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Rule-takers or rule-makers?

A new look at African bilateral investment treaty practice

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Who are the rule-takers and rule-makers in the African BIT universe? Using computational measures of textual similarity this paper provides a nuanced empirical answer to this question. First, we find that African states tend to be rule-takers in North-South relations, yet enjoy greater agency in negotiations of South-South BITs. Only few African countries, however, use their greater say in intra-African negotiations to include public policy exceptions in BITs. Indeed, recent North-South BITs contain more policy space than their Southern counterparts in Africa. Second, rule-makers and rule-takers also exist within the African South-South BIT landscape. Yet, in contrast to North-South relations, negotiation outcomes seem to be shaped more by expert knowledge than by power asymmetries. Powerful states like Egypt fail to dominate negotiations, while small-island-state Mauritius with its strategic investment policy agenda succeeds in setting the terms of investment agreements. This paper thus provides a more nuanced view of the African treaty landscape, points to new areas of research and highlights the importance of technical expertise in achieving coherent treaty networks.

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1. Introduction

Who writes the rules in the investment treaty universe? Prior studies suggest that bilateral investment treaties (BITs) often contain a distinctly “Northern” or developed country handwriting. BIT programs first originated in Europe,¹ and as new countries, including from the developing world, jumped on the BIT bandwagon, they looked to European treaty practice for inspiration.² Furthermore, empirical research has shown that, in general, developed countries are more successful than developing countries in achieving consistent treaty networks, which suggests that developed countries tend shape negotiation outcomes.³

While it is thus well documented that, as a general matter, developed countries are the primary rule-makers in the universe of bilateral investment treaties, this does not preclude the existence of a distinctly “Southern” handwriting in parts of the BIT landscape. In particular, when bargaining power is more evenly distributed, as is the case of BITs concluded between two developed countries, we would expect that negotiation outcomes more clearly reflect developing countries’ policy preferences. Put differently, while developing countries may often be the rule-takers in North-South BITs, they can become rule-makers in South-South agreements. In this paper, we use Africa, and in particular sub-Saharan Africa, as a case study to empirically verify this hypothesis tracing developing countries’ handwriting in BITs.⁴

To what extent have African countries played an active role in the making and shaping of their bilateral investment treaties? To answer that question, we proceed in four stages. First, we introduce the challenges and opportunities developing countries face in investment treaty making generally drawing on the existing literature. We conclude that the main challenge for African countries is to make their voice heard in asymmetric North-South negotiations and that the main opportunities for shaping BITs lie in South-South treaties. With that framework in mind, we next introduce our methodology that employs computational text comparisons to reveal rule-takers and rule-makers in Africa. We then apply that method to compare African North-South

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¹ The first BIT was signed between Germany and Pakistan in 1959. In the 1960s other European countries such as Belgium, the Netherlands or Switzerland followed suit.

² Stephan W Schill, *The Multilateralization of International Investment Law* (Cambridge Univ Press 2009) (emphasising the role of the 1967 OECD Draft Convention on the Protection of Investments Abroad as template for subsequent BITs around the world).

³ Wolfgang Alschner and Dmitriy Skougarevskiy, ‘Consistency and Legal Innovation in the BIT Universe’ (2015) Stanford Public Law Working Paper No. 2595288 <<http://ssrn.com/abstract=2595288>>, accessed 28 April 2015.

⁴ In this paper, we focus exclusively on bilateral investment treaties and do not investigate treaty design in other types of investment agreements such as regional investment treaties or free trade agreements with investment chapters.

agreements with African South-South agreements. We find that African countries indeed are less successful in shaping the terms of North-South negotiations and have a greater say in South-South BITs. In the past, African countries partially used their greater agency to integrate more public policy safeguards into their South-South treaties, while today most policy flexibility is imported from North-South Agreements. Finally, we look more specifically at who are the rule-makers and rule-takers in South-South African agreements. We find that economic power only plays a subsidiary role in determining outcomes of negotiations and that expert knowledge and strategic investment policy is more important in shaping treaty design.

2. Challenges and opportunities for developing countries in investment treaty making

The literature of developing countries' experience with international investment agreements emphasizes two themes that provide a background for our subsequent empirical analysis: (1) the struggle for policy space in asymmetric BIT negotiations and (2) the greater opportunity for shaping BIT design in South-South agreements.

2.1. Challenges: The quest for policy space in asymmetric negotiations

BITs emerged in the context of asymmetric investment relations.⁵ Developed countries sought to protect their foreign investors abroad against political risk in developing host countries; while developing countries sought to attract Northern investment in return for promising protection in a BIT.⁶ The unidirectional flow of investments from North to South meant that although BITs were formally reciprocal, the sovereignty costs associated with them fell exclusively on the developing country.⁷

Initially, many developing states were thus reluctant to sign on to BITs fearing that the treaties would unduly constrain their domestic policy space. As part of the discourse on the creation of a New International Economic Order (NIEO) in the 1960s and 70s, they emphasized sovereign control over their natural resources and stressed their right to expropriate with the payment of only "adequate" (rather than "full") compensation.⁸ From the 1980s onwards, however, developing countries' opposition to investment protection began to dwindle in the face of debt crises and economic

⁵ Jeswald W Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 *International Lawyer* (ABA) 655, 663.

⁶ Jeswald W Salacuse and Nicholas P Sullivan, 'Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46 *Harvard International Law Journal* 67, 77. According to them 'a BIT between a developed and a developing country is founded on a grand bargain: a promise of protection of capital in return for the prospect of more capital in the future.'

⁷ José E Alvarez, 'The Evolving BIT' (2010) *Transnational Dispute Management* 3; FA Mann, 'British Treaties for the Promotion and Protection of Investments' (1982) 52 *British Yearbook of International Law* 241, 241; Patrick Juillard, *L'évolution des sources du droit des investissements* (Martinus Nijhoff Publishers 1994) 108.

⁸ Kenneth J Vandeveld, 'Brief History of International Investment Agreements, A' (2005) 12 *UC Davis J. Int'l L. & Pol'y* 157, 166–8.

difficulties and they started to sign more and more BITs in order to attract foreign capital thereby hoping to mitigate their balance of payments difficulties.⁹

When opting into BITs developing countries found it difficult to retain the policy space they had fought for during the NIEO. Developed countries long had little incentive to explicitly include public policy exceptions into BITs since unidirectional investment flows made BIT claims against Northern countries unlikely.¹⁰ Developing countries, in turn, were in desperate need of foreign investment willing to trade capital for sovereignty. The asymmetry in bilateral bargaining forced them to forego the policy space demands they had advocated collectively, and instead signed on to the more protective treaty templates of Northern countries in order to attract foreign investment.¹¹

Since the late 1980s, this situation has evolved in some respects but not others. In the early 2000s investor-state arbitration claims began to increase giving rise to multimillion-dollar investment awards that highlighted the fact that BIT's sovereignty costs were real.¹² In particular, claims began to rise against developed countries, which, partly in response, began to revise their model treaties to integrate explicit policy space flexibilities into their BITs.¹³ At the same time, the benefits of BITs were increasingly cast into doubt as empirical studies failed to conclusively show an impact of these agreements on investment inflows.¹⁴ What did not change, however, was that developed countries still tended to dominate negotiation outcomes. The U.S.-Rwanda BIT (2008), for instance, contains several novel policy exceptions – yet they were not introduced in response to Rwanda's call for policy space, but formed part of the revision of the U.S. model BIT, which served as template for the negotiations of the U.S.-Rwanda BIT (2008). In short, from the early days onwards, North-South BITs carried a heavy North-South handwriting.¹⁵

⁹ Andrew T Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1997) 38 *Virginia Journal of International Law* 639; Kenneth J Vandeveld, 'Of Politics and Markets: The Shifting Ideology of the BITs' (1993) 11 *Int'l Tax & Bus. Law* 159.

¹⁰ The possibility of developed countries being sued pursuant to BITs seemed remote initially. See generally Alvarez (n 7) 3; Mann (n 7) 241.

¹¹ Guzman (n 9).

¹² On the tension between investment arbitration and policy space see generally Gus van Harten, *Investment Treaty Arbitration and Public Law* (Oxford Univ Press 2007).

¹³ UNCTAD, *Investor-State Dispute Settlement and Impact on Investment Rulemaking* (United Nations 2007); Wolfgang Alschner, 'The Impact of Investment Arbitration on Investment Treaty Design: Myth Versus Reality' (forthcoming 2017) 42 *Yale Journal of International Law*; for the U.S., see Mark Kantor, 'The New Draft Model US BIT: Noteworthy Developments' (2004) 21 *Journal of International Arbitration* 383; Kenneth J Vandeveld, 'A Comparison of the 2004 and 1994 US Model BITs: Rebalancing Investor and Host Country Interests' in Karl P Sauvant (ed), *Yearbook on International Investment Law and Policy 2008-9* (2009).

