AN ACCOUNT ON THE LEGITIMACY OF FUNDAMENTAL PRINCIPLES OF CUSTOMARY INTERNATIONAL LAW IN NATURAL RESOURCES DEVELOPMENT IN GROWING HOST ECONOMIES: A LESSON FROM TANZANIA

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ABSTRACT

This paper examines the legitimacy of the basics of fundamental principles of customary international law (also referred in this paper as standards of protection of investment), to ensure equitable sharing of benefits in the investment conducts of natural resources between investors from developed economies (sometimes supported by their home countries) and resource rich developing economies. The main argument which the author ascertains is the verity that, despite the fact that principles of customary international law form the basis of investment agreements more often in natural resources development; they do not carry weight to facilitate resource rich developing countries to benefit. This argument is sound. It is supported by evidence collected from qualitative research technique; especially from the Mineral Development Agreements (MDAs) concluded by the government of Tanzania.

This paper adds knowledge to the old debate between developed and developing economies to dealing with natural resources development. It re-opens the debate on the following: First, resource rich countries to become conscious on the fact that natural resources are the common heritage of the people, and for that reason, the people deserve the maximum benefits from its development. Secondly, resource rich countries, developing African countries in particular to exercise their permanent sovereignty over their natural resources for the benefit of the whole people. Thirdly and finally, resource rich countries, developing African countries in particular to adopt adequate legal framework including state-investor agreements which does have significant positive impact to their economies and to improving the conditions of living of the people.

Keywords: Principles of Customary International Law, Natural Resources Development, and Natural Resources are the Common Heritage of the People, Adequate Legal Framework.

BACKGROUND AND EVOLUTION OF PRINCIPLES OF CUSTOMARY INTERNATIONAL LAW

Principles of customary international law form one of the three segments of law under the framework of international investment law. The other two segments of law are the multilateral framework, including regional investment arrangements; and the bilateral framework which is made up of treaties. The international investment framework works hand in hand with the other two frameworks of law in regulation of investment, particularly investments in the natural resources sector, namely; the national framework and the framework of state-investor agreements, or investment contracts as mostly known in international economic law studies. All these three frameworks regulate investment generally and investments in the natural resources sector in particular.

Principles of customary international law are also referred to as standards of protection of investment. They are embedded in various legal instruments: multilateral treaties, Bilateral Investment Treaties (BITs), national legislation and in state-investor agreements. Principles of customary international law have significant impact over the use of natural resources for the benefit of the country and its people. Principally it is BITs which provide a framework of laws that protect investments.[i] But in most cases principles of customary international law are found affecting investments, including investments in the natural resources sector as this paper reveals.

Scholarly writings suggest that unlike the international trade relations which are subject to a systematic legal regime, namely; the WTO legal regime, and unlike the international financial relations which are mainly regulated by the IMF and the World Bank legal systems, the international framework of investment law, including principles of customary international law has not been a cohesive regime.[ii] It has been developing out of division of ideas between developed and developing countries.[iii] The major reason for this division of ideas in the evolution of international investment law is the rise of different economic forces; mainly

capitalism and socialism, which created blocs, especially after the Second World War (WWII). Literature suggest the following about the foundation of international investment law:

> The foundations of the modern international investment regime were laid in the aftermath of World War II. IIAs were thought to fill the legal gap left by the breakdown of the colonial systems and in light of the expropriation policies adopted in many newly independent as well as communist states that often involved the denunciation of contracts between foreign investors and host countries. The first IIAs that were designed between capital-exporting and capital-importing countries…were designed as a response to these specific legal challenges.[iv]

Sornarajah[v] has stated about the development of international investment law in the following:

> …few areas of international law excite as much controversy as the law relating to foreign investment. Such controversy resulted from the law on the subject being the focus of conflict between several forces released at the conclusion of the Second World War….The ending of colonialism released forces of nationalism. Once freed from the shackles of colonialism, the newly independent states agitated not only for the ending of the economic dominance of the former colonial powers within their states but also for a world order which would permit them more scope for the ordering of their own economies and access to world markets. The cold war between the then superpowers made the law a battleground for ideological conflict…

Since the evolution of international investment law, principles of customary international law or standards of protection of investment have been embedded in investment treaties as a core of substantive provisions.[vi] Principle such as: non-discrimination or general international minimum standards, which include National Treatment and Most-Favoured-Nation treatment; fair and equitable treatment; full protection and security; and umbrella clause have had enclosed in what is called the traditional investment treaties.[vii] This has been the results of the adopted common legal origin from the 1959 Draft Convention on Investment Abroad.[viii]

International investment law comprises rules and regulations. These rules and regulations belong to the private or public systems of individual states, and others acquire their novelty from international legal instruments.[ix] Our interest in this paper is to evaluate fundamental principles of customary international law, either as they are being put forward by international investment treaties and investment contracts or as being practiced by states.[x] It is worth noting that the practicability of standards of protection of investment has depended much on the attitudes of the parties who concluded the treaty.[xi]

Dolzer and Schreuer[xii] explain the following about customary international law:

> …the treaty-based rules on investment have to be understood and interpreted, like all treaties, in the context of the general rules of international law. This includes not only customary law but also general principles of law within the meaning of Article 38(1) lit.of the ICJ Statute. The later will acquire importance in the context of investment rules under certain circumstances, especially in the case of lacuna in the text of treaties and in the interpretation of individual terms and phrases...

