AN EMPIRICAL ANALYSIS ON THE MOST FAVOURED TREATMENT AND INVESTMENT NOMENCLATURES: A FOCUS ON TREATY-BASED CASES FOR TANZANIA

Written by ***Prof Handley Mafwenga***

Ph.d, MSc (fin), MBA (Mg.Econ), LLM (Taxation), LLM (Procedural Law &Intern. Legal practice), LLB (Hons): Ministry of Finance and Planning) Dodoma, Tanzania

ABSTRACT

In the framework of international investment law, the beneficiary of the most-favoured nation clause is the investor. However, it could be imperative to differentiate between Most Favoured Nation and Most Favoured Nation Treatment. In that vein, A most-favoured-nation clause is a treaty provision whereby a State undertakes an obligation towards another State to accord most-favoured-nation treatment in an agreed sphere of relations, whereas Most-favoured-nation treatment is treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State. This paper therefore, analyses the rationale of using most. favoured nation treatment in Tanzania where there are economic and legal variances, and it further, shows how, MFN could be interpreted by the courts focusing on Tanzanian treaty investment framework.

INTRODUCTION

The right of the beneficiary State to most-favoured-nation treatment referred to in Table 1, comes to light and attains its legitimacy from the most-favoured-nation clause. However, this is significantly applicable exclusively with reference to persons or things which are thoroughly itemized in such particular clause or implied from its subject-matter that is, in a determined relationship with that State.

The jurisprudence of bilateral investment treaties (BITs) in Tanzania, gains its genesis before the United Republic of Tanzania (URT) came into being, the then known as Tanganyika after possession of the doctrine of treaty succession. This doctrine contends on the continuity of sovereignty that passes – with all rights and obligations – from the old to the new subject of international law, protecting the validity of obligations assumed under international treaties. However, this validity could not have direct favorability in the treatment to third party due to presence of privity of contract rule contrary as so do BITs.

These triggered challenges concerning lack of sustainability in the treaty making process and their application, this went tandem with existence of variety of agreements such as EAC Treaties[i], related agreements, protocols, and Anglo-Germany agreement[ii] that caused dispute with Malawi on lake Nyasa.[iii] The same was experienced during the war between Uganda under the President Idd Amin Dadah and Tanzania under the President Julius Nyerere which started in October, 1978[iv], in that situation no treaty that was negotiated. Likewise, any period, closer to the general election, no treaty that is being negotiated or signed due to the political transformation. Hence, these events altogether derogated applicability of the MFN clause that ought to mitigate economic and political risks that could deprive enforcement of treaty's rights and obligations[v].

Yet, Tanzania has been exposed to the international tribunals with treaty-based cases such as the case of *Biwater Gauff (Tanzania) Ltd. Vs. United Republic of Tanzania*[vi] and *Standard Chartered Bank (Hong Kong) Limited vs. Tanzania Electric Supply Company*.[vii] In which investors expected that, the MFN clause would profoundly be a typical clause in treaties because even the International Law Commission (hereinafter (ILC) has drawn up Draft Articles on Most-Favoured-Nation[viii]. which describe the basic structure in the functioning of the MFN clause, regarding the source of the right to most-favoured-nation treatment.

Concerning the source of this right, Article 8 provides exclusively that it stems from the treaty containing the MFN clause, entitled the basic treaty.[ix] The clause also determines the scope of the right as provided for by Article 9. 5. Thus, the beneficiary of most-favoured-nation treatment can only demand the application of the more favourable treatment accorded to a third state when it falls within the limits of the subject matter of the clause.

In BITs, the obligation is generally specified as providing MFN treatment to the "investor" or its "investment." that is "in like circumstances" or in a "similar situation" to the comparator.

MOST-FAVOURED NATION CLAUSES (MFN)

The Most-Favoured Nation standard is where a host country must extend to investors from one foreign country the same or no less favourable treatment than it accords to investors from any other foreign country[x]. The MFN treatment seeks to grant foreign investors treatment comparable to other foreign investors operating in the host country.'[xi].

Tanzania is obliged, by virtue of the MFN clause in BITs, to grant investors the higher standards of protection extended under any other BIT to which Tanzania is a party. In investment law, MFN clauses are the vital ingredient that glues thousands of legally bilateral relationships into a *de facto* multilateral investment regime.[xii]. In that context, the MFN may clearly include the dispute settlement procedures except in cases where the "public policy" exceptions applied.

INTERPRETATION OF BILATERAL INVESTMENT TREATIES

In order to regulate the scope of the MFN clause regarding dispute settlement provisions, interpretation of the intention of the contracting states in conformity with Articles 31 and 32 of the Vienna Convention on the Law of Treaties has been preliquisite.[xiii] However, the emphasis has been on the procedural dimension of the dispute settlement mechanism in relation to substantive provisions included in BITs.[xiv] Art. 31 of VCLT catalysed the development of customary law on treaty interpretation.

Any disregard of interpretative methods not only jeopardizes the legality, predictability, clarity, and consistency of judicial reasoning but also derogates legitimacy expectations of investors and investment confidence. The difference between domestic and international law are some features of their law-making process. For example, the fact that international law making requires the involvement of at least two States, while on the other hand, in treaty interpretation, a broader definition of context encompassing, *inter alia*, other international legal acts and the practices of the treaty parties[xv]. Tanzania in order to respect their international obligations, should have to use the interpretative methods of international law, which include;

Textual or literal interpretation is the fundamental idea of treaty interpretation[xvi], a treaty being, by definition, written. The purpose of CIL often entails textual interpretation, as State practice and *opinio juris* are mainly reflected in verbal acts.[xvii] The practice of treaty interpretation by State[xviii] suggests that textual interpretation is a customary interpretative, pervasive, and mandatory in international law method[xix]. This method helps respect the intentions of the law-making States, which the text is presumed to reflect.[xx] With regard to unwritten international law as well, the use of verbal acts profusely secures fidelity to the intentions States have expressed through these acts. The text of international law is its most immediately cognizable feature (except for laws that are not easily accessible).

