8 The past, present and future of international investment law in Africa

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> African history, the destiny of our peoples is being played out day by day. The life of a man is counted in decades, the life of Africa is endless. The path that Africa must take no limit; each generation receives from the past a heritage that it is duty bound to hand on enriched its turn. There is no doubt that our generation will count …
>
> Ahmed Sékou Touré (1963)[1]

1 Introduction: Wind of change and economic independence

After the end of World War II, a strong 'wind of change' spread through Asia and Africa.[2] Between 1951 and 1965, 38 African territories attained independence from European powers[3] with 17 African states gaining independence in 1960 alone.[4] Colonial powers realised that their imperial hold on the continent had to give way to gradual self-governance and recognition of self-determination.[5] However, self-governance in Africa was also to come at an expense for the 'coloniser'.[6] One of the immediate concerns for colonial powers was the demise of colonial economies that had functioned on the basis of international law 'geared towards maximum

1 African Union *Celebrating success: Africa's voice over 50 years 1963-2013* (2013) 48.

2 A Aguda 'The dynamics of international law and the need for an African approach' in K Ginther & W Benedek (eds) *New perspectives and conceptions of international law: An Afro-European dialogue* (1983) 8.

3 IL Head 'The alien's access to local remedies: The African commonwealth countries experience' (1967) 21 *Vanderbilt Law Review* 701.

4 FE Snyder & S Sathirathai 'Preface' in FE Snyder & S Sathirathai (eds) *Third World attitudes toward international law: An introduction* (1987) xi.

5 N Chukwuemeka 'International co-operation in Africa' (1951) 18 *Social Research* 55; JN Hyde 'Permanent sovereignty over natural wealth and resources' (1956) 50 *American Journal of International Law* 855; G Devernois 'The evolution of the Franco-African community' (1960) 10 *Civilisations* 89; B Marshall 'International law and politics in French Africa' (1960) 54 *Proceedings of the American Society of International Law at its Annual Meeting* 91.

6 MD McWilliam 'Economic problems during the transfer of power in Kenya' (1952) 18 *The World Today* 164.

economic benefit for the European state'.[7] Reflecting this change in political economy, international law scholars began to write on the influence newly-developed African states would have on established international law.[8] As territories in Africa gained partial or full independence, there were fears that the appearance of newly-independent nations 'would destroy the universality of international law'.[9] Some authors viewed the place of Africa with scepticism, while others expressed optimism that an African international law was emerging.[10]

One of the central issues that emerged after decolonisation was the legal problems of foreign investment and international law.[11] The nationalisation of foreign-owned companies became the nemesis of the 'coloniser'.[12] A burgeoning Cold War was the atmosphere in which African attitudes to foreign investment and international law began to emerge.[13] Unlike other questions of international law, such as the law of

7 OU Umozurike 'International law and colonialism in Africa: A critique' (1971) 3 *Zambia Law Journal* 98.

8 PC Jessup *The use of international law* (1959) 133; GM Abi-Saab 'The newly independent states and the scope of domestic jurisdiction' (1960) 54 *Proceedings of the American Society of International Law at its Annual Meeting* 87; LC Green 'The impact of the new states on international law' (1969) 4 *Israel Law Review* 27; OJ Lissitzyn 'International law in a divided world' (1963) 34 *International Conciliation* 37; M Sahovic 'Influence des États nouveaux sur la conception du Droit international : inventaire des positions et des problèmes' (1966) 12 *Annuaire Français de Droit International*; O Udokang 'The role of the new states in international law' (1971) 15 *Archiv des Völkerrechts* 145; M Sornarajah *The pursuit of nationalized property* (1986) 24.

9 Lissitzyn (n 8) 4.

10 AA Fatouros 'International law and the Third World' (1964) 50 *Virginia Law Review* 783 820; K Miles *The origins of international investment law: Empire, environment and the safeguarding of capital* (2013) 78.

11 FJ Pedler 'Foreign investment in West Africa' (1955) 31 *International Affairs* 459; EI Nwogugu *The legal problems of foreign investment in developing countries* (1965) 4; E Austin 'Protection of private property and investments of foreigners abroad: foreign investment laws of newly emerging nations' (1966) 12 *Howard Law Journal* 270; G Schwarzenberger 'Decolonisation and the protection of foreign investments' (1967) 20 *Current Legal Problems* 213; H Fox 'The settlement of disputes by peaceful means and the observance of international law: African attitudes' (1969) 3 *International Relations* 389; A Rafat 'Compensation for expropriated property in recent international law' (1969) 14 *Villanova Law Review* 200; TO Elias 'Foreign investments and international law' (1970) 4 *Nigerian Law Journal* 160.

12 AW Bradley 'Legal aspects of the nationalisations in Tanzania' (1967) 3 *East African Law Journal* 149 151; C Dias 'Tanzanian nationalisations: 1967-1970' (1970) 4 *Cornell International Law Journal* 59.

13 B Sen *A diplomat's handbook of international law and practice* (1965) 396; SKB Asante 'International law and investments' in M Bedjaoui (ed) *International law: Achievements and prospects* (1991) 667 671; M Sornarajah *Resistance and change in the international law on foreign investment* (2015) 35.

succession,[14] boundary issues,[15] international law on the sea[16] and human rights, the economic dimensions of foreign investment raised difficult questions of international law on 'acquired interests'.[17] In 1956, Egyptian President Gamal Abdel Nasser announced the nationalisation of the Suez Canal company that had been operated as a joint British-French enterprise since 1869 through a decree.[18] Guinea's 1958 independence under Ahmed Sékou Touré ushered in radical discouragement of foreign investment and economic difficulties.[19] The United Nations (UN) became a battlefield for international law where the world was split along ideology and hemisphere.[20] During this decolonisation period, international law underwent significant changes and an international investment law began to emerge.[21]

Most of Africa has become fully independent, but many of the international economic law issues that emerged for the first time six decades ago remain highly relevant today.[22] These issues are not merely theoretical, but they are practical issues that remain embedded in the everyday lives of Africa's 1 216 billion inhabitants.[23] As many African states celebrated 60 years of self-governance in 2020, the international law of foreign investment provides an important context for examining the contributions of Africa to international law, and the place of Africa in a fast-evolving regime where politics and economics continue to shape the dynamics and functioning of law.

14 K Zemanek *State succession after decolonisation* (1965).

15 OA Cukwurah *The settlement of boundary disputes in international law* (1967).

16 N Rembe *Africa and the international law of the sea: A study of the contribution of the African states to the third United Nations conference on the law of the sea* (1980).

17 M Domke 'Foreign nationalisations: Some aspects of contemporary international law' (1961) 55 *American Journal of International Law* 585; Schwarzenberger (n 11) 215; P Lalive 'The doctrine of acquired rights' in M Bender (ed) *Rights and duties of private investors abroad* (1965) 145.

18 R Delson 'Nationalisation of the Suez Canal company: Issues of public and private international law' (1957) 57 *Columbia Law Review* 755; Abi-Saab (n 8) 89.

19 E Schmidt *Cold War and decolonisation in Guinea, 1946–1958* (2007) 172.

20 O Schachter 'Private foreign investment and international organisations' (1960) 45 *Cornell Law Quarterly* 415.

21 JH Jackson 'International economic problems and their management in the 21st century' (1979) 9 *Georgia Journal of International and Comparative Law* 497.

22 M Sornarajah 'The battle continues: Rebuilding empire through internationalization of contracts' in J von Bernstorff & P Dann (eds) *The battle for international law: South-north perspectives on the decolonisation era* (2019) 175 197.

23 African Union 'State of Africa's population' (2017), https://au.int/sites/default/files/newsevents/workingdocuments/32187-wd-state_of_africas_population_-_sa19093_-e.pdf (accessed 7 December 2020).

This chapter examines how African approaches to international investment law have evolved over the last six decades in tandem to 'world' political and economic events. These include decolonisation and the quest for self-determination after World War II; UN-based resolutions for permanent sovereignty over natural resources and a new international economic order in the 1960s and 1970s; the 1973 world oil crisis; the end of the Cold War in the 1990s; the 2008 global financial crisis and a multi-polar post-9/11 world. This chapter argues that these events have led to an accidental trajectory that has contributed to deeply-fragmented ideas on the form, structure, purpose and use of international law in Africa. Although African contributions to international investment law have been largely overlooked, this chapter repositions the importance of the continent.

The chapter is divided into three main parts: the past, the present and the future. These parts chronologically examine key developments in a historical, economic and political context.[24] This analysis reveals that even though it is difficult to identify a uniform intellectual movement on an African international investment law, the central concern for all scholars remains economic growth and development of the continent. Using a law and sociology approach, the chapter identifies the main strands of scholarship that have emerged over the last six decades. The chapter also examines the challenges of international investment law in Africa by amplifying the perspectives of a younger generation of international law scholars. Overall, the chapter argues that the future of international investment law in Africa rests on collaboration, dialogue, capacity, realism and impact-driven research. The chapter illustrates that the main hindrances to the future of international investment law are good governance and an overhaul of the current political class.

2 Ideological warfare and the sociology of international investment law

International investment law (IIL) has been described as one of the most controversial areas of international law.[25] This may partly be because it is a field of international law that remains central to post-colonial engagements

24 Udokang (n 8)147; K Yelpaala 'In search of a model investment law for Africa' (2006) 1 *African Development Bank Law for Development Review* 71.

25 SKB Asante 'International law and foreign investment: A reappraisal' (1988) 37 *International and Comparative Law Quarterly* 588 588; M Sornarajah *The international law on foreign investment* (2017) 14.

and struggles for economic determination.[26] Even though there are no agreed definitions, IIL may be defined as 'domestic and international principles and rules which govern the legal regime of investments carried out by nationals of a state in the territory of another state'.[27] It is a field of international law that can be defined on the basis of 'myriad sources and actors – treaties, custom, domestic laws and contracts; states, investors, arbitrators, international institutions, NGOs, and academics'.[28] IIL is the sum of rules and procedures that regulate relationships between host states and foreign investors. At the centre of these multiple norms is the right of non-state subjects (including state-owned enterprises) to institute claims against sovereign states before *ad hoc* arbitral tribunals.

Even though IIL may be described as a successful field of international law, it remains steeped in controversy, mystery, complexity and mythical illusions surrounding its theoretical foundations and practical implications.[29] Several legal theories can be applied to IIL, but one way to address the theoretical difficulties of IIL in the post-colonial state is to examine IIL as a sociological enterprise. This is because IIL is a perfect site for examining the dynamics of the sociology of legal knowledge[30] and the role of international lawyers.[31] Academic scholarship has shown that IIL is developed and interpreted by an investment arbitration community that influences the content of the law.[32] The earliest and most prominent of these studies was published by Garth and Dezalay in 1996.[33] Other studies

26 GM Abi-Saab 'The newly independent states and the rules of international law: An outline' (1962) 8 *Howard Law Journal* 95 113; S Pahuja *Decolonising international law: Development, economic growth and the politics of universality* (2011) 119; Sornarajah (n 23) 196.

27 P Juillard *L'évolution des sources du droit des investissements* (1994) 21.

28 J Pauwelyn 'Rational design or accidental evolution? The emergence of international investment law' in Z Douglas et al (eds) *The foundations of international investment law: Bringing theory into practice* (2014) 12 13.

