THE PROTECTION OF INVESTMENT IN AFRICA UNDER INTERNATIONAL LAW

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ABSTRACT

This Paper examines the essence of protection of investment in Africa under International law. International law does not operate in an abstract realm. International law comes into play when two states or other subjects of International law interact. In this context, these interactions occur in the spheres of International trade and Foreign Direct Investment (International Investment). Foreign Direct Investment benefits both the host and the foreign country. Hence, they both need protection. In Its preamble, the World Bank acknowledges this fact and provides for the guidelines on the Treatment of Foreign Direct Investment, it states;

> *"That a greater flow of foreign direct investment brings substantial benefits to bear on the world economy and on the economies of developing countries in particular, in terms of improving the long term efficiency of the host country through greater competition, transfer of capital, technology and managerial skills and enhancement of market access and in term as of expansion of international trade"*[i]

There are standards of treatment guaranteed by international law on protection of Foreign Direct investments. The standards are popularly known as "Minimum Standards" that's comes in two categories; namely; Non-Discrimination Standards and Fair and Equitable Treatment. In attempting to examine these, the paper will take into consideration the fact that, Sources of International Investment law include, principles of general international law, Treaties, BITs, Chapters of Free Trade Areas (Investment Chapters), Regional Investment Agreements, Case law and national investment legislation.

The paper will further, give a critique on the above and have a word on the challenges faced by developing countries, which most of them are African states as far as applicability of these standards of treatment is concerned.

INTRODUCTION

The term investment literary means the act of putting money, effort or time into something to make a profit or get an advantage.[ii] ICSID[iii] has considered this ordinary meaning of the term in the Malaysian Case, this was in accordance with the object and purpose of a treaty to which parties to the case were parties to that treaty too.[iv] The term is also defined to mean, every kind of asset, owned or controlled directly or indirectly by an investor. It includes, tangible and intangible, movable and immovable properties and any property rights, a company or business enterprise or shares, stock, or other form of equity participation in a company and bonds or other debt instruments, claims to money and performance according to contracts, Intellectual Properties, Returns and any rights conferred by law or contract or license and permits pursuant to law.[v]Further, ICSID considers investment to infer to contributions, a certain duration of performance of the contract and a participation in the risk of transactions and contribution to economic development of the host state.[vi]

From the above definitions, the term may be defined by an Open Assets based definition, a closed assets based definition or by an enterprise based definition, but the Salini Test, by ICSID in the above case, by looking at the criteria for an investment has taken all tenants on board and more important the last criteria of significant contribution to the economic development of the host state.

Foreign Investment is different in nature and form from engaging in a trade transaction. A trade deal consists of a single transaction, exchange of goods for money. Whereas, investment in a foreign country initiates a long-term relationship between investor and the host country. The plan is to sink substantial resources into a project at the outset of the investment, with expectations to recoup this amount plus an acceptable return and taking into consideration of risks involved for a very long period of time, up to 30 years or more.[vii]

Before independence, natural resources were exploited by foreign corporation. The relationship between the host state and foreign investors, was a matter of national law of the host state[viii] and to a small extent customary international law in regard to minimum standards of treatment for foreigners.[ix]During the decolonization process, new independent raised their concerns, inter alia having control over their natural resources that were exploited during the colonial period. Hence control over natural resources and even expropriation by host states due to sovereignty of the host states. Today, Foreign investment is subject to extensive principle of international law.[x]

SOURCES OF LAW

International Investment Law is a branch of international law, it therefore share some sources with general international law, treaties, international customary law, and general principles of law.[xi] Investment law however, has peculiar sources of law which are, Treaties which includes; International investment Agreements,[xii] Bilateral investment treaties (BIT's) which have a predominate role in investment relations, Investment Chapters of a free trade area, Regional investment agreements, Investment agreements dealing with a specific sector like the Energy Charter Treaty,[xiii] Case law and other sources such as national investment legislation, investment contracts and stabilization clauses in national legislation where the government commits itself that the law will not change and if it changes then it will not affect the investors.