The Systematic interpretation (Contextual) matters vividly on the international atmosphere where art. 31(1) VCLT mandates contextual interpretation. Art. 31(2) VCLT postulates the view of context, and art. 31(3) VCLT identifies elements to be 'taken into account, together with the context', ie, subsequent agreements (a), subsequent practice (b), and international law applicable to the treaty parties (c).

The circumstances surrounding the conclusion of the treaty are 'supplementary means of interpretation' (art. 32 VCLT). Systematic interpretation is drastically related to identify CIL[xxi] in order to scrutinize if State practice is sufficiently coherent, constant, and general, or when treaties are used to ascertain custom.

When using Systematic interpretation is a matter of 'both common sense and good faith'.[xxii] Several laws are applicable to a dispute, and courts must consider them all. Likewise, using context helps ensure that the law does not impose contradictory obligations. While contextual interpretation does not answer all interpretative questions, good reasons explain why States do

and must interpret international law in its context. [xxiii]

Teleological interpretation (Purposive) is prominent in international law as a third method of treaty interpretation mentioned by art. 31(1) VCLT and art. 31(3)(b) VCLT, which allows resorting to subsequent treaty practice and hence to changing circumstances[xxiv] Purposive interpretation is the first method mentioned in the 1935 Harvard Draft Convention on the Law of Treaties, where it is emphasized twice.[xxv] It is also relevant for the ascertainment of CIL. Although the ILC's draft conclusions do not mention the notion of 'purpose[xxvi]

The ILC deliberates that, purposive interpretation is mandatory in relation to 'both common sense and good faith[xxvii] specifically to determine whether an interpretation leads to a 'manifestly absurd or ambiguous result' (art. 32 VCLT).[xxviii] Purposive interpretation preserve room for evolutionary interpretation. Purposive interpretation is a customary and good interpretative method in international law.

Historical interpretation exists in international law because regarding treaty interpretation, art. 32 VCLT, entitled 'supplementary means of interpretation'. Therefore, it provides that the *travaux préparatoires*[xxix] may be used to confirm a specific interpretation (a), or to avoid manifestly absurd or ambiguous results (b). This last point resembles the 'golden rule' in English statutory interpretation.

However, the ILC refrained from defining the travaux, as it well-thought-out that such a meaning would be under inclusive.[xxx] Outstandingly, the travaux must be public[xxxi] and replicate the parties' common intentions, not an isolated position[xxxii] or one that was subsequently abandoned. Many courts (including the ICJ) do not rigorously respect these conditions, however. One difficulty in this context is that CIL is not enacted through an institutionalized deliberative process like treaties. Instead, it emerges based on State practice and *opinio juris*. Yet acts providing evidence of these two constitutive elements are analogous to the travaux, as they shed light on the process by which a custom has emerged[xxxiii].

The first interpretative issue is that of defining the beneficiaries of an MFN clause; where second interpretative issue is that of determining what constitutes treatment that is "no less favourable." Where one view is that the rationale for granting "no less favourable" treatment is the desire of the beneficiary State to ensure that there is equality of competitive opportunities

between its own nationals and those of third States[xxxiv]. The final interpretative issue is the scope of the right being accorded under an MFN clause The question of the scope of the treatment to be provided under an MFN provision has become one of the most vexed interpretative issues under international investment agreements. The problem concerns the applicability of an MFN clause to procedural provisions, as distinct from the substantive provisions of a treaty.

DOCTRINAL ANALYSIS ON MOST FAVOURED NATION TREATMENT

Arbitral interpretation of MFN clauses is in the case of *The Maffezini Case*[xxxv]under the *Argentina-Spain BIT* (1991)[xxxvi] which contained no such dispute settlement condition precedent but allowed for international arbitration straight after a six-month negotiation period. The purpose of the MFN clause is to avoid discrimination which can only take place in connection with material economic treatment and not with regard to procedural matters (see *Emilio Augustin Maffezini case*)[xxxvii]. Therefore, the MFN treatment clause could be extended to cover the 'administration of justice", as long as *the ejusdem generis principle* was satisfied depending on the reasonable interpretation of the treaty see the *Ambatielos case (Greece vs. UK),*[xxxviii].

The ***ejusdem generis principle***[xxxix] is an unconventional principle to the interpretation of treaty provisions and indeed, the MFN clause. Its application will guarantee that an MFN clause confers only those rights which are within the parameters of the subject matter of the clause. In effect, an MFN clause can only extend to matters that can be delivered into the similar category as the provisions to which the clause itself relates. In that vein, Fietta, S. (2005)[xl] points out that, the inter-relationship between this principle and the general rule of interpretation contained in Article 31 of the Vienna Convention[xli] is self-evident. An incisive review of the recent ICSID cases would reveal that this principle of interpretation runs through the cognitive in those cases, even where it was not unambiguously cited.

Consequently, the Maffezini tribunal held that:

> *"Notwithstanding the fact that the basic treaty… does not refer expressly to dispute*

> *settlement as covered by the most favoured nation…there are good reasons to believe that today dispute settlement arrangements are inextricably related to the protection of foreign investors… if a third-party treaty contains provisions for the settlement of disputes that are more favourable… than those in the basic treaty, such provisions may be extended to the beneficiary of the [MFN] clause…"*[xlii]

In the *Biwater Gauff (Tanzania) Ltd Vs the United Republic of Tanzania*[xliii] under *UK-Tanzania BIT* BGT argues that Article 3(2) of the BIT allows it to rely on the dispute settlement provisions in Section 23.2 of the TIA, to the extent that they are more favourable than the equivalent provisions of the BIT.

Article 3(2) of the BIT provides as follows:

> *"Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords its own nationals or companies or to nationals or companies of any third State".*

However, the Republic submitted that BGT has failed to identify any nation other than the United Kingdom whose nationals are subject to a different arbitral regime.

