The International Law Framework for Foreign Investment Protection: An Analysis of African Treaty Practice

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Abstract

Traditionally, African states have played an active and relevant role in the formulation and development of international investment law. Generally, the contribution of African states is demonstrated through the active participation of African states in deliberations of the Non-Aligned Movement, the role of African states in the creation of specialised institutions such as UNCTAD and the strategic use of numerical strength by African states to sponsor numerous United Nations Resolutions. During the epitome of Africa's active participation, African states aggressively resisted the internationalisation of foreign investment rules. However, the practice of African states appears to have changed through the conclusion of BITs containing far-reaching treaty provisions.

On the basis of the foregoing, the thesis reviews the types of BITs concluded by African states with the objective of establishing the investment treaty practice of African states. In so doing, the thesis examines whether African treaty practice conforms or differs from general investment law. While reviewing the treaty practice of African states the thesis also explores the extent to which the emerging investment treaty practice interferes or restrains legitimate policy making of African states. This thus raises awareness to (i) African specific concerns with respect to the international law of foreign investment (ii) the controversy entrenched in substantive treaty standards (iii) the suitability of treaties concluded by African states and (iv) the possibility of drafting more acceptable rules that balance the interests of African states *vis-à-vis* interests of foreign investors.

The thesis argues that there has been a paradigm shift in the investment treaty practice of African states. Specifically, the present treaty practice of African states suggests that African states have retreated from previously held positions augmenting for state sovereignty to a more peculiar position of acquiescence. Broadly, the current state of African investment treaty practice is all surprising when contrasted with the fierce resistance African states mounted against the internationalisation of foreign investment rules in the last century. The thesis demonstrated the extent to which African treaty provisions restrain legitimate policy making and suggests how African states can contribute to the further development of international investment law.

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Author's Declaration

I declare that the thesis does not include work forming part of a thesis presented successfully for another degree. I declare that the thesis represents my own work except where referenced to others.

Signed:

Date:

Table of Abbreviations

A.B.A. J	American Bar Association Journal
ACP	African Caribbean and Pacific Group of States
AJCL	American Journal of Comparative Law
Am. J. Int'I.L	American Journal of International Law
Am.J.Comp.L	American Journal of Comparative Law
Am.U.Int'l L. Rev	American University International Law Review
BIICL	British Institute of International and
BIT	Bilateral Investment Treaty
BYIL	British Year Book of International Law
Colum. J. Transnant'I L	Columbia Journal of Transnational Law
COMESA	Common Market for Eastern and Southern Africa
Comp & Int'l L.J. Southern Afr	Comparative and International Law Journal of Southern Africa
Cornell Int'l LJ	Cornell International Law Journal
Duke L.J	Duke Law Journal
EAC	East African Community
ECHR	European Court of Human Rights
ed(s)	editor(s)
EU	European Union
FCN	Friendship, Commerce and Navigation
Fordham Int'l L. J	Fordham International Law Journal
GA	General Assembly
GATT	General Agreement on Tariffs and Trade
Geo Mason L Review	George Mason Law Review
Harv Int'l LJ	Harvard International Law Journal
ICJ Rep	Reports of International Court of Justice
ICJ	International Court of Justice
ICSID Rep	Reports of ICSID Awards
ICSID Review-FILJ	ICSID Review-Foreign Investment law Journal
ICSID	International Centre for the Settlement of Investment Disputes
IILJ	Institute for International Law and Justice
ILM	International Legal Materials
Int'l & Comp. L.Q	International and Comparative Law Quarterly