Bilateral investment treaties are the major source of international investment law. BIT's standards are based on BIT's models, which are not legally binding but designed as guidelines for states that wish to conclude a BIT. These models include the US BIT model, the Canadian BIT model or the SADC BIT model, these models apart from setting standards for BIT's they also clarify the relationship between investment treaties and other treaties.[xiv]BIT's are said to be useful tools in creating a welcoming environment for companies seeking to invest in foreign countries. Since the late 1980's BIT's became the universally accepted instrument for the protection and promotion of foreign investment.[xv]

BIT's are defined as agreement between two countries for the reciprocal encouragement, promotion and protection of the investment in each other's territories by companies based in

their country.[xvi]BIT's aims at creating good conditions for greater investment flow, they restrict regulatory discretion of host states by imposing conditions that prohibit certain conducts such as breaking agreements, discrimination among foreign investors , revoking licenses or confiscating property.[xvii]

Recent developments in FDI regulatory framework, records a massive increase of BIT's due to failures in reaching a comprehensive multilateral agreement on investment.[xviii]Mot agreements have been concluded developed and developing countries, a sizable number between two developing countries and even between least developing countries. Apart from attracting investment and providing for a broad range of investment rights and protection to foreign investors, BIT's creates flexibility in investment dispute resolution. BIT's allow resolution of investment disputes through international arbitration, often under the auspices of the ICSID.[xix]

PROTECTION OF INTERNATIONAL INVESTMENT

International law does not impose an obligation on states to admit foreign investment. Since states are sovereign, they have a right to exclude and regulate and the power to conclude investment treaties with other states. Once a state has admitted a foreign investment, the host state becomes subject which is governed by international customary law.[xx] Moreover, international investment treaties go beyond these minimum standards in the scope of obligations, a host state owes an investor. Whether those treaties are considered to benefit the host state remains a matter of each sovereign state to weigh.[xxi]

Generally, rules on investment protection are designed to guard the interest of foreign investors, against host government actions that are unduly detrimental to investors' interest. Such rules may include the following; rules of non-discrimination and expropriation. Recent BIT's which are investment based, contains core protection rules namely; National treatment, MFN and Fair and equitable treatment. These BIT's agreements may cover compensation for loss and expropriation, and provide for the free transfer of funds. The most recent United States and Canadian model BIT's are examples of agreements containing strong rules with respect to the core investment protection disciplines.[xxii]

Core Investment Protection Rules

Non- discrimination Standard:

a) National Treatment

National treatment addresses discrimination on the basis of nationality of ownership of an investment. In order to ascertain whether there is discrimination, a comparison is made between the treatment accorded to a foreign investor and treatment accorded to a domestic investor in similar circumstances.[xxiii]This principle under international investment law has a slightly different meaning from the meaning accorded to it under international trade law.[xxiv] UNCTAD define the principle to mean, treatment that a host country extends to a foreign investor that is at least favorable than the treatment that it accords to national investors in similar circumstances.[xxv]

This principle holds that, host state should accord investors and their investment treatment not less than the treatment it accords in like circumstances to its own investors and their investments.[xxvi]This treatment is in respect to management, operation and disposition of investments in its territory. Like the circumstances of an investment include among others, its effect on third persons and the local community, the sector of the investor, aim of the measure concerned, its effect on the environment, the regulatory process and other factors relating to the investor in relation to measures concerned.[xxvii]

b) Most Favored Nations Treatment (MFN)

This is one of the core principles of international investment; it is the heart of multilateralism and is applicable to both international trade and international investment. Virtually all BIT's have MFN clause. This clause obliges the host state to accord the same treatment to one investor that it accords to other investors from other states.[xxviii]In other words it means that a host state treats investors from one foreign country no less favorably than investors from any other country.[xxix]

In principle, MFN clauses may either be unilateral or reciprocal, conditional or unconditional. In international investment MFN is conditional, that is to say, it can only apply if only there is an explicit provision of the same in the BIT for Instance, the SADC BIT model do not have an

MFN clause. And even if a BIT has an MFN provision it can only be applicable to the extent of what it covers.[xxx]

The rationale behind investment protection under MFN principle is to avoid any discrimination against them which would put them at a competitive disadvantage compared to other investors from third world countries. Moreover, the principle aims at ensuring equality of competitive opportunities between investors from different foreign countries.