MFN is a relative standard of treatment which creates similarity of treatment amongst foreign investors and helps as an insurance against involuntary errors or deficiencies in specific BITs as compared to other BITs[xliv]. Like national treatment, it is a comparative standard with no substantive content of its own. National Treatment and Most-Favoured Nation Treatment when are collectively put into practice serve to maintain a level playing field on the investment market of a country as between all foreign and national investors. The phraseology of the MFN Clause may be drafted as follows;

> "For the avoidance of doubt, it is confirmed that the [MFN] treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement."

From Article 1 to 11 there in between there must be an Article dealing with the *Dispute Settlement Procedures*. Therefore, the MFN may clearly include the dispute settlement

procedures as it would be stipulated in the Article relating to Dispute Settlement in the BIT, thus extending the MFN clause to dispute settlement. On the other hand, where the parties have expressly excluded dispute settlement from the MFN clause, such express wording must be given effect to the following drafting;

> "Each Party shall accord to investments of another Party treatment no less favourable than it accords, like circumstances, to investment of investors of any other Party or of a non-Party with respect to the establishment, acquisition, management, conduct, operations, and sale or other disposition of investments."

Table 1: Analysis of the Effectiveness on the Enforcement of Most Favoured Nation Standard

SNo	Country	Date of Signature	Date of Enforcement	Most Favoured Nation Standards for the BITs Enforce
1	Germany	30th -01-1965	12th-07-1968**	Article 2: (2) Neither Contracting Party shall subject activities of nationals. or companies of the other Contracting ' Party in· connection with their investments, as well as the management, use or ·enjoyment of such investments, to conditions less favourable than It Imposes on activities in connection with any other similar Investment in its territory. X
2	Switzerland ***	3rd-05-1965	16th-09-1965**	Article 4:(2) Each Contracting Party shall in its territory accord investments or returns of investors of the other Contracting Party treatment not less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State, whichever is more favourable to the Investor concerned. X

3	United Kingdom	7th-01-1994	2nd-08-1996	ARTICLE 3:(2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.ü
4	Denmark	22nd-04-1996	9th-01-2002	Article 3: (1) Each Contracting Party shall in its territory accord to investments made by investors of the other Contracting Party fair and equitable treatment which in no case shall be less favourable than that accord to its own investors or to investors of any third state, whichever is t h e more favourable from the point of view of the investor. ü URT*
6	Korea	18th-13-1998	Not Enforce	ARTICLE 3: Each Contracting Party shall in its territory accord to investors of the other Contracting Party as regards management, maintenance, use, enjoyment or disposal of their investments, treatment which is fair and equitable and no less favourable than that which it accords to its own investors or to investors of any third State, which is more favourable to investors
7	Sweden	1st-09--1999	1st-03-2002**	Article 3: National and Most Favoured Nation Treatment of Investment (4) With respect

				to the United Republic of Tanzania it reserves the right to grant special incentives to its nationals and companies in order to stimulate the creation of local industries. Such incentives shall be considered compatible with this Article provided they do not significantly affect the investment of investors of the other Contracting Party. In particular the principle of most favoured nation treatment shall be observed in case of foreign participation in such ventures.[X]
8	Finland	19th-06-2001	30th-10-2002	ARTICLE 3 (2) Treatment Of Investments Each Contracting Pany shall accord to investors of the other Contracting Party and to their investments, a treatment no less favourable than the treatment it accords to investors of the most favoured nation, and to the investments of investors of the most favoured nation with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, and sale or other disposal of investments.
9	Italy	21st-08-2001	27th-09-2002	ARTICLE 11 Application of other Rules (2.) Whenever the treatment accorded by one Contracting Party to an investor of the other Contracting Party, according to its laws and regulations or other provisions or specific contracts or investment

				authorizations or agreements, is more favourable than that provided under this Agreement, the most favourable treatm'2nt shall apply.
10	Switzerland	8th-04-2004	6th-04-2006	Article 4 Protection and treatment Each Contracting Party shall in its territory accord investments or returns of investors of the other Contracting Party treatment not less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State, whichever is more favourable to the Investor concerned
11	South Africa	22nd-09-2005	Not Enforce	ARTICLE 3 Treatment of Investment 2) Each Party shall in its territory accord to investments and returns of investors of the other Party treatment not less favourable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State. X
12	Mauritius	4th-05-2009	2nd-04-2013	ARTICLE 4 TREATMENT OF INVESTMENT (2) Each Contracting Party shall in its territory accord to investors and to investments and returns of investors of the other Contracting Party treatment not less favourable than that which it accords to investments and returns of investors of any

				third State
14	Turkey	11th-03-2011	18th-09-2013	ARTICLE 3 Treatment of Investments 2. Each Contracting Party shall accord to these investments, once established, treatment no less favourable than that accorded in like circumstances to internments of its investors or to investments of investors of any third State, whichever is the most favourable, as regards the management, maintenance, use, enjoyment, extension, or disposal of the investment*
15	Oman	16th-10-2012	2nd-11-2013	ARTICLE3 Treatment of Investments (1) Each Contracting Party _, hall accord to the investments and returns by investors of the other Contracting Party a treatment which is no less favourable than that accorded to investments and returns made by its own investors or by investors or third States, whichever is the more favourable to the investors. ü
17	China	24th-03-2013	18th-03-2014	ARTICLE 4 MOST FAVOURED NATION TREATMENT 1. Each Contracting Party shall accord to investors of the other Contracting Party and the investments thereof treatment no less favourable than that it accords,

				in like circumstances, to investors and the investments thereof of any third State with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, sale or disposition of investments. 2. The provisions of Paragraph 1 of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege by virtue of: a) any free trade area, customs union, economic union, monetary union or any agreement resulting in such unions, or similar institutions; b) any international agreement or arrangement relating to taxation; c) any arrangements for facilitating small scale frontier trade in border areas. 3. Paragraph 1 of this Article does not apply in respect of dispute settlement provisions laid down by this Agreement and by other similar international agreement to which one of the Contracting Parties is signatory ü URT*

18	Canada	17th-05-2013	9th-12-2013	Article 5 – 1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory. 2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments of investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory. 3. For greater certainty, the treatment accorded by a Party under this Article means, with respect to a sub-national government, treatment accorded, in like circumstances, by that sub-national government to investors, and to investments of investors, of a non-Party.