¹⁴ Jason Webb Yackee, 'Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties' (2007) 33 *Brooklyn Journal of International Law* 405; Jason Webb Yackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment-Some Hints from Alternative Evidence' (2010) 51 *Va. J. Int'l L.* 397; UNCTAD, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries* (United Nations 2009); on the effect of BITs on investment flows, see generally Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press 2009).

¹⁵ For a full empirical appraisal of this point, see Alschner & Skougarevskiy (n 3).

2.2. Opportunities: Agency in South-South agreements

If unidirectional investment flows and asymmetric bargaining power is the reason why North-South treaties long tended to not to include policy space safeguards, South-South treaties offered an opportunity to better integrate developing country preferences into BITs.

Several studies have highlighted that South-South BITs provided an occasion to safeguard greater policy space in investment agreements. At the same time these studies only found mixed evidence of developing countries seizing this opportunity. On the one hand, scholars and international organizations have concluded that South-South treaties contain some systemic variations from North-South treaties. According to Lauge Poulsen, national treatment and transfer of funds clauses in South-South treaties grant more flexibility to host states than in North-South treaties.¹⁶ UNCTAD also found that some features, such as performance requirements and pre-establishment clauses, tend to occur less frequently in South-South treaties.¹⁷

On the other hand, these studies also concluded that variation between South-South and North-South treaties is overall minor. According to UNCTAD “[t]o a large part, South-South IIAs are similar to North-South IIAs.”¹⁸ Coming to the same conclusion as UNCTAD, Malik thus surmises that “Southern countries have not taken advantage of the more ‘equal’ negotiating space, free of traditional political pressures associated with North-South, post-colonial relationships, to design more bespoke provisions in their treaties.”¹⁹

Two sets of reasons have been offered in the literature why South-South BITs do not depart more radically from North-South templates. First, Malik points out that the asymmetric bargaining dynamics present in the latter often also occur in the former as a powerful developing country negotiates with a less developed counterpart.²⁰ Second, lack of expert knowledge and bounded rationality may have clouded the need to take advantage of the more favourable bargaining setting. As one negotiator interviewed by Poulsen revealed, “[o]ur negotiations with developing countries were generally much quicker and much easier. When demands were made we didn’t object, as most understood that these treaties were basically just signals, rather than hard and serious legal agreements.”²¹ By considering BITs as pieces of paper rather than enforceable legal instruments, Poulsen concludes that many developing states failed to see the necessity of adding safeguards to their treaties even where it may have been possible given the negotiation dynamics.²²

¹⁶ Lauge Poulsen, ‘The Politics of South-South Bilateral Investment Treaties’ in T Broude, ML Busch and A Porges (eds), *The Politics of International Economic Law* (Cambridge Univ Pr 2011).

¹⁷ UNCTAD, *South-South Cooperation in International Investment Arrangements* (United Nations 2005) 31.

¹⁸ *ibid* 45.

¹⁹ Mahnaz Malik, ‘South-South Bilateral Investment Treaties: The same old story?’ (2010) IISD Paper 3 (2010) <http://www.iisd.org/pdf/2011/dci_2010_south_bits.pdf>, accessed June 3, 2015.

²⁰ *ibid*.

²¹ Poulsen, *supra* note 7, 199.

²² *ibid*, 200.

2.3. Towards testable hypotheses

This general appraisal of development countries' experience with investment treaties yields a number of hypotheses that can be empirically tested for the specific case of African BITs. First, are African countries rule-takers when it comes to North-South investment relations? Second, do some of them turn into rule-makers in South-South African treaties when bargaining powers are more equal and, if so, do they use their newly gained agency to integrate policy flexibilities into BITs? Finally, do we find rule-takers and rule-makers also in South-South African agreements and if so, what turns a country into one or the other? Is it power, expertise or something else?

In the remainder of this paper, we will investigate these questions. We begin by introducing our methodology that uses consistency in treaty patterns as proxy for agency in negotiations and then applies it to African North-South and South-South treaties in the follow sections.

3. Measuring agency in African BIT practice

How can we measure whether a country is a rule-taker or a rule-maker in BIT negotiations? In this section we introduce the notion of inter-BIT consistency as a measure of agency in negotiations and outline how we can use consistency scores to determine what party shapes the outcome of BIT negotiations.

3.1. Inter-treaty consistency as measure of agency

Inter-treaty consistency is a desirable feature in a BIT network. From an inward investments perspective, coherent treaty language across BITs facilitates a country's compliance with investment agreements, since it faces a homogenous set of international obligations rather than a patchwork of potentially conflicting commitments. From an investment outward perspective, a streamlined treaty landscape helps home country investors to vindicate their rights as they can rely on tried and tested treaty language and expertise acquired in dealing with other treaties. Therefore, countries strive to have coherent treaty networks.

To facilitate consistency in a treaty network, states tend to employ "model BITs".²³ These templates may either take the form of a written document that can form the basis of negotiations or may be distilled ad hoc from prior treaty practice. Some developed countries, like the United States, are often very successful in streamlining their investment practice by permitting only small deviations from their model templates.²⁴ As we have shown elsewhere, the UK is the global champion when it

²³ OECD, *International Investment Perspectives* (OECD: Paris, 2006), 144. "To secure a degree of consistency in their commitments the governments of many OECD countries have formulated Bilateral Investment Treaty 'models', which have been used as a template, or a starting point, for formulating new agreements."

²⁴ Asoka de Z. Gunawardana and José E Alvarez, 'The Inception and Growth of Bilateral Investment Promotion and Protection Treaties', *Proceedings of the Annual Meeting (American Society of International Law)* (JSTOR 1992) 533 <<http://www.jstor.org/stable/25658683>> accessed 31 January 2016 For the U.S., former negotiator Alvarez remarked that the 'truth is that to date the U.S. model

comes to consistency in treaty networks.²⁵ Generally, from a developed country's perspective, the only desirable deviation from prior practice is when a revision or innovation of that country's model BIT has taken place. As can be neatly observed for cases like Canada or Japan, we then see different generations of internally coherent sets of treaties.²⁶

Consistency of a country's BIT network is thus in essence a measure of its agency in negotiation. If a country is repeatedly successful in shaping the outcome of bilateral negotiations, it will have a more coherent treaty network than a country that always opts into the treaty template of its negotiation partners. By investigating consistency across treaties we can therefore gain insights into which country shapes negotiation outcomes.

3.2. Approach

To formally define African countries' consistency in BITs, we rely on a metric we proposed in an earlier paper.²⁷ For every treaty pair we identify the number of common unique 5-character-long substrings in the two texts. The main advantage of this metric is that it is aware of word order. We then divide this number by the total number of unique 5-character-long substrings in the pair. This measure is formally known as a Jaccard distance between sets of treaty 5-grams. It belongs to a range 0...1 and shows textual similarity or dissimilarity between pairs of treaties, with 0 indicating that 100% of 5-character-long substrings in the two specified BITs are the same, and 1 indicating that 0% of 5-character-long substrings in the two specified BITs are the same.

The Jaccard distance itself is unit-less. That is why it has to be interpreted in a relative sense assessing how sets of treaties differ in their similarity scores from each other. We define the mean Jaccard distance between the BITs signed by a particular country as that country's consistency score. We can use the ensuing numbers to compare consistency scores across states. Countries that sign relatively similar treaties will have a more favourable consistency score (i.e. a lower mean Jaccard distance) than countries with relatively diverse treaties (i.e. that display a higher mean Jaccard distance).

Figure 1 displays the mean Jaccard distance of the national BIT networks of all African country. We see that some countries like South Africa or Morocco possess a more coherent treaty network than other African states, such as Mali, Egypt or Uganda.

