana under chapter three of the study to ascertain whether there are any commonalities or otherwise.

1.7.3 Chapter three: Consideration of Ghana's BITs

Chapter three then examines the specific case of BITs in Ghana to establish the main features and to determine the extent to which these features are common to those established under chapter two. This entails a detailed examination of 17 concluded BITs in Ghana. The chapter also undertakes a systematic discussion of the conditions or factors that make the existing Ghana's BITs human rights inconsistent. The chapter underscored that the existing Ghana's BITs have commonalities with the features of general BITs established under chapter two. This leads to chapter four of the study which examines the approaches and conditions precedent to making BITs human rights compatible in Ghana.

1.7.4 Chapter four: Approaches to making BITs human rights compatible

This chapter examines selected approaches and distilling the conditions precedent to making BITs human rights compatible. Thus, selected new generation BITs including the Morocco-Nigeria[61] BIT that have human rights dimensions within their text are reviewed. The Morocco-Nigeria BIT is selected because it is arguably the first to substantively incorporate human rights provisions in its text and thus serves as a good model for human rights consistent BITs. The chapter also discusses the legal basis as well as the method to making BITs human rights compatible. The chapter further examines the conditions precedent and the practical steps to having a Model BIT and to make a case for Ghana to configure its legislation and policy towards ensuring that future BITs are human rights compatible. This chapter dovetails into the concluding chapter five where conclusions and recommendations are presented.

1.7.5 Chapter five: Conclusions and recommendations

This is the concluding chapter of the study, which, draw conclusions, summarises the findings, and presents proposals and recommendations. The final product is development a prototype human rights compatible Model BIT.

[61] Morocco-Nigeria Bilateral Investment Treaty (2016).

CHAPTER TWO: LEGAL FRAMEWORK OF BILATERAL INVESTMENT TREATIES

2.1 Introduction

Bilateral investment treaties (BITs) are considered critical to attracting and maintaining foreign investment flows into the economies of developing countries. As a result it is feared any attempt to introduce human rights dimensions into such agreements could drive away potential investors and thereby lower foreign investment outcomes for the host state.[62] However, there is no scholarly consensus on the classical thinking that BITs have an unquestioned capacity to deliver foreign investment in the host countries.[63] In the case of Ghana, Dagbanja asserts that foreign investment flow into the economy is based on multiplicity of factors, including returns on investment; and so any attempt to encourage such investments into the country solely on the basis of BITs is not only false and misleading but likely not to achieve the desired outcome.[64] Thus, contracting out the right to regulate in the public interest by any state in such treaties is not justifiable.[65] Notwithstanding the uncertainty surrounding the benefits of BITs, legal scholars have long recognized the impact of such investment treaties on human rights globally, especially in the territories of less-developed capital importing countries such as Ghana.[66] This phenomenon stems from both the text of BITs and the attitude of international arbitral tribunals.[67]

BITs are agreements involving two countries and are governed by international investment law. Thus, the rest of the chapter discusses the historical development, the processes and rationale for negotiating the BITs. The chapter further discusses in detail the general legal structure of BITs and bringing out the common features that make such treaties human rights incompatible. The chapter also examines the nature of BITs and the implication for human rights in dispute settlement as well as draws some conclusions.

2.2 Historical development of BITs

A BIT refers to an agreement between two countries where each of the contracting parties commits to reciprocally treat investors and investments of each other favourably.[68]

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[62] Goldstein (2017).
[63] See Sornarajah M *The international law on foreign investment* 3 ed (2010).
[64] Dagbanja *(2019).*
[65] Dagbanja *(2019).*
[66] Goldstein (2017).
[67] See generally Kube & Petersmann (2016).
[68] Yackee (2008) 33.

The origin of BITs is traced to the ancient practice where states used bilateral commercial treaties (BCTs) to encourage trade between themselves; and these BCTs were popularized by the United States of America (USA) in what is generally classified as treaties of friendship, commerce, and navigation.[69] While these treaties were primarily intended for trade and shipping facilitation, they sometimes contained enactments on the capacity of nationals of one state to do business in the territory of the other state.[70] The period of 1946-1966 witnessed the signing of about 24 of such BCTs between USA and some developing countries. However, many of the developing countries became doubtful of the purported benefits of the BCTs to increasing foreign investments in their respective economies. [71] This situation made developing countries reluctant to continue to make the kind of guarantees demanded by the USA to protect investments of its nationals.[72]

Following this development, European countries began to conclude formal bilateral investment agreements; and the first BIT, properly so-called, was concluded in 1959 between Germany and Pakistan.[73] Germany was subsequently followed by many European countries as well as other capital-exporting countries. The number of BITs grew steadily peaking in the late 1990s;[74] due to the reason that the majority of the capital-exporting countries wanted to protect their investment interests in territories of developing countries. Again, many developing countries progressively introduced more open policies on foreign investment, propelled by the economic philosophy of investment and trade liberalization spearheaded by the International Monetary Fund (IMF) and the World Bank.[75] From 1959 to 1990, a total number of 385 BITs were concluded, and cumulatively reaching 1857 in 1999 and 2861[76] in 2022.[77] However, the craving for BITs slowed down after 2003 as some states begun to either revise or terminate their treaties.[78]

[69] Salacuse JW 'BIT by BIT: The Growth of bilateral investment treaties and their impact on foreign investment in developing countries' (1990) 24(3) *The International lawyer* 656 (hereinafter 'Salacuse (1990)').
[70] Salacuse (1990) 656.
[71] Salacuse JW 'Toward a new treaty framework for direct foreign investment' (1985) 50 (3&4) *Journal of Air Law and Commerce* 969 (hereinafter 'Salacuse (1985)').
[72] Salacuse (1985) 969.
[73] Salacuse (1990) 657.
[74] UNCTAD (2000).
[75] UNCTAD (2000).
[76] United Nations Conference on Trade and Development *World investment report* (2022) 65 (hereinafter UNCTAD WIR (2022).
[77] UNCTAD (2000) 1.
[78] UNCTAD WIR (2022).

2.3 The BIT-making process

The need for and scramble to conclude BITs was initiated and promoted by the global north, capital exporting countries.[79] Salacuse regards the primary objective of such treaties as the basis to establishing predictable legal rules and effective enforcement mechanisms to protect nationals and companies in territories of foreign countries, often in the global south.[80] The auxiliary objective is to secure liberalised markets to invest surplus capital, and the markets are often procured by inducing capital-importing countries to free their regulatory systems of any barriers.[81] On the contrary, the main purpose for developing countries to negotiate and conclude BITs is to promote investment thereby increasing the flow of foreign capital to their economies.[82] The divergence of the economies of the developed and the developing countries manifests in the different objectives for concluding such investment treaties.[83] While the two goals (developed countries emphasizing investment protection in the territory of developing countries and the developing nations stressing on encouraging the developed nations to invest in their economies) are not necessarily mutually exclusive, the differing priorities may greatly affect the negotiations.[84]

2.4 Structure of BITs

The broad structure of BITs consists of the title, the preamble, the scope (definition clause that defines concepts such as investments, investors, nationals, companies, territory), obligations of the host state (including fair and equitable treatment, full protection and security, most-favoured-nation treatment, national treatment, repatriation of profits, expropriation, and compensation), and dispute settlement. These listed attributes are further discussed in the ensuing paragraphs.

2.4.1 Title

Globally, one of the core features of BITs is the title. The title defines the contracting parties; and to a large extent, limits enjoyment of the benefits therein to investors and investments of the named contracting state parties.[85] The title gives a gist about the nature of the agreement. For instance,

[79] Salacuse (1990) 661.
[80] Salacuse (1990) 661.
[81] Salacuse (1990) 661.
[82] Salacuse (1990) 661.
[83] Salacuse (1990) 661.
[84] Salacuse (1990) 661.
[85] In practice, the confinement of benefits in any given BIT solely to the contracting state parties can be overtaken by other international investment agreements, especially under the most-favoured-nation provisions which allow

the BITs of Senegal and United States,[86] Morocco and Nigeria,[87] and Japan and Bahrain[88] illustrate this point. In these examples, each of the BIT titles specifically names the two states entering the agreement as in the governments of Senegal and United States of America; Morocco and Nigeria; as well as Japan and Bahrain. Each of the titles also indicates the character of the agreement as reciprocal investment promotion and protection in different phraseology, namely, 'reciprocal encouragement and protection of investment', 'reciprocal investment promotion and protection', and 'reciprocal promotion and protection of investment' respectively. This leaves no one in doubt as to the nature of, and the contracting state parties involved in, the agreement. Although reciprocal encouragement and protection of investments is evident in each of the above titles, Salacuse argues that the interest of the respective contracting state parties to the treaty usually differs. The author argues that the protection of investments in the territory of developing nations is the main goal of the industrialised nations when negotiating BITs and increasing foreign investments in the territory of developing countries by developed nations is the main objective for the others.[89]

2.4.2 Preamble

Immediately following the title is the preamble. Most BIT preambles are one-directional, stressing mainly on the need to generate a congenial investment environment without recourse to *broader policy goals* and human rights.[90] Although a few BITs reflect in their preambles the necessity to respect the sovereignty and laws of state parties, it has been recognized that the preambles of some new generation BITs require, in addition to the conventional investment promotion and protection objectives, compatibility with international human rights standards and norms like labour rights.[91] The BIT preamble reflects the intentions and objectives of the parties at the time of concluding the

investors of other countries (non-contracting parties) to take advantage of more favourable investment terms where such countries have entered separate treaties with less favourable terms.

[86] See the Senegal-United States of America BIT (1990) titled 'Treaty between the United States of America and the Republic of Senegal concerning the reciprocal encouragement and protection of investment' available at https://investmentpolicy.unctad.org/international-investment-agreements/countries/223/united-states-of-america.

[87] See the Morocco-Nigeria BIT (2016) titled 'Reciprocal investment promotion and protection agreement between the government of the kingdom of Morocco and the government of the federal republic of Nigeria.'

[88] See the Japan-Bahrain BIT (2022) titled 'Agreement between Japan and the kingdom of Bahrain for the reciprocal promotion and protection of investment.'

[89] Salacuse (1990) 661.

[90] Sheffer MW 'Bilateral Investment Treaties: A friend or foe to human rights' (2011) 39(3) *Denver Journal of International Law and Policy 503* (hereinafter referred to as 'Sheffer (2011)').

[91] Sheffer (2011) 503-504.

agreement.[92] The preamble further gives indication of the purpose of the agreement between the two contracting parties. Although the preamble does not necessarily form part of the substantive enactment of the treaty and should ordinarily have no binding legal effect on the parties, it is considered an aid to construing and interpreting the substantive provisions of the treaty in times of dispute where rival meanings are attributed to a given text.[93] The Vienna Convention on the Law of Treaties supports this interpretative approach to treaties by making reference to the preamble.[94]

2.4.3 Scope

All BITs contain a definition clause that defines some critical concepts and/or terminologies in the agreement, including investments, investors, nationals, and companies. The definition clause gives the scope and applicability of the treaty. The definitional clauses are very key to the investor-state dispute settlement mechanisms. The terms commonly defined are investments and investors, and these are further discussed below.

2.4.3.1 Investments

Among the interpretation clauses, investment has attracted the broadest of definitions.[95] There are two prominent classes of definition of investments in BITs, viz (i) asset-based definition,[96] and (ii) enterprise-based[97] definition.

The asset-based model has sometimes defined investments to encompass *every kind of asset*.[98] The formulation of 'investment' in the China-Djibouti treaty to mean 'every kind of asset', followed by a list of five classes of such assets, including movable and immovable properties, property rights like liens and mortgages, any form of participation in a company, and goodwill, is so broad to cover almost everything and thus portents serious trouble for the contracting parties.[99] This is because the open-ended character of the asset-based definition gives adjudicating tribunals an

[92] See the Preamble to the Senegal-United States BIT (1990).
[93] Sheffer (2011) 504; Paramita K 'Much in little: The umbrella clause that changes the international investment protection standard' (2020) 6(1) *Hasanuddin Law Review* 35 (hereinafter 'Paramita (2020)').
[94] See arts. 31(2) and 32 of the Vienna Convention on the Law of Treaties (VCLT).
[95] Ofodile UE 'Africa-China bilateral investment treaties: A critique' (2013) 35 *Michigan Journal of International Law* 162 (hereinafter 'Ofodile (2013)'); also see art.1(1) of the China-Djibouti BIT (2003).
[96] Ofodile (2013) 162.
[97] Mbengue MM 'Special focus issue: Africa's voice in the formation, shaping and redesign of international investment law' (2019) 34(2) *ISCID Review* 471 (hereinafter 'Mbengue (2019)').
[98] see art.1 of the China-Djibouti BIT (2003).
[99] see art.1(1) of the China-Djibouti BIT (2003).

unfettered chance to engage in expansive interpretation during disputes.[100] Meanwhile, this standard formulation of investments is maintained in a majority of the BITs.[101] The expansive nature of the definition is also evident in a general statement to the effect that 'a change in the form in which assets are invested does not affect their character as investments'.[102]

The enterprise-based model, on the other hand, defines the protected investment in terms of the business organisation through an enterprise, and usually limits the protection afforded to a foreign direct investment made by a foreign owned or controlled company or other type of enterprises.[103]

2.4.3.2 Investors

The other most important terminology often defined is investors. The parameters of a BIT and its scope of application is determined by the meaning of 'investors' in the given treaty. While every BIT may define the term differently, the traditional definition of investors covers both natural and juridical persons. With reference to natural persons, the majority of the BITs would often protect individuals who are nationals of either of the two contracting parties who are recognised as nationals or citizens under the respective party's domestic laws.[104] The definition of 'investor' is occasionally extended to cover permanent residents under the municipal law of the parties.[105] The 2003 China-Djibouti treaty defines investor in terms of natural or juristic (or legal) persons.[106] The Juridical or juristic persons are seen from four (4) perspectives. The first set of definitions requires that a legal person should be incorporated in accordance with the laws of the Contracting party and should have a registered office in the contracting party. The second set covers those entities which are recognised under the laws of the contracting party whether they are profit making or non-profit making. The third category requires that a legal person be in accordance with the laws of the contracting party and that it should have its headquarters in the territory of that contracting

[100] It is trite learning that interpretation of enactments in legislations and treaties that use the word 'include' or 'include but not limited' make the list of circumstances therein inexhaustive and thus admit of other class or genus of items not specifically listed.
[101] Ofodile (2013) 162 .
[102] see art.1(1) of the China-Djibouti BIT (2003).
[103] See art. 2 (1) of the Ghana-Romania BIT (1989).
[104] see art.1(2) of the China-Djibouti BIT (2003).
[105] See art.1(1)(c) of the Ghana-Malasia BIT (1996).
[106] see art.1(2) of the China-Djibouti BIT (2003).

party.[107] The fourth category requires the legal person to have either its headquarters or its economic activity in the territory of the contracting party.[108]

2.4.4 Obligations of host states

BITs contain far-reaching obligations to the host state, while having little (if not no) obligation to the home state or the investors.[109] The most prominent obligations to the host state in typical BITs include fair and equitable treatment, full protection and security, most-favored-nation treatment, national treatment, performance requirements, expropriation, and compensation.[110] It has been agued by many legal and other scholars that the obligations of the host state are largely designed to treat each other's foreign investors favourably.[111] The inherent unbridled protection for foreign investors in such agreements of which they have no privity[112] could potentially make BITs affect investor-state negotiations. This is because BITs provide irrevocable protection and safeguards to investors in a manner that they would not have had in independent direct negotiations with the host state.[113] By their public international law nature, BITs are designed to limit certain types of state actions, yet such state actions are largely based on legitimate human rights concerns.[114] Thus, some institutions have argued that it is not prudent for any state to try to gain investment advantage by excluding human, labour and environmental rights in the host country in what is known in international investment and human rights law jurisprudence as a *race to the bottom*.[115] The texts of these agreements are often skewed in favour of the investors to the detriment of the host-state primarily due to unhealthy competition for such investment.[116] Investment treaties, in principle,

[107] See art.1(1) (b) of the South Africa-Turkey BIT (2000)
[108] See para. 86 of the *Alps Finance and Trade AG* v. *The Slovak Republic* (Award) (2011) UNCITRAL Rep. 28.
[109] Radi Y 'Realizing human rights in investment treaty arbitration: A perspective from within the international investment law toolbox' (2012) 37 *North Carolina Journal of International Law and Commercial Regulation* 1110 (hereinafter 'Radi (2012)').
[110] Sheffer (2011) 488.
[111] Yackee (2008).
[112] BITs are agreements between sovereign states which confer benefits on investors of the contracting parties.
[113] Yackee (2008).
[114] Institute for Development and Peace (2010) *INEF Research paper series human rights - corporate responsibility and sustainable development: international investment agreements and human rights* available at http://humanrights-business.org/international_investment_agreements_and_human_rights.pdf (accessed 5 July 2022).
[115] International Organisation of Employers *IOE position paper: international investment agreements and human rights (2021)* available at https://www.ohchr.org/sites/files/documents/issues/business/wg/submissions/others/ioe.pdf (accessed 6 July 2022).
[116] Radi (2012).

'create obligations only for the host state' while placing no obligation on investors.[117] This phenomenon has generated unending calls for reforms that will cause the legal structure of BITs to expressly incorporate human rights dimensions.[118]

The ensuing paragraphs examine in detail selected common features characterizing the obligations of the host state, namely, most-favored-nation treatment, national treatment, full protection and security, fair and equitable treatment, expropriation, and compensation.