On the other hand application of principles of customary international law or standards of protection of investment has encountered resistance as it is put down by Sornarajah[xiii] in the following phrases:

> Powerful states sought to construct rules of investment protection largely aimed at developing states by espousing them in their practice and passing them off as customary principles. They were always resisted. The Latin American states had, for example, resisted US claim to an international minimum standard of treatment of aliens and their property (as contrasted to the national standard of treatment principle they have been advocating for). Nevertheless, the norms that were supported by the developed states were maintained on the basis that they were accepted as custom though that was never the case.[xiv]

As far as protection of investment is concerned, there has been intense debate in the field of international investment law on standards of protection of investment. The thinking between developed and developing countries on the subject has varied, especially in the way these

standards help to secure benefits for the country and for the people. Developed countries view standards of protection of investment as useful principles of law. But developing countries have examined the same, and consider that they are crystallized in the environments which aim to benefit investors and their capital-exporting nations.[xv] Considering the controversies, developing countries have come up with the alternative idea; the national control over investment though with favourable conditions that would attract foreign investment.[xvi]

Whether the idea of national control over investment works or not, we are currently experiencing developing countries introducing open policies on investment. Developing countries are entering into investment treaties and agreements embedding principles of customary international law. Fundamental principles of customary international law which are mostly embedded in investment treaties and agreements are: the principle of national treatment or the national standards of treatment, the principle of fair and equitable treatment, the principle of *pacta sunt servanda*, the principle of Most-Favoured-Nation (MFN) Treatment, and the principle of full protection and security. These principles have impact to ensure that investment; particularly investments in the natural resources sector benefit the host state and its citizens.

Tanzania has entered into a number of investment treaties embedding various fundamental principles of customary international law. Tanzania has concluded the bilateral treaty with German (formerly West German), Norway, Finland, Denmark, Italy, Netherlands, Switzerland, India, Sweden, Zambia, Korea, China, Mauritius and the United Kingdom. All these BITs contain standards of protection of investment. Tanzania has also signed several double taxation treaties containing standards of protection of investment; including the double taxation treaty with Zambia, Sweden, South Africa, Norway, Italy, India, Finland, Denmark, and Canada.[xvii] Tanzania owes membership to several international organizations which uphold standards of protection of investment. She is one of the founding members of the World Trade Organization (WTO), after having signed the Marrakesh Agreements in 1994. Tanzania is a member of the UN, which establishes the UN Conference on Trade and Development (UNCTAD) of 1966. UNCTAD has provided some guidelines on treatment of investment. These guidelines even though are not binding; they contain fundamental principles of customary international law.

Tanzania has acceded to the agreements establishing the Multilateral Investment Guarantee Agency (MIGA) of 1985 and the International Centre for Settlement of Investment Disputes

(ICSID) of 1966 since 1992. MIGA and ICSID are among the five institutions/members of the World Bank group. Other institutions of the World Bank group are the International Bank for Reconstruction and Development (IBRD) commonly referred to as the World Bank, the International Development Association (IDA) and the International Finance Corporation (IFC). Tanzania is a signatory state to the Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958, simply the New York Convention of 1958 since 1964. All the mentioned international instruments are founded with fundamental principles of customary international law.

As already we have opened the minds of our readers, standards of protection of investment have impact in the determination of investment benefits for the country and its people. They have more impact on the benefits expected from exploited natural resources in developing and least developed African countries. The discussions below specify in detail the impact of the most pertinent principles of customary international law or standards of protection of investment in the regulation of mining investments. The author uses the Tanzania miming sector because it is of long history in minerals development projects; since pre-colonial era to date. Nevertheless, its impact has been litigious.

THE PRINCIPLE OF NATIONAL TREATMENT

The national treatment or national standards of treatment is one of the oldest fundamental principles of international law.[xviii] The principle of national treatment was proliferated from the point of view of developing economies. This principle calls for states to accord to resident foreigner investor's similar treatment as given to national or local investors in like situations or circumstances. The principle of national treatment compels states to extend to residents, but who are foreign investors in their territories the same treatment being given to nationals on equal basis. According to this principle nationals or local inventors are not supposed to be accorded with favourable treatment than could be to foreigners. The principle of national treatment has its origin from the Calvo doctrine which had developed since 1868.

The principle of national treatment has extended the boundary of natural persons. It has taken into account legal persons as well. This principle applies mostly where there are concluded

investment treaties among states, in which member countries are obliged to accord, (in respect of transnational corporations) to enterprises operating in their territories and owned or controlled directly or indirectly by nationals of another member country, treatment under their laws, regulations and administrative practices, no less favourable than that accorded in like situations to domestic enterprises.[xix]

With regard to taxation for example, the South Africa-Tanzania Double Taxation Treaty[xx] provides the following about the principle of national treatment:

> Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirements connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected… The taxation on a permanent establishment which an enterprise of a Contacting States has in the other Contracting State shall not be less favourably levied in that other State than the taxation levied on enterprises of the other State carrying on the same activities.

The same concept as exposed in the previous immediate paragraph is revealed in the Tanzania-Zambia Income Tax Treaty.[xxi]

> The taxation on a permanent establishment which an enterprise of one of the Contracting States has in the other Contracting State shall not be less favourable levied in that other Contacting State than the taxation levied on enterprises of the other Contacting State carrying the same activities…

The UN[xxii] directs the following:

> …entities of transnational corporations should be given by the countries in which they operate [the treatment] [treatment no less favourable than that] [appropriate treatment] *accorded to domestic enterprises under their laws, regulations and administrative practices [when the circumstances in which they operate are similar/identical] [in like situations].