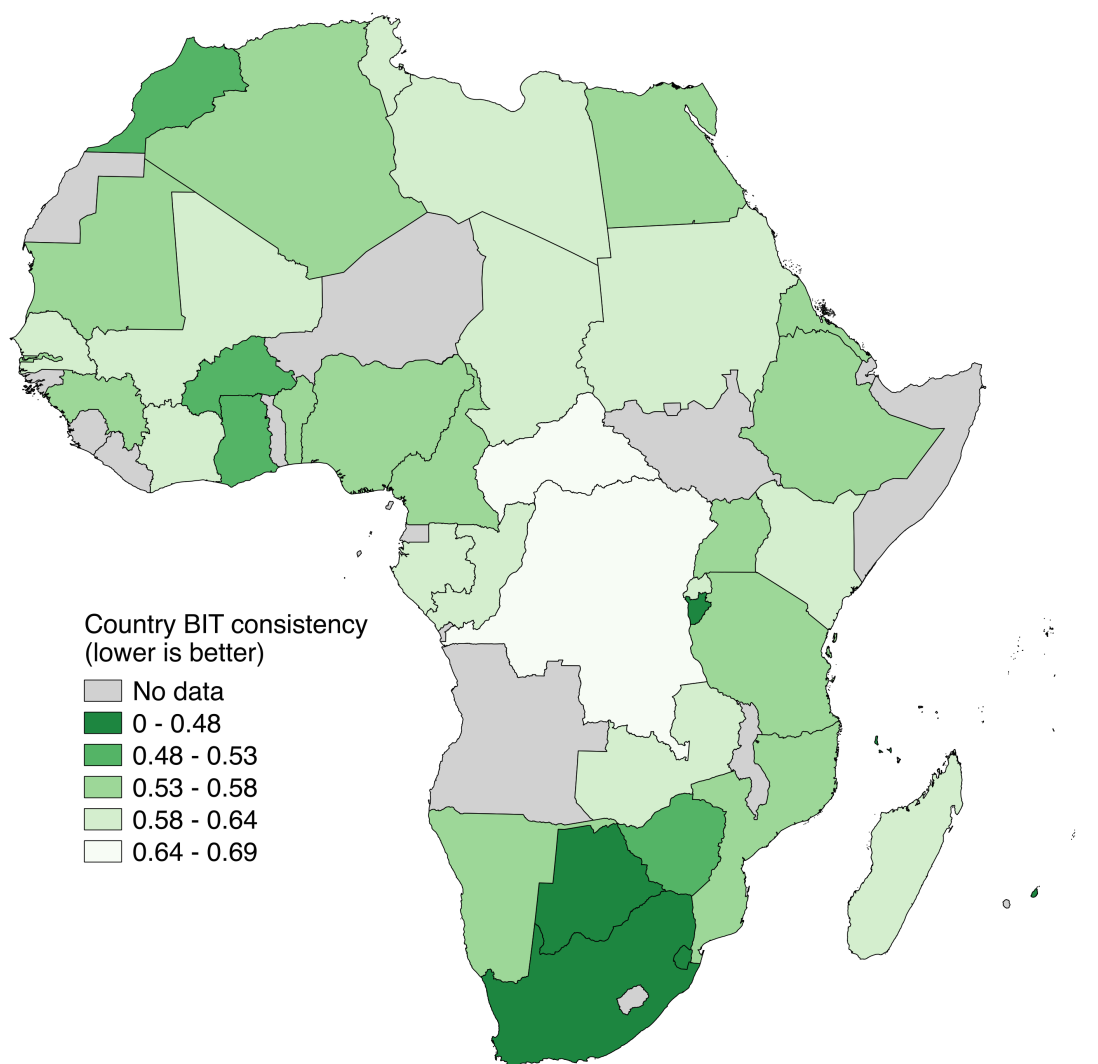
BIT has been regarded as, generally-speaking, a "take it or leave it" proposition, with the United States calling the shots and the BIT partner as supplicant."

²⁵ Alschner and Skougarevskiy, *supra* note 3.

²⁶ *ibid.*

²⁷ *ibid.*

Figure 1: Consistency scores of National BIT networks in Africa



Aside from calculating mean Jaccard distances of a country's entire BIT network, we can also use Jaccard distances for other purposes. For instance, by comparing a country's mean score of North-South BIT Jaccard distances to the mean distance of its South-South treaties, we can get an indication whether a country is more coherent in its treaty making with other developing countries than with developed countries. Furthermore, we can look at Jaccard distances between treaties of interest to see where negotiating parties might have copied from each other's treaties. Jaccard distances are thus a quite versatile measure to trace BIT design patterns.

3.3. Data set

We gather 511 BIT full texts where one of the signatories is an African country, of which 333 are in English and 178 are in French.²⁸ Our primary source of BIT full

²⁸ We thank the participants of Trade and Investment Law Clinic-2015 of the Centre for Trade and Economic Integration at the Graduate Institute, Geneva for cleaning the African treaty texts and metadata, and Rodrigo Polanco for providing texts of missing South African treaties.

texts is *Kluwer Arbitration*²⁹ which features treaties supplied by the research staff at the Penn State Institute of Arbitration. We then complemented this data set with additional treaties exclusively available at Investment Claims³⁰, UNCTAD or other sources. In total our full text data encompasses 57% of all treaties signed by African countries (891 BITs) according to the UNCTAD database and our manual data collection effort.³¹ When it comes exclusively to sub-Saharan Africa,³² we similarly have 57% of BITs with English or French full texts available (358 out of 631 treaties signed).

Next, we edited the texts excluding annexes, side-letters, protocols and footnotes. We then corrected typos, optical character recognition errors and other mistakes in the underlying data sources. We also unified treaty spelling, converting all British English words into their American English counterparts (e.g. “favour” to “favor”) with the aid of spelling variant pairs from VarCon.³³ For Jaccard distance computations we removed all punctuation, accents, and capitalization from the documents.

4. Greater Agency in South-South African BITs?

Applying the above methodology to African BITs, the first question we need to answer is whether there is a systematic difference between North-South and South-South African BITs. Our hypothesis is that agency on the part of African countries will be higher in negotiations among themselves (South-South) than in negotiations with developed countries (North-South).³⁴

In order to empirically test this hypothesis we compare Jaccard distances between pairs of treaties. The intuition is that African countries will have to buy into diverging developed country model templates in North-South BITs resulting in a patchwork treaties with low overall consistency, while they can benefit from more symmetric bargaining power and more homogenous preferences in South-South negotiations to conclude more consistent treaties. Suppose there are three African countries: A1, A2 and A3, and one country N outside Africa. Our agency hypothesis will be supported if Jaccard distance between the text of A1-A2 bilateral treaty and A2-A3 bilateral treaty will be lower than that between the texts of A1-N and A2-N treaties. Similarly, the hypothesis will hold if the Jaccard distance between A1-A3 BIT and A2-A3 BIT will be lower than that between A1-N and A3-N treaties.

We extend this pair-wise comparison to Jaccard distances between 75,361 treaty pairs that are present in our data with the aid of a multivariate linear regression. Its results

²⁹ <http://kluwerarbitration.com>

³⁰ <http://oxia.ouplaw.com>

³¹ All African countries, apart from the Seychelles, that are signatories to BITs, are present in our treaty sample.

³² We define sub-Saharan African as any country on the African continent apart from Algeria, Morocco, Tunisia, Libya, and Egypt.

³³ <http://wordlist.aspell.net/varcon/>

³⁴ For the purposes of this paper we define the treaty as North-South if one of the signatories is an African country, and another one is not. Similarly, the treaty is South-South when both signatories are African countries. We are aware of the breadth of the definition “Global South” and that it may include non-African developing countries. However, in this paper we contrast African countries and the rest of the world.

are reported in the below table. For the purposes of this regression, we combine Jaccard distances between English-language treaty pairs and between French-language treaty pairs (but not cross-language Jaccard distances) and account for language differences with the aid of a French language dummy variable.

Table 1: Regression results for pair-wise Jaccard distances

DEPENDENT VARIABLE:	(1)	(2)	(3)	(4)	(5)
	Jaccard 5-gram distance between texts of a pair of BITs where one of the signatories is an African country				
First treaty in the pair is betw. two African countries	-0.008 (0.007)	-0.004 (0.013)	-0.006 (0.005)	-0.003 (0.013)	-0.005 (0.005)
Second treaty in the pair is betw. two African countries	-0.005 (0.007)	0.001 (0.016)	-0.005 (0.007)	-0.005 (0.008)	0.005 (0.007)
Both treaties in the pair are betw. two African countries	-0.058*** (0.011)	-0.059*** (0.013)	-0.058*** (0.013)	-0.058*** (0.012)	-0.101*** (0.004)
Treaty pairs R ²	71,031 0.284	71,031 0.479	71,031 0.359	71,031 0.423	71,031 0.440
Scope	all Africa	all Africa	all Africa	all Africa	Sub-Saharan
Signature year FE	yes	yes	yes	yes	yes
First treaty, first signatory FE	no	yes	no	yes	yes
First treaty, second signatory FE	no	no	yes	no	no
Second treaty, first signatory FE	no	yes	no	no	yes
Second treaty, second signatory FE	no	no	yes	yes	no

Note: Standard errors clustered at first treaty, first signatory level and second treaty, first signatory level in parentheses. French-language treaty BIT text dummy and year of treaty signature FE are included in the model but not reported. “Scope” indicates whether we define African country as the one that belongs to the continent or the one that is in the sub-Saharan group. Stars show significance: *** $p < 0.01$, ** $p < 0.05$, * $p < 0.1$

The hypothesis that African countries enjoy greater agency in intra-African negotiations is strongly supported by the regression results. When both treaties in the pair are between African countries, the Jaccard distance between them is consistently lower by 0.06, indicating higher textual similarity. This finding is robust to yearly idiosyncratic changes in treaty practice and accounts for unobserved differences in treaty practice across first or second signatory in any of treaties in the pair. Furthermore, when both BITs in the pair are between sub-Saharan countries, the Jaccard distance between them is lower by 0.10, almost a two-fold increase. As we will show in Section 6, this surge in sub-Saharan textual similarity is explained by the

markedly inconsistent but large treaty network of Egypt, which is not a sub-Saharan economy.