29 JE Alvarez *The public international law regime governing international investment* (2011) 351.

30 M Reisman 'Forward' to G Wang *International investment law: A Chinese perspective* (2015) ix.

31 S Dezalay 'Professionals of international justice: From the shadow of state diplomacy to the pull of the market for commercial arbitration' in J d'Aspremont et al (eds) *International law as a profession* (2017) 311 328; CN Brower & D Litwin 'Navigating the judicialisation of international law in troubled waters: Some reflections on a generation of international lawyers' (2019) 37 *Berkley Journal of International Law* 171.

32 M Hirsch *Invitation to the sociology of international law* (2015) 142.

33 Y Dezalay & BG Garth *Dealing in virtue: International commercial arbitration and the construction of a transnational legal order* (1996).

have argued that IIL is an epistemic community.[34] For example, using network analytics, a recent study maps the appointment of individuals to investment arbitration tribunals.[35] Methodologically, examining IIL as a sociological enterprise requires a full review of existing literature.[36] This is because IIL literature reminds us that

> [w]e must also acknowledge that IIL literature reflects both an evolution in the law itself and changes in the professional, political, and institutional practices and communities involved. The literature on international investment law thus is a reflection of the sociological dimension of a discipline that until recently was the province of a small group of specialists and now is rapidly moving mainstream.[37]

The IIL community is an 'invisible' community of smaller communities of arbitrators, lawyers, scholars, states and organisations who identify with different ideologies and take different stances.[38] The spheres of interaction include arbitral proceedings, conferences, protests, international law commission sessions, public consultations, blog posts, universities and treaty negotiations. As a member of the IIL community, an African scholar fulfils several functions and roles. These roles are performed in separate but overlapping functions. Dynamic relationships exist between these overlaps and because individuals are not immune, they are often guided by personal values and beliefs that function as social parameters.[39] An African international law intellectual may act as an arbitrator, as an adjudicator, as a teacher of law, as a 'highly-qualified' jurist, as a counsel, as a government official,[40] as a negotiator and as a legal consultant. For six generations of international law scholars, borrowing from Abi Saab, these roles may be described as choices between confrontation, participation, or operation behind enemy lines. Interestingly, Abi Saab has described

34 Miles (n 10) 291; A Kulick 'Narrating narratives of international investment law: History and epistemic forces' in SW Schill et al (eds) *International investment law and history* (2018) 41 48 .

35 S Puig 'Social capital in the arbitration market' (2014) 25 *European Journal of International Law* 387.

36 W Kidane 'Africa's international investment law regimes' (2020) *Oxford Bibliographies*.

37 SW Schill 'W(h)ither fragmentation? On the literature and sociology of international investment law' (2011) 22 *European Journal of International Law* 875.

38 A Roberts *Is international law international* (2017) 230.

39 E Gaillard 'Sociology of international arbitration' (2015) 31 *Arbitration International* 1 14.

40 G Abi-Saab 'The Third World intellectual in praxis: Confrontation, participation, or operation behind enemy lines?' (2016) 37 *Third World Quarterly* 1957 1967.

his personal encounters with international investment arbitration as 'operating behind the enemy lines'.[41]

A socio-legal analysis of IIL is important because, unlike other fields of international law, IIL has not developed solely through treaties and conventions. As a result of its highly-decentralised structure, and the social conditions in which it operates,[42] IIL has developed through arbitral decisions and the writings of highly-qualified publicists.[43] Even though article 38 of the Statute of the International Court of Justice (ICJ) recognises the writings of highly-qualified publicists as a source of international law, it has been argued that this is a weak source of international law developed in the interests of capital-importing states.[44]

In addition to several other reasons, one of the main criticisms of IIL is that 'from a sociological standpoint … [IIL] reflects a growing global class divide and the converging interests of an ascendant transnational capitalist class of the developed and third world nations in the era of neoliberal globalisation'.[45] This criticism of IIL can only be fully understood in the historical context of decolonisation. It thus is trite to describe IIL as follows:[46]

> An important part of the history of IIL is the technical and sociological process of its establishment as its own distinct professional specialization, a new 'field' of study and work. It has emerged in recent years as not merely a particular application of general rules of public international law or procedures for commercial dispute settlement, but as a new discipline requiring specialist (and expensive) knowledge and expertise, provided and supported by an 'epistemic community' with its own networks, conferences, and journals.

As the next part will illustrate, decolonisation in Africa was followed by fierce ideological battles between 'Western' publicists and 'non-Western'

41 Abi-Saab (n 40) 1969.

42 Abi-Saab (n 26) 95.

43 Abi-Saab (n 40) 1963; M Sornarajah 'The case against a regime on international investment' in L Trakman & N Ranieri (eds) *Regionalism in international investment law* (2013) 475 487; Y Radi *Rules and practices of international investment law and arbitration* (2020) 36.

44 M Sornarajah *The international law on foreign investment* (2004) 404.

45 BS Chimni 'Customary international law: A Third World perspective' (2018) 112 *American Journal of International Law* 1 33.

46 A Mills 'The balancing (and unbalancing?) of interests in international investment law and arbitration' in Z Douglas et al (eds) *The foundations of international investment law: Bringing theory into practice* (2014) 437 454.

publicists. Although some of these writings may have failed to crystallise immediately into international law, they form an important backdrop and have indeed formed the basis for formation of law and exchange of ideas in later years. It thus is important to examine if today's IIL has been influenced by African experiences.

Until a few years ago, it would have been difficult to identify an African international investment law community. Even though African states and scholars have played active and pivotal roles in the development of IIL, until recently these roles have not been fully acknowledged.[47] This may be because until decolonisation, Africans were not encouraged to study law.[48] However, as a need for 'capital economic growth for certainty and predictability (and the protection of foreign investments), the consolidation of land titles, and the structuring of new economic institutions increased',[49] there was an increasing need for African trained lawyers. The following parts identify main strands of African scholarship in the field of international investment law over the last six decades as a sociological enterprise.

3 The past

This subsection examines the first decades of international investment law in a decolonised Africa. It shows that this period was one of trial and error, characterised by acceptance, rejection and pragmatism.

3.1 Decolonisation and the emergence of international investment law (1960-1970)

Until the 1960s modern IIL was non-existent.[50] Rather, customary rules on international law protected the interests of alien property.[51] Foreign capital and property was promoted and protected by a patchwork of friendship and commerce agreements,[52] state contracts[53] and enforced primarily

47 *MM Mbengue 'Something ELSE: African discourses on ICSID and on ISDS: An introduction' (2019) 34 ICSID Review-Foreign Investment Law Journal 259* 263.

48 Y Ghai 'Law, development and African scholarship' (1987) 50 *Modern Law* 763.

49 As above.

50 J Baumgartner *Treaty shopping in international investment law* (2016) 44.

51 PC Jessup 'Responsibility of states for injuries to individuals' (1946) 46 *Columbia Law Review* 903.

52 KJ Vandevelde 'A brief history of international investment agreements' (2005) 12 *UC Davis Journal of International Law and Policy* 157.

53 C Veeser 'A forgotten instrument of global capitalism? International concessions, 1870-1930' (2013) 35 *International History Review* 1136.

through state-state dispute settlement.[54] Principles on state responsibility, which recognised the duty of states to protect the property of foreigners, had developed primarily in eighteenth and nineteenth century Europe and America.[55] Although these rules have evolved over two centuries of international law, the emergence of new states in the 1950s created great anxiety among international lawyers and colonial powers.[56]

In the immediate decolonisation era, the declaration of economic self-determination by newly-independent states emphasised the inadequacies of pre-existing rules on the protection of alien property.[57] There were also concerns about the distinct legal succession problems that would arise from concession agreements granted by the colonial powers.[58] These issues were critical to economic and political integration. African states declared their intention to encourage the investment of foreign capital provided that this did not compromise their independence, sovereignty and territorial integrity.[59] Notably, during the colonial period concessions had been granted to nationals of colonising powers. Upon decolonisation, African states sought to determine their economic affairs afresh. For example, during his speech at the inauguration of the Organisation for African Unity (OAU) in 1962, Gamal Abdel Nasser, the second President of Egypt (1954-1970) stated:

> We were surprised only months after its withdrawal from our land the first time in June 1956, to see it return to us once again in the form of total invasion on October 29th concentrating the forces of three countries alleging that our restoration of the Suez Canal and our removal of that monopoly remaining from the piracy of the nineteenth century, was a violation of international law and the sanctity of treaties. We had to carry arms once again reluctantly we carried arms in a battle imposed on us. Then came the Suez victory, victory

54 A Kaushal 'Revisiting history: How the past matters for the present backlash against the foreign investment regime' (2009) 50 *Harvard International Law Journal* 491 498.

55 C Lipson *Standing guard: Protecting foreign capital in the nineteenth and twentieth centuries* (1985) 12.

56 Lissitzyn (n 8) 41.

57 Hyde (n 5) 855; AA Fatouros 'An international code to protect private investment: Proposals and perspectives' (1961) 14 *University of Toronto Law Journal* 77 82.

58 TM Franck 'Some legal problems of becoming a new nation' (1965) 4 *Columbia Journal of Transnational Law* 13 21.

59 CA Johnson 'Conferences of independent African states international organisation' (1962) 16 *Africa and International Organization* 426; T Allen 'The law relating to private foreign investment in manufacturing in Botswana, Zambia and Zimbabwe' (1992) 4 *African Journal of International and Comparative Law* 44 45.

> for freedom in Africa and everywhere and a symbol of emancipation which heralded hope for numerous peoples in the struggling continent.

The Suez Canal crisis of 1956 was a turning point in international economic law history as it represented a bold attempt by a post-colonial government to revoke a colonial concession.[60] Upon decolonisation of African and Asian states in the 1950s and 1960s, the international law on foreign investment began to emerge. The main catalysts for this change were the desire by European states to build war-torn economies, quests for overseas capital by American corporations and an urgency for foreign capital in newly-independent African states.[61] There were also fears that an 'African socialism' would result in expropriation of foreign-owned property.[62] To facilitate overseas foreign investment flows, international lawyers and decision makers emphasised the need for more clearly-defined international law rules through bilateral and multilateral treaty commitments.[63] Even though post-independence constitutions and domestic investment codes recognised expropriation without compensation as unlawful, Western scholars considered these instruments insufficient.[64] Proposals for a multilateral foreign investment charter were revigorated through the ABs-Shawcross Draft Convention on Investments Abroad.[65] Although proposals for a multilateral investment code did not materialise, European states began to sign bilateral investment treaties (BITs) which were an important departure in international economic law relations of the previous decades.[66] Between 1959 and 1970, 54 BITs were signed between European states and African states on the basis of European treaty models.

60 W Friedmann 'Half a century of international law' (1964) 50 *Virginia Law Review* 1333 1345.

61 Abi-Saab (n 26) 100; AA Yusuf *Pan-Africanism and international law* (2014) 121.

62 Bradley (n 12) 149; W Friedman 'Legal problems in foreign investments' (1959) 14 *Business Law* 746.

63 Domke (n 17) 615; Fatouros (n 58) 77.

64 Domke (n 17) 592; K Ahooja 'Investment laws and regulations in Africa' (1964) 2 *Journal of Modern African Studies* 300.

65 AS Miller 'Protection of private foreign investment by multilateral convention' (1959) 53 *American Journal of International Law* 371.

66 AA Fatouros 'The quest for legal security of foreign investments: Latest developments' (1962) 17 *Rutgers Law Review* 257 262; R Preiswerk *La protection des investissements privés dans les traités bilatéraux* (1963).