2.4.4.1 Most-favored-nation treatment

The most-favoured-nation (MFN) principle emerged in the eleventh century[119] and appeared in international investment agreements by the twelfth century[120]. The initial purpose of the MFN principle was to prevent discrimination in international trade but it was later applied to the field of international investment generally and particularly to BITs.[121] Thus, the MFN treatment in the multilateral trading system requires countries not to discriminate against like products and/or services originating in or destined for markets of other World Trade Organisation (WTO) member countries.[122] Under this regime, all trading partners are offered immediately and unconditionally the prevailing best treatment given to any trading partner independent of whether that second trading partner is a WTO Member. The MFN clause has seen its presence in the first BIT.[123] Also, it is featured prominently in recent BITs; thereby making it the most enduring feature of all known concluded BITs.[124]

Generally, the MFN principle in investment law seeks to ensure that either of the two contracting state parties to a BIT does not treat the other state party (including its investors and investments) less favourable than any other third state in similar circumstances.[125] While it is feasible for a foreign investor to import both substantive and procedural[126] provisions of a different BIT which

[117] Radi (2012) 1110.
[118] Butler & Subedi (2017).
[119] Pérez-Aznar F 'The use of most-favoured-nation clauses to import substantive treaty provisions in international investment agreements' (2017) 20 *Journal of International Economic Law* 777 (hereinafter 'Pérez-Aznar (2017)').
[120] Radi Y 'The application of the most-favoured-nation clause to the dispute settlement provisions of bilateral investment treaties: Domesticating the 'Trojan Horse'' (2007) 18(4) *The European Journal of international law 758.*
[121] Radi (2007) 758.
[122] Art. I.1 of General Agreement on Tariffs and Trade, 1994 (hereinafter 'GATT').
[123] Pérez-Aznar (2017) 777.
[124] See art. 4 of the Japan-Bahrain Investment Treaty (2022).
[125] See art. 2 of the Germany-Pakistan BIT (1959).
[126] *Siemens A.G* v *Republic of Argentina* (Award) [2011] ICSID No. ARB/02/8.

the host country has entered through this principle,[127] some BITs incorporate provisions exempting[128] such a wide application. The essence of MFN is that whenever one of the contracting parties agrees on more favourable terms with a third party, the other contracting party (to the first treaty) will benefit from the new, more favourable terms. A vivid illustration of the nature and character of a typical MFN clause is manifested in the earliest two treaties; namely, the 'Treaty between the Republic of Germany and Pakistan for the promotion and protection of investments' in 1959 and the 'Agreement between the Federal Republic of Germany and the Federation of Malaya concerning the promotion and reciprocal protection of investments, 1960. [129] The most recent formulation is contained in *art. 4* of the 2022 Japan-Bahrain BIT.[130] One of the most pervasive implications of the MFN provision in BITs is its retrospective character and application.[131]

2.4.4.2 National treatment

Closely related to the MFN principle is national treatment. The main distinction between the two concepts lies in the duality (internal and external) application of the MFN Clause, whereas the national treatment is only limited to internal measures.[132] National treatment simply prohibits a contracting party from adopting and/or applying any measure (legislation, regulations, policies) in its territory that is more favourable to its nationals or companies than investors and investments of the nationals or companies in its territory of the other Contracting party.[133] A typical formulation is evident in *art. 3* of the agreement between the Federal Republic of Germany and the Federation of Malaya concerning the promotion and reciprocal protection of investments in 1960 and numerous succeeding other BITs.[134]

The primary purpose of national treatment provision in foreign investment law is the power it offers foreign investors to compete with the local investors and investments for a share of the local

[127] *Emilio Agustin Maffezini* v *Kingdom of Spain* (Decision on Jurisdiction) (2000) ICSID Case No. ARB/97/7.
[128] China - Tanzania BIT (2013), Botswana – Swiss BIT Art 4 (4).
[129] See art. 2 of the Germany-Pakistan BIT (1959), and art. 2(2) of the Germany-Malayan BIT (2060).
[130] See *art. 4* of the Japan-Bahrain Investment Treaty (2022).
[131] See Art. 9 of the Germany-Pakistan BIT (1959) states that 'The present Treaty shall also apply to approved investments made prior to its entry into force…by nationals or companies of either party in the territory of the other party unless in any case it is specifically provided otherwise.'
[132] Pérez-Aznar (2017) 778.
[133] Pérez-Aznar (2017) 778.
[134]German-Malaya BIT (1960).

market in specific sectors of the economy; and as such it is very crucial for like circumstances to be established by the competitive strength and relationship of the foreign investors and the local counterparts.[135] Thus, it prohibits discrimination of foreign investors and the favouring of national investors in the making and applying of legislation, rules, and regulations and thus ensuring that the foreign investor is accorded the same treatment as nationals.[136] With disparities in development, less-developed capital importing countries like Ghana who may desire separate treatment for their infant industries through the enactment and application of local content laws to protect such teething industries are likely to face stiff resistance and opposition by foreign investors.[137]

2.4.4.3. Fair and equitable treatment

The exact meaning and nature of the term 'fair and equitable treatment' (FET) remains an illusion for many scholars.[138] Nevertheless, Schreuer regards FET as the current standard in most BITs in force.[139] The inherent ambiguity and lack of clarity in the meaning of the FET is because of the absence of precedents or 'previous body of jurisprudence' on its construction either in foreign investment or international law generally.[140] This seemingly ambiguous character of the FET in terms of its meaning makes it deviate from the trite legal principles of consistency and certainty of enactments, which therefore affects the predictability and outcomes of investor-sate disputes.[141] The imprecision of the FET was stressed by Rosalyn Higgins, former president of the International Court of Justice (ICJ), that to nationals and companies the FET is a term of art in the 'field of overseas protection',[142] yet there is no unanimity of minds on its specific meaning and

[135] Anozie N 'Legal analysis of "like circumstances" concept under NAFTA National Treatment of investments obligation' (2017) 11 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2996863 (accessed on 1 November 2022).
[136] See generally Anozie (2017)
[137] See generally George and Thomas (2018).
[138] Wythes A 'Investor-state arbitrations: 'Can the fair and equitable treatment' clause consider international human rights obligations?' (2010) 23 *Leiden Journal of International law* 245 (hereinafter 'Wythes (2010)').
[139] Schreuer C 'fair and equitable treatment in arbitral practice' (2005) 6(3) *Journal of World Investment & Trade 359* (hereafter 'Schreuer (2005)').
[140]Dolzer R 'Fair and equitable treatment: a key standard in investment treaties' (2005) 39(1) *International Lawyer* 88 (hereinafter 'Dolzer (2005)').
[141] Connolly K 'Say what you mean: Improved drafting resources as a means for increasing the consistency of interpretation of bilateral investment treaties' (2007) 40(5) *Vanderbilt Journal of International Law* 1598.
[142] *Oil Platforms Case (Islamic Republic of Iran v. United States of America*), Preliminary Objection, (1996) ICJ Report 803, at 858.

parameters.[143] Accordingly, some recent BITs have included a clause on the parties' understanding of the contours of the FET in such agreements and thereby serving as guidance to construction and interpretation.[144] Dolzer reasons that the inclusion of the FET in BITs may represent a 'catch-all' enactment which encompasses the generality of all unforeseen future governmental actions and omissions that may have some negative consequence on investors and investments.[145] The FET is not a rule of domestic law but a rule of international law and as such a state party may violate the principle despite offering equivalent or same treatment to both foreign and local investors.[146] The case of *L. Fay H. Neer & Pauline Neer (USA) v. United Mexican States* [147] is credited with the original formulation of the classical FFT standard, that;

> *the treatment of an alien, in order to constitute an international delinquency, should amount to outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of government action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.*[148]

2.4.4.4 Full protection and security

There are two schools of thought in international law concerning protection of persons and property of aliens. First, states maintain that personal rights and property of their nationals and companies abroad shall be respected; and secondly, states have legitimacy and right to 'legislate and administrate' as far as such actions are not discriminatory against foreign nationals.[149]

The FPS having its origins from customary international law is well documented;[150] and this gives rise to two critical questions on the similarity or otherwise of the content of the FPS standard in

[143] Wythes (2010) 245.
[144] Article 4(3) (a) of the Morocco-Japan (2020) provides: 'It is understood: (a) "fair and equitable treatment" includes the obligation of the Contracting Parties to guarantee access to courts of justice, administrative tribunals and not to deny justice in criminal. Civil or administrative proceedings in accordance with the principles of due process of law.'
[145] Dolzer (2005) 88.
[146] Dolzer (2005) 88.
[147] *L. Fay H. Neer & Pauline Neer (USA) v United Mexican States* (1926).
[148] *L. Fay H. Neer & Pauline Neer (USA) v United Mexican States* (1926).
[149] Junngam N 'The full security and protection standard in international Investment Law: What and who is investment fully protected and secured from?' (2018) 7(1) *American University Business Law Review* 30 (hereinafter referred to 'Junngam (2018)').
[150] For more discussion on the historical development of the concept of full protection and security, see generally Junngam (2018) where the author traced the origins from treatment of foreigners in medieval Greek and Roman empires through to the end of World War I and thereafter.

treaties and the international customary law obligation to provide full protection and security on the one hand, and whether treaty-based FPS fully protects investments.[151] There are conflicting views on these two questions by international law experts. The first view is the inclusion of the FPS standard clause in investment treaties does not increase the protection foreign investors are entitled under international law.[152] In contrast, others argue the FPS standard 'represents an autonomous treaty standard that is independent of the international minimum standard under customary international law.'[153] Junngam concurs with Subedi[154] in that the 'qualifying phrase - "as required by international law" - that accompanies the FPS standard plays a role in determining its level of protection'.[155] And that without recourse to international law, the degree of protection and security would be as high as provided for by the individual investment treaty, which is often greater than the protection guaranteed under customary international law.[156]

The FPS has been secured and guaranteed in a greater number of international investment agreements, characteristically in the form of a FPS clause; and even though the FPS phraseology may differ from treaty to treaty, protection and security are the central pillars.[157] While the FPS standard is not necessarily confusing, it has in some instances been extended to cover legal protection and security for investors and investments.[158] At the investor-state dispute settlement mechanisms, while investors desire for and urge arbitral tribunals to interpret the FPS (or its other nomenclatures) expansively, host states on the other hand often argued for a restrictive construction.[159] Hence, some contracting parties in recent treaties have sought to give an idea of the meaning of the FPS in such agreements.[160]

[151] Junngam (2018) 35.
[152] Junngam (2018) 35.
[153] Schreuer C 'Full protection and security' (2010) 1 *Journal of International Dispute Settlement*.
[154] Subedi SP 'The challenge of reconciling the competing principles within the law of foreign investment with special reference to the recent trend in the interpretation of the term "expropriation"' (2006) 40(1) *International Lawyer* 121 (hereinafter 'Subedi (2006)').
[155] Junngam (2018) 35.
[156] Subedi (2006) 126.
[157] Junngam (2018) 4.
[158] Junngam (2018) 4.
[159] Junngam (2018) 4.
[160] Article 4(3) (b) of the Morocco-Japan BIT (2020) provides that 'It is understood: (b) "full protection and security" requires each contracting party to ensure the necessary level of police protection required under customary international law.

The standard is commonly expressed as full protection and security (FPS) but other formulations such as 'full legal protection', 'protection', as well as 'full and complete protection and safety' exist. The FPS standard involves 'physical and legal harms to investments caused by state organs and/or third parties, and that due diligence is decisive for determining the observation or otherwise of the standard'.[161] The FPS standard imposes on a host state a duty to protect foreign investors against actions of private parties and host state and its agencies; and in the case of *Saluka Investments BV (The Netherlands)* v. *The Czech Republic*,[162] the tribunal stated the essence of the FSP standard as,

> *The "full protection and security" standard applies essentially when the foreign investment has been affected by civil strife and physical violence... the "full security and protection" clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force.*

The FPS standard was introduced into the first BIT in 1959, specifically designed to protect investments.[163] The *art. 3(1)* of that treaty provides that '[i]nvestment by nationals or companies of either party shall enjoy protection and security in the territory of the other party'.[164] It is submitted that the absence of the word 'full' in the wording of the standard nomenclature 'full protection and security' in the said *art*.3(1) is not fatal to investors since it is a variant formulation with similar intent and purpose.[165] The protection and security of investment provisions has since been made integral part of subsequent BITs and other international investment agreements.[166]

2.4.4.5 Expropriation

Any governmental (including its agents) conduct, direct or indirect, that imperils investors' investments are generally regarded as expropriation. Direct expropriation amounts to a state measure, legislation or regulation, that expressly withdraws legal title of ownership over an investment for the benefit of the state or a third party designated by the state; and indirect

[161] Junngam (2018) 4.
[162] *Saluka Investments BV (The Netherlands) v. The Czech Republic* (Partial Award) [2006] UNCITRAL.
[163] Junngam (2018) 24.
[164] Germany-Pakistan BIT (1959).
[165] Junngam (2018) 24.
[166] Junngam (2018) 24.

expropriation generally connotes any state measure which causes serious injury to an investment without legal title of the investment being affected.[167] The definition of indirect expropriation has been regarded as not only very complicated but also wide, and thus becoming a source of concern to both host states and arbitral tribunals.[168]

The concept of expropriation may be traced to the international law standards for the protection of aliens.[169] Expropriation is generally not permissible under modern law of international investment protection unless certain prevailing conditions of it being undertaken for a public purpose, in a non-discriminatory manner, in accordance with due process of law, as well as payment of prompt, adequate, and effective compensation, are met.[170] The general prohibition of expropriation and the exceptions thereof of investments in the territory of a contracting state party appeared in the enactment of the first known BIT in 1959.[171] This formulation is repeated with slight modifications in recent BITs, such as contained '[in] the reciprocal investment promotion and protection agreement between the government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria'.[172] Whereas direct expropriation has not been defined in the Morocco-Nigeria treaty, the treaty gives an idea of the parties' understanding of indirect expropriation, as amounting to constructive expropriation; that is a sequence of measures of one of the contracting parties having an equivalent effect of direct expropriation without formal transfer of title or outright seizure.[173] The want of interpretation of 'direct expropriation' in that treaty may be due primarily to the long standing view that the expression lacks ambiguity and so is easy to detect since it involves deliberate or outright actions of the state or agencies under the state's control.[174] To determine whether or not a measure or series of measures of a contracting state party constitute(s) indirect expropriation requires a 'case-by-case, fact-based inquiry into

[167] Nikiema SH 'Compensation for expropriation' (2013), in IISD best practice series *(*International Institute for Sustainable Development 03/2013) 4.
[168] Wei S 'Expropriation in transition: Evolving Chinese investment treaty practices in local and global context' *(2015)* 28 *Leiden Journal of International Law 582,* 586 (hereinafter 'Wei (2015)'
[169] Wei (2015) 579*.*
[170] Wei (2015) 579.
[171] See *art. 3(2)* of Germany-Pakistan BIT (1959).
[172] See *art. 8 (1*) of Morocco-Nigeria BIT (2016).
[173] Morocco-Nigeria BIT (2016): *art*. 8(2) (a) provides that '[f]or purposes of this agreement, … [i]ndirect expropriation results from a series of measures of a party having an equivalent of direct expropriation without formal transfer of title or outright seizure.'
[174] Nikiema SH 'Compensation for expropriation' (2013), in IISD best practice series *(*International Institute for Sustainable Development 03/2013) 4.

various factors including, but not limited to the scope of the measures or series of measures and their [reasonable] interference with … the investment'.[175]

While acknowledging the long standing embodiment of the rules of expropriation in international investment law, a series of literature suggests that expropriation has not seen much scholarly work and arbitral practice.[176] According to Dolzer, three reasons may account for this situation: (i) near absence of direct expropriation cases following the period of the 1990s, where international investment community focused so much energy on the beneficial effect of foreign investment, (ii) change in the attitude of lawyers and tribunals to focusing more on the rules of fair and equitable treatment and less on the rules of expropriation, and (iii) the persistent arbitral practice of distinguishing between 'compensable takings and non-compensable regulatory measures', especially concerning matters of indirect expropriation.[177]

2.4.4.6 Compensation

Compensation follows the determination of a breach to any of the treaty obligations by the host-state and is largely associated with expropriation.[178] BITs often require prompt, adequate, and effective compensation in matters of expropriation.[179] Again, it is the legitimate expectation of nationals and companies of contracting parties of comparable treatment in the emergence of armed conflicts and insurrections, including commensurate compensation where there is loss of investments.[180] Arguably, in compensation computation, international law requires consideration of only direct damages resulting in breach of any of the treaty provisions; and that any remote or speculative damages are not permissible.[181] This situation is prevalent in both the old[182] and new[183] generation BITs as seen below.[184]

[175] The Morocco-Nigeria BIT, 2016, art. 8(2)(b).
[176] Dolzer R 'Case comment: ConocoPhillips v Venezuela and Gold Reserve v Venezuela Expropriation: A new focus on old issues' (2015) 30(2) *ICSID Review* 378 (hereinafter 'Dolzer (2015)').
[177] Dolzer (2015) 378.
[178] Anozie (2017).
[179] Morocco-Nigeria BIT, 2016: Art. 8(1) (1) prohibits the host state from engaging in expropriation except under certain conditions including 'payment of prompt, adequate, and effective compensation' to affected investors and investments of the other contracting party in the territory of the host state.
[180] See art. 12(1) of the Japan-Bahrain BIT (2022).
[181] See para. 186 of the *Alps Finance and Trade AG* v. *The Slovak Republic* (2011) (UNCITRAL Award) 61.
[182] See art. 3(3) of the Germany-Pakistan BIT (1959).
[183] See art. 9 of the Morocco-Nigeria BIT (2016).
[184] In this thesis, old generation is used to describe BITs concluded before 2000 and new generation to describe those BITs that are concluded after 2000.

2.4.5 Dispute settlement

Generally, investment decisions are a very complicated process with investors facing various level of risks at virtually every stage of the process; and this situation is more pronounced with investments in foreign territories as the scope of economic and political risks associated with such investments increases tremendously.[185] The preamble to BITs expresses the expectations of the Contracting Parties to not only reciprocally encourage or promote and protect investments in their respective territories but also defines the state parties' willingness to deepen cooperation in these areas.[186] As a result of the considerable level of risk involved in foreign investment, disputes arising out of BITs are a common feature. Thus, dispute settlement provisions are incorporated into these treaties to minimize foreseeable distortions of the intentions of the parties in the proclamations made in the treaty for purposes of limiting the effect of any dispute on investors.[187] This makes dispute settlement provisions a core characteristic feature of every BIT. As the name suggests, the dispute settlement clause provides a formal grievance redress to a non-defaulting party where the other party is in breach of its treaty obligations.[188] This is regarded as the only means to achieve the doctrine of maintaining reciprocal encouragement and protection of investments of each party in the territory of the other party.

The parties that are often covered by the dispute settlement provisions of BITs are twofold. Firstly, disputes arising between the two contracting state parties; and second, those disputes occurring between one state party (commonly referred to as the host state) and investors originating from the other state party (referred to as the home state). Whereas *art. 11* of the treaty between the Federal Republic of Germany and Pakistan for the promotion and protection of investments is a typical representation of the former scenario,[189] *art. 27* of the Morocco-Nigeria treaty[190] is a vivid illustration of the latter.

[185] Lavopa FM, Barreiros LE, & Bruno MV 'How to kill a BIT and not die trying: Legal and political challenges of denouncing or renegotiating bilateral investment treaties' (2013) 16 *Journal of International Economic Law* 879.
[186] Junngam (2018) 90.
[187] See generally Yackee (2008).
[188] *The AES Corporation and TAU Power B.V. v Republic of Kazakhstan* (Award) [November 2013] ICSID Case No. ARB/10/16.
[189] The Germany-Pakistan BIT, 1959, art. 11.
[190] Morocco-Nigeria BIT (2016). The heading of *art. 27* 'Settlement of disputes between a party and investor of the other party' is a clear manifestation of this point.