Besides, the natural and legal persons, in the WTO legal framework the national treatment principle encompasses the dealing on like products by the WTO contracting parties; all WTO Members are obliged to accord to product of the territory of contracting party imported into the territory of any other contracting party treatment not less favourable than that accorded to the like product of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.[xxiii]

The World Bank's Guidelines on Treatment of Foreign Direct Investment of 1992[xxiv] is another international instrument which provide for national treatment principle in line with the principle of fair and equitable treatment.

In light of the principle of national treatment as herein above explained, we are of the understanding that Tanzania, in the regulation of its mining investments, should not impose rules that slow down the enforcement or practicality of the object of the principle of national treatment. The Government should not adopt measures likely to affect the national treatment principle, or which would prejudice the operationalization of the this principle, be it on natural persons or on corporations, or even on imported like products originating from any other WTO member as the case may be.

The grant of national treatment standard to foreign investors and their products has implications, especially on ensuring maximum benefits to resource rich developing African countries. Scholars like Sornarajah[xxv] argue that this will deny the state ability to protect local business; as such protection will be regarded as involving violations of the international standard of the national treatment. Moreover, the grant of national treatment to the foreign investor is likely to affect domestic policies on resources exploitation. It has implication in relation to local content requirements, where policies put preferences on the consumption of locally produced goods by extractive investors. The national treatment standard has implication in the treatment of corporations as well. Most domestic policies would need to facilitate and promote local companies operating in the same circumstances with foreign companies.

In Tanzania for example, since potential mining and petroleum investments have already been taken by major foreign corporations from most developed states, the need for protection in the face of competition from foreign investor may be more urgent. But if this is done, it will be considered as a violation of the principle of national treatment.

Principle of national treatment can be clearly viewed in the context of trade, especially in the WTO legal framework. We can reflect on the area of benefits of local content to verify the impact of national treatment in natural resources exploitation. In the WTO legal framework, where many states are Members including Tanzania, local content is viewed as protectionist measures.[xxvi] This is because by its nature, local content emphasizes preferential treatment for local suppliers of goods and services vis-à-vis foreign goods and services providers.

The national treatment principle for example, as provided for in GATT[xxvii] puts a strong legal requirement for treatment, that it should be accorded to local goods suppliers the same (as compared) as to foreign products suppliers. The provisions of Articles III: 4 and III: 5 of GATT1994 on local content definition acquire great impact to national legal measures on the grant for local content.[xxviii]

Article III: 8 of GATT 1994 exclude government procurement from the application of the national treatment principle. Related to this is Article XI: 1 of GATT1994 which eradicates the use of quantitative restrictions on imports and exports through quotas, licenses and other measures. Article XVII of GATT 1994 requires state trading enterprises to operate in accordance with the requirements of the principle of non-discrimination. Their purchases and sales should be conducted in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and they should afford the enterprises of the other contracting parties' adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sale.

The provision of Article XVII of GATT 1994 is relevant to any resource rich countries which apply state-owned enterprises in their natural resources development. It is relevant to Tanzania as well, especially in its petroleum sub-sector, where the Tanzania Petroleum Development Corporation (TPDC) operates as state-owned enterprise and as the National Oil Company (NOC).[xxix]

A number of provisions affecting oil and gas industry in Tanzania are relevant, and are expected to fall within the requirement of the provisions of Article XVII of GATT 1994. It should be noted however that the provision of Article XVII does not regulate obligations of foreign mining or petroleum companies operating under joint ventures with national companies.

Regarding treatment accorded on investment, Article III of GATT 1994 is complemented by Trade-Related Investment Measures (TRIMS).[xxx] According to article 2 of TRIMS, all WTO Members are prohibited to apply any trade-related investment measure which is inconsistent with Articles III and XI of GATT 1994.[xxxi] Trade-related investment measures which are inconsistence with national treatment principle and the obligation of general elimination of quantitative restrictions provided for Article XI: 1 of GATT 1994 is contained in Annex to TRIMS. They include those measures which are mandatory, or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage; and those which require: (a) the purchase or use by an enterprise or products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products or in terms of a proportion of volume or value of its local production; or (b) that an enterprises' purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports.[xxxii]

Other WTO instruments which contains fundamental principles of customary international law which have impact to domestic regulation of local content requirements apart from GATT and TRIMS include General Agreement of Trade in Services (GATS)[xxxiii] and Agreement on Subsidies and Countervailing Measures (SCM).[xxxiv]

Discussed impacts of the national treatment on local content area of benefits represent only few of the many cases in international investment relations regarding investment in the extractives sector. The principal of national treatment is revealed in the many Mineral Development Agreements (MDAs) concluded between the government of the United Republic of Tanzania and the investors. The good example is the Development Agreement between the Government of the United Republic of Tanzania and Pangea Minerals Limited (Subsidiary of Barrick Gold Corporation) of 17 February 2007, an agreement for Development of a Gold Mine at Buzwagi, Kahama, and it provides the following regarding to purchase of goods and services:

> The Company will give preference to the purchase of goods and services available in Tanzania provided such goods and services are of internationally comparable quality…. and are offered at the competitive prices on delivered basis in Tanzania.[xxxv]

The above requirement is a reflection about the principle of National Treatment likely to affect domestic policies on locally produced goods and services in the conduct of mining activities in Tanzania.