Hence, African states seem to seize the opportunities of more symmetrical negotiations among similarly situated African countries to exert greater agency over the outcome of BIT negotiation processes than they can in North-South negotiations. Two key questions ensue. First, do African countries use their greater agency in South-South BITs to infuse more policy space into BITs? Second, have some African countries more agency than others or, differently put, do we have rule-takers and rule-makers also in Africa?

5. More Policy Space in South-South African BITs?

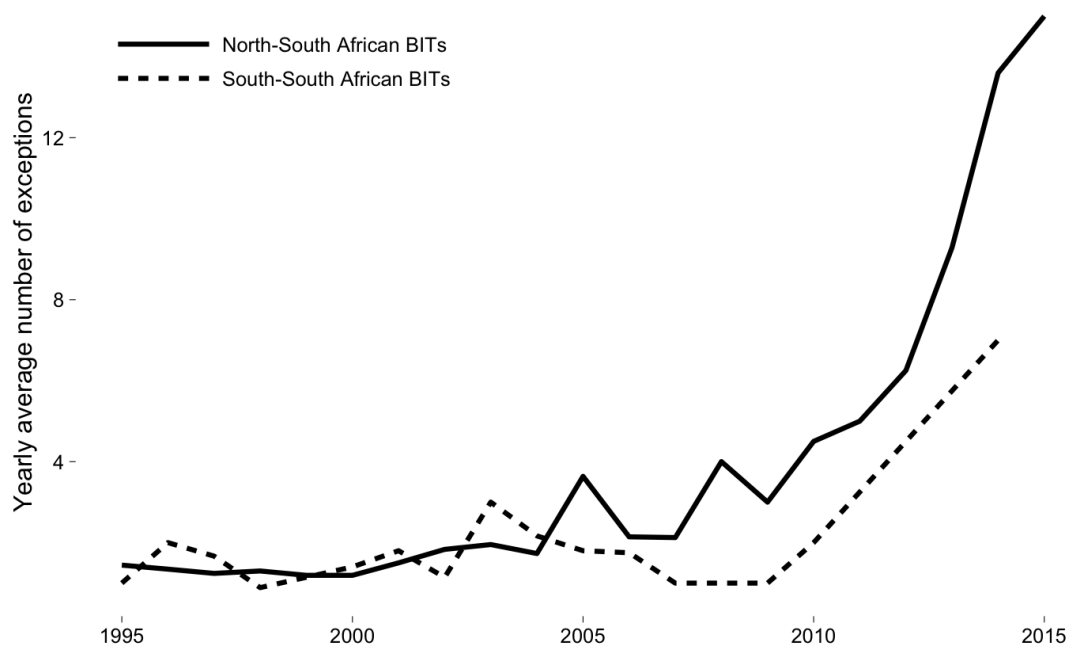
Do African countries use their greater agency in South-South BITs to carve out more policy space in their BITs? To answer this question we investigate the inclusion of exceptions in North-South versus South-South Agreements. While we find examples of policy space exceptions unique to South-South African agreements, they are relatively rare and only systematically pursued by a few countries. The main impetus for more policy space actually comes from more recent North-South Agreements.

5.1. Policy space exceptions over time

We have coded our set of African treaties alongside the policy flexibility they provide. In Annex 2 we list 20 exception features commonly identified in scholarship and the works of international organizations that seek to counterbalance investment protection obligation and provide the host country with policy space. While they are not exhaustive in describing the ways a country may reserve policy space, they are valid proxies to assess how treaties safeguard non-investment concerns. Our expectation based on the above discussion is that South-South agreements contain more such public policy elements than North-South agreements to protect host country policy space.

Our expectation that South-South African BITs contain more exceptions, however, is not confirmed. Comparing annual averages of the number of treaty exceptions for both types of agreements in Figure 2, we find that until 2000 North-South and South-South BITs in Africa did not differ significantly – both types of agreements had low numbers of exceptions. Thereafter, in the early 2000s, exceptions briefly rose in South-South African BITs, but then stagnated until recently. In the meantime, the number of exception has surged in North-South BITs. What should we make of these trends? To explain the observed patterns we take a closer look at the policy exceptions clauses.

Figure 2: Average number of exceptions per treaty per year



5.2. Policy space exceptions made in the South

Importantly, we find evidence that the African states used their greater agency in South-South agreements to include public policy exceptions into their agreements that had no equivalent in developed countries' model BITs. However, the practice is not widespread, concentrated in time to the decade between 1996-2006 and only systematically pursued by a few countries in sub-Saharan Africa.

The most prevalent Southern flexibility provision is a “Prohibitions and Restrictions” clause.³⁵ It originated in Article 11 of the China – Singapore BIT in 1985, but was subsequently widely adopted by developing countries, including in sub-Saharan Africa. Mauritius, probably the most sophisticated rule-maker in Africa (see further below), brought the clause to the continent in 1996 and made it standard practice. Article 11 of the China-Mauritius BIT (1996) reads:

The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection or its essential security interests, or to the protection of public health or the prevention of diseases and pests in animals or plants or the protection of its environment.

Since then at least 15 Mauritian BITs with other African countries spread the clause throughout the continent. Other sub-Saharan countries then incorporated it in their agreements, like the Madagascar-South Africa BIT (2006),³⁶ the Eritrea-Uganda BIT

³⁵ In French-language treaties, the clause appears as an “Interdictions et Restrictions” Clause or a “Droit de Prendre Des Mesures” provision.

³⁶ Article 3.

(2001),³⁷ the Burundi-Comoros BIT (2001)³⁸ or the Botswana-Egypt BIT (2003).³⁹ Without an equivalent in developed country practice and well before the 2004 U.S. model BIT or the first wave of investment awards, states in sub-Saharan Africa were thus using their agency in symmetrical negotiations to safeguard policy space.

Environmental measures are another area where sub-Saharan countries were avant-gardes in rulemaking. In 2003 Botswana included Article 13 in its BIT with Egypt:

- (1) Recognising the right of each Contracting Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or nullify accordingly its environmental legislation, each Contracting Party shall strive to ensure that its legislation provides for high, levels of environmental protection and shall strive to continue to improve this legislation.
- 2) The Contracting Parties recognise that it is inappropriate to encourage investment by relaxing domestic environmental legislation. Accordingly, each Contracting Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such legislation as an encouragement for the establishment, maintenance or expansion of an investment in its territory.
- (3) The Contracting Parties reaffirm their commitments under the international environmental agreements which they have accepted. They shall strive to ensure that such commitments are fully recognised and implemented in accordance with their domestic legislation.
- (4) The Contracting Parties recognise that co-operation between them provides enhanced opportunities to improve environmental protection standards. Upon request by either Contracting Party, the other Contracting Party shall accept to hold expert consultations on any matter falling under the purview of this Article.

A similar provision was later included into the Botswana-Mauritius BIT (2005) Article 12. Importantly, Botswana's practice predates that of Belgium, which started to include equivalent clauses in 2004.⁴⁰

5.3. From makers to takers of policy space exceptions

Oddly, at the time when the discourse around the need for policy space in international investment agreements began to intensify, autochthone exceptions began to disappear in South-South BITs of sub-Saharan Africa. Today, the majority of policy exceptions in African BITs is either "imported" via North-South agreements or copied from there. Moreover, Africa is lagging behind in integrating the drive towards more policy space into South-South agreements that is well underway in North-South agreements.

³⁷ Article 14.

³⁸ Article 12.

³⁹ Article 12.

⁴⁰ Organisation for Economic Co-operation and Development (ed), *International Investment Law: Understanding Concepts and Tracking Innovations* (OECD 2008) 143.

Several Northern countries consistently integrate public policy exceptions into their recent treaties. Canada, the U.S., Turkey and Japan enshrine a wide range of public policy safeguards in their agreements. As Table 2 shows, these BITs not only contain more flexibility clauses than their South-South counterparts, but they also post-date them by a decade. Those South-South BITs that are also of a more recent vintage like the Mauritius-Egypt BIT of 2014 have supplemented the old exceptions of the 1990s and early 2000s with new language limiting the scope of fair and equitable treatment and most-favoured nation taken from American, Canadian or Japanese treaties.