Fair and Equitable Treatment (FET):

Two approaches have been advanced towards giving the meaning of FET, the first approach is its literal/ plain meaning and the second approach is by equating FET with international minimum standards.[xxxi] The plain meaning of FET is where a foreign investor is assured of a fair and equitable treatment, therefore an assessment has to be done to ascertain as to whether that treatment is both fair and equitable.[xxxii]The second approach which is equated to minimum standards of customary international law, this assumption follows from the fact that, under customary international law, foreign investors are entitled to certain level of treatment, and every treatment that falls short of this level rises liability on the part of the host state.[xxxiii] This is also in accordance to customary international law on minimum standards of treatment of aliens to be minimum standards of treatment to be afforded to covered investments.[xxxiv]

In Neer's case,[xxxv] governmental treatment of foreign investors was declared as unfair treatment under international law, it was held that, for treatment under international law to constitute an international delinquency, it should amount to an outrage, bad faith, willful neglect of duty or to an insufficiency governmental action short of international minimum standards that every reasonable and impartial man would recognize its insufficiency. Also, in Genin v. Estonia,[xxxvi] it was held that, a violation of the FET principle could be established by acts showing willful neglect of duty, an insufficient action falling short of international minimum standards or even subjective bad faith.

This principle is incorporated as a key provision in BITs, it is among the International minimum standards of the treatment, and a major and important principle of foreign investment.[xxxvii]The principle provides a basic level of protection to foreign investors and is based on the element of fairness and equity. One of the most concerns of foreign investors is the violation of this

principle, these claims are always made by foreign investors before International Investment Tribunals.[xxxviii]

However, SADC[xxxix] BIT model acknowledges the fact that FET provision is a highly controversial provision. It recommends against its inclusion in a treaty due to its broad interpretation in a number of arbitral decisions. Thus, alternatively requests an alternative formulation of a provision of "Fair Administrative Treatment" which requires state parties to ensure that, their administrative, legislative and judicial process do not operate in a manner that is arbitrary or that denies administrative and procedural justice due process to investors of other state party or their investments, but taking into consideration the development of that other state.[xl]

Expropriation:

This is a centuries old principle of foreign investment law. As a rule of the thumb, foreign owned property may not be expropriated or subjected to a measure tantamount to expropriation unless the following four conditions are met. First, an expropriation must be for a public purpose. Second, expropriation should be non-discriminatory. Third, it is taken in accordance with applicable laws and due process. Lastly, full compensation is paid.[xli]

The SADC BIT model requires that for lawful takings to take place, only three requirements need to be met, first for public interest, second in accordance with due process of law and on payment of fair and adequate compensation within a reasonable period of time.[xlii]

What these conditions means has been a matter of controversy and most scholars have contributed their opinion on this debate. The public purpose principle implies a means differentiating takings for purely private gain on the part of the ruler from foreign investors for reasons related to the economic preferences of the country concerned.[xliii]It also entails taking without due process which is in contravention with the principle of equality before the law, fair hearing and other principles of natural justice generally recognized by the world principle legal systems.[xliv]

Expropriation may either be direct or indirect. Direct expropriation entails takings of property by the government resulting from legislative or administrative acts that transfer titles and

physical possession. Indirect takings on the other hand, results from official acts that effectuate the loss of management, use or control a significant depreciation in the value of assets.[xlv]