The immediate decolonisation era was marked by other important international law events. Following a very successful Bandung Conference (1955),[67] the Asian-African Legal Consultative Committee (AALC) was established in 1958 as an advisory body of legal experts. In its early yearly sessions, the AALC took a stand that the relationship between foreign investors and states was subject to domestic law.[68] These sessions challenged Western notions on foreign investment protection and played a key role in projecting alternative views to international law.[69] One of the most significant international economic events of the 1960s was the 1962 United Nations (UN) General Assembly Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources (PSNR).[70] Newly-independent African states that now had equal voting power at the UN supported this Resolution.[71] This Resolution emerged in response to concerns over protection of foreign direct investment and economic development in developing countries.[72] For African countries, support for Resolution 1803 was aimed at ensuring that 'independence was not just an empty shell but a concrete attribute which would pave the way to economic development'.[73] Resolution 1803, which only very recently has been recognised as a principle of customary international law, enshrines adequate compensation for expropriation and exhaustion of local remedies/consent-based arbitration in disputes relating to compensation for expropriation.

The third key event of the 1960s was the establishment of the World Bank's International Centre for Settlement of Investment Disputes

67 A Chen 'A reflection on the south-south coalition in the last half century from the perspective of international economic law-making: From Bandung, Doha and Cancun to Hong Kong' (2006) 7 *Journal of World Investment and Trade* 201 203; D Lustig *Corporate regulation in international law: A history of failure?* (2020) 184. Egypt, Ethiopia, Gold Coast (Ghana), Liberia, Libya and Sudan participated in this landmark conference.

68 LC Green 'Asian African Legal Consultative Committee: Third session, Colombo, 1960' (1962) 25 *Modern Law Review*122 123; RJ Cummins 'Legal protection for foreign investment: Developing a flexible framework' (1968) 9 *Arizona Law Review* 404 409.

69 Asian-African Legal Consultative Committee 'Foreign investment laws and regulations of member countries' (1965).

70 SM Schwebel 'The story of the UN's declaration on permanent sovereignty over natural resources' (1963) 49 *American Bar Association Law Journa*l 463.

71 Algeria, Burundi, Cameroon, Central African Republic, Chad, Congo, Dahomey (Benin), Ethiopia, Gabon, Guinea, Côte d'Ivoire, Liberia, Madagascar, Mali, Mauritania, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Upper Volta (Burkina Faso) and Togo.

72 N Schrijver *Sovereignty over natural resources: Balancing rights and duties* (1997) 1.

73 V Barral 'National sovereignty over natural resources, environmental challenges and sustainable development' in E Morgera & K Kulovesi (eds) *Research handbook on international law and natural resources* (2016) 1.

(ICSID). This was an important watershed moment in the modern development of international investment law.[74] Upon independence, many African states joined the International Bank for Reconstruction and Development (IBRD). These states provided the numbers required for ratification of the ICSID Convention.[75] During the regional meeting organised to promote the ICSID Convention in Addis Ababa, Ethiopia, Taslim Olawale Elias, who was Nigeria's Minister of Justice and Attorney-General (later president of the International Court of Justice) was one of the African legal experts who welcomed this new international law institution.[76] By the end of 1965, there were only 49 signatories to the ICSID Convention which included 23 African states.[77] The first 15 of the first 20 parties to the Convention were African states.

Other important events in the 1960s were the establishment of the United Nations Economic Commission for Africa and the OAU.[78] During this period IIL jurisprudence was at an embryonic stage and there were very few international investment arbitration disputes between foreign investors and African states.

74 G Delaume 'ICSID arbitration and the courts' (1983) 77 *American Journal of International Law* 784.

75 AR Parra 'The participation of African states in the making of the ICSID Convention' (2019) 34 *ICSID Review – Foreign Investment Law Journal* 271.

76 Parra (n 75) 271. Other experts who participated in the Addis Abba Meeting were Said Mohamed Ali (Somalia); Raymond Awoonor-Renner Expert (Sierra Leone); A Benani (Morocco); Estrada Bernard (Liberia); Jacques Bigay (Central African Republic); B B Bouiti (Congo-Brazzaville); R Brown(Tangayika); MT Diawara (Côte d'Ivoire); NM C Dodoo (Ghana); Osman El Tayeb (Sudan); A Foalem (Niger); Hedi Ghachem (Tunisia); Badr El Din Abo Ghazi (United Arab Republic); Abdul Rahaman Gulaid(Somalia); G Harelimana (Rwanda); L Hassouni (Morocco); C Johnson (Dahomey); S Kpognon (Dahomey); Ahmed Ben Lamin (Libya); S Laurent(Congo-Leopoldville); M Lemma (Ethiopia); E Lobel (Mali); B Macaulay (Sierra Leone); J Mallamud (Uganda); B Mankoubi (Togo); E Mayinguidi (Congo-Brazzaville); M Moalla (Tunisia); D Moignard (Senegal); Ahmed Mokadmy (Libya); Ali Mohsen Moustafa (United Arab Republic); PT Mpanjo (Cameroon); Sangare Nfaly (Guinea); NZ Nicayenzi (Burundi); P Nikiema (Upper Volta); A Ogbagzy (Ethiopia); PR Okpu (Nigeria); CCY Onny (Ghana); GU Osakwe (Nigeria); AO Ouma(Uganda); L Quashie (Togo); Mohamed Abdul Rahman (Ethiopia); N Ratsirahonana(Malagasy Republic); M Robinson (Malagasy Republic); D Sow (Senegal); S Traore (Mali); Soter Tsanga (Cameroon); and E Yossanengar (Chad).

77 Parra (n 75) 277.

78 B Boutros-Ghali 'The Addis Ababa charter: A commentary' (1964) 35 *International Conciliation* 5 18 (quoting Nkrumah: 'In dealing with a united Africa investors will no longer have to weigh with concern the risks of negotiating [at one period with governments which may not exist] in the very next period.'

3.1.1 The first generation of African international investment law scholarship

The political and economic climate examined in the previous subsection was the background against which the first generation of African international law scholarship began to emerge.[79] Until the 1960s, international law scholarship on foreign investment had been dominated by the writings of European and American publicists.[80] During the decolonisation era, non-African publicists declared that the recognition of acquired rights was a basic principle of international economic law recognised by the law of civilised nations.[81] They also argued that the concept of sanctity of contracts was universally acceptable under domestic and international legal order.[82] In the wake of expropriations and nationalisations, European scholars and lawyers declared that under international law, the legality of a nationalisation was subject to prompt, adequate and effective compensation defined as payment of the full value (market price) of the property.[83] These arguments were based on the doctrine of the minimum standard required under international law for the protection of foreigners and international standards governing state responsibility for the treatment of aliens. [84]

The first generation of IIL scholarship in Africa struggled to find a place in a field that was predominantly practised by selected European diplomats and government-appointed lawyers. Even though scholarship was dominated by European and American writers, young African

79 R Yakemtchouk 'L'Afrique en droit international' (1969) 7 *Cahiers économiques et sociaux* 383; D Thiam 'L'Afrique demande un droit international nouveau' (1968) 1 *Law and Politics in Africa, Asia and Latin America* 52; PF Gonidec 'Note sur le droit des conventions internationales en Afrique' (1964) 11 *Annuaire français de droit international* 866; Green (n 64)123; YZ Blum 'New nations and the law of nations international law: Indian courts and legislature' (1969) *17 American Journal of Comparative Law* 485 486; JHW Verzijl 'The present stagnation of interstate adjudication causes and possible remedies' (1963) 2 *International Relations* 479 490.

80 JF Williams 'International law and the property of aliens' (1928) 9 *British Yearbook of International Law* 1; EM Borchard 'Enemy private property' (1924) 18 *American Journal of International Law* 523; H Lauterpacht 'The Grotian tradition in international law' (1946) 23 *British Yearbook of International Law* 1.

81 Domke (n 17) 585.

82 RY Jennings 'State contracts in international law' (1961) 37 *British Yearbook of International Law* 56.

83 FG Dawson & BH Weston 'Prompt, adequate and effective: A universal standard of compensation' (1961) 30 *Fordham Law Review* 727.

84 F García-Amador 'State responsibility in the light of the new trends of international law' (1955) 49 *American Journal of International Law* 339.

scholars made very important contributions.[85] The most notable of these contributions was by a 29 year-old Egyptian Harvard student, Georges M Abi-Saab, in a '1962' essay on newly-independent states. In this essay he argued for the liquification of traditional rules of state responsibility, stating that it was necessary for 'newly-independent states to find ways and means to hold these rules in check'.[86] He rejected arguments that favoured direct access for individuals to international tribunals, arguing that economic disputes between states and foreigners were subject to local law and local dispute resolution mechanisms.[87] However, he recognised the importance of honouring investment agreements that had been negotiated between newly-developed states and European states on the basis of equality and mutual interest.[88] Abi-Saab argued that bilateral economic treaties were more favourable to the interests of newly-independent states than a multilateral convention.[89] He also favoured mediation and conciliation of disputes rather than institutionalised adjudication or compulsory arbitration.[90]

Legal scholarship that emerged during the first years of African independence was carried out by young African scholars who received education abroad and who were confronted by principles of international law.[91] In 1965 Nwogugu, a young Nigerian scholar, published a book based on a doctoral thesis on *The legal problems of foreign investment in developing countries* which he completed in 1963 at the University of Manchester, aged 30.[92] This was one of the earliest comprehensive books on the international law of foreign investment written by an African scholar. In this book Nwogugu adopted a pragmatic stance to established principles of international law, arguing that there was 'no valid legal justification for a state which enters into an investment agreement from which it obtains benefits, to repudiate its obligation by a claim of sovereign immunity'.[93]

In the first decade of African independence, one of the most crucial debates revolved around investment contracts. In 1967 a 27 year-old

85 Before this legal scholarship had focused on independence. See L Solanke *United West Africa at the bar of the family of nations* (1927).

86 Abi-Saab (n 26) 114.

87 Abi-Saab (n 26) 115.

88 Abi-Saab (n 26) 116.

89 As above.

90 Abi-Saab (n 26) 117.

91 Abi-Saab (n 26) 100.

92 EI Nwogugu 'Legal problems of foreign investments' (1976) 153 *Recueil des Cours* 174.

93 Nwogugu (n 11) 208.

Columbia University LLM graduate,[94] Frank Njenga, published one of the very few essays written by an African on the question of state contracts under international law. In this essay he stated that a 'so-called "community interest" in safeguarding the absolute security of investment, is like a partnership of the horse and the rider – the developing countries being in the former role'.[95] In another essay, Harvard-trained 30 year-old Ibrahim FI Shihata, who at the time was an international law lecturer in Cairo, argued that because international law principles of sovereignty and non-intervention were beneficial to interests of new African states, arguments that 'traditional international law was made for the European powers and the foreign traders and investors' were no longer relevant.[96]

Abi-Saab, Nwogugu, Shihata and Njenga represented a new generation of post-colonial African legal scholars. With the exception of Shihata, who is recognised as an important pillar of modern IIL, these young African men eventually had distinguished legal careers in other fields of international law. Abi-Saab would build a very illustrious career in human rights, sit as a judge *ad hoc* on the ICJ, as Chairperson of the Appellate Body, World Trade Organisation (WTO) and judge on the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).[97] Much later, between 2005 and 2010, Abi-Saab was appointed as an arbitrator in key international investment law arbitrations instituted against Latin American states.[98] Nwogugu became a professor in Nigeria specialising in Nigerian family law[99] and the international law of nuclear energy.[100] Njenga, who is known as the father of the maritime concept

94 International Law Commission 'Forty-sixth session Geneva, 2 May-22 July 1994 Filling of Casual Vacancies, Note by the Secretariat Addendum' UN Doc A/CN.4/456/Add.2 (19 April 1994), https://legal.un.org/ilc/documentation/english/a_cn4_456_add2.pdf accessed (4 August 2020).