Table 2: Top ranking treaties by number of exceptions

North-South African Treaties	# of Exceptions	South-South African Treaties	# of Exceptions
CAN-TZA (2013)	17	MUS-EGY (2014)	7
CAN-CMR (2014)	15	BWA-EGY (2003)	5
CAN-BFA (2015)	15	MUS-BWA (2005)	5
CAN-MLI (2014)	14	UGA-ERI (2001)	5
USA-RWA (2008)	13	MUS-MDG (2004)	4
CAN-BEN (2013)	13	ZAF-MDG (2006)	4
CAN-CIV (2014)	13	GAB-MAR (2004)	3
CAN-NGA (2014)	13	GNQ-ZAF (2004)	3
CAN-SEN (2014)	13	MUS-MOZ (1997)	3
JPN-MOZ (2013)	11	MUS-SWZ (2000)	3
TUR-TZA (2011)	10	MUS-ZWE (2000)	3
AUT-NGA (2013)	9	MUS-RWA (2001)	3
CAN-ZAF (1995)	9	MUS-EGY (2003)	3
CAN-EGY (1996)	9	CMR-MRT (2001)	2
TUR-GAB (2012)	9	COM-BFA (2001)	2

We thus observe an interesting reversal. While some parts of sub-Saharan Africa were ahead of the curve at the dawn of the new millennia commonly including general regulatory or environmental concerns into BITs, these countries have become bystanders as innovation is made elsewhere and then imported into the continent via North-South Agreements or copy-and-pasting.

6. Rule-takers and rule-makers in African South-South BITs

Shifting the focus from the continent to individual countries, we finally investigate whether there are countries that make use of their agency in South-South BITs more than others. Differently put, we ask who are the rule-makers and rule-takers in Africa?

Countries in Africa are very diverse in their level of development and investment policy expertise. On one end of the spectrum are states such as Egypt or South Africa that have considerable market power, are central political forces in their respective regions and have comparably more bureaucratic capacity. On the other end are the poor least developed countries of central Africa. One would thus suspect that some of the same power and capacity asymmetries that turn developed countries into rule-makers in North-South agreements also shape the negotiation dynamics in South-South treaties. In this section, we trace patterns in South-South BITs and test our two hypotheses that power and expert knowledge may drive consistency scores through case studies.

6.1. Indecisive role of power asymmetries

Surprisingly, power asymmetry seems to play only a subsidiary role in shaping the landscape of South-South BITs in Africa. Table 3 displays the consistency score of African countries based on the South-South African BITs they sign. We see that relatively small countries like Cameroon and Mauritius lead that list.

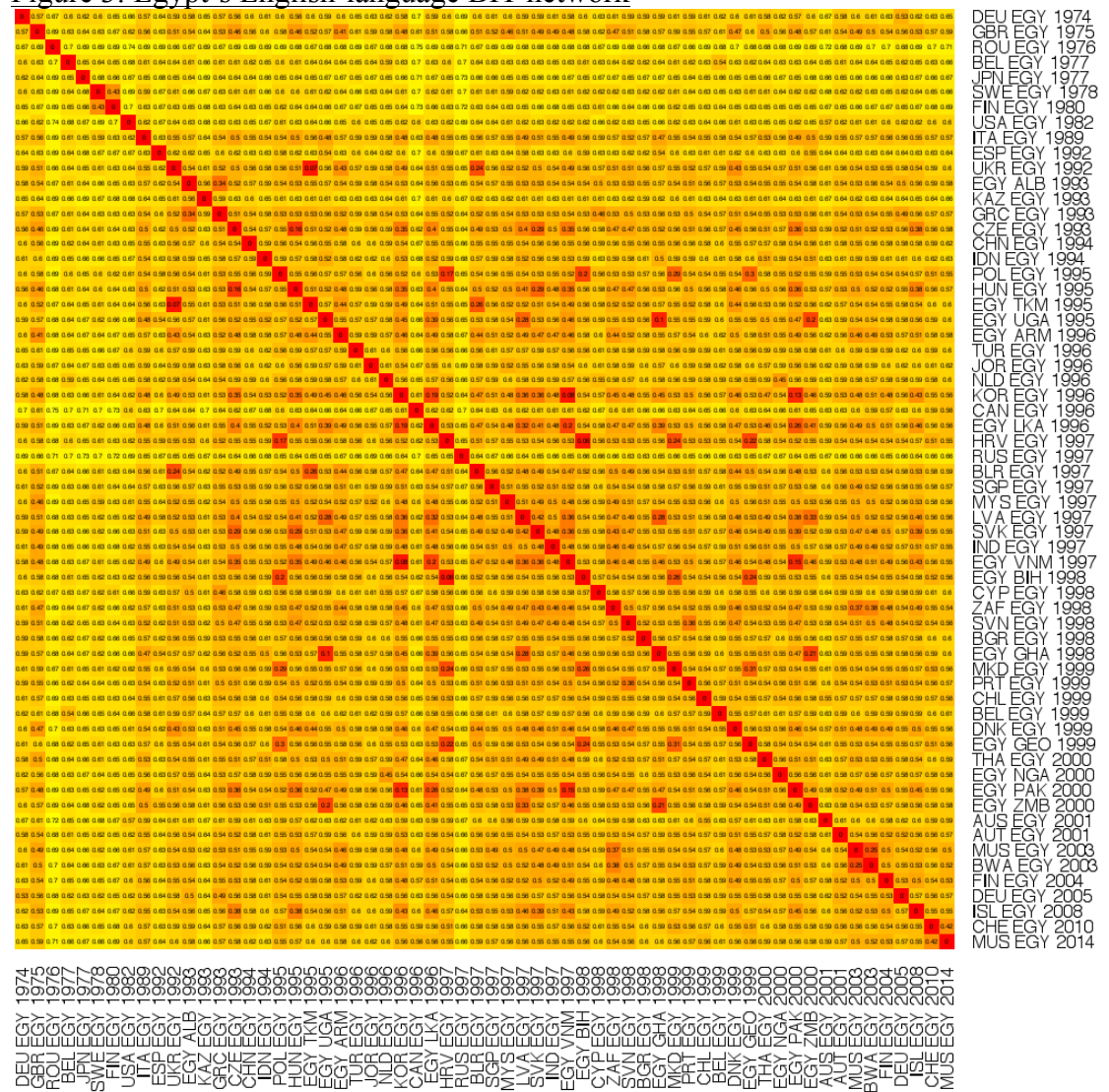
Table 3: Top-ranking countries in South-South consistency score

Rank	Country	South-South Consistency (Overall Consistency)	# of South-South BITs (Total # of BITs)
1.	MAR	0.275 (0.503)	9 (44)
2.	CMR	0.280 (0.553)	6 (16)
3.	ZAF	0.294 (0.482)	15 (33)
4.	MRT	0.331 (0.565)	3 (7)
5.	MUS	0.342 (0.452)	19 (38)
6.	BEN	0.349 (0.559)	5 (13)
7.	COM	0.384 (0.459)	3 (4)
8.	GHA	0.384 (0.532)	6 (18)
9.	BFA	0.393 (0.514)	6 (11)
10.	TCD	0.449 (0.595)	5 (8)
11.	GIN	0.482 (0.556)	8 (11)
12.	EGY	0.538 (0.577)	14 (70)
13.	ETH	0.544 (0.561)	5 (25)
14.	DZA	0.544 (0.572)	9 (35)
15.	SEN	0.586 (0.639)	4 (17)

Note: “South-South Consistency” is mean Jaccard 5-gram distance between pairs of treaties with other African countries signed by the specified African country (lower score indicates more consistency). “Overall Consistency” is mean Jaccard 5-gram distance between all pairs of treaties signed by the specified African country. “# of South-South BITs” is the number of treaties (with full texts available in French or English) signed by an African country where the second signatory is also an African country. “Total # of BITs” is the number of bilateral investment treaties signed by an African country (with full texts available in French or English). Per-country mean Jaccard distances are computed separately for English- and French-language treaties, averaged by language, and combined with the aid of a mean weighted by the number of treaties per language. All consistency scores are computed only for countries with more than 2 treaties in respective group. Extended version of this table is available in Appendix.

Particularly unexpected is the low rank occupied by Egypt. The country has signed 112 investment agreements, yet it fails to impose its terms on its BIT negotiation partners. Figure 3 displays Egypt's treaty network revealing a patchwork of differently worded agreements. Take the 2003 BIT Egypt signed with Mauritius. In 2003, Egypt's GDP exceeded that of Mauritius 15-fold and with a population of more than 70 million its market was 60 times bigger than that of Mauritius. Yet, Mauritius and not Egypt dictated the terms of the treaty: the treaty displays a 93% similarity to the Mauritius-Rwanda BIT (2001), and a 91% to Mauritius-Zimbabwe BIT (2000), Mauritius-Mozambique BIT (1997), and Mauritius-Swaziland BIT (2000). In contrast, it only displays a similarity of 54% (Armenia-Egypt BIT (1996)) or lower to all earlier Egyptian BITs. The only Egyptian treaty coming close in similarity to its BIT with Mauritius is the Botswana-Egypt BIT with 75% of similarity – signed on the very same day as the Mauritius BIT.