	Japan, Singapore, OFID, BADEA, Morocco, and Zimbabwe (Under Negotiation)			

Source: *Ministry of Finance and Planning 2017*

KEY: □= Yes; x= No

***(Name of the Country) = The Government of the United republic of Tanzania has notified the other State on the fulfilment of the requirements for the Agreement to enter into force. The other State is yet to reply.*

****Date of entry into force as indicated by UNCTAD.*

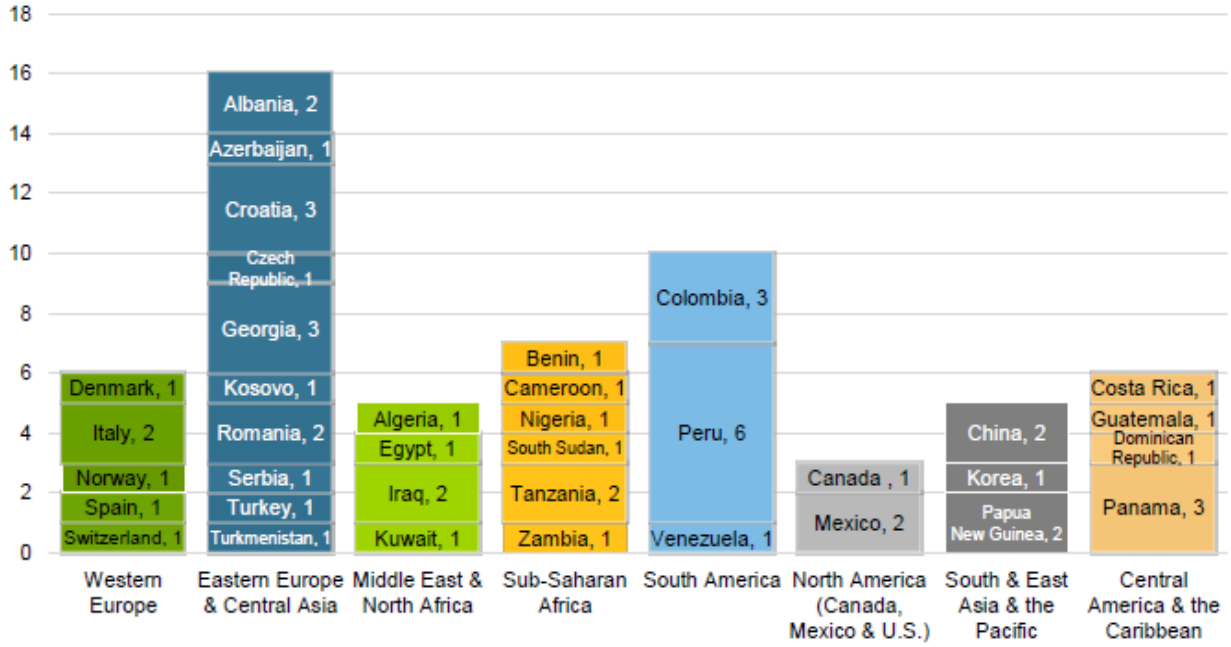
*.*****Terminated*

THE RATIONALE OF USING MOST FAVOURED NATION TREATMENT IN TANZANIA

Regional Legal Variances

Tanzania is a member of SADC which was formed to deepen economic integration for the attainment of economic growth and development in order to alleviate poverty.[xlv] The extent to which SADC law should be reflected in national legislation and the relationship between SADC law and domestic laws of national states remains an area of 'speculation'. SADC law had no direct application in member states, as is the case with EU. Despite the fact that, SADC Protocol on Finance and Investment (SADC FIP) that came into force in 2010 protects investors against uncompensated expropriation and stipulate for the MFN, however, national treatment has not been captured. In that vein, parity, fairness, and equality in the practicability of MFN is doubtful due to existence of the legal variances and lack of direct application of SADC law that ought to harmonize competitive and comparative advantages because either of the country concerned can be reluctant to use MFN

Figure 1: Geographic Distribution of New Cases Registered in 2020 under the ICSID Convention and Additional Facility Rules, by State Party Involved – Further Details