95 FX Njenga 'The legal regime of concession agreements' (1967) 3 *East African Law Journal* 105.

96 IF Shihata 'The attitude of new states toward the International Court of Justice' (1965) 19 *International Organisation* 217.

97 He has also served as a member of the administrative tribunal of the International Monetary Fund, as an arbitrator in various international arbitral tribunals, and as member and Chairperson of the Appellate Body of the World Trade Organisation.

98 *Abaclat & Others v Argentine Republic* ICSID Case ARB/07/5 (formerly *Giovanna a Beccara & Others v The Argentine Republic*) Dissenting Opinion to Decision on Jurisdiction and Admissibility (4 August 2011).

99 EI Nwogugu *Family law in Nigeria* (1990).

100 EI Nwogugu et al 'International law and nuclear energy: Overview of the legal framework' (1995) 37 *IAEA Bulletin* 16.

of the Exclusive Economic Zone (EEZ),[101] became secretary of the Asian-African Legal Consultative Committee and was Chairperson of negotiating group 77, group 2 during the Third United Nations Conference on the Law of the Sea. [102]

In addition to the scholarship of the young Africans examined above, the second group of international investment law scholars, which was older, had closer ties with the political class of the 1960s. The two most prominent of these scholars were Kéba M'Baye and Taslim Olawale Elias. Like most scholars of their generation, M'Baye and Elias originally were African law scholars.[103] However, in the next decades they would make important contributions to African international investment law. Elias was 49 years old when he led the Nigerian delegation to the 1963 ICSID Regional Meeting held in Addis Ababa. In the same year, M'Baye was appointed under Léopold Sédar Senghor as president of the Supreme Court of Senegal in 1963 at the age of 39 years. One of M'Baye's earliest articles examined foreign capital, law and development in French West Africa.[104]

Another author, Salah-Eldin Abdel-Wahab, who was a district attorney and judge of the United Arab Republic (Egypt) argued that a state did not violate its contractual obligations when it nationalised a foreign investor's property for national interests.[105] He also argued that partial compensation covering a major part of the investor's losses was reasonable compensation.[106] Overall, the first generation of African international investment law scholarship was contributory in nature. With the exception of a few scholars, most writers focused only on describing the law as it was.

By the end of the 1960s, African legal scholarship began to take a shape of its own and could be distinguished from scholarship by Asian authors and authors from other developing countries. Reflecting this new scholarly movement, in 1967 a conference on International Law and

101 TO Akintoba *African states and contemporary international law: A case study of the 1982 Law of the Sea Convention and the Exclusive Economic Zone* (1996) 72.

102 United States Congress House 'The Status of the Third United Nations Conference on the Law of the Sea: Hearing before the Committee on Foreign Affairs, House of Representatives, Ninety-sixth Congress, First Session, 16 May 1979' (1979) 53.

103 See TO Elias *The nature of African customary law* (1956); Elias (n 11) 160.

104 K M'Baye 'Droit et développement en Afrique francophone de l'ouest' (1967) 1 *Revue sénégalaise de droit* at 23.

105 S Abdel-Wahab 'Economic development agreements and nationalisation' (1961) 30 *University of Cincinnati Law Review* 436.

106 Abdel-Wahab (n 105) 444.

African Problems was held in Lagos, Nigeria supported by the Carnegie Endowment for International Peace.[107] One of the key issues examined during this conference was the treatment of aliens in Africa. A shift from Afro-Asian attitudes to African international law was aslo exemplified in seminal generalist works by Taslim Olawale Elias and Joseph-Marie Bipoun-Woum.[108] Even though the OAU had placed an emphasis on economic integration, more emphasis was placed on political integration of the continent. Kidane rightly notes that in the immediate post-colonial decades, Africans were preoccupied with the serious task of nation building as a matter of priority, and while scholars focused on questions such as human rights and international criminal law, less emphasis was placed on the study of international economic law.[109] This may be one reason why the first generation failed in its modest attempts to change traditional rules of international investment law.

3.1.2 A new 'African' international economic order (1970-1989)

The 1960s era of decolonisation and urgency for foreign capital took a new turn in the 1970s.[110] Disillusionment after independence, military *coups*, conflicts and economic problems were rife in most African states. Several governments introduced restrictive investment laws and indigenisation policies that aimed at promoting local ownership of economic activities.[111] This was followed by major expropriations in Algeria, Libya, Nigeria, Somalia, Sudan, Tanzania, Uganda and the United Arab Republic.[112] At the UN, developing countries sought a new international economic order (NIEO) based on principles of self-determination and economic development.[113] The NIEO was moved by Algeria when it hosted the fourth

107 J Spencer 'International law and African problems: African conference, Lagos, 14-18 March 1967 under joint auspices of the Nigerian Institute of International Affairs and the Carnegie Endowment for International Peace' (1962) 63 *American Journal of International Law* 373.

108 J Bipoun-Woum *Le Droit international Africain : problèmes généraux règlement des conflits* (1970).

109 W Kidane 'The culture of investment arbitration: An African perspective' (2019) 34 *ICSID Review-Foreign Investment Law Journal* 413.

110 J Duru 'Proceedings: Expropriation regional conference American Society of International Law' (1972) 2 *Denver Journal International Law and Policy* 125.

111 Yelpaala (n 25) 29.

112 FJ Truitt 'Expropriation of foreign investment: Summary of the post-World War II experience of American and British investors in the less developed countries' (1970) 1 *Journal of International Business Studies* 21 27; WG Haight 'Libyan nationalisation of British Petroleum Company assets' (1972) 6 *International Lawyer* 54.1

113 Umozurike (n 7) 79.

non-aligned conference in 1973.[114] The group of Third World states at the UN, led by the Organisation of Petroleum Exporting Countries (OPEC), also caused a system-wide international economic and political crisis,[115] which is generally known as the beginning of the NIEO.[116] The 1974 UN Charter of Economic Rights and Duties of States was an integral part of the resolutions entitled the New International Economic Order and the Programme of Action.[117] Even though the Charter of Economic Rights and Duties of States was first proposed by President Luis Echeverría of Mexico, the draft resolution for adoption of the Charter was introduced by Ethiopia on behalf of the Group of 77.[118]

Many African states incorporated provisions of the NIEO on economic and political independence of states, permanent sovereignty over natural resources, and nationalisation subject to national laws, regulation of foreign investments and the activities of multinationals in domestic legislation.[119] The NIEO also gave birth to a law and development movement and declaration of development as a human right. The Declaration on the Establishment of a New International Economic Order recognised nationalisation as a sovereign right and provided that disputes over compensation had to be solved in accordance with the domestic laws of every country.[120] However, it recognised the right of states to conclude agreements in free exercise of their sovereign will.[121] The Economic Charter also recognised the right of states to expropriate foreign-owned property, and a duty to provide compensation taking into account relevant laws and regulations. Notably, the Charter provides that disputes over compensation shall be settled under the domestic law of the

114 NS Rembe 'Prospects for the realisation of the new international economic order: An African perspective' (1984) 17 *Comparative and International Law Journal of Southern Africa* 322 326.

115 VN Fru *The international law on foreign investments and host economies in sub-Saharan Africa: Cameroon, Nigeria, and Kenya* (2011) 37.

116 B Rajagopal *International law from below: Development, social movements and Third World resistance* (2003) 77.

117 SK Chatterjee 'The Charter of Economic Rights and Duties of States: An evaluation after 15 years' (1991) 40 *International and Comparative Law Quarterly* 669 672.

118 United Nations Audiovisual Library of International Law 'General Assembly Resolution 3281 (XXIX) Charter of Economic Rights and Duties of States' https://legal.un.org/avl/pdf/ha/cerds/cerds_ph_e.pdf (accessed 15 December 2020).

119 Rembe (n 114) 332.

120 *Texaco Overseas Petroleum Co and California Asiatic Oil Company v Libya* Award (19 January 1977) para 90; EJ de Arechega 'Application of the rules of state responsibility for the nationalisation of foreign-owned property' in K Hossain (ed) *Legal aspects of the new international economic order* (1980) 220.

121 UN General Assembly, 3201 (S-VI). Declaration on the Establishment of a New International Economic Order, 1 May 1994, A/RES/3201(S-VI) art 4(e)(iii).

nationalising state and by its tribunals except where states agreed to settle the dispute by any other peaceful means.[122] The NIEO UN resolutions were strongly criticised by scholars from developed countries.[123] As nationalisation became common place, issues concerning the exhaustion of local remedies, breaches of concession agreements and stabilisation clauses were at the centre of academic legal debates.[124] During this period 91 bilateral investment agreements were signed by African states. Unlike the treaties signed between 1959 and 1969, a number of these treaties were signed with states from other developing countries. Reflecting a position that favoured regulation of foreign investment by domestic law, changes were made to domestic law, and regional economic communities (RECs) were established. A few very important investment arbitration disputes occurred during this period.

3.2 A 'newer' generation of African international investment law scholarship

The New International Economic Order movement heralded a newer generation of African international investment law scholarship. Some of these scholars were actively engaged in this movement and they expressed optimism that traditional rules of international law on trade and investment would change. For some of these scholars, these rules had to be rejected because they had been developed for the subjugation of African states for European interests.[125] They believed in a new order in which 'international trade, investment and foreign aid must be made to resonate with the objectives of self-sufficiency and economic self-determination'.[126] For example, Elias argued that customary international law on the treatment of alien property was bound to transform in a manner 'calculated to serve the evolving international community in the foreseeable future'.[127] Asante argued for the formulation of a new set of norms with respect to foreign companies that would give developing countries equal participation.[128] Dr Andronico Adede, who was a founding member of the African Society

122 UN General Assembly, Charter of Economic Rights and Duties of States: Resolution adopted by the General Assembly, 17 December 1984, A/RES/39/163 art 2(c).

123 Haight (n 112) 591.

124 HJ Richardson II 'Reflections on education in international law in Africa' (1974) 4 *Denver Journal of International Law and Policy* 199 211.

125 A Mahiou 'Les implications du nouvel ordre économique et le droit international' (1976) 12 *Belgian Review of International Law* 445.

126 RN Kiwanuka 'The thirteenth UN General Assembly special session: Lessons for Africa' (1987) 21 *Journal of World Trade Law* 78.

127 TO Elias 'New perspectives and conceptions in contemporary public international law' (1981) 10 *Denver Journal of International Law and Policy* 409 423.