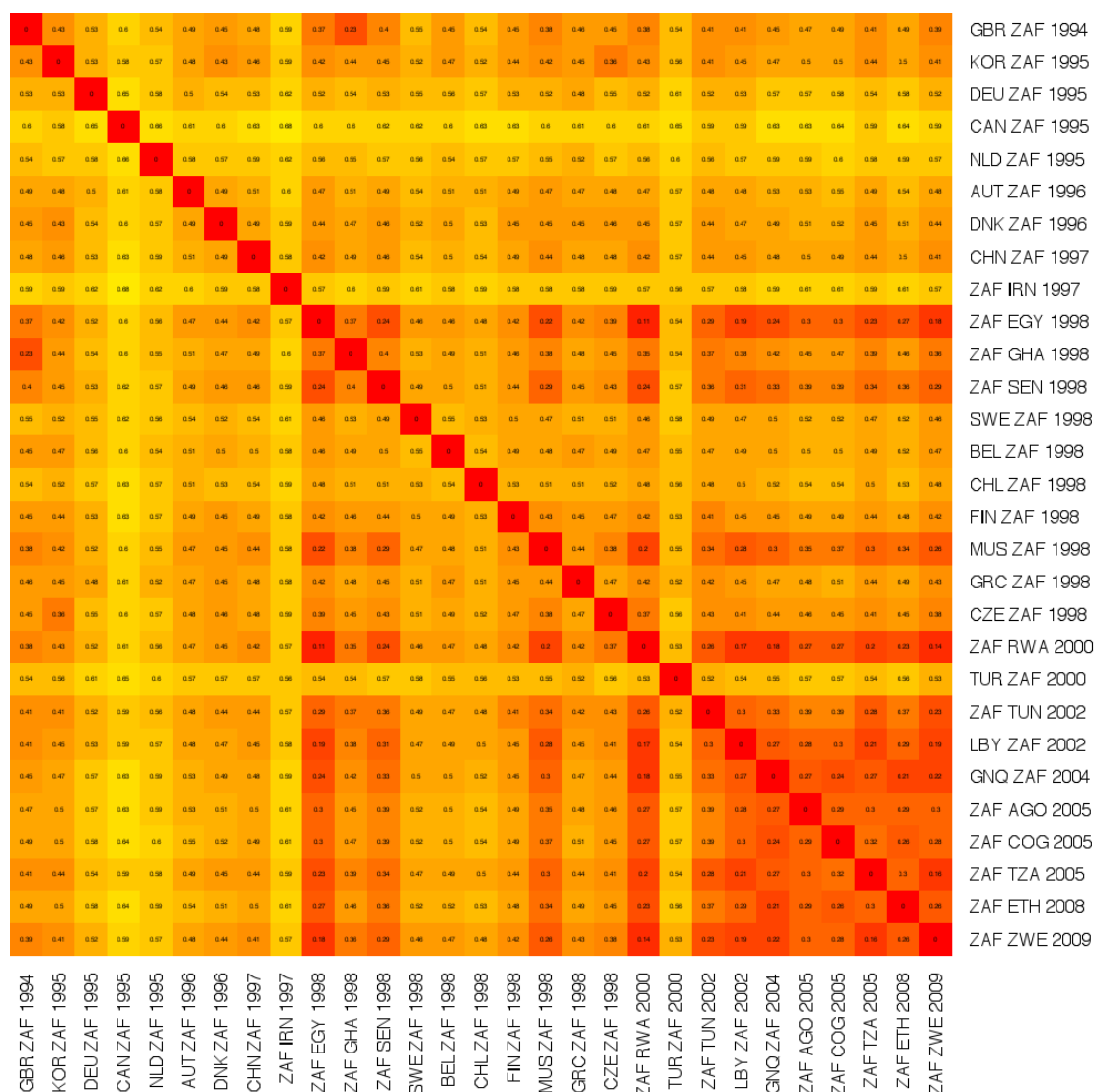
Figure 3: Egypt's English-language BIT network



Note: this figure shows a heat map of pair-wise similarities of all English-language bilateral investment treaties where Egypt was a signatory. Similarities are defined as Jaccard distances between treaty 5-grams and vary from 0 to 1 where zero means full overlap of 5-grams and 1 implies no overlap of 5-grams in two given texts. We color zeros as red and ones as yellow and employ gradient to show values in between. The actual similarity scores are reported in cells. Treaties are ordered by date of signature.

Power asymmetry seems to have played a more decisive role with respect to South Africa. In 1994, the country signed its first BIT with Great Britain and then, as Lauge Poulsen revealed in interviews with South African negotiators, decided to base its own BIT program on the UK model.⁴¹ The ensuing treaty network is divided into two parts as can be seen in Figure 4. First, in negotiations with wealthier developed countries between 1995 and 1998, South Africa was not successful in shaping the outcome of negotiations resulting in an internally incoherent treaty network. In contrast, starting in 1998, South Africa began negotiating with other African countries and could bring to bear its superior bargaining power. The resulting BITs closely mirror the country's first BIT with the UK and are more consistent among themselves.

Figure 4: South Africa's English-language BIT network



Note: this figure shows a heat map of pair-wise similarities of all English-language BITs where South Africa was a signatory. Similarities are defined as Jaccard distances between treaty 5-grams and vary from 0 to 1 where zero means full overlap of 5-grams and 1 implies no overlap of 5-grams in two given texts. We color zeros as red and ones as yellow and employ gradient to show values in between. The actual similarity scores are reported in cells. Treaties are ordered by date of signature.

⁴¹ Poulsen, *supra* note 7, 199.

How can we explain this difference in approach? While South Africa capitalized on its bargaining power in South-South African BITs, Egypt failed to take advantage of it. We suggest that expert knowledge played a decisive role in shaping the design of South-South BITs.

6.2. *Expert knowledge decisive for treaty outcomes*

As Lauge Poulsen's research suggests, many developing countries thought that BITs were simple ink on paper without any meaningful effect on the real world.⁴² They only started to take BITs seriously when they were hit themselves by an investment claims.⁴³ Yet, also among developing countries, the degree of expert knowledge differed.

Expert knowledge about BITs may be informed by different sources. On the one hand, it can be the result of the adoption of an extraneous treaty template without necessarily considering whether this particular template is well suited for the adopting country. This seems to have been the case for South Africa. The country opted into the UK model and developed expertise in negotiating treaties based on it without fully reflecting on its implications. South African negotiators interviewed by Poulsen confessed that they considered BITs as "pure signals" or "a symbolic gesture" rather than "real and serious legal instruments with teeth".⁴⁴ This may explain the awkward design features that some of its treaties have taken: While broadly following the UK model, the South Africa-Senegal BIT (1998) is written in "Frenghish" promoting "investissement" in Article 2 or providing in Article 8 that disputes between the contracting parties have to be resolved "through negotiation [sic] between the Governements [sic]". In South Africa, policy makers only began to take BITs more seriously when a foreign investor challenged the country's post-Apartheid legislation before international arbitration.⁴⁵ Since then, South Africa has halted its BIT program, began an in-depth review of the costs and benefits of BITs and started to terminate some of its existing treaties.⁴⁶

On the other hand, expert knowledge can grow endogenously driven by a strategic, well-conceived, long-term international investment policy. In contrast to the South Africa case, such policy-led expert knowledge can then enable a country to dominate negotiations even in bargaining situations with more powerful countries. The most impressive example of a country employing expert knowledge and long term strategy to build a coherent treaty network is Mauritius. In the last decades, the country steadily shifted from a manufacturing-based economy to a hub for financial

⁴² Poulsen, *supra* note 7.

⁴³ Lauge Poulsen and Emma Aisbett, 'When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning' (2013) 65 *World Politics* 273.

⁴⁴ Lauge Poulsen, *Sacrificing Sovereignty by Chance: Investment Treaties, Developing Countries, and Bounded Rationality* (Ph.D. thesis, London School of Economics and Political Science 2011) 280.

⁴⁵ *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01.