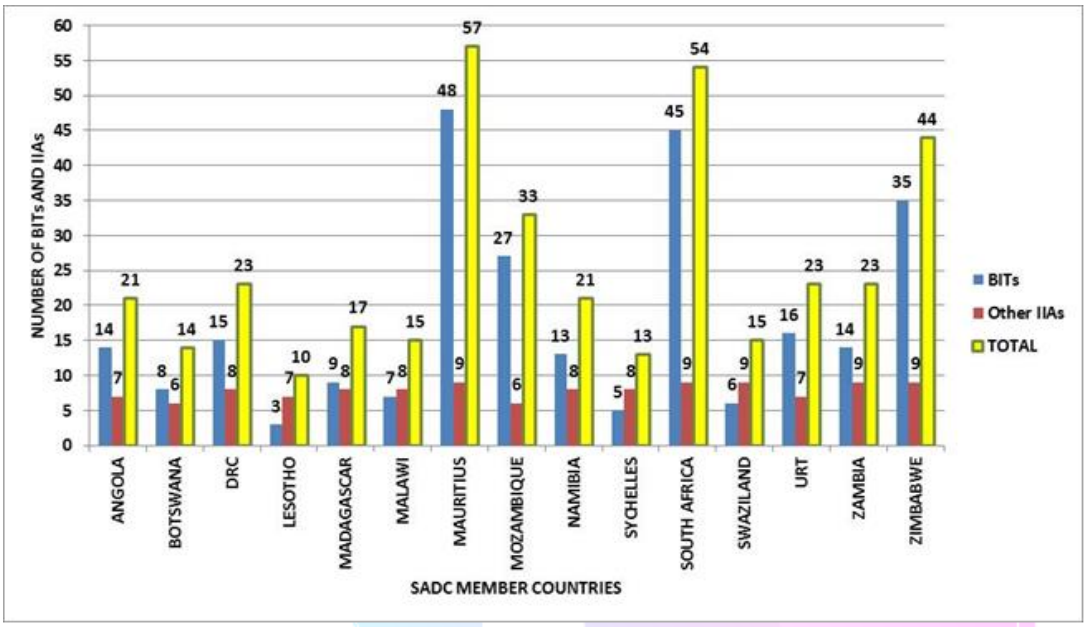


Source: ICSID (2020) The ICSID Caseload —Statistics Issue 2021-1

The SADC FIP[xlvi] reflects the ICM where the host country has the discretion in deciding whether and on what conditions FDI may be admitted into its territory.[xlvii] This however, derogates application of MFN as no less favourable treatment may not be justified.

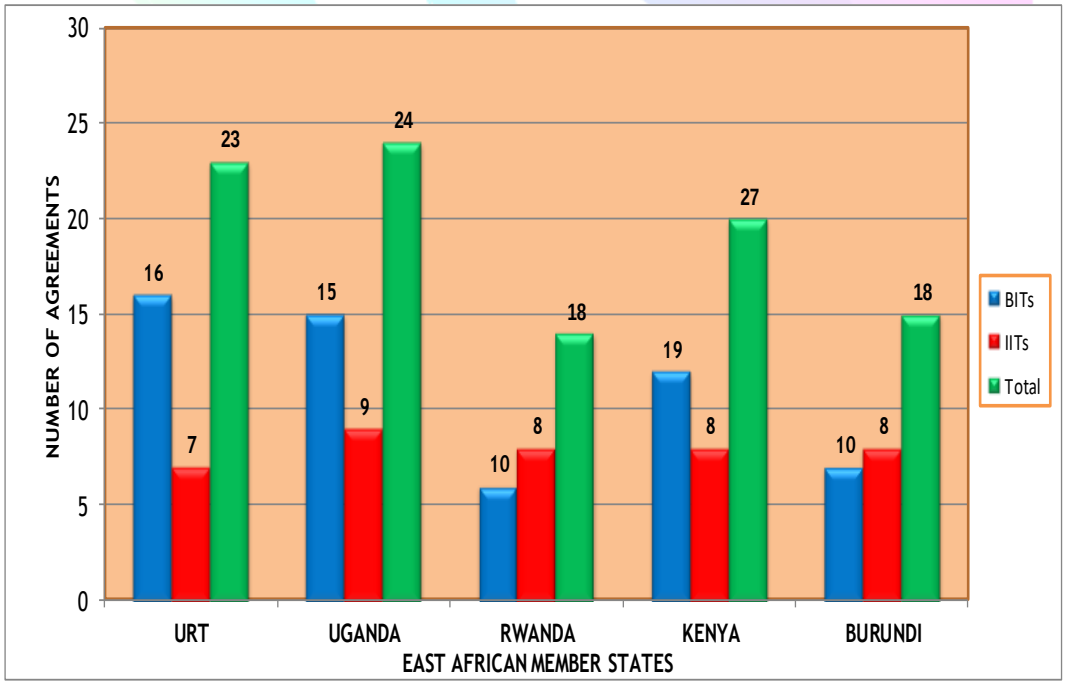
The SADC model treaty differs from many existing treaties because it does not recommend including MFN Treatment[xlviii]. Where *investor-State disputes* are concerned, the SADC model treaty does not recommend including provisions that give investors the right to initiate arbitration. In this context, therefore MFN treatment lacks the solid muscles to justify any treatment of injustice (if any)