THE PRINCIPLE OF FAIR AND EQUITABLE TREATMENT

The principle of fair and equitable treatment demands generally that the general treatment of investments by host countries should be non-discriminatory.[xxxvi] The principle of fair and equitable treatment asserts a bundle of rights, which contain the following terms of demand: stability, predictability, consistency; protection of confidence and legitimate expectations; administrative due process; transparency and reasonableness and proportionality.[xxxvii] The principle of fair and equitable treatment is a modification and variant of the principle of minimum standards of treatment. Its main trait is that foreign investments should be accorded with just and reasonable treatment.

Several international instruments articulate the fair and equitable treatment principle. These include: the Havana Charter for an International Trade Organization of 1948,[xxxviii] ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy of 1977,[xxxix] and the ACP-EEC Convention.[xl] The UK-Tanzania BIT[xli] demands that investments of national or companies of each Contracting Party shall at all-time be accorded fair and equitable treatment. This same requirement is found in the German-Tanzania BIT,[xlii] the Tanzania-Netherlands BIT,[xliii] The Tanzania-Denmark BIT,[xliv] and the Tanzania-Korea BIT.[xlv] The World Bank document[xlvi] also obliges its Members to grant to the Bank officers and employees same treatment in respect of travelling facilities.

As it is intended for, and as it has been proposed by scholars, the principle of fair and equitable treatment has anticipated to fulfilling gaps that may be left by the more specific standards, in order to obtain the level of investor protection intended by the treaty.[xlvii] The principle of fair and equitable treatment has come as an amendment of the principle of minimum standards of treatment, which was earlier proposed by developed countries, but which received opposition from developing countries.[xlviii]

With regard to investments in the mineral sector of Tanzania the requirement of fair and equitable treatment may have negative implications to domestic policies. In the regulation of mining investments, domestic policies aim at empowering the nationals, and increasing their participation in the exploitation of their natural resources, for purposes of improving their economy and the living conditions. This is evidently in the Mining (Local Content) Regulations, 2018, G.N No.3 of January10 2018. The principle of fair and equitable treatment affect measures tailored to building capacity to nationals, to increasing their competition in the mining investments. Observance of fair and equitable treatment affects special arrangements which aim to offering special technical assistance, technological transfer and training of nationals as means to help to building their capacity to compete in the exploitation of their country's natural resources. This is also clear with regard to the implementation of the Local Content Policy of Tanzania of 2014. It is against governmental plans of securing employment opportunities for its nationals as well. The principle of fair and equitable treatment is being reflected in many MDAs in Tanzania, especially to clauses on import, export and treatment of expatriate personnel.[xlix] For example the Development Agreement between the Government of the United Republic of Tanzania and Pangea Minerals Limited (Subsidiary of Barrick Gold Corporation) of 17 February 2007, An agreement for Development of a Gold Mine at Buzwagi, Kahama provides for the government to expedite the grant of necessary permit to expatriate personnel involved in the construction of the project or the infrastructure. Each expatriate employee in this MDA has been permitted to import for free, personal and household effects including one automobile on their first arrival, provided that no property imported shall be resold by such person in Tanzania except with government regulations. Expatriate employees are entitled in this agreement to export freely during each year of their employment, any part of their salaries and to export freely of the same upon termination of their contracts including the sums paid to them from any provident or pension funds.[l] The company and its contractors have been entitled to import without restriction all items required for design, construction, installation and operation of the project, including fuel, spare parts and replacements to the spare part inventory, provided that any imposts applicable to the importation of fuel including road toll contribution will be subject to an annual limit of US $ 200, 000.[li] The same requirement is repeatedly in article 6 of the Development Agreement between the Government of the United Republic of Tanzania and Pangea Minerals Limited of 29th December 2003; An Agreement for the Development of Gold Mine at Tulawaka, Biharamulo.

THE PRINCIPLE OF PACTA SUNT SERVANDA

Pacta sunt servanda form one of the standards of protection of investment which are of most general character in international law.[lii] *Pacta sunt servanda* is a Latin expression which means that agreements must be kept and are binding. This principle originates from civil law system, which regulates private contracts. The principle of *pacta sunt servanda* stresses on contract clauses; that these clauses are law, and that are binding. Thus parties are obliged not to infringe them. Under international agreements, specifically the law of treaties, the principle of *pacta sunt servanda* obliges states or other subjects of international law to remain bound by their concluded obligations, and are obliged to carry out such obligations in good faith.[liii]

In the context of investment law *pacta sunt servanda* means that investment treaties and agreements must be honoured and kept.[liv] With regard to regulation of investments in the mineral sector, under the rule *pacta sunt servanda* states or governments are compelled to continue observing in good faith terms and conditions of investment agreements as freely entered.[lv] Concluded terms are considered sacred and therefore inviolable. In developing countries like Tanzania, the rule *pacta sunt servanda* causes the negative impact to achieving investment benefits, especially in the mining industry. It has been observed from mining investments of Tanzania that most entered MDAs between the government of Tanzania and mining companies do not carry in them the best interests of the country; to cause any positive impact to country's economy and its people. At some points the government of Tanzania has tried to initiate some negotiations with investors in its mineral sector to remedy the situation. But with the rule *pacta sunt servanda* it remains the wishes of the investor either to agree on the proposed changes or to proceed honouring and keeping concluded terms of MDAs. In case the investor disagrees with the proposed changes in terms of MDAs the government has to perform the terms considered unconscionable in good faith! The rule *pacta sunt servanda* has been found mostly in MDAs clauses related to fiscal stability, mostly known as the sanctity clauses.