Until the 1950s, diplomatic protection, which is largely discounted as a dependable instrument for protecting international investment, was effectively the only means to ensuring legal protection and redress for investments of investors in foreign lands.[191] The advent of BITs and the inclusion of specific dispute settlement resolution mechanisms resulted in the change in this phenomenon. Currently, investment disputes are resolved mainly by arbitration, and there are institutions which have been developed for that purpose.[192] The institutions for arbitration can conveniently be classified into International Centre for the Settlement of Investment Disputes (ICSID) Arbitration and Non- ICSID Arbitration.[193] Most cases are brought under the Convention on the Settlement of Disputes between states and nationals of other states.[194] The other investor-state arbitration institutional arrangements include the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the Permanent Court of Arbitration (PCA). Within the African context, the main arbitral institutions include, Cairo Regional Centre for International Commercial Arbitration, the Lagos Regional Centre for International Commercial Arbitration, the Arbitration Foundation of Southern Africa, and the Ghana Arbitration Center.

From the foregoing, while access to investment arbitration is more advantageous to investors, the preference for international arbitration as ISDS mechanism is a cause for concern.[195] Investors' predilection for international arbitration as opposed to adjudication in municipal courts in the host state is largely attributable to the perception that municipal courts in developing countries are not only insufficiently resourced but also lack technical competence and independence to satisfactorily and impartially adjudicate foreign investment disputes.[196] However, this argument is not tenable because investors have often resorted to these same domestic courts to vindicate their rights.[197]

[191] See generally Junngam (2018).
[192] Butler & Subedi (2017).
[193] Kollamparambil U 'Bilateral investment treaties and investor state disputes' (2016), in ERSA Working Paper No.589 available at https://econrsa/wp-content/uploads/2022/06/working_paper_589.pdf (accessed 1 November 2022.
[194] Kollamparambil U 'Bilateral investment treaties and investor state disputes' (2016), in ERSA Working Paper No.589 available at https://econrsa/wp-content/uploads/2022/06/working_paper_589.pdf (accessed 1 November 2022.
[195] Butler & Subedi (2017).
[196] Yackee (2008).
[197] George & Thomas (2018).

2.5 Nature of BITs and implications for human rights in dispute settlement

The nature of BITs is enshrined in the text of the individual treaties, representing the core features of the BITs (most-favoured-nation treatment, national treatment, fair and equitable treatment, full protection and security, expropriation, compensation, and dispute settlement clauses) discussed in the preceding paragraphs on the one hand. On the other hand, the study uses the decisions and/or awards of the arbitral tribunals as proxy for determining the human rights implications of the nature and character of the BITs.

BITs provide irrevocable protection and safeguards to investors in a manner that they would not have had in independent direct negotiations with host states.[198] This is because the texts of the treaties are often skewed in favour of investors to the detriment of host states primarily due to unhealthy competition for such investment.[199] Again, it is argued that the ISDS arbitral tribunals have had inconsistent record in admitting human rights arguments.[200] In *Biloune & Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*,[201] the investor alleged human rights violations in the nature of arbitral detention and deportation and the arbitral tribunal declined jurisdiction to rule on a stand-alone human rights claim. However, the attitude of the tribunal changes where investors use human rights arguments to support a treaty-based claim.[202] This is exemplified in *Grand River Enterprises Six Nations Ltd.et al. v. United States of America*[203] where the tribunal felt obliged to consider public welfare issues because it formed part of the preamble to the treaty in dispute.

Also, there is no consistency in the application of the rules of arbitration regarding whether human rights arguments are used by investors to ground an application for arbitration, or the host-state has used it as defence or counterclaim in such an action.[204] This is significant because investment must deliver sustainable development which encapsulates the principles of protecting, respecting, and remedying human rights infractions in host countries. It is for these and other reasons that *Butler* and *Subedi* assert that the 'la w of foreign investment is in a state of flux' and the ISDS

[198] Yackee (2008).
[199] Radi (2012) 37.
[200] Kube & Petersmann (2016)
[201] *Biloune & Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability (Oct. 27, 1989), 19 Y.B. Comm. Arb. 11 (1994) (hereinafter 'Biloune v. Ghana').
[202] Kube & Petersmann (2016).
[203] *Grand Rivers Enterprises Nations Ltd. et al. v. United States of America*, UNCITRAL, AWARD (12 January 2011).
[204] Kube & Petersmann (2016).

mechanism has been criticized for creating 'inconsistency and confusion in jurisprudence'.[205] This situation calls for either limiting resort to or refraining from the ISDS and increasing the role of domestic judicial systems.[206]

Francioni argues that the overwhelming impact of foreign investment on the social life of the host-state raises substantial questions on whether the principle of access to justice espoused to benefit investors in the nature of binding arbitrations compares favourably and correspondingly with remedial proceedings available to other stakeholders (individuals and groups) who are perilously impacted by investment in the host state.[207] The author further asserts that the right of access to the municipal courts by the local population is not safeguarded by the law and justice system of the host state, because modern investment law compels the host state to delegate resolution of investor-state disputes to international arbitration bodies.[208] This unbridled delegation and ceding to extensive compulsory international arbitration by the host state undermines authority of the municipal courts to resolve investment disputes, thereby making the domestic courts incapable of providing judicial protection against harm caused by the investor.[209]

Overall, the literature shows that neither does the text of BITs sufficiently integrates human rights law and dimensions nor do the arbitral tribunal' awards and decisions embrace and reflect a favourable disposition to admitting human rights arguments in the absence of express provisions in the given treaty text.

2.6 Conclusion

This chapter discussed the general legal structure of BITs. It also identified and examined the most common features of such treaties in the global setting: The title, preamble, scope, most-favoured-nation, national treatment, fair and equitable treatment, full protection and security, expropriation, compensation, and dispute settlement clauses.

[205] Butler & Subedi (2017).
[206] Butler & Subedi (2017).
[207] Francioni F 'Access to justice, denial of justice and international investment law' (2009) 20 *The European Journal of International Law* (hereinafter 'Francioni (2009)').
[208] Francioni (2009).
[209] Francioni (2009).

Bilateral commercial treaties have long been recognized as an ancient method of enabling trade between states but the first such BIT properly so-called, was concluded in 1959 between Germany and Pakistan. [210]

The primary objective for developed countries in BITs is to establish predictable legal rules and effective enforcement mechanisms to safeguard their investors and investments in the territory of any foreign country.[211] While developing countries negotiate and conclude BITs purposely to promote investment and increase flow of foreign capital into their economies.[212]

The title of BITs defines the state parties to the treaty and thereby limits[213] the benefits therein to investors and investments of such states. The preamble reflects the intentions and objectives of the parties at the time of concluding the agreement;[214] and further gives an indication of the purpose of the agreement. The preamble has no binding legal effect on the parties, but it is considered an aid to construing and interpreting the treaty.[215]

The MFN principle seeks to ensure either of the two contracting state parties to a BIT does not treat the other state party less favourable than any other third state in similar circumstances. While national treatment simply prohibits a contracting party from applying any measure (legislation, regulation, or policy) in its territory that is more favourable to its nationals or companies than investors and investments of the other contracting party in its territory.[216]

Whereas the meaning of the FET remains unclarified,[217] it is the standard in most BITs in force.[218] The inherent ambiguity arises from the absence of precedents concerning its construction in either foreign investment law or international law generally.[219] Thus, the FET deviates from the cardinal

[210] Salacuse (1990) 656.
[211] Salacuse (1990) 661.
[212] Salacuse (1990) 661.
[213] In practice, the confinement of benefits in any given BIT solely to the contracting state parties can be overtaken by other international investment agreements, especially under the Most-Favoured-Nation provisions which allow investors of other countries (non-contracting parties) to take advantage of more favourable investment terms where such countries have entered separate treaties with less favourable terms.
[214] See the Preamble to the Senegal-United States BIT, 1990.
[215] Sheffer (2011) 504; Paramita (2020) 35.
[216] Pérez-Aznar (2017) 778.
[217] Wythes (2010).
[218] Schreuer (2005) *359.*
[219]Dolzer (2005) 88.

legal principles of consistency and certainty of enactments, thereby affecting the predictability and outcome of investor-state disputes.

There is also lack of clarity about whether the FPS standard maintained in investment treaties have a wider scope than the requirement of due diligence regarding FPS to foreign nationals than what pertains in customary international law.

Compensation follows the determination of a breach to any of the treaty obligations, and the BITs require prompt, adequate, and effective compensation for acts of expropriation. There is legitimate expectation of investors of the contracting parties for comparable treatment in the emergence of any armed conflict, including commensurate compensation where there is loss of investment.

Overall, the structure of the BITs expressed in the substantive provisions neither integrates human rights, labour standards, and environmental protection in their text nor do the arbitral tribunals' awards or decisions portray any favourable disposition to admitting human rights argumentation in the dispute resolution process.

The above conclusions and findings necessitate an examination of the specific case of BITs in Ghana under chapter three of the study to ascertain whether there are any commonalities or otherwise.

CHAPTER THREE: CONSIDERATION OF GHANA'S BITS

3.1 Introduction

Chapter three is proceeding on the building blocks laid under the previous chapter, which discussed the general legal structure of typical bilateral investment treaties (BITs) within the global context. The literature shows that the common features associated with global BITs make them incapable of integrating human rights dimensions into their text and neither do the ISDS mechanisms make any modest case for the use of domestic court system to resolve disputes, which this study believes is *sine quo non* to addressing the human rights factor in BITs. It is also evident from the awards and decisions generally of the arbitral tribunals that they do not readily accept human rights argumentation in the dispute resolution processes. The situation has created endless public debate on how to minimize the anomalous character of BITs, with some suggesting less resort to the ISDS system of international arbitration or complete boycott of it.[220] Also, there are others clamouring[221] for extreme policy measure of terminating all concluded BITs and developing a holistic national investment protection legislation that will respond to the needs of all stakeholders including foreign investors and their investments irrespective of the country of origin, as well as individuals and communities affected by human rights violations in the host state.[222]

Accordingly, this chapter examines the specific case of Ghana's BITs to establish the main features and to determine the extent to which these features are common with those established in the preceding chapter. This involves a detailed examination of 17 out of 28 concluded BITs.[223]

The chapter also discusses the issue of foreign investment (participation) in Ghana's gold mining sector, incidence of human rights violations arising from the operations, and the legal regime to protecting and redressing such situations.

[220] Butler & Subedi (2017) 45.
[221] UNCTAD Investment Policy Framework for Sustainable Development (2012) available at https://unctad.org/system/files/official-document/diaepcb2012d5_en.pdf (accessed 16 December 2022).
[222] See generally George & Thomas (2018).
[223] UNCTAD International Investment Agreement Navigator (hereinafter 'UNCTAD IIAs Navigator') available at http://investmentpolicy.unctad.org/international-investment-agreements/countries/79/Ghana (accessed 24 October 2022).

3.2 Factors precipitating Ghana's BITs environment

Before discussing the subject matter of Ghana's BITs, it is significant to present the context and events that literally pushed the country under a military government into concluding such treaties.

Ghana is presently regarded as a middle-income country with a total population of 30 832 091.[224] The country gained independence on 6 March 1957 and its economic development agenda from that time to 1982 mirrored a socialist state.[225] From 1966-1981, the country experienced prolonged political and economic instability characterised by high inflation, adverse balance of payments and military adventurism in the political governance. These issues together with poorly designed and implemented investment related policies slowed foreign capital inflow into the country.[226] The unsurmountable economic crisis compelled the government to sign onto IMF-coordinated Structural Adjustment Programmes (SAPs) in 1983.[227] The SAPs did not only succeed in restoring foreign investor confidence in the economy but also helped it to diversify its foreign investment portfolio from the United Kingdom to include other countries like China and South Africa.[228] The SAPs brought about new regulations and opportunities, especially in the mining sector, which attracted several foreign investors leading to increased FDI flow into the economy.[229]

This context is arguably the main driver that shaped the developments of BITs in the country. The following sections examine in detail the composition and core features of Ghana's BITs.

3.3 BITs in Ghana

The classical theory is that developing countries negotiate and conclude BITs purposely to promote investment and increase the flow of foreign capital into their economies.[230] Consistent with this reasoning, Ghana concluded its first set of BITs in 1989; and currently has 27 BITs,[231] 10 treaties with investment provisions (TIPs), and 20 investment-related instruments (IRIs).[232] The conclusion of the BITs must have arguably contributed to increasing the country's FDI in the

[224] Ghana Statistical Service Report *2021 Population and housing census: General report volume 3A (2021) 25.*
[225] Grant (2001) 999; *Williams (2015)*.
[226] *Tsikata, Asante & Gyasi (2000)*.
[227] Aryeetey E, Harrigan J & Nissanke M *Economic reforms in Ghana: The miracle and the mirage* (2000).
[228] Nikoi (2016).
[229] Nikoi (2016).
[230] Salacuse (1990) 661.
[231] Overall, Ghana concluded 28 BITs. However, the Ghana-India BIT (2002) has been terminated effectively bringing the number to 27 BITs.
[232] UNCTAD IIAs Navigator.

1990s.[233] Just as this narrative supports the primary reasoning that states enter BITs to attract FDI, others have reasons to doubt this position.[234] For instance, Dagbanja has identified multi-variate factors determining foreign investments and further stressed that BITs have no special effect on FDI flows to Ghana.[235]

3.3.1 Profile of Ghana's BITs

Ghana's 28 BITs are spread across four continents with 12 in Europe, 11 in Africa, three in Asia, and two in North America. The continental breakdown of the concluded BITs reflects the long-standing scholarly position that the majority of such treaties are often made between the developed (capital-exporting) countries such as the United Kingdom and developing (capital-importing) countries like Ghana.[236] It is instructive to note that seven of these BITs were concluded during the era of a military regime.[237] Further observation and analysis show that eight of the total BITs are in force, one is terminated, and the majority of 19 others are not in force.

The next sub-section discusses the composition of 17 BITs selected for further investigation.

3.3.2 Composition of selected BITs for detailed examination

In all, 17 out of the 28 BITs are selected for further discussion. The inclusion or selection criteria are based on three factors: (i) first, the text of the BIT must be publicly available and/or accessible on either the UNCTAD IIAs navigation database or other platforms, (ii) secondly, a copy of the document is in the English language, and (iii) thirdly, the BIT in question is not terminated. This number represents six BITs in force and 11 not in force.[238]

Table 1 below gives a detailed breakdown of the said selected BITs in terms of title, status of being in force or otherwise, and the foreign state party.

Table 1: Tabular representation of selected BITs

	Short title	Status	Counterparty	
1	Ghana-Turkey BIT (2016)	Not in force	Turkey	

[233] Nikoi (2016).
[234] Butler & Subedi (2017).
[235] *Dagbanja (2019); also see Tsikata, Asante & Gyasi (2000)*.
[236] Yackee (2008).
[237] Ghana was under a military government from 31 December 1981 to 6 January 1993.
[238] The analysis and presentation of this entire section is made with information sourced from the UNCTAD IIAs Navigation.

2	Botswana-Ghana BIT (2003)	Not in force	Botswana	
3	Ghana-Mauritius BIT (2001)	Not in force	Mauritius	
4	Benin-Ghana BIT (2001)	Not in force	Benin	
5	Ghana-Guinea BIT (2001)	Not in force	Guinea	
6	Serbia-Ghana (2000)	Not in force	Serbia	
7	Cuba-Ghana BIT (1999)	Not in force	Cuba	
8	Ghana-South Africa BIT (1998)	Not in force	South Africa	
9	Egypt-Ghana BIT (1998)	Not in force	Egypt	
10	Ghana-Malaysia BIT (1996)	In force	Malaysia	
11	Denmark-Ghana BIT (1992)	In force	Denmark	
12	Ghana-Switzerland BIT (1991)	In force	Switzerland	
13	Bulgaria-Ghana BIT (1989)	Not in force	Bulgaria	
14	China-Ghana BIT (1989)	In force	China	
15	Ghana-Romania BIT (1989)	Not in force	Romania	
16	Ghana-Netherlands BIT (1989)	In force	Netherlands	
17	Ghana-United Kingdom BIT (1989)	In force	United Kingdom	

SOURCE: Information is drawn from UNCTAD IIAs Navigator, and table drawn by researcher.

The subsequent section makes a comparative analysis of the features of Ghana's BITs vis-à-vis the general BITs established under the previous chapter.

3.4 Analysis of Ghana's BITs vis-à-vis the global context

3.4.1 Title

All the above concluded BITs between Ghana and its trading and investment partners have titles. For instance, the first BIT is titled: 'Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the promotion and protection of investments.'[239] While the reciprocal character of the heading of most BITs is absent in this treaty, the element of reciprocity was effectively included in the title of the

[239] See the heading of the Ghana-United Kingdom BIT (1989).

second[240] concluded BIT and 7 others. The observed titling of all the 17 examined Ghana's BITs reflects the general character of such treaties globally, as contained in chapter two of the study.

3.4.2 Preamble

All but one[241] of the Ghana's BITs have preambles. The preamble mostly discloses the contracting parties' desire to intensify economic cooperation, intention to establish and maintain congenial conditions for investments and investors of the respective contracting parties, and a recognition of the importance of protecting such investors and their investments in the territory of the other contracting party for the mutual benefit of the state parties.[242] It is observed, where the title does not include the word 'reciprocal' or 'mutual', the preamble, where it exists is most likely to contain either of the two[243] and this goes to emphasize the significance of a win-win relationship and mutual benefits for the respective parties in such treaties. An examination of the preambles of the Ghana's BITs indicates the purpose and/or intent of the contracting state parties generally mimics the global standard; as they stress mainly on the need to generate a congenial investment environment without recourse to *broader policy goals* and human rights.[244]

3.4.3 Scope

Each of the 17 BITs contains a definition clause that explains critical concepts in the agreement, including investments, investors, nationals, and territory. The definition clause or article provides the scope and applicability of the given treaty, and this is particularly significant in times of any dispute and its resolution during implementation of the treaty. The definitions of investments and investors are further examined.

3.4.3.1 Investments

[240] See the Ghana-Netherlands BIT (1989), which states 'Agreement on Encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Ghana.'
[241] The Ghana-Bulgaria BIT (1989) has no preamble to the treaty.
[242] The Ghana-Switzerland BIT (1989): The preamble states that 'The Swiss Confederation and the Republic of Ghana, Desiring to create and maintain economic cooperation to the mutual benefits of both states,
Intending to create and maintain favourable conditions for investments by investors of one contracting party in the territory of the other contracting party, Recognizing the need to promote and protect foreign investments with the aim to foster the economic prosperity of both states…'
[243] See Ghana-United Kingdom BIT (1989), where the title does not incorporate the either reciprocal or mutual, but the preamble does.
[244] Sheffer (2011) *503*.