⁴⁶ Peter Muchlinski, 'Trends in International Investment Agreements: Calls for Reforms of Model Bilateral Investment Treaties in Norway, South Africa and the United States', *Yearbook on International Investment Law and Policy 2009-10* (2010).

services.⁴⁷ The Mauritian government fostered this transition through the creation of an enabling legal framework that included the conclusion of international investment agreements and double taxation treaties.⁴⁸ Aside from seeking to attract investment inflows into the countries' tourism industry, Mauritius signed these treaties to make it an attractive destination for companies that want to invest in Africa and South Asia. Known as the "Mauritius Route", this strategy has been tremendously successful: in India alone, 40% of the country's foreign direct investment inflows have been channelled through Mauritius between 2000 and 2011.⁴⁹ Not surprisingly then, Mauritian companies have become active users of investor-state arbitration having filed three cases against India and one against Pakistan and Madagascar respectively.⁵⁰

This coherent strategy of creating an enabling environment for FDI inflows and outflows is reflected in Mauritius' BIT network depicted in Figure 5. While Mauritius has to give way to the preferences of powerful developed states, it punches above its weight when it comes to South-South agreements succeeding in having its own treaty preferences shape the outcome of negotiations.

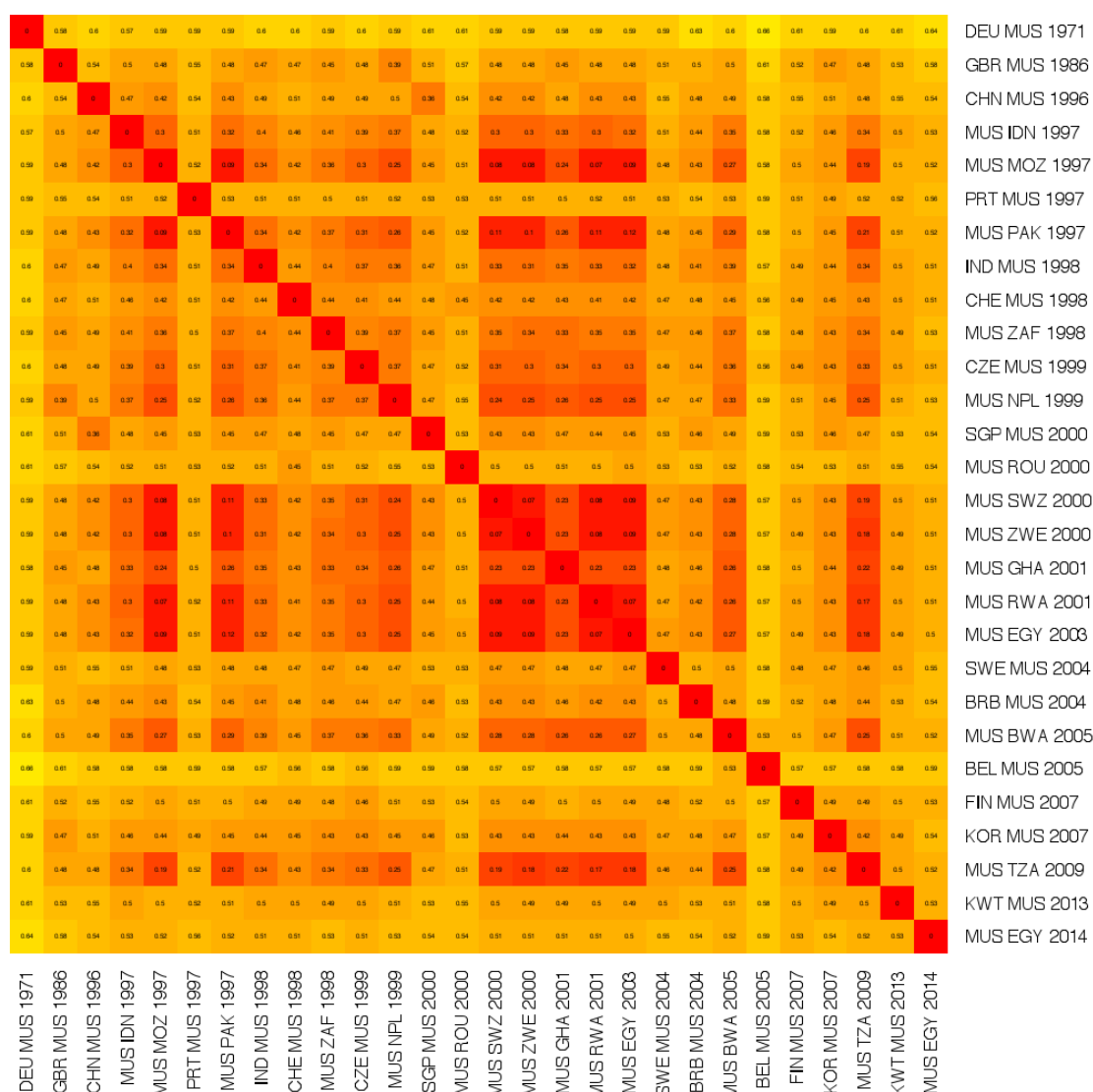
⁴⁷ UNCTAD, 'Investment Policy Review Mauritius' (2001) 1; OECD, 'Investment Policy Reviews: Mauritius' (2014) 19.

⁴⁸ *ibid.*

⁴⁹ Indian Ministry of Commerce and Industry, 'Factsheet on FDI Inflow to India', December 2011, Annex 1, <http://dipp.nic.in/English/Publications/FDI_Statistics/2011/india_FDI_December2011.pdf>, accessed January 28, 2016.

⁵⁰ *Bechtel Enterprises Holdings, Inc. and GE Structured Finance (GESF) v. The Government of India; CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. Republic of India* (PCA Case No. 2013-09); *Khaitan Holdings Mauritius Limited v. India; Progas Energy Ltd v. Pakistan; Courts (Indian Ocean) Limited and Courts Madagascar S.A.R.L. v. Republic of Madagascar* (ICSID Case No. ARB/13/34). These cases have been identified from the UNCTAD ISDS database, January 2016.

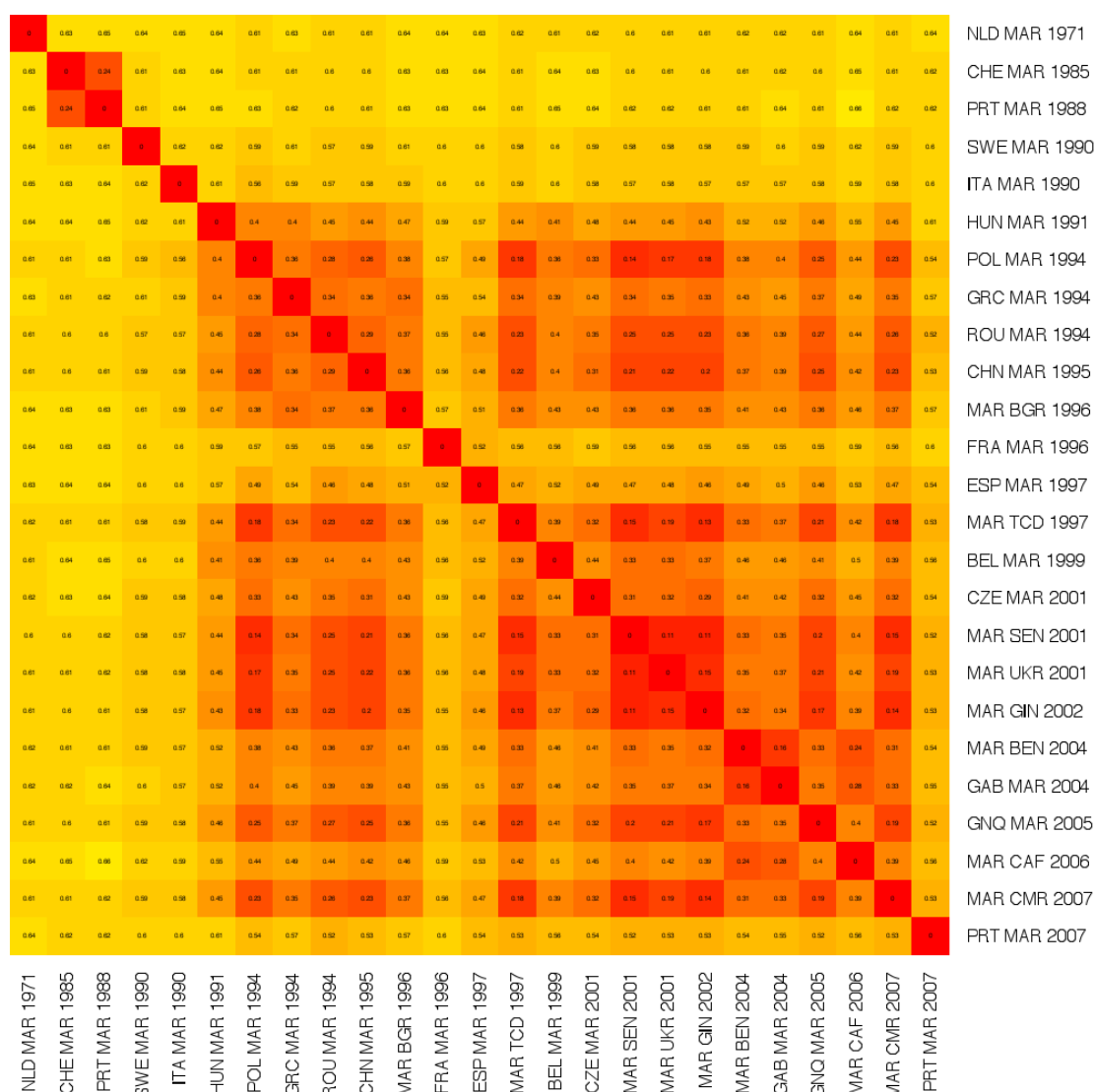
Figure 5: Mauritius' English-language BIT network



Note: this figure shows a heat map of pair-wise similarities of all English-language bilateral investment treaties where Mauritius was a signatory. Similarities are defined as Jaccard distances between treaty 5-grams and vary from 0 to 1 where zero means full overlap of 5-grams and 1 implies no overlap of 5-grams in two given texts. We color zeros with red and ones with yellow and employ gradient to show values in between. The actual similarity scores are reported in cells. Treaties are ordered by date of signature.