Int’l Arb.L.Rev	International Arbitration Law Review
Int’l L	The International Lawyer
Int’l L.F.D	International Law Forum du droit International
Int’L Org	International Organisation
J of Public L	Journal of Public Law
J.Transnat’l L. & Pol’y	Journal of Transnational Law and Policy
Jnl of Int. Dispute Settlement	Journal of International Dispute Settlement
LPICT	Law and Practice of International Courts and Tribunals
Mich. L. Rev	Michigan Law Review
N.Y.U. Envtl L. J	New York University Environmental Law Journal
NAFTA	North American Free Trade
Nw.J.Int’l L. & Bus	North western Journal of International Law and Business
NYU Envtl LJ	New York University Environmental Law Journal
NYU Law Rev	New York University Law Review
OUP	Oxford University Press
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PICT	Project on International Courts and Tribunals
Pub	Publication
Ser A	PCIJ Documents, Series A (Judgements)
Ser A/B	PCIJ Documents, Series A/B (Judgment and Advisory Opinion)
Ser B	PCIJ Documents, Series B (Advisory Opinion)
Suffolk Transnat’l L. Rev	Suffolk Transnational Law Review
TDM	Transnational Dispute Management
U. Pa. J. Int’l Econ	Pennsylvania Journal of International Economic Law
U.C Davis J. Int’l L. & Pol’y	UC Davis Journal of International Law and Policy
U.pitt.L.Rev	University of Pittsburgh Law Review
UCLA J. Envt’l. L. & Pol’y	UCLA Journal of Environmental Law and Policy
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade

UNCTAD	United Nations Conference on Trade and Development
UNCTC	United Nations Code of Conduct on Transnational Corporations
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
Va. J. Int’l L	Virginia Journal of International Law
Vand. J. Transnat’l L	Vanderbilt Journal of Transnational Law
VCLT	Vienna Convention on the Law of Treaties
Wis. Int’l L J	Wisconsin International Law Journal

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Part One Introductory Note: Background to the Study

There are few areas in international law that generate as much controversy as the law regulating foreign investment.[1] For this body of law controversy is not a new phenomenon, it can be traced to as far back as nineteenth century but most profoundly during the last century when formerly colonised states acquired independence.[2] Specifically, during this period, decolonised states from Africa, Asia and Latin America combined efforts along similar ideological lines and started questioning the content of international rules regulating foreign investment. With the reassurance of numerical strength from decolonised African states, the third world movement successfully sponsored numerous resolutions and declarations asserting permanent sovereignty over natural resources and reinvigorated demands for the establishment of a new economic world order favourable to the economic interests of developing countries.[3] Principally, as will be demonstrated in the next chapter, developing countries under the third world solidarity advocated not only for changes to the existing economic order but also for the creation of new international rules favourable to the social, political and economic interests of third world countries.

Undoubtedly, the combined efforts from third world countries received stiff resistance from developed countries and indeed the status of these declarations within international law remains controversial. Substantively, the ideological differences between colonisers and formerly colonised states centred on the composite of rules regulating foreign property which include *inter alia*, the minimum standard of treatment, settlement of disputes, the standard of compensation and national treatment.[4] Throughout this period and over the

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[1] See for instance a recent public statement on the international investment regime supported by numerous academics with expertise relating to international law, investment law, arbitration and regulation <http://www.osgoode.yorku.ca/public_statement>accessed 20 May 2012. See also M Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010) 1.For a conceptual analysis of the successful integration of investment law within the general public international law discourse see Christian J Tams, 'Sources of International Investment Law' in Tarcisio Gazzini and Eric De Brabandere (eds), *International Investment law: Sources of Rights and Obligations* (forthcoming, Brill 2012).

[2] M Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010) 1.

[3] See generally M Sornarajah, *The International Law on Foreign Investment* (2nd edn, Cambridge University Press 2004) 1-4. The numerous United Nations resolutions and declarations were sponsored by Third World Countries from Africa, Asia, and Latin America.

[4] For detailed discussions see Chapter 1, 2, 3, 4 and 5.

years, there has been unequivocal consensus among third world countries to reject all multilateral investment treaties bearing imprints of developed countries. The scale of hostilities towards the internationalisation of foreign investment rules has over the years made consensus between developed and developing countries difficult at the global level.