This is evident for example under Article 9 of the Development Agreement between the Government of the United Republic of Tanzania and Pangea Minerals Limited of 29th December 2003; An Agreement for the Development of Gold Mine at Tulawaka, Biharamulo provides for sanctity of fundamental provisions. The government has to ensure that the legal

provisions governing the company or its shareholders' benefits, rights and duties should not be changed without the consent of the other party.

The Development Agreement between the Government of the United Republic of Tanzania and Pangea Minerals Limited (Subsidiary of Barrick Gold Corporation) of 17 February 2007, An agreement for Development of a Gold Mine at Buzwagi, Kahama under its article11, provide for the government to ensure that there will be no changes in the provisions governing investors and shareholders benefits, rights and duties during the whole period of contract.

The same content about prohibition on changes in the provisions governing investors and shareholders benefits, rights and duties during the whole period of contract is made apparent under article 10 of the Gold Mine Development Agreement between the Government of the United Republic of Tanzania and Samax Resources Limited and Ashanti Goldfields (Tanzania) Limited of 24June 1999, An Agreement for Development of a Gold Mine at Geita.

THE PRINCIPLE OF MOST-FAVOURED-NATION TREATMENT

The Most-Favoured-Nation (MFN) treatment has formed part of international economic treaties for centuries.[lvi] It is an international principle which its goal is to ensure that the relevant parties treat each other in a manner at least as favourable as they treat third parties.[lvii] MFN treatment obliges contracting states or governments, in their established economic relations, to proceed on equal basis, but under the consideration of the third party in the benefits that may be available to contacting parties.[lviii]

In the sphere of trade law, MFN treatment is established in the GATT,[lix] considered one of the primary regimes of international trade law. Under this principle, all WTO members for example, are called upon to accord immediately and unconditionally any advantage, favour, privilege or immunity that is granted to any contracting party, on any product originating in or destined for any other country, to the like product originating in or destined for the territories of all other contracting parties.[lx] Under the Charter of Economic Rights and Duties of States[lxi] all states are required to ensure the following:

> International trade should be concluded without prejudice to generalized non-discriminatory and non-reciprocal preferences in favour of developing countries, on the basis of mutual advantages, equitable benefits and the exchange of most-favoured-nation treatment.

Tanzania is a WTO member and a signatory state to Charter of Economic Rights and Duties of States. The government of the United Republic is obliged to observe this principle in its mining and petroleum investments.

In the administration of investments, more precise on admission of investments the principle of Most-Favoured-Nation treatment has impact on securing benefits for country and its people. It is an international principle with elements of liberalism to potential country's investments. This principle places country's reserved resources, including mineral resources to the use of the entire group of nations, in the exercise of the obligations concluded between two states or governments. The principle of MFN treatment implements the open door policy, which has a negative implications to developing and less developed African economies, mostly over the use of their natural resources since the Doha negotiations.

The impact of the principle of customary international law of MFN treatment is wide range. It ensures that a foreign investor obtains the best treatment that the host country grants to investors from third states. In practice, it means that a foreign investor that is protected by a relatively weak investment treaty signed between his home state and the host state can import more favourable provisions from other investment treaties signed by the host country with third states. Studies on the topic show numerous tribunals having interpreted the clause on MFN in investment treaties in this sense, and many foreign investors being allowed to import more favourable substantive provisions from other investment treaties.[lxii]

THE STABILIZATION CLAUSE

This is an international standard which relates to *pacta sunt servanda*, but unlike the rule *pacta sunt servanda* which requires that treaties should be performed, honoured and kept, the stabilization clause contained in an international investment contract between a government and a foreign investor by which the government party undertakes the commitment neither to

annul the investment contract nor to modify its terms, either by legislation or by administrative measures in the whole life time of the contract.[lxiii]

The impact of stabilization clause in investment is noticeable. It involves a tension between sovereignty of state and public interest of the state party, and the long term viability of the contractual relationship. With regard to exploitation of mineral resources for example, as a consequence of the principle of Permanent Sovereignty over Natural Resources (PSNR), stabilization clause is an invalid principle of law. This principle does not consider the fairly operationalization of other principles and concepts of law, for example, the principle/concepts of *ex injuria non ortur jus* which literary means that no benefit can be received from an illegal act,[lxiv] and *force majeure* and public utility and the principles of nationalization or expropriation which may fairly be adopted by a contracting state.

The change of the fiscal regime has nothing to do with concluded obligations in MDAs under the stabilization clause. The Development Agreement between the Government of the United Republic of Tanzania and Pangea Minerals Limited, an Agreement for the Development of a Gold Mine at Tulawaka, Biharamulo of 29 December 2003, states the following regarding to stabilization clause:

> The Company regards stabilization of the tax and fiscal laws of Tanzania as a fundamental requirement for its investment in the Mine, so that the Company will have certainty that the tax and fiscal regime in effect on the Fiscal Stabilization Date (as defined herein) will continue to apply to the Company throughout the life of the Project.[lxv]

Stabilization clause is provided for under article 15 of the Gold Mine Development Agreement between the Government of the United Republic of Tanzania and Samax Resources Limited and Ashanti Goldfields (Tanzania) Limited of 24June 1999, An Agreement for Development of a Gold Mine at Geita. According to the cited article, in the event of change of the mining legislation after the effective Date or soon thereafter of the agreement, the Government undertakes to ensure that the rights accorded to the Companies under the Agreement or the Mining Licence will continue in full force and effect.