Among the interpretation clauses, investment has attracted the broadest of definitions.[245] While there are two main ways of defining investment in BITs,[246] the majority of the 17 BITs adopt the asset-based definition.[247] The enterprise-based model defines the protected investment in terms of the business organisation through an enterprise, and usually limits the protection afforded to a foreign direct investment made by a foreign owned or controlled company or other type of enterprises. This model, which is manifested in very few BITs, is typified in the Ghana-Romania treaty of 1989.[248] Uncharacteristically, the form of the definition provided for investment under the Bulgaria-Ghana[249] BIT significantly deviates from the two model definitions. The formulation of 'investment' in the first treaty to mean every kind of asset, followed by a list of five classes of such assets is so broad to cover almost everything and thus portents serious implications for Ghana, a capital-importing country.[250] Moreover, the presence of the phrase *not exclusively* appearing after *every kind of asset* in the enactment has the effect of negating the exhaustive character of the definition. This open-ended nature of the asset-based definition of investment gives adjudicating tribunals an unfettered chance to engage in expansive interpretation during disputes with unpredictable implications for parties.[251] Notwithstanding this effect, it is the standard formulation which is repeated either verbatim or *mutatis mutandis* (that is with the necessary modifications) in every other subsequent BIT.[252] The expansive nature of the definition is also evident in a general statement to the effect that 'a change in the form in which an asset is invested does not affect their character as investments' and the investment covers both investments made before or after the treaty enters into force; and thus signifies retroactive application.[253] As a result, certain mechanisms are often introduced to narrow or limit the scope of the definition of investment;

[245] Ofodile (2013) 35.
[246] Ofodile (2013); also see Mbengue (2019).
[247] See *art.2* of the Ghana-Romania BIT (1989). Except the Ghana-Romania treaty and the Bulgaria-Ghana BIT (1989), the rest of the 16 out of the 17 examined BITs applied the asset-based definition.
[248] See art. 2 (1) of the Ghana-Romania BIT (1989).
[249] See art. 1(1) of the Bulgaria-Ghana BIT (1989).
[250] See *art. 1* (a) Ghana-United Kingdom BIT (1989).
[251] It is trite learning that interpretation of enactments in legislations and treaties that use the word 'include' or 'include but not limited' make the list of circumstances therein inexhaustive and thus admit of other class or genus of items not specifically listed.
[252] See *art. 1* of the Ghana-Denmark BIT (1992), Ghana-South Africa BIT (1998), Botswana-Ghana BIT (2003), and the latest treaty, Ghana-Turkey BIT (2016), all illustrating this point.
[253] Ghana-United Kingdom BIT (1989); also see *art. 9* of the Germany-Pakistan BIT, 1959 which states that the '… present [t]reaty shall also apply to *approved investments made prior* to its entry into force…by nationals or companies of either party in the territory of the other party.'

including a closed list of the elements of the investment,[254] legality restrictions,[255] and restricting protection only to investments made in the territory of another contracting party that is owned and controlled by an investor of the contracting party in the territory of the other party. The Ghanaian situation is congruent with the formulation of the meaning of investment in the global setting.

Therefore, to avoid the above observed challenge it is argued that the government of Ghana creates more certainty and predictability in its BIT regime by taking necessary steps to limit the definition of investment as much as possible in future BITs.

3.4.3.2 Investors

The parameters of BITs in terms of their scope of application are determined by the meaning of 'investor' in the given treaty, and this is discernible from the definition. Whereas the first[256] and two[257] other concluded Ghanaian BITs in 1989 provided no explanation for the term 'investor', two others[258] entered within the same year defined the term. *Article 2(3)* of the Ghana-Romania treaty, 1989, defined 'investor' differently in respect of the contracting parties. For Ghana, investor means 'nationals, state corporations and agencies, and companies registered under the laws of Ghana which invest or trade abroad'; and for Romania, it means 'Romanian economic units having legal personality, and which under the law, are entitled to trade abroad or undertake international economic co-operation activities'.[259] Also, *art.1(b)* of the China-Ghana treaty has similar meaning for the term investor but differently worded in respect of the two contracting parties.[260] The 1999 Cuba-Ghana treaty defines investor in terms of natural or legal persons.[261] A natural person means 'any person having the citizenship' of either of the two contracting state parties in accordance with its respective laws and residing permanently in the national territory; and legal person means any

[254] See art. Canada-Serbia BIT (2014).
[255] *Vladislav Kime et al v Republic of Uzbekistan* ICSID Case No. ARB/13/6 (8 March 2017).
[256] See the Ghana-United Kingdom BIT (1989).
[257] See the Ghana Netherlands BIT (1989) and Bulgaria-Ghana BIT (1989).
[258] See the Ghana-Romania BIT (1989) and China-Ghana BIT (1989).
[259] See *art. 2(3) (a) & (b)* of the Ghana-Romania BIT (1989).
[260] See *art.1(b)* of the China-Ghana BIT (1989) where it provides that the 'term "investor" means…in respect of the people's Republic of China: ((i) natural persons who have nationality of the People's Republic of China; (ii) economic entities established in accordance with the laws of the People's Republic of China and domiciled in the territory of the People's Republic of China.' And in respect of the Republic of Ghana: (i) natural persons deriving their status as Ghanaian nationals from the law in force in the Republic of Ghana; (ii) state corporations and agencies and companies registered under the laws of Ghana which invest and trade abroad.
[261] The Cuba-Ghana BIT (1999).

entity established or constituted in the territory of either contracting party in accordance with the laws of that contracting party.[262] In both treaties, the use of the phrase 'investor means' appears to give an exhaustive list of the class of items intended by the parties to be covered and thus gives little room for any adjudicating authority to expand the meaning of investor in times of dispute. This is significant because international law does not provide any principles on the determination of nationality of natural persons; and therefore, nationality in each case is defined in relation to the domestic law. This type of definition is good for Ghana and should be maintain in its future treaties. In fact, this form of defining *investor* should be extended to other key terms, especially *investment* in future BITs to bring about certainty and predictability in their construction and interpretation.

3.4.4 Standard of treatment

The BITs often prescribed a reciprocal standard of treatment required to protect investors and investments in the territory of each of the contracting state parties. There are two major sets of standards of treatment given under BITs, namely, absolute, and relative standards of treatment. The absolute standard of treatment establishes the treatment to be given to investors and their investments without recourse to the way other investors and investments are treated. They are non-contingent on other treatments, and include fair and equitable treatment, fair protection and security, and expropriation. The relative ones require arbitral tribunals to carry out a comparative analysis of two or more sets of situations complained about to determine whether the host country breached any such standards by way of any observed differences between the complaining investor and the investors of third parties. They cover the most-favoured nation and national treatments.

The ensuing sections discuss in detail each of the absolute and the relative standards of treatments in the specific case of Ghana and in relation to the global context.

3.4.4.1 Most-favoured-nation treatment

The character of the most-favoured-nation treatment incorporated in Ghana's BITs is analogous with the text of the general BITs established under chapter two of the study.

All but one of the 17 concluded Ghana's BITs under investigation in this chapter contained most-favoured-nation treatment provisions. This is evidenced by *art.3* of Ghana's treaties with the

[262] See *art.1(2)(a) & (b)* of the Cuba-Ghana BIT (1999).

Netherlands,[263] China, Bulgaria, Cuba, Malaysia, Romania*; art.4* of the agreements with Serbia, United Kingdom, Denmark, Guinea, India, Benin, Botswana, South Africa, Switzerland; as well as *art.6* of Turkey and *art.11* of Mauritius treaties.[264] The only one without the most-favoured-nation treatment clause is the Egypt-Ghana[265] treaty. Moreover, *art. 5* of the Botswana-Ghana BIT provides exceptions in relation to existing and future customs union, common market, free trade area, or regional economic organisation as well as any international agreement and domestic legislation concerning mainly matters of taxation.[266] This exemption clause is a good example for Ghana to adopt in its future BIT negotiations.

3.4.4.2 National treatment

National treatment simply prohibits a contracting party from adopting or applying any measure (legislation, regulation, policy) in its territory that is more favourable to its nationals or companies than investors and investments of the nationals or companies in its territory of the other contracting party.[267] A typical formulation is evident in *art. 4(1)* of the agreement between the governments of United Kingdom of Great Britain and Northern Ireland and the Republic of Ghana[268] and numerous succeeding others.

The essence of the national treatment provision is that foreign investors should not be treated sub-optimally in comparison with their national counterparts who are in like circumstances. Thus, this provision outlaws the government of Ghana from promulgating and applying legislation and other measures which aims at favouring national investors at the expense of foreign investors. This ensures that foreign investors are accorded the same treatment as nationals.

[263] See the formulation in *art. 3(5)* of the Ghana-Netherlands BIT (1989), that 'If the provisions of law of either contracting party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain a regulation, whether general or specific, entitling investments by nationals of the other contracting party to a treatment more favourably than is provided by the present agreement, such regulation shall to the extent that it is more favourable prevail over the present agreement.
[264] See the referenced *arts*. of the Ghana-United Kingdom BIT (1989), Ghana-Netherlands BIT (1989), Ghana-Romania BIT (1989), China-Ghana BIT (1989), Bulgaria-Ghana BIT (1989), Ghana-Switzerland BIT (1991), Denmark-Ghana BIT (1992), Ghana-Malaysia BIT (1996), Ghana-South Africa BIT (1998), Cuba-Ghana BIT (1999), Serbia-Ghana BIT (2000), Ghana-Guinea BIT (2001), Benin-Ghana BIT (2001), Ghana-Mauritius BIT (2001).
[265] See the Egypt-Ghana BIT (1998).
[266] See *art. 5* of the Botswana-Ghana BIT (2003).
[267] Pérez-Aznar (2017) 778.
[268] See *art. 4(1)* of Ghana-United Kingdom BIT (1989).

Meanwhile disparities in economic development require capital-importing countries like Ghana to preserve its regulatory and policy space for purposes of protecting new sectors through enacting and implementing local content laws to protect such teething industries. In this regard, it is submitted that Ghana takes a decisive policy and legislative decision to ensure that its future BITs make an exception to the standard formulation of the national treatment provision to allow for the introduction of new regulations where necessary without negative legal ramifications on the state.

3.4.4.3 Fair and equitable treatment

The fair and equitable treatment (FET) standard is considered a common phenomenon in most BITs in force,[269] and yet the FET has no universally acceptable definition.[270] Hence, some recent treaties have included a clause on parties' understanding of the contours of the FET standard in such agreements, which serves as guidance to construction and interpretation.[271] Accordingly, the FET standard has been incorporated into all but one of Ghana's BITs under review.[272] It is only the Ghana-Romania BIT of 1989 that has no FET provision in it. It is further observed that the China-Ghana and Botswana-Ghana treaties of 1989 and 2003 respectively have only included the words 'equitable treatment' without reference to the term 'fair'. This is symptomatic of the variations observed in the formulation of the FET standard in chapter two. In addition, just as other BITs in the global context give an idea of the FET standard in their texts for purposes of reducing any ambiguity,[273] the Ghana-Turkey treaty has also defined the FET standard to mean 'treatment that meets the minimum standard required by international law' and no additional treatment is required which is over and beyond such a standard.[274] This example is desirable and it should be maintained in Ghana's BITs going forward.

[269] Schreuer (2005) *359.*
[270] Wythes (2010).
[271] See *art. 4(3) (a)* of the Morocco-Japan BIT (2020).
[272] See the referenced *arts*. of Ghana-United Kingdom BIT (1989), Ghana-Netherlands BIT (1989), China-Ghana BIT (1989), Bulgaria-Ghana BIT (1989), Ghana-Switzerland BIT (1991), Denmark-Ghana BIT (1992), Ghana-Malaysia BIT (1996), Ghana-South Africa BIT (1998), Cuba-Ghana BIT (1999), Serbia-Ghana BIT (2000), Ghana-Guinea BIT (2001), Benin-Ghana BIT (2001), Ghana-Mauritius BIT (2001).
[273] See *art. 4(3) (a)* of the Morocco-Japan BIT, 2020.
[274] See *art. 4(3)* of the Ghana-Turkey BIT (2016).

3.4.4.4 Full protection and security

The full protection and security (FPS) clause represents a standard of treatment of investments and investors imbedded in BITs that is independent of the host states' treatment of other investments or investors.[275]

The FPS standard is a key feature of the treaties concluded by Ghana and its bilateral investment partners. The Ghana-United Kingdom treaty stipulates reciprocal mandatary enjoyment of full protection and security by investments of nationals and companies of either contracting party in the territory of the other party.[276] There are varied formulations of the FPS standard in some of the treaties. Thus, whereas many of the treaties contained the standard formulation, the Botswana-Ghana treaty has 'full and adequate protection and security', and the China-Ghana[277] treaty has only 'protection' without the inclusion of 'full' and 'security'. The standard formulation of the FPS and its variants thereof experienced in the Ghana's BITs mirrors the broad character of FPS in general. It is, however, asserted that the observed different formulations are likely not to have any serious legal effect on the construction of the FPS standard. Nonetheless, it is further suggested that Ghana adopts a uniform formulation of the FPS standard in its future BITs and define its scope to promote certainty and predictability.

3.4.4.5 Expropriation

Any governmental conduct, direct or indirect, that imperils investors' investments are generally regarded as expropriation. The expropriation clause is prevalent in Ghana's BITs, starting with the first[278] through to the latest[279] treaty. The treaties imperatively prohibit expropriation and where a contracting party intends to take any action amounting to expropriation that action ought to meet certain prescribed standards, including due process of law, and payment of prompt and adequate compensation.[280] Similar to the general expropriations clauses discussed under chapter two, the

[275] Junngam (2018) 2.
[276] See *art. 3(1)* of the Ghana-United Kingdom BIT (1989).
[277] See *art. 3(1)* of the China-Ghana BIT (1989).
[278] See *art.7(1)* of the Ghana-United Kingdom BIT (1989) states that 'Investments of nationals or companies of either contracting party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation…in the territory of other contracting party.'
[279] See *art. 9(1)* of the Ghana-Turkey BIT (2016), which states that 'Investments shall not be expropriated, nationalized or subjected, directly or indirectly, to measures of similar effects' except certain prevailing conditions.'
[280] See *art. 6* of the Ghana-Netherlands BIT (1989).

expropriation clauses in Ghana's treaties appear too broad and need to be confined to control its legal ramifications on the state. The presence and characterisation of the clause in Ghana's BITs is an expression of the general situation regarding BITs globally.

3.4.4.6 Compensation

Compensation follows the determination of a breach to any of the treaty obligations by the host-state such as Ghana and it is largely associated with expropriation.[281] Also, it is the legitimate expectation of persons (natural and juristic) of the contracting parties for comparable treatment in situations of armed conflicts or insurrections, including commensurate compensation where there is loss of investment. It is submitted that this observed phenomenon in the general character of BITs globally is also prevalent in Ghana' BITs, as evidence of the compensation clause abound in agreements concluded in the 1980s, 1990s, 2000s, and beyond.[282] A careful reading of the provision in the treaties indicates the main ground to holding host states liable for payment of compensation, and this is in a situation where investors of either contracting party suffer losses of their investments in the territory of the other party. And there are numerous factors that may give rise to loss of investments, including war or other armed conflict, state of national emergency, revolt, riots, insurrection, or civil disobedience.[283] The wide variety of factors that may give rise to compensation should be a cause of concern for Ghana. This is because any compensation arising from a breach of the compensation clause could spell doom for the country especially in the current levels of unsustainable public debt.[284]

Thus, it is submitted that any compensation resulting from a breach of any BIT must be based on known variables and not open-ended as is the case today.

3.5 Settlement of dispute

All the examined 17 BITs have a dispute resolution clause. This is unsurprising because the issue of disputes, especially in international investment agreements is not only a natural consequence but also anticipatory. While a few of the treaties contain a unitary provision concerning dispute

[281] Anozie (2017).
[282] See *art.7* of the Ghana-Netherlands BIT (1989), *art. 4* of the Ghana-Malaysia BIT (1996), *art.6* of the Botswana-Ghana BIT (2003), and *art.10* of the Ghana-Turkey BIT (2016) all contained the 'compensation' clause.
[283] See *art.7* of the Ghana-Netherlands BIT (1989), *art. 4* of the Ghana-Malaysia BIT (1996), *art.6* of the Botswana-Ghana BIT (2003), and *art.10* of the Ghana-Turkey BIT (2016).
[284] In July 2022, government of Ghana commenced negotiations with the IMF for a Programme aimed at restoring policy credibility. This is because of Ghana's rising and unsustainable public debt.

resolution generally,[285] the majority of the others have separate clauses dealing with disputes between investors and the host state on the one hand, and between the contracting state parties of the other hand.[286] Majority, if not all, of the treaties require any emerged disputes in the first instance to be settled amicably or by consultation through diplomatic channels. However, where such non-contentious procedures fail, either party is at liberty to submit the dispute to arbitration or to the municipal court of the contracting parties for resolution. Although the option for investors to seek redress in the domestic courts is available, almost every investor-state dispute is submitted for international arbitration primarily due to the so-called lack of confidence in the judicial systems, especially those in the developing countries like Ghana.[287] The observed character of the dispute settlement system in the Ghana's BITs, especially concerning the ISDS mechanism, greatly conforms with the character of BITs generally.

The next section discusses the issue of foreign participation in Ghana's gold mining, regulations and policies, incidence of human rights violations and abuses arising from their operations, as well as legal mechanisms to redress such infractions.

3.6 Foreign investment in the mining sector and implications for human rights

3.6.1 Foreign participation

The exact date or period when gold mining began in Ghana is uncertain; but evidence of natives engaging in gold mining and processing before the arrival of the Europeans abound.[288] Records have it that gold mining had been undertaken in Obuasi for many centuries by the 'Akan group', especially the Ashanti people from the 1700s.[289] The methods used during this pre-colonial period were 'extremely simple'[290] and could be said to have had less effect on the environment at the time than in recent years where sophisticated technology is being deployed.