Indeed, the far-reaching antagonism against foreign investment rules culminated into the signing of the 1959 Bilateral Investment Treaty (BIT) between Germany and Pakistan. The successful conclusion of the Germany-Pakistan BIT inspired other developed countries interested in foreign investment undertakings to pursue similar treaties and over the years investment treaty protection has become a truly global phenomenon.[5] Presently, over two thousand eight hundred BITs have been signed creating a new global system of foreign investment protection dedicated with international institutions, common procedural and substantive principles, specialized lawyers and arbitrators, dedicated activists and an emerging body of jurisprudence.[6] The rapid escalation of BITs has been unprecedented and apart from a few countries such as Brazil, Botswana, Mozambique, Ireland and Myanmar virtually all countries have concluded BITs. Typically BITs are concluded mainly between developed and developing countries.

For instance out of the existing BITs, African states have concluded close to 767 BITs of which 622 have been concluded between an African state and a developed country while 145 have been concluded between African state parties.[7] Remarkably of the 622 BITs concluded between an African state and a developed country 400 are in force while out of the 145 intra-African BITs 29 are in force.[8] This suggests that BITs concluded between African states and developed countries rapidly come into force compared to intra-African treaties.

[5] Stephan W Schill, 'International Investment Law and Comparative Public Law-An Introduction' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 5.

[6] Stephen D Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables' (1982) 36 *Int'L Org* 185, 186; R Doak Bishop, James Crawford and William Michael Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary* (Kluwer Law International 2005) 9-17.

[7] Karel Daele, 'Investment Disputes across Africa: Lessons to Be Learned From' (2012) 2 <http://www.africanlaw.org/images/papers/daelepaper.pdf>accessed 20 May 2012.

[8] Ibid.

There are number of important demographic differences throughout Africa; out of the 767 African BITs, the North African region has concluded 320 BITs, while the West African region has concluded 205 BITs, East African region has concluded 178 BITs and the Southern Africa region has concluded 124 BITs.[9] Comparatively within Africa, the majority of BITs have been concluded between developed states and Sub-Saharan African countries and cumulatively Sub-Saharan African have entered into 507 BITs of all existing African BITs. On the basis of the rapid growth of BITs, it would not be exaggerating to state that bilateralism rather than multilateralism has become the norm through which international investment law progresses. Whether bilateralism remains the prevailing norm is unpredictable but with countries apprehensive about concluding a multilateral investment treaty the progressive development of the area will be shaped and influenced through the interpretation of treatment standards contained in BITs.

In theory BITs aim at attracting foreign investments through offering foreign investors broad substantive treaty protection and the flexibility to directly resolve investment claims through international arbitration usually under the framework of the International Centre for the Settlement of Investment Disputes (ICSID).[10] As the discussion in Chapter 5 elucidates, the flexibility offered to foreign investors to directly bring investment claims against sovereign states cannot be taken lightly considering the problems foreign investors encountered through espousing claims to home states during the pre-BIT era. Indeed, procedural rights contained in investment treaties offering foreign investors the possibility of direct investor-state arbitration have been appropriately described as the ''ultimate investor protection''.[11] Arbitration under the ICSID framework is the most preferred forum for settling investment claims between foreign investors and sovereign states and presently 158 states are signatory to the ICSID Convention.[12] On the African continent alone, with the exception of South

[9] Ibid.

[10] Jarrod Wong, 'Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes' (2006)14 *Geo Mason L. Rev* 135, 135.

[11] See detailed discussion in Chapter 5.

[12] ICSID, List of Contracting States and Other Signatories of the Convention (as of April 18, 2012)<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English>accessed 20 May 2012.

Africa, Libya, Eretria, Djibouti, Guinea and Angola, all African states are signatory to the ICSID Convention and Africa represents a cumulative number of 48 African states. More broadly and this will be dealt with in Chapter 5, the rationale behind Africa's rapid acceptable of the ICSID Convention offers insight into the continued popularity of BITs in African countries.