128 Asante (n 26) 627.

of International Law, argued that the old order was changing and that change would be coherent and deliberate.[129] He argued that

> [d]eveloping countries' attack upon the traditional law of diplomatic protection in cases of expropriation may not be seen as a position which is inconsistent with the legitimate desire of encouraging foreign private investments. A new atmosphere is being established redefining the relationship between the owners of the natural resources and the Transnational Corporations (TNC) which exploit such resources.[130]

During this period, African scholars wrote important dissertations and gave courses at the Hague Academy of International law.[131] Notably, in 1979 Mohammed Bedjaoui published a seminal text titled *Towards a new international economic order* under the direction of the *United Nations Educational, Scientific and Cultural Organisation* (UNESCO). Bedjaoui had been the first Secretary-General of the newly-independent Algerian government, and Minister of Justice. Kéba M'Baye also played a pivotal role in articulating the right to economic development which he argued was the corollary of the right of peoples to self-determination.[132] M'Baye also argued that the harmonisation of investment laws in Africa was a major priority that would lead to legal certainty.[133] Another African, Samuel SKB Asante, was one of the prominent African scholars of this era. In 1977, at the age of 44,[134] he was appointed by Klaus Sahlgren as Chief Legal Adviser of the United Nations Centre on Transnational Corporations (UNCTC).[135] Asante, who had completed a JSD in law at

129 AO Adede 'International law and property of aliens: The old order changeth' (1977) 19 *Malaya Law Review*175 191.

130 Adede (n 129) 192.

131 OC Eze 'The legal status of foreign investments in the East African common market' unpublished PhD thesis, The Graduate Institute Geneva, 1975; Nwogugu (n 87) 174; DA Ijalaye 'Indigenisation measures and multinational corporations in Africa' (1981) 171 *Recueil des Cours, de l'Académie de Droit International* 9; AO Adede *Legal trends in international lending and investment in the developing countries* (1984).

132 K M'Baye 'Voie africaine du socialisme et propriété' (1975) *Éthiopiques : revue socialiste de culture négro-africaine* 1 39; K M'baye 'Développement et sociétés le droit au développement' (1980) 21 *Éthiopiques : revue socialiste de culture négro-africaine* 1.

133 K M'Baye 'L'harmonisation du droit privé et du droit international privé en matière commerciale dans les États de l'Afrique occidentale, équatoriale et orientale' (1971) 26 *Africa: Rivista trimestrale di studi e documentazione dell'Istituto italiano per l'Africa e l'Oriente* 139 149.

134 'Profile of Samuel KB Asante' https://www.wipo.int/export/sites/www/amc/en/domains/panel/profiles/asante-samuelkb.pdf (accessed 4 August 2020).

135 T Sagafi-nejad & JH Dunning *UN and transnational corporations: From code of conduct to global compact* (2008) 93 (noting that Asante's appointment was one of the two most influential appointments).

Yale in 1968 at the age of 35, called for a reappraisal of foreign investment international law. He argued that developing states had the sovereign inherent right to nationalise foreign property and that this right was only subject to payment of 'appropriate compensation'. He also argued that state contracts could be unilaterally modified by states in the public interest. Asante also argued that a host state had no obligation to give special treatment to foreign investors.[136] Samuel Kofi Date-Bah, a 28-year-old African scholar, who later became a Supreme Court judge in Ghana, argued that public international law should play a subsidiary role and that municipal law of host states should be developed to achieve fairness to foreign investors.[137] Adopting similar arguments, Adede argued that a modern rule of exhaustion of local remedies could play an important role in redressing the unbalanced relationship between developed and developing states.[138]

Some scholars who emerged during the second decade of Africa's independence were more accepting of established international law on foreign investment, recognising that some rules of international law were beneficial to the interests of African states. As Abi-Saab has stated more recently, even though newly-independent states contested the universality of international law, they 'claimed the right to pick and choose the rules that apply to them, in a voluntarist attitude'.[139] For example, David Ijalaye, who completed a JSD at Columbia under the supervision of Friedmann, aligned with a position that development agreements were subject to international law as these agreements involved state parties.[140] Umozurike, who is known for his research on self-determination and human rights, represented a middle ground arguing that while there was an inherent danger in a state's economy being dominated by aliens, respect for *pacta sunt servanda* was imperative.[141] He argued that it was wrong to imply that principles of nationalisation were created by imperialist states, favouring a principle of reasonable compensation that would depend on the circumstances of each case.[142]

136 Asante (n 25) 595.

137 SK Date-Bah 'The legal regime of transnational investment agreements that is most compatible with both the encouragement of foreign investors and the achievement of the legitimate national goals of host states' (1971) 15 *Journal of African Law* 241 248.

138 AO Adede 'A survey of treaty provisions on the rule of exhaustion of local remedies' (1977) 18 *Harvard International Law Journal* 117.

139 Abi-Saab (n 41) 1959.

140 DA Ijalaye *The extension of corporate personality in international law* (1978) 242.

141 Umozurike (n 7) 97.

142 Umozurike (n 7) 96.

Some other African scholars, mostly international relations experts, were very sceptical of the NIEO. They were convinced that the attitude of the newly-developing states to international law was primarily driven by 'narrow political ideologies and economic sympathies to assert equality as a fact rather than a relative concept, and justice as an attainable value'.[143] Reflecting similar fears, Adeoye Adesanya, a political scientist who frequently wrote on foreign investment in Africa in legal periodicals,[144] described the NIEO as a 'bad omen for foreign investment in the Third World'.[145] Elias, who had been elevated to the International Court of Justice, argued that the most important guarantees African states could give to foreign investors was not liberal investment laws but political stability and abundant natural resources.[146] Elias also argued that the incessant nationalisation of foreign enterprises would still scare off investors even where there were guarantees of adequate compensation.[147]

One of the central issues that emerged in legal scholarship between 1970 and 1989 was the involvement of African states in international arbitration.[148] Even though the ICSID Convention had been in force for years, ICSID became more active in the 1980s under the direction of Ibrahim Shihata (Egypt).[149] The first disputes instituted at ICSID were instituted mostly against African states and this resulted in negative perceptions towards international arbitration.[150] Even though the NIEO embodied settlement of disputes in national courts, African states signed investment contracts that recognised the jurisdiction of international tribunals. Some scholars embraced ICSID while others viewed the ICSID Convention as detrimental to the interests of developing states.

143 Udokang (n 8) 174.

144 A Akinsanya 'International protection of direct foreign investments in the Third World' (1987) 36 *International and Comparative Law Quarterly* 58; A Akinsanya & A Davies 'Third World quest for a new international economic order: An overview' (1984) 33 *International and Comparative Law Quarterly* 208; A Akinsanya 'Host governments' responses to foreign economic control: The experiences of selected African countries' (1981) 30 *International and Comparative Law Quarterly* 769.

145 A Akinsanya 'Permanent sovereignty over natural resources and the future of foreign investment' (1980) 22 *Journal of the Indian Law Institute* 466 475.

146 TO Elias *Africa and the development of international law* (1988) 241.

147 As above.

148 K M'baye 'Commentary' in ICC *ICC Court of Arbitration 60th anniversary: A look at the future* (1984) 293 296; J Paulsson 'Third World participation in international investment arbitration' (1987) 2 *ICSID Review* 19.

149 AR Parra *The history of ICSID* (2012) 42.

150 *Holiday Inns SA & Others v Morocco* ICSID Case ARB/72/1; *Adriano Gardella SpA v Côte d'Ivoire* ICSID Case ARB/74/1; *AGIP SpA v People's Republic of the Congo* ICSID Case ARB/77/1; *SARL Benvenuti & Bonfant People's Republic of the Congo* ICSID Case ARB/77/2; *Guadalupe Gas Products Corporation v Nigeria* ICSID Case ARB/78/1.

For example, Elias argued that even though the ICSID Convention was far from perfect, it would go a long way towards improving the climate of foreign private investment in Africa.[151] Some scholars believed that ICSID was an institution that 'African states ought to call their own and have confidence in to settle their investment disputes'.[152] Peter Mutharika (Malawi), who had just completed a JSD at Yale aged 32, argued that parties to the ICSID Convention were better positioned to attract foreign investment at the expense of a state that is not party to the Convention.[153] Other scholars argued that African courts were unsuitable for settling investment disputes because they could be influenced by pressure from African governments.[154] African perspectives on international investment law began to emerge in the decisions of arbitral tribunals, notably in dissenting opinions made by some prominent first generation African scholars.[155]

By the end of the 1980s, African scholars were faced with the reality that changing old rules of international law would not be very easy especially as there were frictions within their political and economic classes. Yelpaala has rightly stated that investment legislation of the NIEO era failed to achieve desired economic independence and equity.[156] Even though the NIEO began to disappear from international and academic discourse,[157] scholars such as Abdulqawi A Yusuf argued that UN resolutions on permanent sovereignty over natural resources and the NIEO were not merely political resolutions, but resolutions that would over time have legal significance.[158] Some scholars continued to argue that international law principles were not acceptable as they had been

151 Elias (n 135) 246.

152 AA Agyemang 'African states and ICSID arbitration' (1988) 21 *Comparative and International Law Journal of Southern Africa* 177 183.

153 P Mutharika 'Treaty acceptance in the African states' (1973) 3 *Denver Journal of International Law and Policy* 185 195.

154 AA Agyemang 'African courts, the settlement of investment disputes and the enforcement of awards' (1989) 33 *Journal of African Law* 31 43.

155 *Société Ouest Africaine des Bétons Industriels v Senegal* ICSID Case ARB/82/1 Dissenting Opinion of Kéba M'baye (25 February 1988); *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* ICSID Case ARB/84/3 (20 May 1990) Dissenting Opinion of Mohamed El Mahdi; *Asian Agricultural Products Ltd v Republic of Sri Lanka* ICSID Case ARB/87/3 Dissenting Opinion of Samuel K B Asante (15 June 1990).

156 Yelpaala (n 25) 16.

157 Yelpaala (n 25) 16.

158 AA Yusuf *Legal aspects of trade preferences for developing states: A study in the influence of development needs on the evolution of international law* (1982) 78; MB Kumuwanga 'The teaching of international trade and investment law in a law and development context: A view from Zambia the application of law and development theories: Some case studies' (1987) 1 *Third World Legal Studies* 131 142.

developed without the consent and participation of African states.[159] Other scholars embraced the idea of liberal systems to foreign investors.[160] In 1986 the African Association of International Law was established to 'foster the development and dissemination of African perspectives and practices of international law'.[161]

3.3 Neo-liberalism and the emergence of a global investment law regime (1990-2010)

In the 1980s sub-Saharan Africa faced a serious economic crisis[162] described by some scholars as the 'decade of greed'.[163] The dawn of hope and independence of the 1960s, which had been followed by the commodity price boom of the 1970s,[164] was soon replaced by the debt crisis and the pro-market ideological shift of the 1980s.[165] This resulted in a major shift towards policy-based lending-structural and sector adjustment lending measures introduced by the World Bank group.[166] The Multilateral Investment Guarantee Agency (MIGA) was established in 1988 under the leadership of Ibrahim Shihata to provide guarantees against various types of non-commercial risks faced by foreign private investors in developing countries. By the 1990s, with the impending decline of Soviet power, many African states turned to the World Bank for development assistance, which had changed from project-specific financing to assistance dependent on policy and legal reform.[167] With the end of the Cold War, economic

159 Abi-Saab (n 41) 1959.

160 CN Ngwasiri 'The effect of legislation on foreign investment: The case of Cameroon' (1989) 33 *Journal of African Law* 192 204.

161 'African Association of International Law/*Association Africaine De Droit International*' (1987) 20 *Law and Politics in Africa, Asia and Latin America* 301-302.

162 OO Akinla 'Economic reform in sub-Saharan Africa: The changing business and legal environment' (1987) 7 *Boston College Third World Law Journal* 19 20; M Ndulo 'Harmonisation of trade laws in the African economic community (1993) 42 *International and Comparative Law Quarterly* 101.

163 TWälde 'A requiem for the "new international economic order": The rise and fall of paradigms in international economic law' in NM Al-Nauimi & R Meese (eds) *International legal issues arising under the United Nations decade of international law* (1995) 1301 1333.