Direct takings are associated with measures that have given rise to the classical takings under international law. It constitutes an actual taking of property by the host state by direct means, this include the loss of all, or almost all useful control of property, and the outright takings of all foreign property in all economic sector.[xlvi]For instance in 1967,[xlvii] Tanzania conducted a direct expropriation on the basis of nationalization.[xlviii] A number of enterprises were affected following the enactment of other different laws.[xlix]

This act of the Tanzanian government was proper and legal, it was done in due process of the law, for public interest and compensations was paid by the government. Tracing back history, this was done during the decolonization period, where newly independent states like Tanzania by then, sought to rest economic control from the nationals of their colonial masters. Their position was that only appropriate compensation was needed for these takings.

This position led to a series of UN general assembly that eventually resulted into the doctrine of Permanent Sovereignty over natural resources.[l]The General Assembly, taking into consideration the desire to promote international cooperation for economic development for developing countries, and economic and financial agreements between developed and developing countries is based on equality and self-determination of people and nations, it declared that, peoples and nations have permanent sovereignty over their natural resources. Exploitation, nationalization and requisition shall be based on the above-mentioned conditions.[li]

Indirect takings entail some measures short of physical takings. These takings may result in the effective loss of management, use or control or a significant depreciation of the value of the asset of a foreign investor. These takings are called creeping expropriation or may be termed as regulatory takings.[lii]

In Biwater Case,[liii] a dispute arose between a joint British and Germany Company and the United Republic of Tanzania over a concession to operate water and sewage services in Tanzania's big commercial city of Dar es salaam. After conclusion of an investment contract, the claimant failed to fulfill its contractual obligations; the Tanzanian government terminated

the contract and regained possession of assets leased by the claimant. The claimant brought an action before ICSID under the United Kingdom and Tanzania BIT. The Issue before the tribunal was whether, Tanzania's conduct amounted to indirect expropriation. The claimant's argument was that, indeed the government's act was indeed expropriation, because first, the repudiation of the lease contract and the means by which the government used to implement the termination. Second, the occupation of the City Water's facility, usurpation of management control and deportation of its senior managers was in violation of International investment law generally and article 5(1) of the BIT between Tanzania and United Kingdom. In its decision ICSID found Tanzania liable, in its views the cumulative effect of acts by the government amounted to unlawful expropriation of BGT's rights in the lease contract.[liv]

CONCLUSION

It is believed that, FDI generates positive effects to host countries; FDI has shown its ability to contribute significantly to increase capital, boost human capital and speed up technology transfer. Further, FDI plays a role in modernizing national economy and promote economic development. Developing African countries in consideration of this fact, have liberalized their economies in order to attract FDI. Attracting FDI itself is not enough to make Africa reap the advantages of FDI. The Sector needs to be well regulated by having a multilateral legal framework that will enable protection of interests both parties to an investment.

As already pointed out, the main source of international investment law is BIT's. If only the international community agreed on the norms that constitute international investment law, with substantive rules to regulate the sector, that is to have a multilateral investment treaty. It should be born in mind that under international law, treaties form the primary source of law.[lv] In absence of this in international disputes, then other sources apply, which includes customary international law. In this case, standard and principles of foreign investment protection derives their authority from customary international law.

Attempts to have a multilateral investment agreement were made, but have never been fruitful save for, a dispute settlement forum, which also faces some challenges. This agreement has

never been achieved due to conflicting approaches on foreign investment protection and contending systems of treatment of foreign investment.