At a theoretical level, states envision that by concluding BITs offering substantive treaty rights including the right to direct investor-state arbitration reluctant foreign investors will be persuaded to transfer foreign capital that would otherwise not have been transferred had the investor not been assured of favourable treaty protection. However, over the last decade, the modern investment regime as is loosely articulated in the corpus of BITs is witnessing increased scrutiny and growing level of discontent.[13] Particularly, as subsequent parts of this thesis will demonstrate, discontent with the investment regime relates to concerns that include *inter alia*, ambiguity in treaty language, expansive interpretation by arbitral tribunals and the need for a more inclusive regime that balances the interests of foreign investors' *vis-à-vis* interests of sovereign states. It is this growing level of frustration that rekindles ideological differences similar to the old rivalry between aggressive third world countries and developed states expressed through the united solidarity of third world countries advocating for the adoption of numerous contentious United Nations Declarations and Resolutions.

Most recently, discontent with the investment regime has been expressed not just in the form of reactions and pronouncements but through the astonishing

[13] For a thorough critique see generally Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007). Specifically in Chapter seven Van Harten refers to ICSID tribunals as the ''businessman's court'' and argues that although investment treaty arbitration is akin to the public law system of adjudication when constituted at the international level the system lacks four criteria of public law adjudication i.e. accountability, openness, coherence, and independence. With respect to accountability, Van Harten points out that the present system faces the problem of arbitrators basically interpreting public law issues without the possibility of judicial review for errors of law. On openness Van Harten explains that the system does not satisfy the standard of openness because the arbitral system allows essential information about the process to be withheld from public scrutiny. In terms of coherence, Van Harten notes that the lack of an appellate body makes it virtually impossible to harmonise and unify the jurisprudence into a predictable system of state liability. Lastly, in terms of independence, arbitrators are financially dependent on governments and prospective claimants who appoint them on a case by case basis which simultaneously makes it difficult for them to function impartially. In essence, because arbitrators lack security of tenure this means that arbitrators who want to win future appointments have an interest in safeguarding their reputation with key constituencies.

withdraw of Bolivia, Ecuador and Venezuela from the ICSID arbitral system alleging that investment provisions are notoriously interpreted to favour multinational corporations at the detriment of sovereign states.[14] Moreover, it should also be stressed that dissatisfaction with the investment regime is not peculiar to Latin American countries but is steadily extending to African countries and most recently South Africa initiated a detailed review of all its investment treaties.[15] Specifically, in justifying the need for reviewing investment treaties, the South African government fervently argues that BITs are premised on old models focused on the interests of investors from developed countries and during treaty negotiations of existing BITs major issues of concern for developing countries are not addressed.[16] Similarly, South Africa asserts that ''BITs extend far into developing countries policy space, imposing damaging binding investment rules with far-reaching consequences for sustainable development''.[17]

The attacks levelled against the content of BITs by the South African government are not without merit considering that recent commentary questions the efficacy of BITs as instruments of attracting foreign direct investment to developing countries.[18] More insightful is the 2003 World Bank's Report on Global Economic Prospects and Developing Countries which concluded that despite developing countries being signatory to BITs with strong protections such provisions have not resulted into increased investment flows to developing countries.[19] Despite the marginal contribution of BITs, the 2011 data shows that 76% of cases registered under the ICSID framework have invoked BITs as the basis of consent to establish

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[14] Luck Eric Peterson, 'Investment Treaty News' May 27, 2007 <www.iisd.org/pdf/2007/itn_may27_2007.pdf>accessed 20 May 2012.

[15] Official Gazette of the Republic of South Africa, General Notice 961 of 2009.

[16] Ibid.

[17] Ibid.

[18] For a thorough discussion on the spectrum of varying opinions see Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (OUP 2009). Karl Sauvant and Lisa Sachs note that the analysis suggests difficulty in firmly establishing the contribution of BITs in attracting FDI.

[19] The World Bank, *Global Economic Prospects and the Developing Countries* (2003) xvii <http://siteresources.worldbank.org/INTGEP/Resources/335315125720039l829/gep2003complete.pdf> accessed 20 May 2012.