Figure 2: Variances on the BITs in SADC Region



Source: *UNCTAD (2019)*

Figure 3: Variances on the BITs and IIAs in EAC Region



Source: *UNCTAD (2019)*

ECONOMIC AND POLITICAL DISPARITY

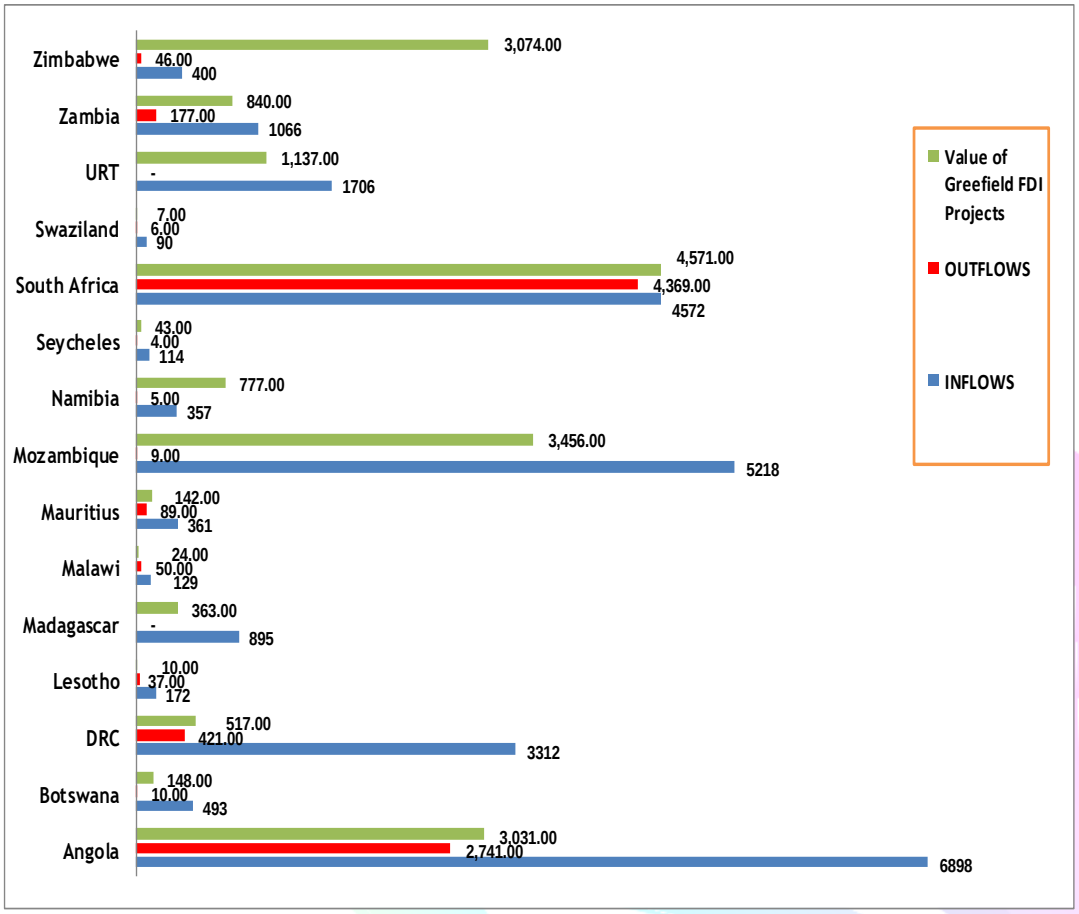
BITs have the potential to reduce fiscal revenue and spending, as the case of Tanzania that needs potential revenues to meet its recurrent expenditure, the applicability of MFN standards may not preferably be entertained under unfair competition. The number of investment arbitrations has increased rapidly after mid-1990s and still there are cases registered at the ICSID in the year 2020 (Figure 1).[xlix] These investment arbitrations tend to restrict the budgets of host states and reduce future FDI inflows[l]. Taking into consideration the differences in the FDI flows in SADC and EAC for the member States, it is most likely applicability of MFN may be a contentious issue in economic sense.

Unfortunately, the BITs in Tanzania lack clear definition of investment as they do not give specific definition of investment; and this may open Pandora box in what should really be deemed as investment (Emmanuel Gaillard, 2008)[li]. This is supported by the case of *Biwater Gauff (Tanzania) Ltd vs. the United republic of Tanzania* ICSID Case No ARB/05/22[lii].The tribunal noted;

> "……the Convention was not drafted with a strict, objective, definition of "investment", it is doubtful that arbitral tribunals sitting in individual cases should impose one such definition which would be applicable in all cases and for all purposes" …….. The Arbitral Tribunal therefore considers that a more flexible and pragmatic approach to the meaning of "investment" is appropriate, which takes into account the features identified in Salini, but along with all the circumstances of the case, including the nature of the instrument containing the relevant consent to ICSID.

In general, there is no single definition of what constitutes foreign investment. The absence of a common legal definition is due to the fact that the meaning of the term investment varies according to the object and purpose of different investment instruments which contain it (OECD 2008)[liii].

Figure 4: SADC Region FDI Flows and Greenfield FDI Projects (Amounts in Millions of Dollars)



Source: *UNCTAD (2019)*

CONCLUSION

The MFN may clearly include the dispute settlement procedures, clause to dispute settlement. Any MFN clause that does not include settlement of dispute may not be able to enhance FDIs because erode the investors' confidence through lack of application in the courts and consequently failing to uphold prevalence of the rule of law.

An MFN clause can only attract matters belonging to the same category of subject matter and that "the question can only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty. The "administration of

justice," is not associated with procedural provisions or dispute settlement, but rather to substantive provisions under other investment treaties relating to the treatment of nationals in accordance with justice and equity, these are procedural and consequential.[liv]

ENDNOTES

[i] Agreement such as EAC Treaty of 1967 was revised and signed on 30 November 1999 after EAC disbandment in 1977: See also Tanzania *"Bilateral Investment Treaty"* Model, (2004)".

[ii] Anglo-Germany Treaty 1890 Between Germany and the United Kingdom on Tanganyika and Malawi Boundary: See also Rembe, N, S The Vienna Convention on State Succession in respect of Treaties: An African perspective on its applicability and limitations: *The Comparative and International Law Journal of Southern Africa* Vol. 17, No. 2 (JULY 1984), pp. 131-143 (13): See also the United Republic (Declaration of Name) Act no. 61 of 1964 (Cap. 578 of the Laws): section 3 of the Acts of Union: The Articles of Union between the Governments of the Republic of Tanganyika and the People's Republic of Zanzibar (

[iii] Seaton, E. E. & Maliti, S. T. (1973), *"Tanzania Treaty Practice".* ISBN-10: 0195720873 Nairobi, Dar es Salaam, London, New York: Oxford University Press, 1973. Pp. x, 200.

[iv] George Roberts (2014) "The Uganda–Tanzania War, the fall of Idi Amin, and the failure of African diplomacy, 1978–1979": *Journal of Eastern African Studies* Volume 8, 2014 - Issue 4: Politics and violence in eastern Africa: the struggles of emerging states, c.1940-1990

[v] Stephan W. Schill "Multilateralizing Investment Treaties Through Most-Favoured-Nation Clauses: See generally" Andreas F. Lowenfeld International Economic Law (2d ed. 2008).

[vi] *Biwater Gauff (Tanzania) Ltd. Vs United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award 24 July, 2008: *Asian Agricultural Products Ltd. vs. Sri Lanka*, ICSID Case No ARB/87/3, Final Award 27 June 1990,

[vii] *Standard Chartered Bank (Hong Kong) Limited Vs Tanzania Electric Supply Company* ICSID Case No. ARB/10/20.