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[285] See *art. 9* of the China-Ghana BIT (1989) evidencing the unitary clause model.
[286] See *arts.* 10 and 11 of the Ghana-United Kingdom BIT (1989) and *arts*. 7 and 8 of the Ghana-Malaysia BIT (1996) illustrating the two-clause model.
[287] Many authors have argued this is only a convenient position taken by investors, since evidence abound of these investors making use of the same so-called discredited domestic legal system and courts to vindicate their rights when it suits them. See George & Thomas (2018).
[288] Hilson G *Harvesting mineral riches:1000 years of gold mining in Ghana* (2002), in 28 *Resources Policy* (Environmental Policy and Management Group (EPMG), imperial College of Science, Technology and Medicine, Royal School of Mines 12/2002) 18 (hereinafter 'Hilson (2002)'); also see Ofosu-Mensah AE '*Traditional Gold Mining in Adanse*' (2010) 19 (2) *Nordic Journal of African Studies* 124.
[289] Hilson (2002) 19.
[290] Hilson (2002) 16.

The first notable foreign participation in gold mining was by the Europeans around 1874, and this ushered in commercial exploitation of the commodity.[291] Nevertheless, it was not until the early 1880s that foreign interest increased with substantial investment of 'European capital', especially in the acquisition of mining concessions.[292] Hilson argues that despite increased foreign interest in the sector, insignificant quantity of gold was recorded by 1894, and this is attributable to the failure of most of the mining enterprises at the time resulting from inexperience, low capital, basic technology, and lack of managerial expertise.[293] However, gold production in pre-independent era was improved after the opening of several mines in Obuasi, especially the Ashanti Goldfields Company, which remains Ghana's most important gold mine and one of the richest in the world.[294]

The post-independence period witnessed a relatively stable annual output of gold in the country in the 1960s, recording 956 947 oz in 1960 and 1 002 940 oz in 1963 before declining to 946 617 oz in 1964. The annual output of the commodity further deteriorated throughout the 1970s and the early 1980s because of 'excessive state control'.[295] The most enduring and progressive growth in gold mining occurred after the government of Ghana signed up for an IMF-led Economic Recovery Programme (ERP) in 1983.[296] Thus, annual production levels increased from 373 937 oz in 1988 to 1 261 424 oz in 1993,[297] and peaking at 5 232 398 419 oz in 2018.[298] The incremental growth in the annual production over the years could be regarded as a direct consequence of increased foreign interest and investments in the sector.[299] Therefore, it is submitted that the ERP, in which period Ghana had its first BIT, succeeded in restoring investor confidence in the economy generally with tremendous positive effect on foreign investment in the mining sector.[300]

[291] Hilson (2002) 20.
[292] Hilson (2002) 20.
[293] Hilson (2002).
[294] Hilson (2002) 21
[295] Hilson (2002) 22.
[296] Hilson (2002) 23.
[297] Hilson (2002) 23, 24.
[298] Ghana gold production available at https://www.ceicdata.com/en/indicator/ghana/gold-production (accessed on 13 December 2022). Note: The 2018 output was 148 336 000 kg and this figure was converted to oz using a conversion factor of 1 kg to 35.274 oz to make it comparable with earlier figures.
[299] Hilson (2002) 24.
[300] Dagbanja (2019).

3.6.2 Mining regulations and policies

Ghana's Minerals Policy is traced to the British rule and it was underlined by five key principles.[301] These objectives were: to establish credible administrative and legal framework to support mining operations, provide security of tenure for grantees of mineral rights, ensure effective management of issues arising out of mining operations between mining companies and the communities, raise revenues, and contribute to funding of the British government.[302] For purposes of the human rights and Ghana's BITs, the study agrees with Hilson's assertion that the most important principle was and still is the recognition of the need to 'ameliorate problems between miners and the local communities' arising out of the mining operations.[303]

Additionally, the promulgation of the Minerals and Mining Law of 1986 (PNDCL 153) with its favourable tax policy objectives 'made the investment climate extremely attractive for foreign mining companies' in the country.[304] The author asserts that all the policies were meant to increase foreign investors' interest in the mining sector for purposes of revitalizing productivity in the economy.[305] Currently, the most important mining legislation is the Minerals and Mining Act[306] with similar policy goals, except contributing to funding the British government. However, there are no pre-conditions requiring environmental and social impact assessment before the awarding of minerals rights under the legislation.[307]

This account doubtlessly shows the significant contribution of FDI in the economy, especially in the mining sector. The question is, should this be encouraged at the expense of protecting human rights and the environment? This study believes a balanced solution is required, and that using BITs to attract FDI must not only respond to, but also balance, the rights and obligations of investors on the one hand and individuals and communities of the other. Thus, the next section examines the human rights issues in the gold mining sector.

[301] Hilson (2002) 19.
[302] Hilson (2002) 19.
[303] Hilson (2002) 19.
[304] Hilson (2002) 24.
[305] Hilson (2002) 24.
[306] Minerals and mining Act, 2006 (Act 703).
[307] See *section* 13 titled 'Grant of mineral rights' of Act 703.

3.6.3 Human rights issues in the mining sector

The worth of a business entity is often 'measured in terms of its business performance' but apart from this approach, the operational 'efficiency of a business' is also determined based on its human rights orientation.[308] It is argued that the human rights-based approach to measuring the success or otherwise of mining operations in Ghana has been overlooked in many instances. Meanwhile, this approach is preferable because such operations 'affect human society in variety of ways' including farming, health, human rights violations, labour exploitations, and environmental protection.[309]

At the heart of mining operations is the deprivation of indigenous landowners of their property rights in land. While the law of Ghana protects private and corporate interest in land, [310] it also permits compulsory acquisition of such land under certain given conditions, primary among them is *prompt payment of fair and adequate compensation*.[311] The acquisitions and subsequent payment of compensation affects both owners and users of land, but the users are often disproportionately impacted.[312] Apart from delays and inadequate compensation to affected persons, it has been argued that 'deprivation of access to land' by individuals and communities has a debilitating effect on the right to education, food, health, housing, work, and livelihoods generally.[313]

While acknowledging that this situation is not applicable only to the mining sector, it is significant to point out that a single mining concession usually involves vast hectares of land, often displacing many individuals and communities. For instance, AngloGold Ashanti Obuasi concession alone is roughly 455 square kilometres, and this is approximately 14 per cent of the total land area[314] of the Greater Accra Region of Ghana.[315] Accordingly, it has been argued that gold mining has come at

[308] Dagbanja DN 'Human rights, mineral rights and corporate social responsibility in Ghana: Legal and policy analyses' (2012) *Ghana Mining Journal* 67 (hereinafter 'Dagbanja (2012)').
[309] Dagbanja (2012) 68.
[310] See *art*. 18 of the Constitution of Ghana, 1992, where it provides in clause 1 that 'Every person has the right to own property either alone or in association with others.'
[311] See *art*. 20 of the Constitution of Ghana, where it says in clause 1 that '[n]o property of any description, or interest in or right over any property shall be compulsorily taken possession of or acquired' except some specified conditions including 'prompt payment of fair and adequate compensation' are met.
[312] *UNHRC Report on Ghana* (2014) 10 para 34.
[313] *UNHRC Report on Ghana* (2014) 10 para 35.
[314] The Greater Accra Region has a total area of 3,245 square kilometres.
[315] In 2016, AngloGold Ashanti released 60% (about 273 square kilometres) of its Obuasi mine concession to government of Ghana. The researcher used this information to compute the 100% of the said concession to be at 455 square kilometres. See news article at https://www.ghanaweb.com/GhanaHomePage/business/AngloGold-surrenders-60-of-concession-to-gov-t-422219 (accessed 14 December 2022).

cost to many as several 'indigenous communities that depend on land for their survival have lost their livelihoods to giant multinationals mining companies operating in the country'.[316]

Another source of exploitation is high levels of poverty among rural dwellers and this vulnerability is regarded as a key element in the equation of labour exploitation.[317]

The next section discusses in brief the legal and institutional framework to remedy human rights violations in Ghana.

3.6.4 Mechanisms to redress human rights violations

Chapter five of the Constitution of Ghana protects fundamental rights and freedoms of persons in Ghana.[318] The constitutional protection of human rights is not only limited to those named in the Constitution but also covers others that are 'inherent in a democracy and intended to secure the freedom and dignity of man'.[319]

At the institutional level, there are two main legal means by which human rights violations could be addressed. The first procedure is through the court system. The law enjoins any person who is a victim, or experiencing, or at-risk of human rights violation to seek redress at the high court.[320] The second option is for such affected persons to petition the Commission on Human Rights and Administrative Justice (CHRAJ) for investigations.[321]

The combine effect of *arts. 33 (1)*[322] and *218* of the Constitution is that CHRAJ shares limited[323] concurrent jurisdiction with the high court of Ghana as forum for remedying human rights related

[316] Ellimah R 'Stained gold: A story of human rights violations in Ghana's mining industry' in Stoffregen M (ed) *Fighting the Tide: Human Rights and Environmental Justice in the Global South* (2017) 172-87 (hereinafter 'Ellimah (2017)') available at https://www.dejusticia.orgwp-content/uploads/2017/08/taller-global-22-08-2017-1 (accessed 27 July 2022).

[317] Engle E 'Corporate social responsibility (CSR): Market-based remedies for international human rights violations' (2004) 40(1) Willamette Law Review 103.

[318] See Chapter 5 of the Constitution of Ghana.

[319] See art. 33(5) of the Constitution of Ghana.

[320] See art. 33(1) of the Constitution of Ghana.

[321] See art. 218 of Constitution of Ghana.

[322] *Art. 33(1)* provides: 'Where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, is being or is likely to be contravened in relation to him, then, *without prejudice to any other action that is lawfully available*, that person may apply to the high court for redress.' [emphasis is mine].

[323] limited because by *s.7* of Act 456 and *art. 218* of the Constitution CHRAJ mandate is not triggered in circumstances where person's fundamental human right is likely to be violated but it has not yet occurred. However, CHRAJ may by *art. 229* of the Constitution of Ghana invoke the jurisdiction of the high court in situations of anticipatory breaches of rights of persons as a cure to this limitation.

complaints. CHRAJ is, however, a quasi-judicial body, and it is situated within the context of a state-based non-judicial grievance mechanism for resolving business-related human rights complaints. Also, there must be an official complaint to trigger the investigative machinery of CHRAJ in matters relating to human rights.[324] Thus, CHRAJ's human rights mandate is not properly invoked by mere publications of human rights violations in the media; however, it may investigate such issues for purposes of policy and legislative reforms.[325]

The judiciary is also notorious for excessive delays in dispensing justice coupled with long distances to the high court especially in rural areas where the greater number of mining operations take place and hence human rights violations.[326] However, ongoing implementation of automation of the court system is likely to improve turnaround time.[327]

3.7 Conclusion

Ghana's BITs have similar features with the rest of the BITs in the global setting. For instance, every examined BIT has a title which defines the two contracting state parties, a preamble which gives an idea of the intent and purpose of the treaty as well as an interpretation clause. The rest are most-favoured-nation and national treatment, fair and equitable treatment, full protection and security, expropriation, and compensation provisions. Additionally, the incorporation of a dispute settlement clause is a common feature of the BITs. Moreover, there is lack of integration of human rights and environmental concerns in the treaties. Also, none of the dispute settlement provisions makes it a requirement for parties to submit disputes in the first instance to the domestic courts for resolution. The derogation from using municipal court system is symptomatic of majority of the dispute settlement clauses in BITs generally.

Gold mining activities in Ghana predates arrival of the Europeans in 1874 and their subsequent participation in commercial exploitation of the commodity.[328] Notwithstanding increased foreign

[324] *Republic v. High Court (Fast Track Division) Ex Parte, CHRAJ; Interested Party, Richard Anane (HC)* [2007-8] SCGLR, 340 (hereinafter 'Ex Parte Anane [2007-8] SCGLR)'.
[325] Ex Parte Anane [2007-8] SCGLR.
[326] Ellimah (2017) 179.
[327] Addazi-Koom ME & Bediako EA 'Implementing an e-justice system in Ghana: Prospects, risks, challenges and lessons from best practice' (2019) at https://www.researchgate.net/publication/347437666_implementing_an_e-justice_system_in_ghana_prospects_risks_challenges_and_lessons_from_best_practice (accessed 22 December 2022).
[328] Hilson (2002) 18-20.

involvement, no significant quantity of gold production was realized by 1894[329] and this situation continued up to the 1950s. However, post-independence saw relatively stable annual outputs in the 1960s and this stability became more pronounced after Ghana signed up for the ERP in 1983.

Ghana's Minerals and Mining Policy is a remnant of British rule, which was underlined by five key objectives. The most important objective for purposes of human rights argument in Ghana's BITs was and still is recognition of the need to 'ameliorate problems between miners and the local communities' arising out of mining operations.

Business performance should not only be measured by its profitability ratios but also by its human rights orientation.[330] This is critical because business activities such as mining 'affect human society' severally.[331] For instance, acquisition of land concessions deprive indigenous landowners of their property rights in land with consequential effects on the right to education, health, housing, and work.[332] Thus, gold mining has come at a cost to many as several indigenous communities have lost their livelihoods to multinational mining corporations.[333]

Chapter five of the Constitution of Ghana protects fundamental rights of persons.[334] The Ghanaian courts and CHRAJ are the main legal means by which individuals or groups who suffer human rights violations may seek redress.

Thus, chapter four explores approaches to making Ghana's BITs human rights compatible. The objective is to make Ghana's BITs human rights compatible to serve the interest of both foreign investors and the communities, including individuals who may suffer human rights violations on the back of the operations of foreign investments in Ghana. Thus, the ensuing chapter discusses the context and reorientation of the purpose of BITs, legal and policy basis for human rights integration, methods of human rights integration, practical integration process, and conclusion. The overall objective is to make a solid case for a new Model BIT, to be configured in a manner that ensures the country's future BITs are human rights compatible.

[329] Hilson (2002).
[330] Dagbanja (2012) 67.
[331] Dagbanja (2012) 68.
[332] *UNHRC Report* (2014) 10.
[333] Ellimah (2017).
[334] See Chapter 5 of the Constitution of Ghana.

CHAPTER FOUR: APPROACHES TO MAKING BITS HUMAN RIGHTS COMPATIBLE

4.1 Introduction

Chapter two discussed the legal structure of typical bilateral investment treaties (BITs) within the global context. That is identifying and examining the common features of BITs in the international arena comprising the title, preamble, scope, most-favoured-nation treatment, national treatment, fair-and-equitable treatment, full protection and security, expropriation, compensation, and dispute settlement provisions. The chapter also examined generally the decisions and/or awards of arbitral tribunals as a proxy to determining the human rights implications of the core features of BITs on varied stakeholders in the territory of the host state.

Chapter three followed with a detailed examination of the specific case of the structure of BITs in Ghana, establishing that the main features of such treaties are common with the general features established in chapter two. The investigation concluded that there are commonalities between the features of the Ghana BITs and the general features of BITs globally.

Just as in the nature and character of BITs internationally, the examined Ghanaian 17 BITs failed to incorporate human rights dimensions into their text. A systematic analysis of the prevailing factors that make Ghana's existing BITs human rights incompatible show a common thread that neither do the preambles nor the substantive provisions of these treaties in the slightest sense seek to hold foreign investors accountable for human rights violations or infringement upon labour and environmental standards in the country.

Accordingly, chapter four focuses on human rights integration into the text of BITs in Ghana.

4.2 Context setting

The overwhelming impact of foreign investment on the social life of host states raises substantial questions on whether the principle of access to justice espoused to benefit the investor in the nature of binding arbitrations compares favourably with corresponding remedial proceedings available to other stakeholders (including individuals and groups) who are perilously impacted by investments in the host countries.[335] The right of access to the municipal courts by the local population is not safeguarded by the law and justice systems of the host states because modern investment law compels such host states to delegate resolution of investor-state disputes to international arbitration

[335] Francioni (2009).

bodies.[336] This unbridled delegation and ceding to extensive compulsory international arbitration by the host state undermines the authority of municipal courts to resolve investment disputes, thereby making the domestic courts incapable of providing judicial protection against harm caused by the investor.[337] This characterisation of the human rights problem of BITs stems from the nature of the texts of such treaties.

It is established from chapters two and three of the study that there is commonality in terms of the features of BITs in the global context and in Ghana, in what is characterized by the United Nations Office of the High Commissioner for Human Rights (OHCHR) as *imbalance*, *inconsistency*, and *irresponsibility*.[338] The imbalance effect stems from the fact that almost every BIT grants legally enforceable rights to investors, but rarely any responsibilities or obligations concerning human rights and the environment. The second aspect of this issue is that apart from investors who are third parties to these treaties having the opportunity to rely on the state's obligations to initiate legal action, often in the form of arbitration proceedings against such host states for any claim of breach of investments' protection provisions and standards, no other third party such as individuals and communities affected by investment-related projects has any such privilege.[339] Inconsistency in this context concerns investors' justification for investor-state dispute settlement system (ISDS) by reason of supposed weak domestic legislation and court systems in developing countries where their investments reside; but such investors have often resorted to the same municipal courts to vindicate their rights when affected individuals and communities pursue claims against them on grounds of human rights violations.[340] There is also lack of consistency in the decisions of arbitral tribunals due to inconsistent precedential approach. The stated imbalance and inconsistencies have conspired to induce a substantial degree of irresponsibility on the part of investors, by motivating such investors to concentrate on investments protection to the utter neglect of any responsibility to respect human rights under both national and international law.[341]

[336] Francioni (2009).
[337] Francioni (2009).
[338] UNHRC Report (2021).
[339] UNHRC Report (2021).
[340] UNHRC Report (2021).
[341] UNHRC Report (2021).