Provisions of the similar nature to the above is provided for in different MDAs existing in the Tanzania mining sector, and have made it difficult to implement new changes suggested in the mining legislative framework, including changes suggested in the fiscal framework such as the Income Tax Act, 2004 (Act No. 14 of 2004) of Tanzania.[lxvi] The government considers stabilization clauses which are contained in almost all the MDAs in Tanzania as of being not beneficial for the development of the economy and to improving the conditions of living of its people and it has called for renegotiation of unconscionable terms.

THE PRINCIPLE OF FULL PROTECTION AND SECURITY

Full protection and security is a standard which require states to ensure the safeguard of investments that are being carried on its territory. It require states to provide an investment guarantee against any type of action or measure, of the nature of infringement of the investor's acquired rights by the operation of laws and regulations of the host state.[lxvii] Traditionally full protection and security had meant only the need to protect the investor against various types of physical violence, including the invasion of the premises of the investment, but now this has extended to include legal protection as well.[lxviii] In the case of *BiwaterGauff Limited* V. *Tanzania*[lxix] the tribunal interpreted the concept of protection of investment to cover not only the physical security of investments, but also the broader commercial and legal stability of the business.

The German-Tanzania BIT on protection and security of investment asserts *inter alia* that the government forces should not harm the investments, and that such investments should be protected against adverse forces in the country.[lxx] This requirement is found in other BITs including the UK-Tanzania BIT,[lxxi] the Tanzania-Denmark BIT[lxxii] and Tanzania-Korea BIT.[lxxiii]

The principle of full protection and security has characterized most of the MDAs in Tanzania. It has actually affected the government and its people from earning maximally from mineral resources. The principle of full protection and security has been noted in the Development Agreement between the Government of the United Republic of Tanzania and Pangea Minerals

Limited (Subsidiary of Barrick Gold Corporation) of 17 February 2007, An Agreement for Development of a Gold Mine at Buzwagi, Kahama under the following clauses:

> ...the government shall ensure that during the term of this agreement, legal provisions governing the Company or its shareholders' benefits, rights and duties…shall not be changed unilaterally…use of land, bringing into Tanzania expatriate personnel, machinery spare parts and other materials which are necessary for the building of the mine or the conduct of Mining Operations, taxes, duties, levies and imposts of any nature, guarantee of transfer of capital, profits and dividends and guarantee against expropriation…export of gold, liability to royalty, income tax and the method of computation thereof.[lxxiv]

The cited agreement in the immediate paragraph prohibits nationalization or compulsory acquisition either in whole or in part the rights provided in the investment project. However, the government may do so or may take actions to acquire such rights and interests, but should only do so upon payment of compensation in US$ to an account outside Tanzania specified by the company in amount and manner that is prompt, adequate and effective.[lxxv]

This same requirement to the mentioned immediate paragraph is found under article 8.1 of the Development Agreement between the Government of the United Republic of Tanzania and Pangea Minerals Limited of 29th December 2003; An Agreement for the Development of Gold Mine at Tulawaka, Biharamulo. Similarly the same content is provided for under Part E of the Agreement between Government of the United Republic of Tanzania and Resolute Limited, and Samax Resources Limited, and Resolute Tanzania Limited, and Mabangu Mining Limited of 25th June 1997.

Other principles of customary international law, which are related to the principle of full protection and security, and which bear the same adverse impact on the domestic arrangements to ensure that investment; particularly mining investments provide equitable share between the investor and the host country and its people include: the principle of respect for acquired rights which contain the Hull formula in matters of compensation, and the principle of good faith and prohibition of abuse of power. All these principles are expressed in many MDAs in Tanzania. For example, the Development Agreement between the Government of the United Republic of Tanzania and Pangea Minerals Limited (Subsidiary of Barrick Gold Corporation) of 17

February 2007, an agreement for Development of a Gold Mine at Buzwagi, Kahama provides the following about compulsory acquisition:

> The government shall not nationalize or compulsory acquire the whole or the party of the Company's interest in the Special Mining Licence nor compulsorily acquire or nationalize any right, title or interest of the Company or its contractors or sub-contractors in any property used for the purpose of mining operations on or in relation to the Special Mining Licence, provided that if it does take any such action…it will pay compensation in US dollars to an account outside Tanzania specified by the Company in any amount and manner that is prompt, adequate and effective.[lxxvi]

CONCLUSION

Comprehend participation of Tanzania in international economic relations which basically is governed by fundamental principles of customary international law signals the clear conscious of the government to open policies on her important mineral resources. It is important to understand that natural resources, including minerals are the common heritage of the people, and therefore all the Tanzanians deserve to fully benefit from them. This includes having permanent sovereignty over the use of these resources, and making freely arrangements which enhance participation of the people in investment projects for exploitation of these resources, for the best interests of the country. Fundamental principles of customary international law as we have observed in this discussion do not carry in them the best interests of the most resource rich developing African countries. Tanzania shows the case. To be able to benefit maximally from mining investments we recommend that resource rich countries, including Tanzania should adopt a legal framework which is grounded in the need to ensure equitable sharing of benefits in natural resources development. For example, the principle of Permanent Sovereignty over Natural Resources (PSNR) is premised, and requires natural resource rich countries, especially resource rich developing African countries like Tanzania, to make use of their resources in the best interest of their people. The principle of PSNR therefore is recommendable as of preference to many natural resources rich African countries in framing their legal systems, suitable in the exploitation of natural resources. Natural resources rich

African countries have to adopt satisfactory legal frameworks, including Bilateral Investment Treaties (BITs) and state-investor agreements which does have significant positive impact to the growth of their economies, and to improving the living conditions of the people. It is shown in this paper that fundamental principles of customary international law do not carry in them the best interest of resource rich developing countries, to help to secure equitable share in the development of their natural resources for their countries, and for welfare of their people.