[viii] International Law Commission, Draft Arts. on Most-Favoured-Nation Clauses (hereinafter ILC Draft Arts.), text adopted by the International Law Commission at its 30th session (1978), available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_3_1978.pdf For commentaries on the ILC's Draft Arts., see Report of the International Law Commission on the Work of its Thirtieth session , 8 May – 28 July 1978, Offi cial Records of the General Assembly, Thirty-third session, Supplement No. 10, Doc. A/33/10 (hereinafter ILC Report), 2 Yearbook of the International Law Commission (1978) 8, available at: http://untreaty.un.org/ilc/documentation/english/A_33_10.pdf

[ix] Art. 8 states: ' [t]he source and scope of most-favoured-nation treatment : 1. The right of the beneficiary State to most-favoured-nation treatment arises only from the most-favoured-nation clause referred to in article 4, or from the clause on most-favoured-nation treatment referred to in article 6, in force between the granting State and the beneficiary State. 2. The most-favoured-nation treatment to which the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, is entitled under a clause referred to in paragraph 1 is determined by the treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.' :

[x] The UNCTAD (1999e); Ibid (Note 293)

[xi] The UNCTAD (1999e); Ibid (Note 293)

[xii] Waibel, M, (2012); "*The Implications of The MFN Clause for Domestic Policy Space"* Globalization and Finance Project University of Oxford; the Blavatnik School of Government: OECD-SADC, (2015); *"Addressing development challenges in Southern Africa-An Investment Policy Framework For The Southern African Development Community"* OECD-SADC Policy Brief: UNCTAD (2015) *"International Investment Agreements Navigator: Uganda"*, available from *http://investmentpolicyhub.unctad.org/IIA/CountryBits/218#iiaInnerMenu* (Visited 15th-08-2017)

[xiii] Art. 31 states: 'General rule of interpretation: 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument

related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended. ' Art. 32 states: 'Supplementary means of interpretation: Recourse may be had to supplementary means of interpretation, including the preparatory work and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable

[xiv] Yannick Radi, "The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the 'Trojan Horse"; *The European Journal of International Law Vol. 18 no. 4* (EJIL 2007)'

[xv] See art. 31(3)(b) and (c) VCLT.

[xvi] ILC, 'Draft Articles on the Law of Treaties with Commentaries' (n 783) 219 f; Fatima (n 45) 83 f. Textual interpretation is mentioned in art. 31(1) and (4) VCLT.

[xvii] Draft conclusions 6 and 10, ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (n 891). For a critique: Sienho (n 960) 385 f. See also Tullio Treves, 'Customary International Law', Max Planck Encyclopedia of Public International Law (Online Edition) (Oxford University Press 2008) <opil.ouplaw.com>. Treves considers that custom cannot be interpreted because interpretation, he alleges, is limited to verbal acts

[xviii] On the practice of domestic courts, see Fatima (n 45) 83 f; Waibel, 'Principles of Treaty Interpretation: Developed for and Applied by National Courts?' (n 183) 20.

[xix] Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–4: Treaty Interpretation and Other Treaty Points' (n 1006) 204.

Institut de droit international, 'Interprétation des traités' (n 1197); ILC, 'Draft Articles on the Law of Treaties with Commentaries' (n 783) 220 f

[xxi] d'Aspremont, 'The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order' (n 1191) 151 ff; Jean d'Aspremont, 'Articulating International Human Rights and International Humanitarian Law: Conciliatory Interpretation Under the Guise of Norms-Resolution' in Malgosia Fitzmaurice and Panos Merkouris (eds), The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications (Martinus Nijhoff 2013). Contra Philippe Sands, 'Treaty, Custom, and the Cross-Fertilization of International Law' (1998) 1 Yale Journal of International Development Law 85, 94

[xxii] ILC, 'Draft Articles on the Law of Treaties with Commentaries' (n 783) 221

[xxiii] Odile Ammann *"Chapter 6 The Interpretative Methods of International Law: What Are They, and Why Use Them?*" In: Domestic Courts and the Interpretation of International Law DOI: *https://doi.org/10.1163/9789004409873_008*

[xxiv] Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–4: Treaty Interpretation and Other Treaty Points' (n 1006) 210

[xxv] Art. 19(a), 'Harvard Draft Convention on the Law of Treaties' (n 1197)

[xxvi] Draft conclusion 3(1) in ilc, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (n 891)

[xxvii] ILC, 'Draft Articles on the Law of Treaties with Commentaries' (n 783) 221

[xxviii] Le Bouthillier (n 1185) 850

[xxix] The circumstances of the conclusion of the treaty, which are also mentioned in art. 32 VCLT, form part of the context lato sensu (supra, 2.2.2).

[xxx] ILC, 'Draft Articles on the Law of Treaties with Commentaries' (n 783) 223.

[xxxi] See ibid. See also PCIJ, case concerning the Competence of the European Commission of the Danube Between Galatz and Braïla, advisory opinion, PCIJ Series B No 14, 8 December,1927, 6, at 32.

[xxxii] See for example ICJ, Ambatielos Case (Greece v. United Kingdom), judgment, preliminary objection, ICJ Reports 1952, 1 July 1951, 28, at 45.

[xxxiii] See the ILC's draft conclusions 6(2) and 10(2).

[xxxiv] Todd Weiler, The Interpretation of International Investment Law: Equality, Discrimination, and Minimum Standards of Treatment In Historical Context (Leiden: Martinus Nijhoff Publishers, 2013), pp. 415-416.