4.3 Reorienting the purpose of foreign investment

The key purpose and object of attracting foreign investment must include the realization of human rights, instead of human rights just demonstrating an exception to such investment agreements to justify host countries' regulation of investments and investors. Thus, Ghana must ensure that its investment derive contributes immensely to inclusive and sustainable development by having a Model BIT that accomplishes this objective. For instance, the proposed Ghana Model BIT should mimic the goals and aspirations of the Pan-African Investment Code[342] and the International Chamber of Commerce Guidelines[343] for International Investment. The objective of the Pan-African Investment Code states that it is 'to promote, facilitate and protect investments that foster the sustainable development' of every member state and especially in the member state in which the investment is made.[344] Also, para. XI.1 of the International Chamber of Commerce Guidelines for International Investment provides that investors should 'seek to create shared value by developing business opportunities that contribute to the economic, social and environmental process of the host country'.[345]

Moreover, several national constitutions require governments to conduct their international affairs, including negotiating international investment agreements, in a manner that does not only promote sustainable development but also protect the interest of such countries and economies. This is exemplified in *art. 43(3)* of the Constitution of Ethiopia that any international agreement entered, or relations formed by the state shall be such as to guarantee the sustainable development of that country.[346] In its external dealings, the Constitution of Ghana mandates the government to promote and protect the interest of the country, institute 'a just and equitable economic and social order', promote respect for international law (this includes international human rights law), and comply with the principles, aims, and ideals enshrined in the Charter of the United Nations and other international organizations of which Ghana is a member.[347] The Constitution further supports

[342] See *art. 1* of the Draft Pan-African Investment Code, 2016 of the African Union Commission available at https://au.int/en/documents/20161231/pan-african-investment-code-paic (accessed 15 November 2022).
[343] See *para. XI.1* of the ICC Guidelines for International Investments, 2016 available at https://iccwbo.org/publication/icc-guidelines-international-investment-2016/ (accessed 15 November 2022).
[344] See art. 1 of the Draft Pan-African Investment Code, 2016 of the African Union Commission available at https://au.int/en/documents/20161231/pan-african-investment-code-paic (accessed 15 November 2022).
[345] See para. XI.1 of the ICC Guidelines for International Investments, 2016 available at https://iccwbo.org/publication/icc-guidelines-international-investment-2016/ (accessed 15 November 2022).
[346] See *art. 43(3)* of the Constitution of the Federal Republic of Ethiopia, 1995.
[347] See *art. 40* of the Constitution of the Republic of Ghana, 1992.

encouragement of foreign investment to the extent that such investments are consistent with the domestic law in force.[348]

4.4 Principles underlying human rights integration into BITs

4.4.1 General context

There is a human rights-based approach to supporting the proposition for integrating human rights into BITs.[349] The foundation of the approach is grounded in international human rights instruments representing a 'normative framework' embodying general principles and norms of international law, customary international law, and legal precedents.[350] It is submitted that the human rights-based approach is also rooted in the municipal laws of many states. It is for this reason that international human rights norms and treaties binding on individual states would serve as instruments for evaluating and appreciating Ghana's legal responsibility to have a Model BIT that expressly protects and safeguards human rights generally as well as labour standards and the environment. Therefore, this section of the chapter discusses the human rights-based approach to integrating human rights into BITs with the primary goal of advancing the argument that the government of Ghana is bound by its international and domestic obligations to conduct its affairs regarding investment agreements in a manner that protects and safeguards human rights, labour standards, and the environment. The approach essentially 'offers a firm foundation for people to make claims and for holding states to account for their duties to improve the access of their citizens [and other persons living in that country] to the realisation of their rights'.[351] It is well established in international law and other declarations that states such as Ghana have a legal duty to respect and encourage private persons including investors to respect human rights in their territories.[352] They are also enjoined to protect such rights as well as provide mechanisms for those who suffer human rights violations and abuse to credible sources of remedy.[353]

This notion is succinctly embedded in the UN Guiding Principles on Business and Human Rights as detailed below.

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[348] See *art. 36 (4)* of the Constitution of the Republic of Ghana, 1992.
[349] See generally Adeleke F *International Investment Law in Africa: Exploring a human rights based approach to Investment Regulation and Dispute Settlement* (2018); and George and Thomas (2018).
[350] Chidede (2019) 80.
[351] Chidede (2019) 80.
[352] See generally UNHRC Report (2021) and George & Thomas (2018).
[353] UNHRC Report (2021).

> *States must protect persons against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.*[354]

Guiding principle 9 is the strongest point in favour of the position taken by this study, and it provides that 'states should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other states or business enterprises…through investment treaties and contracts'.[355] At the national level, while *art. 33* of the Constitution of Ghana provides for the protection of rights by the judiciary,[356] Chapter 18[357] of the same Constitution establishes a national human rights institution responsible for investigating and remedying human rights abuses and violations. This presupposes that both national and international law have a favourable disposition to protecting human rights and remedy business (investment)-related human rights abuse and violations in Ghana. What is lacking is the required political will to act; and it is for this reason that this study is proposing radical measures toward designing a human rights compatible Model BIT for Ghana to decisively deal with this conundrum.

4.4.2 Right to development

The right to development has long received substantial support from the comity of nations, ranging from *art.55* of the Charter of the United Nations,[358] *art. 1* of the UN International Covenant on Economic, Social and Cultural Rights,[359] through to the UN Declaration on the Right to

[354] United Nations Guiding Principles on Business and Human Rights 2011 (hereinafter 'UNGPs); also see Chidede (2019).
[355] See UNGPs (2011) Principle 9.
[356] *Art. 33(1)* provides that 'Where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the high court for redress.'
[357] *Chapter 18* of Constitution of Ghana is headed 'COMMISSION ON HUMAN RIGHTS AND ADMINISTRATIVE JUSTICE' and *art.218* provides the functions of the Commission.
[358] *Article 55(a)* of Chapter IX of the Charter of the United Nations (1945) provides that the UN shall promote 'higher standards of living, full employment, and conditions of economic and social progress and *development'* (emphasis added).
[359] *Article 1* of the International Covenant on Economic, Social and Cultural Rights provides that all people shall have the right to 'freely determine their political status and freely pursue their economic, social and cultural *development*' (emphasis added).

Development.[360][361] It is further mainstreamed into the Vienna Declaration and Programme of Action[362] as well as the Millennium Declaration.[363] Nevertheless, the African Charter on Human and Peoples' Rights (ACHPR) is regarded as the first to legally recognise the right to development in 1981.[364] *Article 22* of the ACHPR provides that every person 'shall have the right to their economic, social and cultural development'; and further enjoins states to ensure the enjoyment of the right to development.[365] The right to development was subsequently incorporated into several human rights instruments of the African Union (AU), such as the African Charter on the Rights and Welfare of the Child,[366] the Protocol to the ACHPR on the Rights of Women in Africa,[367] and the African Youth Charter.[368] Additionally, several African countries including Ghana have enshrined the right to development in their national Constitutions as a fundamental human right.[369] A case in point is *art.36(1) o*f the Constitution of the Republic of Ghana, where it stipulates that,

> *The state shall take all necessary action to ensure that the national economy is managed in such a manner as to maximize the rate of economic development and to secure the maximum welfare, freedom and happiness of every person in Ghana.*[370]

The right to development is regarded as,

> *…an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.*

[360] Declaration on the Right to Development, General Assembly Resolution 41/128 U.N. Doc. A/RES/41/128, 1986.
[361] Fauchald OK 'International investment law in support of the right to development?' (2021) 34 *Leiden Journal of International Law* 182.
[362] See *para. 10* of the Vienna Declaration and Programme of Action, adopted by consensus at the World Conference on Human Rights on 25 June 1993 in Vienna, Austria.
[363] See *para. 11* of the Millenium Declaration, UN General Assembly Resolution 55/2 adopted on 8 September 2000.
[364] Chidede (2019) 98.
[365] See *art. 22 (1) & (2)* of the ACHPR.
[366] See *art. 5* of the African Charter on the Rights and Welfare of the Child.
[367] See *art. 19* of the Protocol to the ACHPR on the Rights of Women in Africa
[368] See *art. 10* of the African Youth Charter.
[369] Chidede (2019) 98.
[370] Constitution of the Republic of Ghana, 1992.

> *The human right to development also implies …the right of peoples to…the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.*[371]

In sum, the right to development obliges states to formulate development policies and programmes for purposes of improving the wellbeing of the population as a collective as well as individuals, based on their active, and meaningful participation in development and the fair sharing of the benefits thereof.[372] States are further enjoined to take necessary measures to ensure the realisation of the right to development at the national level.[373]

Moreover, the main objective for a developing country like Ghana to negotiate and conclude any BIT is to attract foreign investment through increased flow of foreign capital[374] into that economy with the aim of contributing to achieving its national developmental goals. Thus, Ghana's BITs must be such that they do not promote an agenda that is incongruent with the right to development. Accordingly, the right to development as a basis to integrating human rights into BITs is well founded.

4.4.3 Labour rights and standards

The fundamental principles underpinning international labour rights and standards are set out in the 1919 Constitution of the International Labour Organisation (ILO) and the subsequent ILO Philadelphia Declaration of 1944.[375] The state's duty to respect, promote, and realise fundamental rights in conformity with those advanced in the fundamental ILO Conventions is affirmed by the 1998 ILO International Labour Conference.[376] Ghana is a signatory to about 51, including 8 of the fundamental, ILO Conventions[377] and it is therefore legally bound by the provisions embodying

[371] See art.1 of the Declaration on the Right to Development, General Assembly Resolution 41/128 U.N. Doc. A/RES/41/128, 1986.
[372] Chidede (2019) 99.
[373] Chidede (2019) 99.
[374] Salacuse (1990) 661.
[375] Chidede (2019) 95.
[376] Chidede (2019) 95.
[377] See ILO Conventions ratified by Ghana available at https://ilo.org/dyn/normlex/en/f?p=11200:0::no::p11200_country_id:103231 (accessed 18 November 2022).

labour standards in such Conventions such as forced labour,[378] non-discrimination,[379] minimum age,[380] and freedom of association and collective bargaining.[381] These labour rights are widely recognised as *core* human rights requiring the needed respect and protection.[382] The Ghanaian Constitution and other labour-related legislation also have provisions that mirror the ILO labour standards, including prohibition of forced labour,[383] minimum age of employment,[384] safe working environment,[385] non-discrimination,[386] freedom of association[387] and collective bargaining[388] power. Thus, developing countries like Ghana must maintain their sovereign power and authority to not only safeguard labour rights in the domestic setting but also ensure that investors and their investments respect such rights.[389] The state must further take steps to ensure the availability of reliable mechanisms to remedy any emergent human rights violations, including labour rights suffered by individuals and communities at the hands of foreign investors resulting from their investment operations in the country.

It is strongly submitted that the tendency for countries to lower labour standards in competition to attract foreign investment, popularly described as a race-to-the-bottom, must be avoided at all costs

[378] ILO Forced Labour Convention, 1930 (No. 29) and ILO Abolition of Forced Labour Convention, 1957 (No 105) available at https://ilo.org/dyn/normlex/en/f?p=11200:0::no::p11200_country_id:103231 (accessed on 18 November 2022).
[379] ILO Equal Remuneration Convention, 1951 (No 100) and ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111) available at https://ilo.org/dyn/normlex/en/f?p=11200:0::no::p11200_country_id:103231 (accessed on 18 November 2022).
[380] ILO Minimum Age Convention, 1973 (No. 138) available at https://ilo.org/dyn/normlex/en/f?p=11200:0::no::p11200_country_id:103231 (accessed on 18 November 2022).
[381] ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and ILO Right to Organise and Collective Bargaining Convention, 1949 (No. 98) available at https://ilo.org/dyn/normlex/en/f?p=11200:0::no::p11200_country_id:103231 (accessed on 18 November 2022).
[382] Chidede (2019) 96.
[383] See *art.16(2)* of the Constitution of Ghana, 1992.
[384] See *ss. 89, 90, 91* of the Children's Act, 1998 (Act 560) of Ghana.
[385] See *art. 36(10)* of the Constitution of Ghana where it provides that 'The State shall safeguard the health, safety and welfare of all persons in employment' in the country; also see generally Part XV titled 'Occupational Health, Safety and Environment' of the Ghana Labour Act, 2003 (Act 651), as amended.
[386] See *art. 17* of the Constitution of Ghana; see generally the Ghana Labour Act, 2003 (Act 651), as amended.
[387] See *art. 21(1) (e)* of the Constitution of Ghana, 1992 where it provides that all persons shall have the right to 'freedom of association' which includes the freedom to join and/or form trade unions or other associations whether local or international in furtherance of protecting their rights; also see section 79 of the Ghana Labour Act, 2003 (Act 651), as amended.
[388] See generally Part XII titled 'Collective Agreement' of the Ghana Labour Act 2003 (Act 651), as amended.
[389] Chidede (2019) 96.

by Ghana in its quest to bring in foreign investment, else the constitutional intent and aspiration to safeguard labour standards and human rights in the country would be a mirage.

4.4.4 Environmental and public health and safety concerns

Proponents of environmental justice have elevated environmental concerns to the status of basic human rights; and states have an undiluted duty, under public international law, to take measures, including enacting legislation to safeguard society and the environment from harm by the activities of private individuals and corporations.[390] This position was enunciated in the case of *Arbitration Regrading the Iron Rhine ('Ijzeren Rijn') Railway (Belgium v. Netherlands)*[391] where the Permanent Court of Arbitration held that,

> *Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm…This duty…has now become a principle of general international law. This principle applies not only in autonomous activities but also in activities undertaken in implementation of specific treaties between the parties.*[392]

The issue of environmental regulation is inextricably linked to public health protection. The Ghana Constitution is forthright on the issue. It enjoins the state to take appropriate measures necessary to protect the national environment for current and future generations.[393] The Constitution further called all citizens to action in matters of environmental protection, where it provides expressly in *art.41 (k)* under the heading 'DUTIES OF A CITIZEN' that the exercise and enjoyment of rights are indivisible from the performance of duties and obligations and so 'it shall be the duty of every citizen to protect and safeguard the environment'.[394] The Constitution also mandates the National Development Planning Commission (NDPC), a constitutional body, to 'make proposals for the protection of the natural and physical environment'.[395] This is clear indication that the fidelity of

[390] Chidede (2019) 91.
[391] *Arbitration Regrading the Iron Rhine ('Ijzeren Rijn') Railway (Belgium v. Netherlands)*, Permanent Court of arbitration – Award of the Arbitral Tribunal (24 May 2005) (hereinafter 'Belgium v. Netherlands (2005)')
[392] See para. 56 of Belgium v. Netherlands (2005).
[393] See art. 36(9) of the Constitution of Ghana, 1992 provides that 'The state shall take appropriate measures needed to protect and safeguard the national environment for posterity; and shall seek cooperation with other States and bodies for purpose of protecting the wider international environment for mankind.
[394] *Article 41(k)* of the Constitution of Ghana, 1992.
[395] See *art. 87(2)(c)* of the Constitution of Ghana, 1992.

the Ghana Constitution to the environment is huge and inter-generational.[396] Hence, the least the government and people of Ghana can do to realise this aspiration is to ensure that BITs do not derogate from the cardinal principles of safeguarding and protecting environmental rights.

4.4.5 Sustainable development

Some academics regard sustainable development as a concept that is not only vague but also defies any precise definition and thereby making it appear incapable of legal classification.[397] The most fundamental landmark history in sustainable development is the Rio Conference on Environment and Development with its accompanying Declaration of Principles,[398] where it brings sustainable development to the ambit of the law in strongly worded legal terms.[399] Nevertheless, the legal issues surrounding the concept traverse three fields of international law, viz, international human rights law, international environmental law, and international economic law.[400] However, this part examines sustainable development along the first two fields. Sustainable development has come of age as a basic human right requiring a significant shift from the era where economic concerns overshadowed environmental and social issues.[401] The role of sustainable development in projecting the 'public policy purpose' of not subordinating social and environmental concerns to that of economic issues must always be reflected upon when negotiating BITs.[402]

Sustainable development has been defined in many ways but the most frequently quoted definition is the Brundtland Report which says 'sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[403] Many scholars have however berated this definition as being inadequate and requiring a revision to accommodate current trends.[404] It has become the leading framework guiding international

[396] See *art. 36(9)* of the Constitution of Ghana, 1992.
[397] Barral V '*Sustainable development in international law: Nature and operation of an evolutive legal norm'* (2012) 23(2) *The European Journal of International Law* 383 (hereinafter 'Barral (2012)').
[398] Rio Declaration on environment and Development, 1992, A/CONF.151/26 (vol.1)
[399] Barral (2012) 379.
[400] Tladi D *Sustainable development in International Law: An analysis of key enviro-economic instruments* (2007) 66 (hereinafter 'Tladi (2007)').
[401] Tladi (2007) 94.
[402] Chidede (2019) 101.
[403] Report of the World Commission on Environment and Development Report: Our Common Future available at www.un-documents.net/our-common-future.pdf (accessed 19 November 2022).
[404] Kim RE 'The nexus between international law and the sustainable development goals' (2016) 25(1) Review of European Community & International Environmental Law 25 (hereinafter 'Kim (2016)').

cooperation and national development agenda, which is expressed in the 2030 agenda for sustainable development and its accompanying sustainable development goals (SGGs).[405]

The concept of sustainable development is acclaimed as a principle of international (customary) law and is incorporated in many international treaties.[406] Additionally, the concept appears in many international declarations and policy documents concerning investment, including UNCTAD Investment Policy Framework for sustainable development,[407] the OECD Policy Framework for Investment,[408] the UN 2030 Agenda,[409] and the G20 Guiding Principles for Global Investment Policymaking.[410] The SDGs are fashioned in a universal form, but may be tweaked by individual countries to meet their unique peculiarities and national goals. The SDGs aim at integrating the economic, social, and environmental pillars of development to transform the functioning of societies and economies for a more sustainable tomorrow, while facilitating the pooling of quality and strategic investment in pursuit of the said transformation agenda.[411] The principle of sustainable development is grounded in the sovereignty of the state and its exercise of control over the natural resources, ensuring environmental protection and right to development.[412]

Ghana subscribes to these international instruments and documents espousing the need to maintain policy space and the right to regulate in line with the overarching objectives of sustaining development. For instance, under the UN 2030 Agenda, states have declared their support and readiness to 'respect each country's policy space and leadership to implement policies for poverty reduction and sustainable development'.[413] Further, private business activities and investments are recognised as key drivers of productivity and inclusive economic growth and job creation.[414]

[405] United Nations *Transforming Our World: The 2030 Agenda for Sustainable development*, 2015 (hereinafter 'UN Agenda 2030').
[406] Tladi (2007) 65; and for examples the treaties, see Chidede (2019) 102, footnote 555.
[407] UNCTAD Investment Policy Framework for sustainable development, 2015.
[408] OECD Policy Framework for Investment, 2015.
[409] United Nations *Transforming our World: The 2030 Agenda for Sustainable development*, 2015.
[410] G20 Guiding Principles for Global Investment Policymaking, 2016.
[411] Chidede (2019) 102.
[412] Chidede (2019) 102, also see Tladi (2007) 65.
[413] See *para. 63* of the United Nations *Transforming our World: The 2030 Agenda for Sustainable development* (2015) A/RES/70/1; also see *paras. 24, 44, and 74 (a)*.
[414] See Paragraph 67 of the UN 2030 Agenda.

4.5 Modification of BITs

This section examines the methodology that may be applied to modify an existing BIT as well as the practical textual changes required to be made in modifying specific provisions of Ghana's BITs in furtherance of making future treaties human rights compatible.