ENDNOTES

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i BAGGERMAN-NOUDARI, K and OFFERMANNS, R Foreign Direct Investment in Developing Countries: Some Tax Considerations and Other Related Legal Matters, IBFD, p.317.

ii DAMROSCH, Lori (et al.)(2001), International Law: Cases and Materials, St. Paul Minnesota, West Publishing Company Ltd, p.1614.

iii DAMROSCH, Lori (et al.)(2001), International Law: Cases and Materials , St. Paul Minnesota, West Publishing Company Ltd, p.1614

iv DEUTSCHE GESELLSCHAFT FUR INTERNATIONAL ZUSAMMENARBEIT (GIZ) GmbH (2015), Developing Countries and the Future of the international investment Regime, p.6.

v SORNARAJAH, M. (2004), The International Law on Foreign Investment, 2nd Ed, Cambridge, Cambridge University Press, p.1. See also SORNARAJAH, M (2010), The International Law on Foreign Investment,3rd Ed, Cambridge, Cambridge University press, p.1.

vi TDEUTSCHE GESELLSCHAFT FUR INTERNATIONAL ZUSAMMENARBEIT (GIZ) GmbH (2015), Developing Countries and the Future of the international investment Regime, p .6.

vii DEUTSCHE GESELLSCHAFT FUR INTERNATIONAL ZUSAMMENARBEIT (GIZ) GmbH (2015), Developing Countries and the Future of the international investment Regime, p.6..

viii The 1959 Draft Convention on Investment Abroad was prepared by Hermann Joseph Abs the then Director-General of Deutsche Bank and Lord Shawcross, a former UK Attorney General.

ix KUNIG, P LAU, N and MENG, W (Eds), (1989), International Economic Law, Walter de Gruyter, Berlin. New York, p. IX.

x SQRENSEN, M (Ed.), (1968), Manual of Public International Law, the Uganda Publishing House Ltd, Kampala, p.144.

xi SQRENSEN, M (Ed.) (1968), Manual of Public International Law, op.cit, p.140.

xii SQRENSEN, M (Ed.) (1968), Manual of Public International Law, op.cit, p.4.

xiii SORNARAJAH, M (2010), The International Law on Foreign Investment,3rd Ed, Cambridge, Cambridge University press, pp.92-93.

xiv SORNARAJAH, M (2010), loc.cit.

xv SORNARAJAH, M (2004), op.cit, pp 22-23.

xvi SORNARAJAH, M (2004), loc.cit.

xvii INVESTORS GUIDE TO TANZANIA 2014-2015, p. 94.

xviii BROWNLIE, I (2003), Principles of Public International Law, New Delh, Oxford University Press, p.502.

xix Paragraph II of the OECD Declaration on International Investment and Multinational Enterprises of June 21 1976. See also KUNIG, P LAU, N and MENG, W (Eds), (1989), International Economic Law, op.cit, p. 559.

xx Article 22(1)(2) of the Agreement Between the Government of the Republic of South Africa and the Government of the United Republic of Tanzania for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income of September 22 2005 which entered into force on 15 June 2007.

xxi Article XVII of the Convention Between the Government of the Republic of Zambia and the Government of the United Republic of Tanzania for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income of March 2nd 1968.

xxii Article 49 of UN-Draft Code of Conduct on Transnational Corporations of September 1986/ May 1987.

xxiii Article III of GATT 1994.

xxiv Guideline III of the World Bank's Guidelines on Treatment of Foreign Direct Investment of 1992.

xxv SORNARAJAH, M (2010), op.cit, p.343.

xxvi RAMDOO, Isabelle (2015), Unpacking Local Content Requirements in the Extractive Sector: What implications for the Global Trade and Investment Frameworks? International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.

xxvii Article III of GATT 1994.

xxviii GATT Article III:4 requires that the products of the territory of any contracting party imported into the territory of any other contracting party should be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportations, distribution or use. And GATT ArticleIII:5 prohibit any contracting part to have established or maintained any internal quantitative regulation relating to the mixture, processing or use of products in a specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportions of any product which is the subject of the regulation must be supplied from the domestic source. Furthermore, it prohibits contracting parties to apply internal quantitative regulations in a manner that contravene the requirements set in paragraph 1 of GATT 1994 article III. Paragraph 1 of GATT 1994 article III prohibits the use of internal taxation and regulation that afford protection to domestic production.

xxix Section 8 of the Petroleum Act, Act, 2015.

xxx Article 2 of TRIM provides with effect to observances of articles III and XI of GATT 1994. These two articles of GATT 1994 generally provide for the national treatment on internal taxation and regulation, and elimination of quantitative restrictions through quotas, imports or export licences or other measures on the exportation or sale for export of any product destined for the territory of any other contacting party respectively.

xxxi Article 2 of TRIM.

xxxii ANNEX to Agreement on Trade-Related Investment Measures, illustrative list 1 (a) and (b).

xxxiii Article II of GATS requires for observances of the principle of Most-Favoured-Nation Treatment in services delivery.