A country even better than Mauritius in terms of its intra-African consistency score is Morocco. Like Mauritius, Morocco is a rule-taker in negotiations with developed countries. Figure 6 shows how the BITs signed with France (1996) and Portugal (2007) break the otherwise neatly consistent pattern that characterizes Morocco's role as rule-maker in intra-African negotiations since 1991.

Figure 6: Morocco's French-language BIT network



Note: this figure shows a heat map of pair-wise similarities of all English-language bilateral investment treaties where Morocco was a signatory. Similarities are defined as Jaccard distances between treaty 5-grams and vary from 0 to 1 where zero means full overlap of 5-grams and 1 implies no overlap of 5-grams in two given texts. We color zeros with red and ones with yellow and employ gradient to show values in between. The actual similarity scores are reported in cells. Treaties are ordered by date of signature.

What explains the success of Moroccan negotiators is difficult to ascertain. In comparison with its negotiating partners, Morocco does not stand out in terms of its economic power or foreign policy influence. We therefore suspect that, not unlike Mauritius, Morocco may have succeeded in shaping BIT outcomes through policy-led technical expertise. Further research is needed to corroborate this claim.

6.3. Spurs of the moment

Finally, some treaty design patterns can neither be attributed to power asymmetries nor to expertise-driven long-term policymaking, but are literally spurs of the moment.

Another country that fares extremely well in terms of intra-African consistency scores is Cameroon with an average similarity of 72% across its South-South African treaties. This, however, is not due to the outstanding power or expertise of Cameroon's negotiators, but rather due to the fact that 3 of its 6 intra-African BITs were signed on a single day – 18 May 2001 – in the course of the Third UN Conference on the Least Developed Countries.⁵¹ Hence, aside from power and expertise, there is also a more erratic element that has shaped international investment policy in Africa.⁵²

7. Conclusion

Who are the rule-takers and rule-makers in the African BIT universe? This paper provided a differentiated answer to that question. First, we confirmed the hypothesis that African states are rule-takers in North-South negotiations, while they tend to act more often as rule-makers in South-South BITs. At the same time, the greater agency countries have in South-South BITs is generally not used to safeguard non-investment protection values in BITs.

Second, we found that while also Africa has its own rule-makers and rule-takers, negotiation outcomes seem to be shaped more by expert knowledge rather than power asymmetries. Egypt, for instance, is revealed as rule-taker in our analysis in spite of its large market and active foreign policy. In contrast, smaller countries such as Mauritius or Morocco, presumably due to better in-house expertise and a more coherent investment policy agenda, are more successful in setting the terms of investment agreements. What this suggests is that more technical expertise can not only help turn some of Africa's rule-takers into rule-makers, but may also enable countries to pursue their investment policy consistently with a view to achieving more coherent treaty networks.

Our paper thus provides a more nuanced view of the African treaty landscape and points to new areas of research to determine what turns countries into rule-makers as opposed to rule-takers.

⁵¹ UNCTAD, '29 bilateral investment treaties signed by least developed countries in Brussels' (17 May 2001) LDCIII/PRESS/08/Rev.1, <<http://unctad.org/en/pages/PressReleaseArchive.aspx?ReferenceDocId=2914>>, accessed on January 30, 2016.

⁵² For an in-depth investigation of the bounded rational diffusion of BITs including in Africa see Lauge N Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (1 edition, Cambridge University Press 2015).

Annex 1: Consistency Scores

Country	# Total BITs	# S-S BITs	# N-S BITs	Overall Consistency	S-S Consistency	N-S Consistency
BDI	5	2	3	0.403	NA	NA
MUS	38	19	19	0.452	0.342	0.505
COM	4	3	1	0.459	0.384	NA
SWZ	4	1	3	0.472	NA	0.481
BWA	5	2	3	0.474	NA	NA
ZAF	33	15	18	0.482	0.294	0.537
MAR	44	9	35	0.503	0.275	0.540
BFA	11	6	5	0.514	0.393	0.654
ZWE	16	2	14	0.529	NA	0.537
GHA	18	6	12	0.532	0.384	0.540
TZA	14	2	12	0.550	NA	0.563
CMR	16	6	10	0.553	0.28	0.659
GIN	11	8	3	0.556	0.482	0.699
BEN	13	5	8	0.559	0.349	0.636
NAM	7	0	7	0.559	NA	0.559
ETH	25	5	20	0.561	0.544	0.567
MOZ	13	1	12	0.562	NA	0.568
MRT	7	3	4	0.565	0.331	0.671
NGA	15	2	13	0.569	NA	0.571
ERI	3	1	2	0.570	NA	NA
DZA	35	9	26	0.572	0.544	0.578
GMB	8	2	6	0.577	NA	0.605
EGY	70	14	56	0.577	0.538	0.574
UGA	11	2	9	0.577	NA	0.582
MLI	6	2	4	0.592	NA	NA
TCO	8	5	3	0.595	0.449	0.727
TUN	26	3	23	0.596	NA	0.607
ZMB	7	1	6	0.597	NA	0.601
MDG	7	2	5	0.598	NA	0.631
GAB	7	1	6	0.615	NA	0.637
RWA	4	2	2	0.616	NA	NA
CIV	7	0	7	0.620	NA	0.620
LBY	14	4	10	0.623	NA	0.639
KEN	7	0	7	0.624	NA	0.624
COG	9	2	7	0.625	NA	0.626
SDN	12	2	10	0.627	NA	0.632
SEN	17	4	13	0.639	0.586	0.653
CAF	3	2	1	0.667	NA	NA
COD	8	1	7	0.690	NA	0.684
AGO	2	1	1	NA	NA	NA
CPV	3	0	3	NA	NA	NA
DJI	2	0	2	NA	NA	NA

GNB	0	0	0	NA	NA	NA
GNQ	3	2	1	NA	NA	NA
LBR	3	0	3	NA	NA	NA
LSO	2	0	2	NA	NA	NA
MWI	1	0	1	NA	NA	NA
MYT	0	0	0	NA	NA	NA
NER	2	1	1	NA	NA	NA
REU	0	0	0	NA	NA	NA

Note: “# Total BITs” is the number of bilateral investment treaties signed by an African country with full texts available in French or English. “# S-S BITs” is the number of treaties signed by an African country where the second signatory is also an African country. “# N-S BITs” is the number of treaties signed by an African country where the second signatory is not an African country. “Overall Consistency” is mean Jaccard 5-gram distance between all pairs of treaties signed by the specified African country (lower score indicates more consistency). “S-S Consistency” is mean Jaccard 5-gram distance between pairs of treaties with other African countries signed by the specified African country. “N-S Consistency” is mean Jaccard 5-gram distance between pairs of treaties with countries outside Africa signed by the specified African country. Per-country mean Jaccard distances are computed separately for English- and French-language treaties, averaged by language, and combined with the aid of a mean weighted by the number of treaties per language. All consistency scores are computed only for countries with more than 2 treaties in respective group. Otherwise, “NA” score is reported. Table is sorted by overall consistency score.

Annex 2: Coded Features

Exception Features

Balance of Payments
 Bona Fide Taking Carve-out
 Compulsory License Carve-out
 Creditor Protection
 Culture
 Denial of Benefits
 Environmental Measures Clause
 Exchange Rate Measures Carve-out
 FET linked to CIL
 GATT XX
 Health Exception
 Indirect Expropriation
 Indirect FET Breach Carve-out
 International Security Exception
 Investment Characteristics
 Non-conforming Measures
 Prudential Measures Carve-out
 REIO
 Security Exception
 Lowering standards