4.5.1 Methods of modifying BITs

Bringing BITs in conformity with modern human rights law and jurisprudence may be articulated through variety of legal techniques and approaches. But the specific technique to be applied in each case is necessarily based on the *political* intentions of the treaty parties.[415] Notwithstanding the long-held view that investment treaties have skewedly constrained policy and regulatory space in developing countries, recent developments show that such treaties also have a limiting policy space effect in capital-exporting countries to operate.[416] This is evidenced by such developed countries taking concrete steps to defend their own regulatory space by reference to human rights argumentation.[417] There are three main techniques for modifying BITs, namely, negotiating a completely new BIT, amending an existing BIT, and issuing binding interpretations on certain provisions of an existing BIT without altering the text.[418]

4.5.1.1 Negotiating completely new BITs

This method requires the parties to an existing BIT to either abandon or cancel that treaty and negotiate a new treaty that can accommodate human rights dimensions into its text. While there is no legal limitation of the initial duration of BITs to ten years,[419] majority of the treaties when concluded typically remain in force for a period of ten years in the first instance.[420] This presumes that either of the contracting state parties may terminate the treaty at the end of the initial ten-year or more period or at any time thereafter, and with a prior (often twelve months)[421] written notice to the other state party.[422] Nevertheless, following a successful termination of any BIT,

[415] Jacob (2010).
[416] Jacob (2010) 33.
[417] See Jaco (2010) 33; and Subedi (2006) 121.
[418] Jacob (2010) 33.
[419] See arts. 42 (3) of the Canada-Serbia BIT (2014) and 14(1) of the Ghana-Netherlands BIT (1989); where each treaty remains in force for the initial period of 15 years.
[420] Jacob (2010) 33.
[421] All the examined 17 Ghana's BITs require the party intending to terminate any BIT to give twelve months written notice to the other party of its intention to do so.
[422] See art.17 of the Ghana-Turkey BIT (2016).

investments made pursuant to or affected by that treaty usually continue to enjoy protection for a considerable number of years.[423] It is submitted that even though negotiating a new BIT may take a long time to conclude,[424] it is nonetheless an exercise that willing states could pursue. Thus, in the quest to make Ghana's BITs human rights compatible, terminating and negotiating new BITs is considered the most suitable option. The reason is simple. Ghana currently has only 8 BITs in force, indicating that it is likely not to be too onerous to negotiate with 8 individual countries to lawfully terminate their BITS, unlike if the number of treaties in force were to involve all the concluded 28 treaties.

4.5.1.2 Amending existing BITs

The second approach is where two contracting state parties agree to amend an existing treaty. It is trite learning that every legal document may subsequently be amended by the contracting parties in a mutual agreement or where the document intended to be amended provides for amendments. Specifically, the possibility of amending an existing BIT has long been established.[425] However, while the process is considered as being technically feasible it is not without complexities. This is because investors are entitled to rely on the provisions of an investment treaty to conduct their affairs concerning investments in the host country,[426] and such legitimate expectations of investors must be safeguarded to promote the sanctity of foreign investments in the host countries. It is submitted that the same principle that safeguards and allows investments made prior to termination of a BIT to survive and enjoy the rights and privileges contained in that terminated BIT for an extended number of years, could be applied to the situation where the BIT is merely amended in part. In fact, this proposition is intended to achieve two objectives, one for the investors and the other for the host country Ghana, in a win-win situation. First, it will ensure that investors who have relied on the terminating treaty to make investments in Ghana are protected and to recoup their investments under the same conditions of the investments for a certain period; and secondly, it will allow the government of Ghana to have policy space to regulate future investments in the country in conformity with its national objectives and international human rights obligations. And

[423] See *art. 15(2)* of Ghana-Denmark BIT (1992) stipulates that the investments made prior to the time of the termination shall continue to enjoy the protections provided under the treaty for a period of ten years after the termination. A similar provision is contained in all the other BITs that Ghana is a contracting state party.
[424] Jacob (2010) 33.
[425] Jacob (2010) 33.
[426] Dolzer & Schreuer *Principles of international investment law* (2008) 23.

it has been recognized that having a two-state discussion in this regard is much easier to reach conclusions than in a multi-state arrangement.

4.5.1.3 Issuing binding interpretation of certain provisions of the BITs without altering the text of such existing BITs.

The third method is the situation where the contracting state parties leave the substantive treaty in its original state unaltered, and issue binding interpretations regarding certain provisions. This scenario was applied in the North American Free Trade Area (NAFTA) where the three parties issued a statement limiting the ambit of fair and equitable treatment under the NAFTA.[427] *Article 30* of the 2012 USA Model BIT anticipates this situation.[428] This type of provision is recommended for inclusion in the proposed new Ghana Model BIT.

4.6 Practical means of integrating human rights in BITs

The research study preferred method of modifying Ghana's BITs aimed at integrating human rights dimensions into its text is to negotiate new BITs guided by a carefully crafted Model BIT for the country. Revision may be made to the various standard clauses contained in the existing treaties as a means to mainstream human rights provisions. It is, however, important to state from the outset that the study is not unmindful of the potential effect that the proposed revision exercise could have on the flow of foreign investments to the country, at least based on the classical reasoning that the main objective of BITs, especially for capital-importing countries like Ghana, is to attract foreign investment. It is equally significant to point out that many legal scholars like Dagbanja have disagreed with the classical school of thought in this matter.[429] The following paragraphs discuss revisions relating to BITs preamble, scope of the agreement, expropriation, standards of treatment (fair and equitable treatment, most-favoured-nation treatment, national treatment, full protection and security), miscellaneous, and introducing direct investor obligations.

4.6.1 Preamble

Although the preamble of a BIT does not necessarily form part of the substantive enactment of the treaty and should ordinarily have no binding legal effect on the parties, it is considered an aid to

[427] Jacob (2010).
[428] See art. 30 of the USA Model BIT (2012).
[429] Dagbanja (2019).

interpreting substantive provisions of the treaty.[430] Thus, relying on the interpretative significance of the preambles to BITs, Ghana could conveniently have a Model BIT that ensures that investment treaties are not seen as isolated international legal regimes, but that the contracting parties would take cognizance of other international law, norms and values like sustainable development, human rights, and environmental protection. This is exemplified in BITs of some Scandinavian and North American countries concerning the parties' express reaffirmation of the existing general system of public international law.[431] In Africa, this type of preambular formulation is found in the Morocco-Nigeria treaty.[432] In the preamble to the said treaty, the state parties unequivocally recognized the crucial role of investment to sustainable development, including the furtherance of human rights in their respective economies, and sought to encourage investments that promotes such sustainable development. Also, while the state parties reaffirmed the right to introduce new measures in their territories for purposes of meeting national policy objectives, they also sought a careful balance of the rights and obligations of the various parties (the host state, investors, and investments).[433]

4.6.2 Scope of the agreement

BITs often contain a definition clause that defines critical concepts in the agreement. This clause provides the scope and applicability of the given treaty, and this is especially important in an investor-state dispute settlement process. One important modification in this regard would be to confine the definition of investments to direct investments and exclude the indirect ones such as portfolio investments. In addition, selected sectors (whole or partial) of the economy could be excluded from the scope of application of the BITs as means of redressing any historical imbalances.[434] This approach is consistent with *art.17(4)* of the Constitution of Ghana where discrimination is permissible on certain grounds, including enacting legislation that are reasonably necessary for the implementation of policies and programmes aimed at correcting economic and social imbalance in the society.[435]

[430] Sheffer (2011) 504; Paramita (2020) 35.
[431] Jacob (2010) 34.
[432] Morocco-Nigeria BIT (2016).
[433] See the preamble of the Morocco-Nigeria BIT (2016).
[434] Jacob (2010) 34.
[435] *art. 17(4)* of the Constitution of the Republic of Ghana 1992.

It is recommended that the definition of investments in Ghana's new BITs should expressly exclude certain claims to money or property acquired, which is not directly relating to investment.

4.6.3 Standards of treatment

4.6.3.1 Fair and equitable treatment

The fair and equitable (FET) is usually not defined in BITs and ought to be defined in the Ghana Model BIT to provide some amount of legal certainty and predictability of the FET standard for all concerned parties. For instance, the parties may have to stipulate in the treaty whether the FET standard is equivalent to the minimum standard of treatment required under customary international law or whether it is a unique concept requiring different treatment. Although it will appear onerous to list all instances of unfair and inequitable treatments, it will be useful to give an idea by listing some factors that might give rise to a breach of the FET standard.[436] While the list of items may not be exhaustive it provides the genus (class) of factors or instances of unfair and/or inequitable treatment that may constitute a breach of the FET standard, and thus limits any unreasonably expansive interpretation of the concept. The idea of defining the FET standard in the text of BITs for purposes of reducing any ambiguity has already been incorporated in some treaties including the Morocco-Japan and Ghana-Turkey treaties.[437] The Ghana-Turkey treaty, albeit not in force, defined the FET standard to mean 'treatment that meets the minimum standard required by international law' and no additional treatment is required which is over and beyond such a standard.[438]

4.6.3.2 Full protection and security

The above proposition is equally applicable to other absolute standards of treatment such as full protection and security (FPS). For instance, it is established from the discussions so far that there is lack of clarity about whether the FPS standard maintained in investment treaties can be said to have a wider scope than the requirement of due diligence regarding full protection and security to foreign nationals than what pertains in customary international law. Thus, a definition of the FPS standard in the Ghana's BITs will provide some degree of certainty and predictability for all parties who may be affected by such treaties.

[436] Jacob (2010) 35.
[437] See *art. 4(3) (a)* of the Morocco-Japan BIT (2020), and *art. 4(3)* of the Ghana-Turkey BIT (2016).
[438] See *art. 4(3)* of the Ghana-Turkey BIT (2016).

4.6.3.3 Expropriation

Now, majority of the expropriation clauses in existing BITs concentrate more on spelling out details of compensation payments than clarifying and limiting the scope indirect expropriation.[439] It is proposed that future Ghanaian BITs should take a cue from Annex B of 2012 USA Model BIT to precisely define the circumstances of 'non-discriminatory regulatory actions' that may be designed and applied to protect human rights and legitimate national policy goals including public health, safety and the environment without amounting to expropriation.[440] In parity of reasoning, it is proposed that compensation awards be reduced in situations where human rights obligations mandate non-compliance with regulatory measures.[441]

4.6.3.4 Most-favoured-nation and national treatments

The study submits that a future Ghana Model BIT should provide for positive discrimination by expressly exempting national treatment violations of certain actions. For instance, programmes pursued in furtherance of protecting or promoting certain sectors of the economy primarily due to some historical imbalances may be exempted in this regard.[442] This is evidenced in South Africa-Tanzania[443] and Ghana-South Africa[444] treaties. Additionally, most-favoured-nation (MFN) clause should be tweaked to limit, if not exclude, procedural benefits associated with reliance on other BITs to avoid the issue of *"cherry-picking"* when same may not have been intended by the contracting parties.[445]

Accordingly, the study proposes an exception to MFN and national treatments as,

'The provisions of this agreement relative to MFN and national treatments shall not be construed as obliging any of the state parties to extend to nationals or companies of the other party, the benefit of any treatment, preference or privilege resulting from any law or other measure intending to promote achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination.'

[439] Jacob (2010) 35.
[440] Jacob (2010) 35.
[441] Jacob (2010) 35.
[442] Jacob (2010) 35.
[443] See *art. 3(4)* of the South Africa-Tanzania BIT (2005).
[444] See *art. 6(c)* of the Ghana-South Africa BIT (1998).
[445] Jacob (2010) 35.

4.6.4 Miscellaneous

Apart from the restraining modifications outlined in the preceding paragraphs, Ghana can draft a general exception clause that seeks to preserve the state's right to regulate in critical sectors of the economy, with the clear understanding that commitment to human rights and related interests often require more than an omission.[446] A cue may also be taken from similar provisions in some modern BITs. For instance, *art. 10(1)(b)* of the Canada Model BIT, provides among others that 'nothing in this agreement shall be construed to prevent a party from adopting or enforcing measures necessary…(b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this agreement'.[447] It is submitted that the caveat 'that are not inconsistent with the provisions of this agreement' should not be excluded in the exception clause, since its inclusion greatly undermines the potency of the enactment making it ineffectual. In fact, that phrase appears superfluous since laws and regulations not inconsistent with the treaty would have been allowed anyway. Also, *art. 23* of the Morocco-Nigeria treaty has substantively incorporated the right to regulate in that 'the host state has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development'.[448]

Hence, it is recommended for inclusion in Ghana's new treaties that: The host state shall have the right to take regulatory measures to ensure that developments, including investments in its territory is consistent with the goals and principles of sustainable development.

4.6.5 Investor obligations

One of the contentious issues is whether BITs should expressly provide for investor obligations. It is regarded that introducing such obligations may appear as a low-hanging fruit to resolving the imbalance observed in the text of BITs, but that this quick fix solution must be carefully balanced against likely fallout with the international investment community.[449] However, the fear expressed by Jacob in 2010 has been heavily discounted by current developments. According to the United Nations Office of the High Commissioner for Human Rights (OHCHR) report on business and Human Rights of 2021, international investment agreements, of which BITs form the majority,

[446] See art. *6* of the Ghana-South Africa BIT (1998).
[447] See *art. 10* of the Canada Model BIT (2004).
[448] See *art. 23* of the Morocco-Nigeria BIT (2016).
[449] Jacob (2010) 36.

must maintain sufficient parity between the rights and the obligations of foreign investors.[450] The conferment of enforceable rights in favour of foreign investors ought to correspond with the inclusion of legally enforceable obligations concerning human rights and environmental standards.

The inclusion of human rights obligations for investors is grounded in three facts. First, the initial process leading to the development of the Code of Conduct on the Transnational Corporations by the United Nations in the 1970s covered both rights and obligations of foreign investors. It is the stalemate over the negotiations concerning the Code together with the development of the soft responsibilities of multinational enterprises by OECD and ILO resulted in separation of the rights and responsibilities of investors.[451]

Secondly, it is reasonable to argue that human rights law applies to foreign investors, at least by implication;[452] else it will be anomalous to submit that non-state actors such as investors could conduct themselves in ways that the State is prohibited from so doing. More importantly, there should be equity between the human rights obligations of investors under BITs and their rights thereto. That is, if such treaties impose legally enforceable rights on investors, they must equally confer legally enforceable human rights obligations on the same investors. This is because merely imposing soft responsibilities with weak legal implications for investors is certainly inadequate.[453]

Thirdly, the issue of business corporations having human rights obligations is gaining currency in many states. The recent requirement for mandatory human rights due diligence at the European Union level and several states in Europe is apposite.[454] Moreover, courts have held in recent times that parent corporations may have direct duty of care in some circumstances for human rights violations associated with their subsidiaries.[455] Some companies have openly supported calls for legal commitments and binding human rights obligations of businesses in furtherance of creating

450 UNHRC Report (2021).
[451] UNHRC Report (2021) 20.
[452] The arbitration tribunal in the Urbaser ruled that 'it cannot longer be admitted that companies operating internationally are immune from becoming subjects of international law'. *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilabao Bikaia Ur Partuergoa v. Argentine Republic,* ICSID Case No. ARB/70/26 para. 1195.
[453] UNHRC Report (2021) 20.
[454] UNHRC Report (2021) 20.
[455] UNHRC Report (2021) 20.

a level playing field for both investors and individuals and communities who suffer human rights abuses resulting from business operations.[456]

There are examples of BITs seeking to balance the rights and obligations of investors. A typical case in point is the Morocco-Nigeria BIT, albeit not yet in force, that has substantively incorporated legally enforceable obligations for investors, concerning labour and human rights.[457] The parties agreed in *art.15 (3*) that 'it is inappropriate to encourage investment by relaxing domestic labour, public health or safety' standards. The *art. 15* further provides that each party 'shall ensure that its laws and regulations provide for high levels of labour and human rights protection appropriate to its economic and social' context. In article 18, the treaty imperatively confers direct obligations on investors to not only 'uphold human rights' in the host country but also conduct its investments in accordance with core labour standards.[458] Additionally, foreign investors are obliged to conduct their businesses in conformity with international human rights, labour, and environmental obligations of the state parties.[459]

Thus, the study recommends inclusion of direct investor obligation clause(s). Specifically, the proposed clause is, 'Investors shall manage and/or operate their investments in conformity with national and international human rights, labour, and environmental obligations of the contracting state parties.'

4.7 Conclusion

There are legal and policy basis in support of the pursuit of integrating human rights in the text of BITs. The first is grounded in international human rights instruments embodying general principles and norms of international law, customary international law, and legal precedents at the regional and international levels.[460] This approach is also rooted in the municipal laws of Ghana. Thus, it is well established in international law and national legislation that Ghana and other states have a legal duty to not only protect and respect human rights in their jurisdictions, but also ensure private persons including investors do same. It is also an obligation for states to provide credible redress

[456] UNHRC Report (2021) 20.
[457] The Morocco-Nigeria BIT (2016).
[458] See *art. 18(2) & (3)* of the Morocco-Nigeria BIT (2016).
[459] See *art.18 (4)* of the Morocco-Nigeria BIT (2016).
[460] Chidede (2019) 80.

mechanisms to those who suffer associated human rights violations. The other grounds involve the right to development, labour standards, sustainable development, and environmental protection.

The study also established three modes by which Ghana's BITs may be modified, namely, negotiating a completely new BIT, amending an existing BIT, and issuing binding interpretations on certain provisions of an existing BIT without altering the text. It is proposed that Ghana adopts the first method. The first method is preferred. The required revisions must be made to the various standard clauses contained in its future treaties.

Accordingly, the final chapter presents the overall conclusions, findings, and recommendations of the study. The final product is a developed prototype Model BIT, and this is expected, when adopted by the government of Ghana, to significantly transform the country's existing non-compliant human rights BITs regime to a regime of compliance.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.1. Introduction

This is the concluding chapter of the thesis where conclusions, findings, and recommendations are presented. The chapter is sub-divided into two parts. The first part presents a summary of the findings of the study. The findings communicate the results of the study which are drawn from the preceding chapters, and this is done in order of the four specific research objectives contained in chapter one. The said four objectives are reproduced as follows:

i. To review the general legal structure (framework) of BITs with a view to establishing common features.
ii. To examine selected BITs in Ghana, including identifying the main features and drawing any commonalities with BITs globally; bringing out factors that could make them human rights incompatible.
iii. To analyse selected approaches to making BITs human rights compatible, including using selected BITs with human rights dimensions to illustrate the point and make a case for human rights compatible Model BIT for Ghana.
iv. To present conclusions and recommendations.

The second part of the chapter presents the recommendations of the study. The recommendations are aimed at answering the main research question: What are the legal and policy considerations necessary to making bilateral investment treaties (BITs) human rights-compatible in Ghana?