It is debatable as to whether; BIT's can guarantee liberalization, treatment and protection to foreign investment on the basis of standards contained in them, and to ensure regulatory control to protect the host state's interest at the same time. This debate that aired clashes between developed and developing countries surfaced the Doha Round of Multilateral trade negotiations.[lvi]

The debate was centered around the purpose of an international treaty on international investment. For developed countries, their wish was to achieve a free mobility of capital by minimizing the powers of governments on impositions of condition and regulations on foreign investors through a treaty. While a developing state wished to protect their autonomy over both investment policy and the right to regulate the activities of foreign investors. Which are two opposing wishes.[lvii]

At regional level, African states have made efforts to improve their investment climate; apart from liberalizing investment regulations that offers among other things incentives to foreign investment. Africa has adopted a program, NEPAD[lviii] with a purpose of eliminating poverty and develops economies in the continent. NEPAD has provisions with legal certainty to foreign investors.[lix]With these achievements still some investors are still hesitant to invest in Africa due to a number of reasons, inter alia, political instability, economic instability, diseases and disasters in some African States.

At the regional level, southern African countries have developed SADC BIT Model. The East African Community has also developed its BIT Model. However, there is no binding law on foreign investment, the Community has accomplished a number of phases and projects on their integration ladder and one area of corporation in the community is investment and industrial development, the aim is to harmonize incentives and rationalize investment with an aim of promoting EAC as a single investment area.

ENDNOTES

[i] World Bank Group, (1992) "Guidelines on the Treatment of Foreign Direct Investment" Legal Framework for the Treatment of foreign investment, Volume 2. pp.35-44.
[ii]https://dictionary.cambridge.org/dictionary/english/investment - Accessed on 6th November 2021, 16:50 hours.
[iii]International Center for Settlement of Investment Disputes.
[iv] See also the case of Malaysian Historical Salvors, SDN, BHD v Malaysia, Decision on the Application for Annulment, ICSID Case No. ARB /05/10, 29 February 2009.
[v] Article 1 of the Energy Charter Treaty, annex 1 to the European Energy Charter Conference, 1994, International Legal materials 500 (1996).
[vi] Salini Costruttori S.P.A. and Italstrade S.P.A v Kingdom of Morocco, Decision on Jurisdiction, ICSID Case No. ARB/00/4,23 July 2001, 42International Legal Materials 609(2003).
[vii] DOZLER R and SCHEREUER C, (2008) Principles of International Investment Law, Oxford University Press. p.4
[viii] DIXON M et al (2016) Cases and Materials on International Law, 6th Edition, Oxford University Press p.511.
[ix] This arises out of general international law on state responsibility, where a state owes another state an obligation to protect nationals of the other state within its territory. This was considered in the case of Neer Claim (United States v. Mexico) RIAA 60 (1926), Mexico – United States General Claims Commission. See also, Hackworth G.H (Ed) (1943) vol 5, Washington Govt Printing House.
[x] DIXON Supra.
[xi] Article 38 of the ICJ Statute.
[xii] Example Agreement on Trade – Related Investment Measures (TRIMs).
[xiii] Energy Charter Treaty, annex 1 to the European Energy Charter Conference, 1994.
[xiv] HIRSCH, M Sources Of International Investment Law, International Law Forum of the Hebrew University of Jerusalem Law Faculty Research Paper No. 05-11 July 2011- Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1892564 – Accessed on 6th November 2021, 18:00 hours.
[xv] HAMILTON, C. A & ROCHWERGER, P. I (2005) Trade and Investment: Foreign Direct Investment through Bilateral and Multilateral Treaties, New York International Law Review 1.
[xvi]http://www.unctadxi.org – Accessed on 07th November 2021 12:00 hours.
[xvii] RAJAN, P (2008), *International Investment Agreements and Regulatory Discretion; Case study of India*, Journal of World Investment and Trade 211 p. 209.
[xviii] SORNARAJAH, M. *The International Law on Foreign Investment*: Cambridge University Press 978-0-521-76327-1 Third Edition p. 204.
[xix] All BITs include a clause that provides for the possibility to submit claims to international arbitration; such clause declares consent by parties, as it is a rule to every international dispute settlement, that parties must give prior consent. ICSID is the most popular forum for international investment disputes, there are other arbitral tribunals under the auspices of UNCITRAL, see DIXON above p 524.
[xx] ROOT, E (1910), *Basis for protection to Citizens Residing Abroad*, 4 AJIL517, 528 – In Dolzer, R. and Schreuer, C (2008) Principles of International Investment Law, Oxford University Press, New York, USA. P.6
[xxi] DOLZER, R. and SCHREUER, C (2008), *Principles of International Investment Law*, Oxford University Press, New York, USA. p.6.
[xxii] *UNCTAD Series on International Investment Policies for Development*, UNITED NATIONS, New York and Geneva, 2005 pp. 33-34.
[xxiii] SUBEDI, S.P (2008), *International Investment Law: Reconciling Policy and Principle*, Hart Publishing, Oxford p. 67.
[xxiv] Article 2 of Trims read together with Article xi of GATT 1994.
[xxv] *UNCTAD, National Treatment, UNCTAD Series on Issues of International Investment Agreement*, UNITED NATIONS, New York and Geneva, 1999 UNCTAD/ITE/IIT/11 (Vol. VII) p.5.
[xxvi] Art 4, SADC Model Bilateral Investment template with commentary, 2012.
[xxvii] Ibid.
[xxviii] DIXON above, p.518.
[xxix] *UNCTAD, Most Favored Nations Treatment, UNCTAD Series on Issues of International Investment Agreement*, UNITED NATIONS, New York and Geneva, 1999 UNCTAD/ITE/IIT/10(Vol. III).