164 IFI Shihata 'Destination embargo of Arab oil: Its legality under international law' (1974) 68 *American Journal of International Law* 591.

165 MG Desta 'Competition for natural resources and international investment law: Analysis from the perspective of Africa' (2016) *Ethiopian Yearbook of International Law* 117 148.

166 PW Ofosu-Amaah *Reforming business-related laws to promote private sector development: The World Bank experience in Africa* (2000) 23.

167 DP Fidler 'A kinder, gentler system of capitulations: International law, structural adjustment policies, and the standard of liberal, globalised civilisation' (2000) 35 *Texas*

nationalism was replaced by a new regime based on adoption of a free market philosophy in which the private sector played an active role both in investment and development.[168]

The liberalisation of foreign direct investment also led African states to negotiate an increasing number of bilateral investment and avoidance of double taxation treaties.[169] In 1992 the Guidelines on Foreign Investment were formulated by the World Bank.[170] Ibrahim Shihata, who was the founder of the OPEC Fund and Senior Vice-President and General Counsel at the World Bank from 1983 to 1998, played an important role in the 'depoliticisation' of international investment law and in the formulation of these guidelines.[171] Mohamed Ibrahim Khalil, who was the first dean of law at the University of Khartoum and former speaker of the Sudan Parliament, was one of the individuals who was carefully selected by Shihata to conduct a survey with Rudolf Dolzer which formed the background to the 1992 World Bank Guidelines of Foreign Investment.[172] During his tenure, Shihata appointed distinguished Africans such as Kéba M'Baye to ICSID *ad hoc* committees, which was a deliberate decision to promote consistency in the jurisprudence and create more geographically-balanced panels.[173] While to some Shihata must have represented American hegemony and 'neo-colonisation' of the Third World,[174] he pursued his activities with great passion. Reflecting on his time at the World Bank, he would later state that he had acted as the spokesman for the law as he understood it, and that this was not based on personal preferences but on research. He was fully aware that this was a choice between being popular and being credible.[175]

After the 1990s there was a proliferation of international investment agreements. Between 1990 and 2010 almost 700 bilateral investment

International Law Journal 387 404.

168 F El Rahman & A El Sheikh *The legal regime of foreign private investment in Sudan and Saudi Arabia* (2003) 5; Sornarajah (n 13) 10.

169 El Rahman & El Sheikh (n 168) 6; A de Nanteuil *International investment law* (2020) 33.

170 IFI Shihata *Legal treatment of foreign investment: The World Bank guidelines* (1993).

171 World Bank Legal Vice Presidency 'Ibrahim I Shihata: Senior Vice President and General Counsel of the World Bank 1983-1998 '(2019) http://documents1.worldbank.org/curated/en/266821572449833340/pdf/Ibrahim-F-I-Shihata-Senior-Vice-President-and-General-Counsel-of-the-World-Bank-1983-1998.pdf (accessed 4 August 2020).

172 Shihata (n 171) 47.

173 Parra (n 150) 172.

174 Rajagopal (n 117) 121.

175 World Bank Archives 'Transcript of oral history interview with Ibrahim F I Shihata' (23-24 May 2000).

treaties were signed by African states. Many of these agreements took a path that was different from the principles embodied in the NIEO principles and were based on European or American treaty models. These treaties provided for international arbitration without the requirement to exhaust local remedies; they attached treatment of foreigners to a minimum standard of treatment under customary international law and provided that parties could not derogate from their obligations. Even though the African Union (AU) was established to replace the OAU in 2000, full integration of investment rules remained minimal. In 2003 a model law on investment law in Africa was drafted but this faced difficulties. Several disputes were instituted at ICSID by foreign investors from developed countries against African states. At the global level, the economic crisis of 2008 contributed to a 'backlash' in the international investment law regime.[176]

3.4 New African approaches to international law

African scholarship that emerged in the 1990s and 2000s was very different from the scholarship that had emerged in the preceding decades. It was diverse, rich and more specialised. More African scholars studied IIL as an advanced subject and there were more doctoral dissertations on the subject. Some of the scholars who had written in previous years began to reflect on the paucity of African solutions to African problems. There were renewed calls for African solutions to international trade and investment problems.[177] Notably, in 1997 a group of scholars declared a treatise of African international law, which identified international economic law (investments, international contracts, nationalisations and privatisations) as one of the most important fields of African international law.[178] However, as in preceding decades, there still was no deliberate or uniform African international law position on international investment law.[179]

Scholarship became more critical and reflexive. Some scholars began to address the expropriation of alien property without prompt, adequate and effective compensation by dictatorial regimes, arguing that this was

176 Abi-Saab (n 41) 1961.

177 AO Adede 'Africa in international law: Key issues of the second millennium and likely trends in the third millennium' (2000) 10 *Transnational Law and Cotemporary Problems* 351 357.

178 P Gonidec 'Existe-il un droit international Africain' (1993) 5 *African Journal of International and Comparative Law* 243; P Gonidec 'Towards a treatise of African international law' (1997) 9 *African Journal of International and Comparative Law* 807 814.

179 Yelpaala (n 25) 59.

inimical to a minimum world order.[180] It was argued that the 'approach-and-avoidance' attitude toward foreign direct investment (FDI) was a mishmash of incentives and disincentives, which often was internally inconsistent.[181] As a new millennium beckoned, African scholars recognised that there was an irreconcilable conflict between economic nationalism and the need for foreign investment.[182] Scholarship showed that political and economic instability had weakened Africa's negotiating power with foreign investors and that, unless this was addressed, Africa would remain underdeveloped.[183] Other scholars began to focus on the need for regional integration noting that to promote foreign capital, African states must create large internal markets.[184]

The late 1990s gave birth to alternative African approaches to international law, and the Third World Approaches to International Law (TWAIL) movement was created among young African scholars studying in the United States of America. These scholars expressed dissatisfaction with what they considered to be 'contributionist, non-confrontational and non-critical' legal scholarship of 'elite' law scholars of previous generations.[185] For example, in a review of the scholarship of TO Elias, James Thuo Gathii, who is a founder of the TWAIL movement, has argued that Elias underemphasised the role of international law in the colonial encounter and that his contributions failed to examine the role of international law in the economic and political subjugation of Africa.[186] Even though TWAIL scholarship is full of 'blind spots', it has sought to uncover the role of international law in what is considered to be deeply-ingrained biases and injustices in the rules and institutions of

180 E Kwakwa 'Emerging international development law and traditional international law – Congruence or cleavage' (1987) 7 *Georgia Journal of International and Comparative Law* 431 454.

181 K Ndiva 'The political economy of foreign direct investment: A framework for analysing investment laws and regulations in developing countries' (1992) 23 *Law and Policy in International Business* 619 625.

182 T Allen 'The law relating to private foreign investment in manufacturing in Botswana, Zambia and Zimbabwe' (1992) 4 *African Journal of International and Comparative Law* 44 81.

183 AA Agyemang 'Protecting natural resource contracts from national measures in Africa: Some comparisons with the Australian experience' (1992) 25 *Comparative and International Law Journal of Southern Africa* 273 292.

184 PA Mutharika 'The role of international law in the twenty-first century: An African perspective' (1994) 18 *Fordham International Law Journal* 1706 1716.

185 JT Gathii 'TWAIL: A brief history of its origins, its decentralized network, and a tentative bibliography' (2011) 3 *Trade Law and Development* 26 39.

186 JT Gathii 'A critical appraisal of the international legal tradition of Taslim Olawale Elias' (2008) 21 *Leiden Journal of International* 317 323.

the international legal system.[187] These scholars argue that BITs facilitated foreign investment to increase productivity in developing countries without simultaneously addressing whether such investment indeed works to increase productivity or even to promote equitable distribution of wealth.[188] They also argue that transnational corporations and multilateral institutions exploit Third World states to escape accountability through investment agreements that disregard the environment and erode the rights of workers.[189] Although these claims underemphasise the role of Africa's political class in 'under-developing Africa', TWAIL has successfully provided alternative approaches to tradition Eurocentric international investment law.

As in the preceding decades, African involvement in international investment arbitration disputes was a major concern for scholars. Increasing international arbitration cases led scholars to focus attention on African states and investment arbitration.[190] Even though these studies focused on 'commercial arbitration', they examined the involvement of African states in investment arbitration. After the 1990 decision in *AAIL v Sri Lanka*, investment treaty arbitration became more common.[191] Some scholars argued for the primacy of domestic law over international law in oil investment disputes.[192] Other authors argued that investment arbitration was tilted in favour of foreign investors [193] and criticised

187 Abi-Saab (n 41) 1958.

188 JT Gathii 'Foreword: Alternative and critical: The contribution of research and scholarship on developing countries to international legal theory' (2000) 41 *Harvard International Law Journal* 263 267.

189 M Mutua 'Critical race theory and international law: The view of an insider-outsider' (2000) 45 *Villanova Law Review* 841 851.

190 S Sempasa 'Obstacles to international commercial arbitration in African countries' (1992) 41 *International and Comparative Law Quarterly* 387 402; L Atsegbu 'International arbitration of oil investment disputes: The severability doctrine and applicable law issues revisited' (1993) 5 *African Journal of International and Comparative Law* 634 634; SKB Asante 'The perspectives of African countries on international commercial arbitration' (1993) 6 *Leiden Journal of International Law* 331; VC Igbokwe 'Developing countries and the law applicable to international arbitration of oil investment disputes: Has the last word been said' (1997) 14 *Journal of International Arbitration* 99; KK Mwenda & NG Goblr 'International commercial arbitration and the international centre for settlement of investment disputes' (1998) 30 *Zambia Law Journal* 91; AA Shalakany 'Arbitration and the Third World: A plea for reassessing bias under the specter of neoliberalism' (2000) 41 *Harvard Journal of International Law* 419; AA Asouzu *International commercial arbitration and African states: Practice, participation and institutional development* (2001).

191 AS El-Kosheri 'ICSID arbitration and developing countries' (1993) 8 *ICSID Review* 104.

192 Atsegbua (n 176) 660.

193 Abi-Saab (n 41) 1969.

African scholarship that exposed the inadequacy of African courts for settling investment disputes.[194]

By the end of the 2000s, African scholars were faced with the harsh reality that even though the legal regime for foreign investment had become more liberal, FDI levels remained very low.[195] Also, many countries continued to face economic problems. During the 2000s there were reviews of investment agreements and innovative regional rules on investment such as the Economic Community of West African States (ECOWAS) Supplementary Act on Investment and the Southern African Development Community (SADC) Investment Protocol. However, there was a renewed realisation that continental regulation of foreign investment was important. In 2008 the African Ministers responsible for continental integration decided to initiate work on a comprehensive investment code for Africa.[196]

4 New nationalism and new regionalism: The present (2010-2020)

This subsection examines the growth and development of international investment law in Africa since 2010. It illustrates how the last decade has led to new approaches at national, regional and continental levels that are relics of the decolonisation era.