xxxiv Article 10 of SCM generally prohibits discriminatory anti-dumping and countervailing measures.

xxxv Article 7 of the MDA.

xxxvi Paragraph 48 of the UN Draft Code of Conduct on Transnational Corporations of September 1986/May 1987. Also see KUNIG, P LAU, N and MENG, W (Eds), (1989), International Economic Law, op.cit, p.573.

xxxvii BERING, Jurgen (et al.) (2009), General Public International Law and International Investment Law: A Research Sketch on Selected Issues, Institute of Economic Law, Transnational Economic Law Centre, pp14-23 as cited in KILANGI, A Introduction to International investment Law.

xxxviii Article 11(2) of the Havana Charter for an International Trade Organization, 1948. Also see DOLZER, R and SCHREUER, C (2008), Principles of International Investment Law,op.cit, p.120. The Havana Charter never entered into force.

xxxix Paragraph 21 of ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy of Nov.16 1977. This paragraph requires that governments should pursue policies designed to promote equality of opportunity and treatment in employment, with a view to eliminating any discrimination based on race, colour, sex, religion, political opinion, national extraction or social origin. Also see KUNIG, P LAU, N and MENG, W (Eds), (1989), International Economic Law, op.cit, p.578.

xl Article 240 of ACP-EEC Convention (LOME III of December 8, 1984 requires Contracting Parties to accord 'fair and equitable treatment' to investors, and to encourage and create clear and stable conditions conducive to the participation of investors in investment activities

xli Article 2(2) of the UK-Tanzania BIT, 1994.

xlii Article 1 of the German-Tanzania BIT of 1965.

xliii Article 3 of the Tanzania-Netherlands BIT of 1970.

xliv Article 3(2), of Tanzania-Denmark BIT of 1996.

xlv Article 3(2) of Tanzania-Korea BIT of 1998.

xlvi Section 8(iii) of Article VII of Articles of Agreement of the International Bank for Reconstruction and Development (World Bank) of July 22, 1944 ,p.37.

xlvii DOLZER, R and SCHREUER, C (2008), Principles of International Investment Law, US, Oxford University Press, p.122.

xlviii NEWCOMBE, A P (2009), Law and Practice of Investment Treaties, Kluwer, Law International, p.11 cited in KILANGI, A Introduction to International Investment Law.

xlix Articles 6 and 8 of the MDA.

l Article 8.3 to 8.5 of the MDA.

li Article 8.1 of the MDA.

lii SQRENSEN, M (Ed.) (1968), Manual of Public International Law, op.cit, p.148.

liii Article 26 of the Vienna Convention on the Law of Treaties of 1966. Also SQRENSEN, M (Ed.), (1968), Manual of Public International Law, op.cit, p.127.

liv SHAW, Malcolm (2008), International Law, Cambridge, Cambridge University Press, p.829.

lv Article I paragraph 8 of the UNGA Resolution, 1803 (XVII), 14 December 1962 Permanent Sovereignty over Natural Resources.

lvi DOLZER, R and SCHREUER, C (2008), Principles of International Investment Law, op.cit, p.186.

lvii DOLZER, R and SCHREUER, C (2008), op.cit, p.186.

lviii BISHOP, W.W (1962), International Law: Cases and Materials, 3rd Ed, Canada, Little, Brown and Company(Canada) limited,p.157-166.

lix Article I of GATT 1994.

lx Article I of GATT 1994.

lxi Article 26 of Charter of Economic Rights and Duties of States of December12 1974 UN GA Res.A/3281(XXIX) p.414

lxii DEUTSCHE GESSELSCHAFT FU INTERNATIONALE ZUSAMMENARBEIT (GIZ) GmbH, (2015), Developing Countries and the Future of the international investment regime, p.14.

lxiii BROWN, I (2003), Principles of Public International Law, op.cit, p.526.

lxiv BROWN, I (2003), Principles of Public International Law, loc.cit.

lxv Part 5 of preamble of the MDA. The life of the project is defined in the same MDA under article 3 as 25 years, but subject to renewal. That means there will be no change of tax laws for a period of 25 years.

lxvi In the new Income Tax Act of 2004, in order to abide to obligations that the government had entered into with mining corporations before this Act, the government has retained the fixed deductions of capital expenditure in respect of mining operations as provided for in the repealed Income Tax Act of 1973, which is 100%. See section 145 of the Income Tax Act of 2004.

lxvii DOLZER, R and SCHREUER, C (2008), Principles of International Investment Law, op.cit, p. 149

lxviii DOLZER, R and SCHREUER, C (2008), loc.Cit.

lxix ICSID Case No. ARB/O5/22.

lxx Article 3 of the Treaty between the Federal Republic of German and the United Republic of Tanzania Concerning the Encouragement and Reciprocal Protection of Investment of 1965.

lxxi Article 2(2) of Agreement between the Government of the United Kingdom of the Great Britain and Northern Ireland and the Government of the United Republic of Tanzania for the Promotion and Protection of Investment of 1994.

lxxii Article 2 of the Agreement between the Government of the United Republic of Tanzania and the Government of the Kingdom of Denmark Concerning the Promotion and Reciprocal Protection of Investment of 1996.

lxxiii Article 2(2) of the Agreement between the Government of the Republic of Korea and the Government of the United Republic of Tanzania for the Promotion and Protection of Investment of 1998.

lxxiv Article 11 of the MDA.

lxxv Article 10 of the MDA.

lxxvi Article 10 of the MDA.