[xxx] See Art 3 of the German BIT Model and Art 4(1) of the US BIT model.
[xxxi] UNCTAD, Fair and Equitable Treatment, UNCTAD Series on Issues of International Investment Agreement, UNITED NATIONS, New York and Geneva, 1999 UNCTAD/ITE/IIT/11 (Vol. III) p.10
[xxxii] Ibid.
[xxxiii] Ibid.
[xxxiv] See Article 5 of the US BITs model, 2012.
[xxxv] USA (LF Neer) v. United Mexican States 15th October 1926 4 RIIA (1926) 60.
[xxxvi] ICSID Case No. ARB/10/11/ of 12 October 2005, 12.
[xxxvii] SUBEDI, Above p.68.
[xxxviii] *UNCTAD, Fair and Equitable Treatment, UNCTAD Series on Issues of International Investment Agreement II. A Sequel*, UNITED NATIONS, New York and Geneva, 2012.
[xxxix] Southern African Development Community.
[xl] Art 5, SADC Model Bilateral Investment template with commentary, 2012.
[xli] UNCTAD, Taking of Property, UNCTAD Series on Issues of International Investment Agreement II. A Issue Paper Series, UNITED NATIONS, New York and Geneva, 2000 p,12.
[xlii] Article 6 of the SADC BIT Model 2012.
[xliii] HIGGINS, R (1982) The taking of Property by the State (1982-III) 176, *Recueil des Cours* 259, 371.
[xliv] Ibid.
[xlv] UNCTAD, Taking of Property Above.
[xlvi] Ibid.
[xlvii] Following the promulgation of Arusha Declaration of 1967.
[xlviii] The Nationalization Act of 1967, allowed the Tanzanian government to expropriate for public interest.
[xlix] Maina, C.P (1994) Foreign Investment in Tanzania: The Mainland and Zanzibar, Dar es Salaam, Friendrich Ebert Stiftung.
[l] UNCTAD, Taking of Property Above.
[li] United Nations General Assembly Resolution 1803 (XVII) on Permanent Sovereignty over Natural Recourses, 14 December 1962.
[lii] UNCTAD, Taking of Property Above.
[liii] Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania ICSID Case No. ARB/05/22.
[liv]Ibid.
[lv] See Art 38 of the ICJ statute.
[lvi] The Doha Roundtable. November 2001.
[lvii] WTO (2002) The Working Group on the Relationship between Trade and Investment to the General Council of the WTO, WT/WGTI/ 6 of 9 December 2002.
[lviii] New Partnership for Africa's Development.
[lix] NEPAD, a Session held in Lusaka Zambia 2001.