4.1 The decade of African international investment law

In the last decade, international investment law in Africa has expanded and flourished. There has been a marked increase in distinct African approaches and sub-regional investment norms. To a large extent, these norms are taking a departure from the copy-and-paste approach of investment treaties signed in previous decades. South Africa, Tanzania and Côte d'Ivoire have introduced foreign investment policies that are reminiscent of the NIEO.[197] Other states, such as Ethiopia, have introduced national

194 Sempasa (n 191) 402.

195 Yelpaala (n 24) 34.

196 Mbengue (n 48) 260.

197 South Africa, Protection of Investment Act 22 of 2015 (art 12(5) provides: 'The government may consent to international arbitration in respect of investments covered by this Act, subject to the exhaustion of domestic remedies. Such arbitration will be conducted between the Republic and the home state of the applicable investor.' Art 11 of the Tanzanian Permanent Sovereignty Act 2017, provides only for settlement of disputes in local courts. Art 50 of the 2018 Côte d'Ivoire Investment Code provides only for resolution of disputes in the Arbitration Centre of the Common Court of Justice and Arbitration (CCJA) of the Organisation for the Harmonisation of Corporate Law

investment laws that are more liberal to promote foreign investment. Even in the midst of these different African approaches to international foreign investment law, it has been said that we have entered an era of 'African investment law'.[198] However, it is clear that the present state of international investment law in Africa is deeply fragmented, incoherent, conflicting and quite variegated.[199] This is because even though in recent years African states have adopted regional investment treaties, because of the historical events of the last two centuries, the African continent reflects diverse post-colonial interests that are relics of its colonised past. To a large extent, African states remain capital-importing states that compete for rent-seeking foreign investment. At the global level, the last decade has been marked by new nationalism, termination and renegotiation of investment treaties, the rejection of arbitration by some European states and an explosion in investment arbitration awards.[200] We have also witnessed the rise of new international economic powers.

African scholarship on foreign investment post-2010 has remained very critical and divided, but a key distinction may be drawn in the literature. Unlike scholarship that emerged in the decolonisation era, instead of focusing solely on rejecting rules of international law, scholars now understand that the future of Africa no longer lies in empty promises and rhetoric.[201] Some argue that the IIL regime undermines 'African countries' governance and national development priorities'.[202] Other scholars, who appear to be in the minority, are more pragmatic, showing more convincedly that, for instance, actions of public officials are the major causes of investment arbitration claims and that a wider regulatory space for host states in BITs will make little difference to the incidence of ISDS claims against African states.[203]

in Africa.

198 Mbengue (n 48).

199 FN Botchway '*Consent to arbitration: African states' practice' (2019) 34 ICSID Review-Foreign Investment Law Journal* 278 294.

200 M Sornarajah 'Disintegration and change in the international law on foreign investment' (2020) 23 *Journal of International Economic Law* 413.

201 MF Massoud 'International arbitration and judicial politics in authoritarian states' (2014) 39 *Law and Social Inquiry* 1.

202 D Dagbanja 'The limitation on sovereign regulatory autonomy and internationalisation of investment protection by treaty: An African perspective' (2016) 60 *Journal of African Law* 56 82.

203 E Laryea & O Fabusuyi 'African countries and international investment law: Right to regulate or appropriate regulation or both?' (2019) 40 *Australasian Review of African Studies* 40 27.

In the past few years there has been a significant increase in African scholarship in international investment law[204] even though this has not been matched by an increase in appointment of African arbitrators. Notably, female scholars have emerged as important contributors.[205] Unlike previous decades when scholarship remained limited, studies now focus on broad-ranging subjects including treaty practice of states such as South Africa[206] and Nigeria[207] and treaties with China.[208] Studies have also focused on the practice of RECs such as the Organisation for the Harmonisation of Business Law in Africa (OHADA)[209] and the Common Market for Eastern and Southern Africa (COMESA).[210] Scholars have focused on topical issues such as agricultural and land contracts,[211] human rights[212] and the relationship between BITs and FDI inflows.[213] Scholarship has highlighted the role that African states have played in the development

204 African-centred research networks such as the African International Economic Law Network (AfIELN), the African Society of International Law, and the African Journal of International Economic law are promoting 'African International Investment Law'.

205 R Radilofe 'Phénomène de Droit transnational dans les pays en développement/legal enclosure and international investment: essay on a phenomenon of transnational law in developing countries' PhD thesis, University of Nice Sophia Antipolis, 2019 (on file with the author).

206 Z Motala 'Free trade, the Washington consensus, and bilateral investment treaties: The South African journey: A rethink on the rules on foreign investment by developing countries' (2016) 16 *American University Business Law Review* 31; T Chidede *Legal protection of foreign direct investment: A critical assessment with focus on South Africa and Zimbabwe* (2016).

207 Nde Fru (n 106).

208 UE Ofodile 'Emerging market economies and international investment law: Turkey-Africa bilateral investment treaties' (2019) 52 *Vanderbilt Journal of Transnational Law* 949; W Kidane 'China's bilateral investment treaties with African states in comparative context' (2016) 49 *Cornell Journal of International Law* 141.

209 WB Hamida 'L'intégration imparfaite de l'arbitrage d'investissement dans le droit de l'OHADA' (2019) 4 *Revue de l'arbitrage : Bulletin du Comité français de l'arbitrage* 1109; GL Sita 'Le défi de l'Organisation pour l'harmonisation en Afrique du droit des affaires face au développement des marchés financiers africains : quid de la protection des investisseurs' (2019) 22 *Droit en Afrique* 157.

210 R Baruti 'Investment facilitation in regional economic integration in Africa: The cases of COMESA, EAC and SADC' (2017) 18 *Journal of World Investment and Trade* 493.

211 UE Ofodile 'Managing foreign investment in agricultural land in Africa: The role of bilateral investment treaties and international investment contracts (2017) 7 *Law and Development Review* 329.

212 F Adeleke *International investment law and policy in Africa: Exploring a human rights-based approach to investment regulation and dispute settlement* (2017); A Hankings-Evans 'Africa's human rights and development-based approaches to international investment law' in R Hofmann et al (eds) *Investment protection, human rights, and international arbitration in extraordinary times* (2022) 291.

213 DN Dagbanja 'Can African countries attract investments without bilateral investment treaties? The Ghanaian case' (2019) 40 *Australasian Review of African Studies* 71.

of the ICSID dispute settlement system.[214] Most scholars who belonged to the first generation have left us or are no longer actively writing. However, ideological divides across generations remain and scholars of the first generation, such as Abi-Saab, continue to place much hope on the crystallisation of decolonisation era principles such as permanent sovereignty over natural resources.[215]

The most distinct characteristic of African scholarship in the last decade is what may be described as the 'Africanisation' of international investment law.[216] 'Africanisation' was first used in the decolonisation era to signify changes in political power and replacement of colonial officers with an African civil service and judicial officers.[217] It was used by 'African law scholars', such as William Twinning, Antony Nicholas Allott and Olawale Elias, to signify a new political class of African leaders.[218] It was also used to describe African nationalisation of foreign property.[219] More recently, Africanisation of international investment law, as coined by Makane Moïse Mbengue, is used to describe Africa as a 'catalyser', 'crystalliser' and 'customiser' of IIL.[220] Professor Mbengue, who has played a key role in the drafting of the Pan-African Investment Code, defines the Africanisation of IIL as 'the regulation of international investment according to African policy and development priorities'.[221] For this reason, decades after seminal texts on Africa and the development of international law were published, international investment law may be a field where the place of Africa appears to be very active.

The Pan-African Investment Code (PAIC) may be described as the beginning of a new era of international investment law in Africa. In 2016 the ministers of the AU adopted the PAIC as a model for future investment treaty negotiations in Africa. The PAIC is distinct because it is the first continent-wide African model investment treaty and because it introduces distinct treaty provisions that are meant to reflect the needs

214 Parra (n 75) 277.

215 Abi-Saab (n 41) 1966.

216 MM Mbengue and S Schacherer 'The Africanisation of international investment law: The pan-African investment code and the reform of the international investment regime' (2018) 18 *Journal of World Investment and Trade* 414.

217 TO Elias 'The commonwealth in Africa' (1968) 31 *Modern Law Review* 284 296.

218 AS Touré *Toward full re-Africanisation: Policy and principles of the Guinea Democratic Party* (1959); AN Allott 'The codification of the law of civil wrongs in common law African countries' (1966) 16 *Sociologus* 101 103; W Twining 'Legal education within East Africa' (1966) 12 *International and Comparative Law Quarterly* 115 141.

219 Bradley (n 12) 171.

220 Mbengue (n 48) 263.

221 Mbengue & Schacherer (n 217) 199.

of African states.[222] However, in practice the PAIC has failed to have real impact on the treaty practice of African states.[223] A desktop review of treaties signed after the PAIC came into force reveals that treaties still follow the template of the non-African treaty partner. Also, African states are still developing model treaties that are inconsistent with a 'pan-African' model.[224] Thus, even though the PAIC represents the promise of a truly African international investment law, in reality African treaty practice is still shaped by deeply-entrenched economic and political interests that are legacies of the colonial era. Therefore, even though increasing focus is placed on the novelty of African investment norms, it is glaring that Africa's contributions to the development of IIL are still through mere participation, rather than deliberate decision making.[225]

4.2 Contributions

Africa has played an important role in the evolution of IIL over the last six decades. This may be examined from a positive and a negative perspective. Even though for many years African countries were perceived to be at the margins of the field,[226] as the preceding parts have illustrated, African intellectuals and institutions have been behind some of IILs greatest achievements.[227] African individuals have played very important roles in the construction of legal rules and norms. As the previous parts have also shown, the independence of African states was a watershed for the development of modern IIL. This slowed down the multi-lateralisation of IIL and contributed to the non-universality of international investment law.[228]

At the national level, African states have actively signed investment agreements and contracts that invariably are part of international law. The involvement of African states in investment arbitration disputes has helped to develop the jurisprudence that forms the backbone of one of the most vibrant fields of international law.[229] Even though very few Africans

222 Mbengue (n 48) 261.

223 As above.

224 Morocco- Model BIT 2019.

225 Kidane (n 110) 420.

226 MM Mbengue 'Africa's voice in the formation, shaping and redesign of international investment law' (2019) 34 *ICSID Review-Foreign Investment Law Journal* 455.

227 SW Schill 'Editorial: The new (African) regionalism in international investment law' (2017) 18 *Journal of World Investment and Trade* 367.

228 PC Jessup 'Non-universal international law' (1978) 12 *Columbia Journal of Transnational Law* 415 419.

229 OD Akinkugbe 'Reverse contributors? African state parties, ICSID and the development

have been appointed as arbitrators, Africa has been pivotal to this.[230] In recent years African experts have also been at the forefront of legitimising the international investment law regime. For example, Judge Abdulqawi Ahmed Yusuf has introduced reforms that prevent sitting judges of the ICJ from accepting appointments as investment arbitrators.[231]

4.3 Challenges and opportunities

Six decades of international investment law have provided an adequate timeframe to reflect on the challenges that African states continue to face. These challenges have been examined by scholars. First and foremost, even though rules of foreign investment have been fully developed, Africa still faces serious economic and political challenges.[232] Thus, many of the international economic law problems that emerged six decades ago remain present.[233] In post-independence Africa, 'the asymmetrical vulnerability dependence has continued and so have the minimalist investment policies. Countries with abundant natural resources have continued to attract "scoop and ship" investment operations.'[234] Intra-African investment remains low and most economies are capital-importing, debt-ridden and dominated by foreign investors. In addition to this, international investment agreements have failed to live up to the grand bargains of promoting foreign investment.