[xxxv] *Maffezini case, Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, decision of January 25, 2000 (Ibid Note 173)

[xxxvi] Argentina-Spain, BIT, (1991) Salomon C, Friedrich S & Latham & Watkins *"International Arbitration Group 'How Most Favoured Nation Clauses in Bilateral Investment Treaties Affect Arbitration"* available at *http://www.lw.com/thoughtLeadership/favoured-nation-clauses-arbitration* (Visited 30th -09-2017)

[xxxvii] *Maffezini case, Emilio Agustín Maffezini v The Kingdom of Spain*, Decision on objections to jurisdiction, ICSID Case No ARB/97/7, IIC 85 (2000), (2001) 16 ICSID Rev-FILJ 212, (2002) 5 ICSID Rep 396, (2003) 124 ILR 9, (2001) 40 ILM 1129, 25th January 2000, World Bank; International Centre for Settlement of Investment Disputes [ICSID] (Ibid Note 173): see also *Siemens AG vs. The Argentine Republic*, ICSID case NO. ARB/02/8 Decision of August 3, 2001

[xxxviii] *The Ambatielos case (Greece vs. Unite Kingdom),* Award of March 1956, UNRIAA, 1963, Vol. XII at 107: Judgment, Merits, [1953] ICJ Rep 10, ICGJ 190 (ICJ 1953), 19th May 1953, International Court of Justice [ICJ]

[xxxix] ***Ejusdem Generis*** is a Latin term which means "of the same kind," it is used to interpret loosely written statutes. Where a law lists specific classes of persons or things and then refers to them in general, the general statements only apply to the same kind of persons or things specifically listed. Example: if a law refers to automobiles, trucks, tractors, motorcycles and other motor-powered vehicles, "vehicles" would not include airplanes, since the list was of land-based transportation. The term *Ejusdem Generis* in other words means words of a similar class. The rule is that where particular words have a common characteristic (i.e. of a class) any general words that follow should be construed as referring generally to that class; no wider construction should be afforded.

[xl] Fietta, S., (2005); *"Most Favoured Nation Treatment and Dispute Resolution Under Bilateral Investment Treaties: A Turning Point?"* Int. A.L.R (2005) available at http://66.102.9.104/search?q=cache:8EQYPlYpudAJ:www.lw.com/resource/publications/_pdf/pub1395_1.pdf+most+favoured+nation+treatment+and+dispute+resolution+under+bilateral+investment+treaty&hl=en&ct=clnk&cd=2.

[xli] 1969 Vienna Convention of the Law of Treaty (Ibid Note 8)

[xlii] *Emilio Augustin Maffezini Vs Kingdom of Spain* (ICSID Case No ARB/97/7): see also *L.F.H. Neer and Pauline Neer (USA) vs. United Mexican States*, Reports of international Arbitral Awards (15october 1926) 21: See also The Salini ICSID Case No ARB/02/13 decision of November 15, 2004: *Plasma Consortium Limited v The Republic of Bulgaria*, Decision on jurisdiction, ICSID Case No ARB/03/24, (2005) 20 ICSID Rev-FILJ 262, (2008) 13 ICSID Rep 272, (2005) 44 ILM 721, IIC 189 (2005), 8th February 2005, World Bank; International Centre for Settlement of Investment Disputes [ICSID]: see also *Salini Construttori S.P.A and Italstrade S.P.A vs. The Hashemite Kingdom of Jordan* (2004), ICSID case No. ARB/02/13), Decision on Jurisdiction, 29 November, 2004: See also *Anglo-Iranian Oil Co, United Kingdom v Iran, Judgment*, Jurisdiction, [1952] ICJ Rep 93, ICGJ 188 (ICJ 1952), 22nd July 1952, International Court of Justice [ICJ]: *The Ambatielos case (Greece vs. Unite Kingdom),* Award of March 1956, UNRIAA, 1963, Vol. XII at 107: Judgment, Merits, [1953] ICJ Rep 10, ICGJ 190 (ICJ 1953), 19th May 1953, International Court of Justice [ICJ]

[xliii] Ibid (fn 215)

[xliv] Pieter Jan Kuijper, *et al*, (2014); (Ibid Note 258)

[xlv] Oosthuizen GH *"The Southern African Development Community: the organisation, its policies and prospects"* (Midrand: The institute for Global Dialogue 2006) at 39

[xlvi] Article 2 (1) of the SADC FIP: Available at *http://www.pdfs.semanticscholar.org*

[xlvii] `See, for example, Article 3 of the SADC Model BIT; Article 3 of the Agreement on Investment and Free Movement of Arab Capital among Arab Countries, 1970; Articles 2 and 5 of the Unified Agreement for the Investment of Arab Capital in the Arab States, 1980; and Article 2 of the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference, 1981. Available at *http://www.pdfs.semanticscholar.org* :NCTAD *"Admission and Establishment"* UNCTAD Series on Issues in International Investment Agreements (1996) 247: Stromness, K.B.(2014); *"SADC - Regional integration in Southern Africa and its effects on the political risk for foreign direct investment"* Master Thesis-M.Sc. Political Science: Leiden University: Available at *http://www.openaccess.leidenuniv.nl*

[xlviii] United Nations (2015); Ibid (Note 160)

[xlix] Wellhausen, Rachel. *"Bondholders vs. Direct Investors? Competing Responses to Expropriation."* International Studies Quarterly. Forthcoming

[l] Allee, Todd, and Clint Peinhardt. 2011. *"Contingent Credibility."* International Organization 65(3): 401-432.

[li] Emmanuel Gaillard, (2008); *"Biwater,' Classic Investment Bases: Input, Risk, Duration"* International Arbitration Law: New York Law Journal Volume 240-No 126 Expert Analysis

[lii] *Biwater Gauff (Tanzania) Ltd Vs The United republic of Tanzania ICSID Case No ARB/05/22 (2005)* the Tribunal observed that the BIT (Tanzania – UK BIT, 1994) defines "investment" in extremely broad terms.

Under Article 1(a) an "investment" means "every kind of asset", including (without limitation)… and thus dismissed the Preliminary Jurisdictional Objection of the URT (that the BGT's claim did not directly arise from the BIT) as the "every kind of asset", notion could possibly include even worthless assets;

[liii] The Organisation for Economic Co-operation and Development OECD (2008); *"International Investment Law: Understanding Concepts and Tracking"* Definition of Investor and Investment in International Investment Agreements: ISBN 978:92-64-01202-5 (OECD) (2008); www.oecd.org/publishing/Corrigenda (Visited 15th December, 2016)

[liv] See also Salini, para. 106. Ambatielos (Greece v. United Kingdom), Merits: Obligation to Arbitrate, Judgment, I.C.J. Reports 1953, p. 10.