5.2 Summary of findings

Chapter one established the prevalence of the human rights-related problem associated with BITs globally. The said problem is twofold: (i) the textual non-integration of human rights dimensions into the structure of BITs, and (ii) the arbitral tribunals' disregard for human rights argumentation, reflected in their awards and decisions. The chapter justified the significance of the problem to merit further research into the peculiar case of BITs in Ghana.

In resolving the first objective, chapter two discussed the general legal structure of BITs and the purpose for concluding such treaties from the perspectives of capital-exporting countries (mostly developed countries) and capital-importing countries (developing and least-developed countries). The objectives for concluding BITs by capital-exporting countries differ from that of the capital-importing countries. The former's objective is to have predictable legal rules and effective

enforcement mechanisms to protect their nationals and companies in the territories of foreign countries. While the latter's objective is to promote investment and increase the flow of foreign capital into their economies. The chapter further established that the focus of the latter's objective puts them at a disadvantaged position at the point of negotiating BITs. This naturally results in a skewed, if not a perverse, legal structure of the treaties in favour of the investors of capital-exporting countries at the expense of human rights, labour standards, and environmental protection in developing countries.

The chapter also established that BITs have a common structure concerning preliminary matters and substantive clauses. The common preliminary issues are the title and the preamble. The main clauses include the scope and applicability of the treaty, most favoured nation (MFN), national treatment, fair and equitable treatment (FET), full protection and security (FPS), expropriation, compensation, and dispute settlement.

The preamble reflects the intentions and objectives of the parties at the time of concluding the agreement and gives an indication of the purpose of the agreement. Although the preamble does not form part of the substantive enactment of the treaty and should ordinarily have no binding legal effect on the parties, it is an aid to construing and interpreting such substantive provisions.[461]

The MFN principle seeks to ensure either of the two contracting state parties to the treaty does not treat the other state party less favourable than any other third state in similar circumstances. While national treatment simply prohibits a contracting party from applying any measure (legislation, regulation, or policy) in its territory that is more favourable to its nationals or companies than investors and investments of the other contracting party.[462]

The chapter also finds that although the exact meaning of the FET remains unclarified,[463] it is the standard in most BITs in force.[464] And the inherent ambiguity arises from the absence of precedents concerning construction of the FET standard in foreign investment law or international law generally.[465]

[461] Sheffer (2011) 504.
[462] Pérez-Aznar (2017) 778.
[463] Wythes (2010).
[464] Schreuer (2005) *359.*
[465]Dolzer (2005) 88.

The study also established lack of clarity on whether the FPS standard maintained in investment treaties can be said to have a wider scope than the requirement of due diligence regarding FPS to foreign nationals than what pertains in customary international law.

Additionally, the rules of expropriation are common in international investment law; yet the legal remit of indirect expropriation remains undefined in most treaties. Also, compensation follows the determination of a breach to any treaty obligation; and the treaties demand prompt, adequate, and effective compensation for acts of expropriation. There is legitimate expectation of investors of both contracting parties for comparable treatment in the emergence of any armed conflicts and insurrections, including commensurate compensation where there is loss of investment.

Accordingly, the chapter concludes that the standard provisions of BITs deviate from the cardinal legal principles of consistency and certainty of enactments, thereby affecting the predictability and outcome of investor state disputes.

The other findings are that the structure of the BITs expressed in the substantive provisions neither integrate human rights, labour standards, and environmental protection in their text nor do the arbitral tribunals' awards or decisions portray any favourable disposition to admitting human rights argumentation in the dispute resolution process.

Chapter three, which addressed objective two of the study, reviewed the specific legal structure of Ghana's BITs. In all, the review covered 17 treaties. The findings revealed striking commonalities concerning the legal structure and features of BITs in Ghana and the general situation established in chapter two.

A careful reading of the text of the Ghana's BITs shows there is lack of integration of human rights and environmental concerns. The chapter finds none of the ISDS provisions makes it mandatory for parties to submit disputes in the first instance to the domestic courts for resolution. The derogation from using the municipal courts in the ISDS observed in the Ghana treaties is symptomatic of majority of the dispute settlement clauses of BITs globally. The reasonable conclusion from the unrestrained access to international arbitration by foreign investors in times of dispute at the expense of the domestic courts is that arbitral tribunal proceedings arising from implementation of the treaties are likely not to reflect a favourable disposition toward admitting human rights arguments.

It was further found that the prevailing factors that make Ghana's existing BITs human rights incompatible show a common thread that neither the preambles nor the substantive provisions or clauses of the treaties, in the remotest sense, seek to hold foreign investors accountable for human rights violations or infringement of labour and environmental standards in the country.

The findings of chapter four concern objective three. A key finding is that there are sufficient legal and policy reasons in support of the call to integrate human rights into the legal structure of BITs in Ghana. The first reason is grounded in international human rights instruments embodying reference to general principles and norms of international law, customary international law, and legal precedents at the regional and international levels. This ground is also rooted in the laws of Ghana. These international human rights principles, norms, and national legislation impose a legal duty on the government of Ghana to not only protect and respect human rights in its jurisdiction but also ensure private persons including investors do the same. It is also an obligation for the state to provide credible redress mechanisms to those who suffer associated human rights violations. The other grounds concern the right to development, sustainable development, labour standards, and environmental protection.

Chapter four further established the existence of three methods by which BITs in Ghana may be modified. The methods are: (i) negotiating completely new BITs, (ii) amending existing BITs, and (iii) issuing binding interpretations on certain provisions of an existing BIT without altering the text. The preferred method toward modifying Ghana's BITs aimed at integrating human rights dimensions into its legal structure is the first method.

The negotiation of any new BITs necessitates the termination of the existing treaties. The process of negotiation must be guided by a carefully crafted Model BIT. Also, revisions must be made to the preamble and the various standard clauses contained in the existing treaties to accommodate human rights concerns, labour standards and environmental protection. The components requiring revisions include the preamble, the scope, most-favoured-nation treatment, national treatment, fair and equitable treatment, full protection and security, expropriation, and investor obligations. This is because the said components of the existing Ghana's BITs lack clarity and predictability, and so, the intended revisions must aim at defining these clauses as much as practicable.

Ten key findings are:

i. The Ghana's BITs have created binding obligations for the government of Ghana without any corresponding rights in her favour.
ii. The treaties also create enforceable rights in favour of foreign investors without any corresponding binding obligations and responsibilities.
iii. Multiplicity of factors influence the decision of investors to invest in the economy of Ghana and that BITs do not have the unquestioned ability to attract foreign investments.
iv. The structure of BITs generally, and in the case of Ghana, does not incorporate human rights dimensions into their text.
v. The main ISDS mechanism in the Ghana's BITs is international arbitration.
vi. The ISDS system lacks transparency in its proceedings and consistency in its decisions.
vii. The arbitral tribunals have unrestrained discretion to admit or exclude human rights argumentation during dispute settlement proceedings.
viii. The textual non-integration of, and the judicial discretion of arbitrators to disregard, human rights provisions have emboldened investors to undermine human rights in Ghana and other host countries without any serious legal consequences.
ix. The Ghana's BITs have not provided policy space to enable the country to introduce domestic measures (including regulations and policies) to protect legitimate matters such as sustainable development, environmental protection, public health and safety, human rights, and labour standards.
x. There are ample legal grounds and policy considerations for Ghana to seek to lawfully terminate its existing BITs and to negotiate new treaties that would be human rights compatible.

5.3 Recommendations

Flowing from the above findings, the study makes the following recommendations in pursuit of making BITs human rights-compatible in Ghana.

5.3.1 Legislative considerations

First, the study recommends to the government of Ghana to develop a new Model BIT with revised clauses that make its future BITs human rights compatible or adopt the one proposed by this study in *Appendix A*.

Secondly, the study recommends to the government of Ghana to initiate processes to re-negotiate the existing 8 BITs currently in force upon their expiration because of the absence of human rights dimensions in their texts.

Thirdly, the study recommends to the government of Ghana to take steps to negotiate completely new human rights compatible BITs. The re-negotiations should target the core provisions of the structure of the BITs as illustrated in chapter four. This should include revising these provisions in the new Model BIT or treaties to make them certain and predicable to all parties and stakeholders who may suffer from the implementation of such treaties.

Fourthly, the study recommends amendments to the 1992 Constitution of the Republic of Ghana to outlaw any treaty, legislation, policy, or measure that seek to derogate from the human rights injunctions contained in the said Constitution. The study proposes formulation of the article as:

'No legislation or treaty or any other measure in whatever form or name, shall derogate from the human rights provisions enshrined in Chapter Five of the 1992 Constitution of the Republic of Ghana.[466] Any such legislation or treaty or measure made in contravention of this article is void.'

The proposed constitutional provisions will then be incorporated into the text of all BITs and be made effective 'in accordance with domestic law'. The amendments must be made entrenched provisions to make it almost impossible for any future government to amend same at will.

Fifthly, relying on interpretative significance, the study recommends that the preamble of the Model BIT must ensure that investment treaties are not seen as isolated international legal regimes but take cognizance of other international law, norms, and values such as sustainable development, human rights, and environmental protection.

Sixthly, it is further recommended that, apart from the restraining modifications outlined in the preceding paragraphs, Ghana Model BIT should include a general exception clause that seeks to preserve the state's right to regulate in critical sectors of the economy.

[466] Chapter five of the Constitution of the Republic of Ghana, 1992 contains elaborate provisions on fundamental human rights and freedoms of all persons in Ghana.

Seventhly, it is recommended that the new Ghana Model BIT must maintain sufficient parity between rights and obligations of foreign investors; and must include obligations for investors, especially human rights-related obligations.

Finally, it is recommended that selected sectors of the Ghanaian economy should be excluded from the scope of application of the BITs in furtherance of redressing any historical imbalances.

5.3.2 Policy recommendations

At the policy front, the study recommends to the government of Ghana to commit to the ongoing processes toward developing a National Action Plan (NAP) on Business and Human Rights. This proposal is consistent with the recommendations of the United Nations Guiding Principles on Business and Human Rights of 2011.

The study further recommends to the Commission on Human Rights and Administrative Justice (CHRAJ) to intensify its lead role in the development of the NAP on Business and Human Rights (BHR) in the country.

The study also recommends to CHRAJ and the government of Ghana to adopt a more inclusive approach to the formulation and implementation processes of the NAP on BHR. The inclusive process involves multi-stakeholder participation and must include state agencies, private citizens, faith-based organisations, civil society organisations, and political parties. The main objective is to engender overall citizens' buy-in and ownership of the process for purposes of promoting political neutrality of the NAP on BHR, policy coherence and commitment to maintaining human rights compatible BITs in Ghana irrespective of the government of the day.

In sum, the study submits that the legal and policy considerations necessary to making BITs human rights compatible in Ghana involve development of a new Model BIT with human rights consistent provisions. It also requires termination of the existing BITs and re-negotiation of new treaties which would be human rights compliant. Additionally, the development of a comprehensive NAP on BHR and an amendment of portions of Ghana's Constitution are other critical considerations.

In this regard, the study presents, in *Appendix A*, a prototype Model BIT as a contribution toward reforming the BIT regime in Ghana. This Model BIT is envisioned to make the country's future treaties human rights compatible. It is important, from the outset, to point out that this proposed Model BIT is not comprehensive, in terms of it containing all relevant clauses of a typical BIT.

This is because the Model BIT focuses mainly on revision of problematic clauses or introduction of new clauses to make such treaties human rights compliant. To this end, uncontested provisions such as ‘entry into force’, ‘duration’, ‘termination’ are omitted. See *Appendix A* for more details of the recommended Motel BIT.

APPENDIX A: A PROTOTYPE HUMAN RIGHTS COMPATIBLE MODEL BIT[467]

AN AGREEMENT BETWEEN

THE GOVERNMENT OF THE REPUBLIC OF GHANA

AND

THE GOVERNMENT OF [insert name of Country]

FOR RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENT

Preamble

The government of the republic of Ghana and the government of [insert name of Country] (hereinafter the 'parties'),

Desiring to create favourable conditions for investment by natural and juristic persons of one party in the territory of the other,

Recognising the important contribution investment can make to sustainable development of the parties including economic growth, technology transfer, human rights, and human development,

Recognising the importance of providing effective means of asserting claims and enforcing rights under national law and international arbitration,

Reaffirming that these objectives can be achieved without compromising human rights, labour standards, and environmental measures of general application or under international law,

Resolving to preserve policy space for setting legislative and regulatory priorities, safeguard public welfare and protect legitimate national policy goals such as the environment,

[467] The Model BIT relied specifically on the Morocco-Nigeria BIT (2016), the USA Model BIT (2012), the Ghana Model BIT (2008), and the SA Protection of Investment Act No.22 of 2015.

Reaffirming the right of the parties to regulate and to introduce new measures in their territories to meet national policy objectives and taking into consideration any development asymmetries concerning the measures and in particular the need for developing countries to exercise this right,

Seeking an overall balance of the rights and obligations of the parties, investors, and investments under this Agreement,

Have agreed as follows,

Article 1: Definitions

'Investment' means every assert invested in accordance with the laws and regulations of the host state by companies and nationals of either party in the territory of the other, covering:

i. movable and immovable property and any other property rights including mortgages,
ii. shares and debentures of, and any other form of participation in, a company,
iii. claims to money or to any performance under contract having a financial value,
iv. intellectual property rights,
v. business concessions conferred by law or under contract, including concessions to search for, cultivate, extract, or exploit natural resources,

'**Investment'** does not mean:

A. claims to money that arise solely from commercial contracts for the sale of goods or services, or credits associated with a commercial transaction, where the original maturity date is less than three years.
B. any other claims to money arising from operations of external credit undertaken in accordance with the laws and regulations of the party or investor undertaking it or operations of public debt.
C. tangible or intangible real estate or other property other than that acquired purposely for economic benefit or other business purposes.

'**Investor'** means a party, or a company or a national of a party, that attempts to undertake or is undertaking or has undertaken an investment in a territory of the other party; provided that a natural person who is a dual national shall be deemed to be exclusively of the state of his or her dominant and effective nationality.

Article 2: Protection of investments

1. Investment of a company and a national of either party shall be given fair and equitable treatment and full protection and security in the territory of the other party.
2. The parties understand that the concept of 'fair and equitable treatment' and 'full protection and security' means treatment that amounts to the standard required by customary international law and does not include treatment beyond such standard.

Article 3: Most favoured nation treatment

1. Neither party shall in its territory subject any investment of companies or nationals of the other party to treatment less favourable than that which it accords, in like circumstances, to investments of its own companies or nationals or to investments of companies or nationals of any third state.
2. Neither party shall in its territory subject investments of companies or nationals of the other party, concerning the management, maintenance, enjoyment, use, or disposal of such investments, to treatment less favourable than that which it accords, in like circumstances, to investments of its own companies or nationals or to investments of nationals or companies of any third state.
3. The treatment referred to in paragraphs (1) and (2) shall not extend to provisions on investor-state disputes.

Article 4: Exceptions to non-discrimination

1. The provisions of this agreement relative to granting treatment not less favourable than that accorded to companies or nationals of third states shall not be construed as obliging either party to extend to companies or nationals of the other party, the benefit of any treatment, preference or privileged resulting from:
    i. any existing or future customs union, common market, free trade area, or regional economic organization or measures leading to the formation of a customs union or a free trade area of which either party is a member, or to which it is associated.
    ii. any international arrangement or agreement relating exclusively to taxation or domestic legislation relating exclusively to taxation.

iii. any law or other measure intending to promote the achievement of equality in its territory, or designed to protect or advance persons, or groups of persons, or regions disadvantaged by unfair discrimination.

Article 5: Expropriation

1. Neither party shall, directly or indirectly, expropriate or nationalize investments of companies or nationals of the other party through measures having an effect equivalent to expropriation or nationalization in that party's territory except for a public purpose, and it is done in a non-discriminatory manner, in accordance with due process of law, and on payment of prompt, adequate, and effective compensation.
2. any company or national affected by expropriation shall have a right, under the law of the party undertaking the expropriation, to prompt review by a judiciary or other independent authority of that party, of its investments in accordance with this agreement.
3. Save in exceptional circumstances, non-discriminatory regulatory actions by a party which are introduced to protect legitimate public interest such as national security, environmental protection, labour standards, public health, safety, and human rights shall not amount to indirect expropriation.

Article 6: Investment, labour, and human rights protection

1. The parties reaffirm their respective obligations as members of the International Labour Organization (ILO) and their commitments under the ILO Declaration on Fundamental Principles and Right to Work, 1998.
2. The parties recognize that it is inappropriate to encourage investment by lowering the protection accorded in domestic labour legislation. Thus, each party shall ensure that it does not offer to waive or waive or offer to derogate or derogate from its labour laws where the waiver or derogation is not in conformity with the labour rights conferred by domestic legislation and international labour instruments that both parties are signatories.
3. Each party shall ensure its legislation, progressively, provides effective protection for the environment, labour, and human rights, appropriate to its economic and social conditions.
4. Parties shall ensure that their laws, policies, and conduct comply with international human rights instruments to which either party is a signatory.

Article 7: Right of the state to regulate

1. In accordance with general principles of international law, the host state shall have the right to take regulatory measures to ensure that development, including investments in its territory is consistent with the goals and principles of sustainable development, and with other legitimate economic and social policy objectives.
2. for the avoidance of doubt, non-discriminatory measures taken by either state to comply with its international obligations and rights under other treaties shall not amount to a breach of this agreement.

Article 8: Investor obligations

Investors and investments shall:

i. uphold human rights and environmental standards in the host state.
ii. act in accordance with standards required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998.
iii. not manage or operate their investments in circumstances that defeats international environmental, labour, and human rights obligations of the host party.

Article 9: Dispute settlement

1. an investor that has a dispute in relation to any action taken by the host state, which action has affected that foreign investor's investment, may within six months of notice of the dispute request the host government to facilitate resolution of the dispute by appointing a competent mediator.
2. The mediator should be appointed from a database of qualified mediators maintained by the government of the host state, and in the absence of a database, from individuals proposed by either party, provided that the appointment must be by an agreement between the government and the foreign investor.
3. Where the governmental body responsible for appointing the mediator is conflicted or likely to be conflicted, either party may petition any of the supervising high court judges to appoint a mediator.

4. Subject to the applicable legislation, an investor on notice of the dispute in sub-paragraph 1, may petition the high court, independent tribunal within the host sate for the resolution of a dispute relating an investment.
5. The host state may consent to international arbitration relating to investments, subject to the exhaustion of domestic or local remedies.

In WITNESS WHEREOF, the undersigned, duly authorized thereto by their respective governments, have signed this agreement.

Done in duplicate at ……. this ……. day ……. in English Language.

For the government of the Republic of Ghana.

For the government of [insert name of Country].

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