Second, even though Africa has very competent IIL scholars, a 'brain drain' persists. For this reason, inadequate legal capacity to negotiate investment agreements and contracts is not because of the absence of competence hands but a function of economic and power dynamics. Many African governments continue to view investment treaties and contracts as photo-taking opportunities, failing to realise that agreements have deep consequences. This has been described as a suicidal attitude under which African lawyers only turn pages for signatures.[235] Over the last 60 years of international investment law practice, African countries

of international investment law' (2019) 34 *ICSID Review-Foreign Investment Law Journal* 434.

230 Kidane (n 110) 413.

231 F Baetens & P Bodeau-Livinec 'Face-à-face interview with President Yusuf: president of the international court of justice' (2020) 18 *Law and Practice of International Courts and Tribunals* 267 276.

232 D Ailola 'Using law to protect foreign investors in Southern Africa: An appraisal' (1996) 29 *Comparative and International Law Journal of Southern Africa* 295 308.

233 Umozurike (n 7) 123.

234 Yelpaala (n 25) 70.

235 Kumuwanga (n 159)145.

have been perceived as investment rule 'consumers'. The main reason for this perception is that a larger majority of international investment agreements (IIAs) concluded by African states reflect the models of their respective contracting partners.[236] This is also evident in recently-drafted 'new generation' African regional treaties that adopt 'foreign models' and give less favourable treatment to African investors by excluding access to arbitration and omitting standards of protection.

The number of African scholars who specialise in international economic law remains rather low.[237] In investment disputes, African states usually appoint foreign counsel and arbitrators,[238] thereby enabling a diversity deficit.[239] Related to this is the low visibility of female African intellectuals in the formation of the African intellectual project. Even though this is changing, more female scholars should be given adequate space to address some of Africa's foreign investment challenges. Until recently, a third challenge was the dearth of African scholarly works.[240] Even though this has improved significantly, leading IIL texts are still written by European and American authors[241] and quoted as authority by investment arbitration tribunals. This sociological dimension on the formation of law must not be overlooked.

A fourth major challenge of IIL in Africa is the dearth of specialised international economic law programmes.[242] At the 1968 Conference on African Legal Education, participants agreed that it was important to train lawyers who would be able to address 'growing problems of foreign investment and contractual negotiations'.[243] Even though several African universities have integrated IIL into their curricula, many lawyers are not

236 MM Mbengue & S Schacherer 'Evolution of international investment agreements in Africa: Features and challenges of investment law Africanisation' in J Chaisse, L Choukroune & Sufian Jusoh (eds) *Handbook of international investment law and policy* (2020) 19.

237 Kidane (n 110) 413.

238 Kumuwanga (n159) 145.

239 Kidane (n 110) 421.

240 YN Hodu & MM Mbengue (eds) *African perspectives in international investment law* (2020); D Dagbanja *The investment treaty regime and public interest regulation in Africa* (2022).

241 Abi-Saab (n 27) 101.

242 The University of Pretoria offers the LLM in International Trade and Investment Law in Africa while the University of Western Cape offers the LLM in International Trade, Business and Investment Law.

243 Richardson (n 125) 210.

trained to deal with international investment law and other transnational problems.[244]

A fifth and major challenge of IIL in Africa is the absence of clear continental coordination and policy making.[245] Even though this is a reflection of the non-universality of international law, it has created a fragmented system with multiple and overlapping norms.[246] Furthermore, many of the investment agreements between African states have never been ratified.[247] Finally, another major challenge of IIL is the divisions that continue to exist between different schools and legal systems.[248] For example, even though several important doctoral dissertations have been written in French, IIL is largely dominated by Anglophone publishers, creating a divide between Francophone and Anglophone Africa, and distancing Lusophone states. Related to this is the disconnect between the legal academy and political decision makers at all levels of governance. While one must acknowledge that none of the challenges identified above are purely legal questions, by reflecting on the past one can understand the limited but important function law plays in the realisation of economic goals.

5 The future (beyond 2020)

Making predictions about the future of international law is not always straightforward. This is because even though international law is a dynamic process which evolves with changes in society, norm making can be very slow. Decades ago, some African scholars made predictions about the future of international investment law in Africa. Most of these predictions emerged during the NIEO. For example, in 1977 Adede argued that states would continue to protect legitimate interests of foreign investors and that this would lead to increases in intra-African capital investment flows.[249] For Mutharika, Africa would remain marginalised and irrelevant until reforms were made to encourage investment and until regional free trade

244 Richardson (n 125) 205.

245 Allen (n 183) 83; Mbengue (n 48) 260.

246 Mbengue & Schacherer (n 217) 12.

247 Mbengue & Schacherer (n 217) 20.

248 WEB du Bois 'The realities in Africa - European profit or negro development' (1943) 21 *Foreign Affairs* 721 724. 'For convenience we refer to "Africa" in a word. But we should remember that there is no one "Africa". There is in the continent of Africa no unity of physical characteristics, of cultural development, of historical experience, or of racial identity. We may distinguish today at least eleven Africas.'

249 Adede (n 118) 192-193.

arrangements were signed.[250] For him, African countries that faced political and economic stability will continue to play a limited role in shaping international law.[251] Mutharika also argued that the principal foreign investors in Africa will remain multinational companies.[252] Eze argued that because international law would remain for another 40 years (1979 to 2019), states would resort to national regulation of foreign investment.[253] As the previous parts have illustrated, Professor Eze's predictions have not come true. In the last three decades, IIL has undergone radical transformation and IIL i no longer is embryonic.[254] However, he may have been partly right, as we are witnessing a shift from internationalisation to nationalism and protectionism in some states. Also, domestic investment laws continue to play important roles in African states.

Fully aware of the limitations of making predictions, it remains worthwhile to think of what IIL will look like beyond 2020. In the next few decades, African states will continue to sign international investment treaties. Competition between regional, sub-regional and continental norms will continue to exist and some states will continue to use national law to regulate the activities of foreign investors. More African arbitration centres will be established, but these institutions will continue to compete with more established arbitral institutions based outside the continent. There will be a marginal increase in the number of arbitration claims filed against African states, and some new claims will be instituted on the basis of intra-African treaties and investment contracts. However, this will not necessarily lead to an increase in the appointment of African arbitrators. Even with an increase in the number of African arbitrators, it is highly unlikely that these arbitrators will radically transform existing international investment rules. However, the appointment of African arbitrators will give some sociological legitimacy to the regime and provide some more context for developing African solutions to Africa's international economic law problems. It suffices to say that while we may indeed see the emergence of an African foreign investment law, full control over economic activities will depend on good governance, good policy making and economic development.

250 Mutharika (n 185) 1711.

251 Mutharika (n 185) 1719.

252 Mutharika (n 185) 1716.

253 OC Eze 'Legal structures for the resolution of international problems in the domain of private foreign investments: A Third World perspective now and in the future' (1979) 9 *Georgia Journal of International and Comparative Law* 535 547.

254 C Leben *The advancement of international law* (2010) 5.

In March 2018 member states of the AU established the African Continental Free Trade Area which creates a single market for goods, services, facilitated by movement of persons in order to deepen the economic integration of the African continent. This treaty is born from a reinvigorated Pan-African Vision for an integrated, prosperous and peaceful Africa. Phase II negotiations, which will include an Investment Protocol, will be completed soon. The major objectives of this Protocol are the Africanisation of international law on foreign investment law and the facilitation of intra-African investment. This Protocol is expected to replace 178 bilateral investment treaties and several overlapping sub-regional investment treaties. The texts of the Agreement establishing the African Continental Free Trade Area (AfCFTA) will be spearheaded by an older generation of African international scholars, but the task of moving this project ahead will fall on an even younger generation. Even though the AfCFTA is meant to signify a new dawn of international economic law in Africa, there are clear indications that the future of international investment law in Africa will be fraught with challenges and opportunities.

6 Conclusion

The present chapter has examined the evolution of international investment law scholarship over the last six decades, using a sociological approach, from the perspective of a young scholar who studied international law long after a requiem mass was declared for the NIEO.[255] It has identified defining moments in 60 years of African independence and highlighted the contributions of Africa to the development of international investment law.

This edited book is about Africa's international law's decades. It is also about the quest for self-discovery and economic freedom in post-colonial Africa. This chapter has examined the ideas held by previous generations and shown how rejection of international law was replaced by new pragmatism and new radicalism. As the opening quote to this chapter stated, Africa's international law history remains cyclical and it has been inherited by younger generations who are shaped by different sociological agents. Unlike preceding generations, we have had ample time to learn from Africa's international jurists and no longer live on borrowed knowledge.[256] We understand that it no longer is sufficient to keep harping on the harm

255 H Koh 'The new new international economic order: Private international law' (1993) 87 *Proceedings of the ASIL Annual Meeting* 449; Wälde (n 151).

256 Abi-Saab (n 27) 101.

that colonialism has done to the Third World.[257] The newer generation of Africans do not want to see an Africa that depends mostly on commodity prices and foreign aid for economic stability.[258] Younger investment lawyers and arbitrators have been accused of being non-vocal and unwilling to challenge the basic premises of the investment law regime by inference being alibis to investment law's coloniality.[259] Our generation has been accused by older international investment lawyers of being thirsty 'to join the institutions set up by the First World, and become betrayers of [our] own people'.[260] In our defence, we agree that we must pursue 'statesmanship, vision, a commitment to the social good and … selflessness'.[261] Yet, our generation understands that the greatest stakes are not developing a perfect international law or being cynical. Rather, learning from previous generations, we know that the greatest political stakes are our abilities as social agents and intellectuals to 'combine legal professionalism with a new strategic awareness of the limits and possibilities offered by international law for political engagement'.[262] We also know that the future of international investment law in Africa rests on collaboration, dialogue, capacity, realism, impact-driven research, good governance and an overhaul of the 'lost generation' of Africa's political leaders.

The young African international lawyer is fully aware of the ideological choices that must be made. She understands that Africa is still divided along linguistic lines, along legal traditions and divided by invisible but powerful lines drawn between the north and the south of the Sahara. However, there is a pan-African international law collective for addressing problems of conflict, strife, poverty, economic development, poor governance and unequal wealth distribution. The first generation of African international law scholars has virtually been replaced by newer generations that remain divided along lines of political ideology and legal tradition. Six decades of post-colonial experiences have produced radical, pragmatist and cynical clusters of international economic law

257 M Sornarajah 'On fighting for global justice: The role of a Third World international lawyer' (2016) 37 *Third World Quarterly* 1972 1984.

258 CN Brower & Michael P Daly 'A study of foreign investment law in Africa: Opportunity awaits' Paper delivered at ICCA Congress Mauritius (2016) 30.

259 D Schneiderman *Investment law's alibis: Colonialism, imperialism, debt and development* (2022) 36.

260 Sornarajah (n 257) 1985.

261 M Sornarajah 'A law for need or a law for greed? Restoring the lost law in the international law of foreign investment' (2006) 6 *International Environmental Agreements: Politics, Law and Economics* 329 329.

262 M Koskenniemi 'The politics of international law: 20 years later' (2009) 20 *European Journal of International Law* 7 9.

scholarship. It has led to disillusionment and distrust in the promise of international law. Yet, the African continent is on the cusp of its largest and most ambitious international economic law integration project: the AfCFTA. As 90 year-old Samuel Asante has written more recently, we must understand that '[t]he grand battles have been fought and won. Colonialism is no more; nationalism has prevailed. After fits and starts … beyond the epoch-making milestones achieved in the broad political arena …We now have the solemn duty of carrying on the legacy of our forebears.'[263]

263 SKB Asante 'The role of the early generation of lawyers in establishing good governance' (2014) 27 *Ghana University Law Journal* 1 5.