ICSID jurisdiction.[20] The vast majority of developing countries have been subjected to ICSID proceedings for breach of BIT treaty standards-for example African states have been involved in 84 ICSID proceedings which represents close to 22% of all ICSID proceedings.[21]

Broadly, the prevailing controversy suggests that the investment regime is at a tipping point and witnessing not only hostile response but also the rhetoric rekindles the previous rivalry that existed between industrialised and formerly colonised states during the last century. Whether the pace of hostilities towards international investment rules intensifies and spreads to other African countries remains unpredictable. However, as the discussion in Chapters 2, 3, 4 and 5 of this thesis will demonstrate after reviewing the interpretation accorded to treaty standards, the possibility of African states revolting against the *status quo* is undoubtedly a question of time. In the interim, what remains remarkably clear is that without thorough reorientation of BITs towards more inclusiveness of legitimate public policy concerns of African states, it is inevitable that rules regulating foreign investors will pivot to a repetition of sovereign centred arguments. Moreover, given that for decades African states contributed to shaping rules of international investment law as witnessed during debates of the New International Economic Order (NIEO), the furtherance of rules regulating foreign investors will without doubt be underpinned and influenced by the investment treaty practice of African states.

Against this backdrop, the thesis undertakes a detailed analysis of BITs concluded by African states with the objective of establishing the investment treaty practice of African states. In so doing, the thesis examines whether African treaty practice conforms or differs from general investment law. While reviewing the treaty practice of African states the thesis also explores the extent to which the emerging investment treaty practice interferes or restrains legitimate policy making of African states. This thus raises awareness to (i) African specific concerns with respect to the international law of foreign

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[20] Presently ICSID has registered 369 cases under the ICSID Convention and Additional Facility Rules. For detailed statistics see ICSID, *The ICSID Case Load-Statistics Issue 2012-1* (ICSID Secretariat 2012).

[21] Karel Daele, 'Investment Disputes across Africa: Lessons to Be Learned From' (2012) 6 <http://www.africanlaw.org/images/papers/daelepaper.pdf>accessed 20 May 2012.

investment (ii) the controversy entrenched in substantive treaty standards, (iii) the suitability of treaties concluded by African states and (iv) the possibility of drafting more acceptable rules that balance the interests of African states *vis-à-vis* interests of foreign investors.

Rationale for the Study

While there is considerable literature on the alleged systemic bias of international investment treaties, this thesis goes beyond the universal narrative and captures concerns relevant to African countries that are broadly missing from the general discourse of international investment law. Specifically, examining international investment law from a regional African perspective offers insight into how investment law is evolving. In addition, while treaty practices from other regions/countries have been studied, there is no comprehensive study exploring Africa investment treaty practice despite the traditional contribution of African states towards shaping rules governing foreign investment. Evidently, over the last few years, scholarly commentary has mainly focused on capital exporting states, China, OECD countries, NAFTA member countries, Latin American countries and some studies examine developing countries more generically.[22] The focus on more advanced economies is for obvious reasons, international investment law is still evolving and it takes time for exhaustive regional perspectives to be studied.

Even more, although BITs are country specific the existing literature generally treats them as one regime. It is thus important to review BITs from an African perspective and explore whether BITs concluded by African states contain any nuances different from other existing BITs. Particularly, the over generalisation of BITs as one regime misses important differences such as whether a country enters into BITs and with whom, how it approaches the key substantive standards, what influences a country or region to conclude BITs, the extent to which BITs restrain a country's legitimate policy making, and how the country approaches dispute settlement. It is the overall importance of critically reviewing the peculiar difference from different countries and regions that

[22] For example see Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties Policies and Practice* (OUP 2009). The authors explore Chinese perspectives on foreign investment regulation and provide a blueprint for future Chinese investment treaties.

necessitate a regional perspective centred on the investment treaty practice of African states. In essence, through examining African treaty practice the thesis offers insight into the formulation of investment law at a regional level.

Similarly considering that there is detailed literature on other regions and countries, it is only after examining Africa treaty practice that we can fully claim to have a holistic view of international investment law. In addition, given that the restrictive nature of BITs towards policy space of sovereign states varies depending on country or region, there is need to review the treatment standards contained in African BITs to fully be informed of the extent to which the evolving jurisprudence restrains the legitimate policy making of African states. Also, although there is growing perception that international investment law as articulated in BITs and the evolving jurisprudence restrains legitimate policy making the literature does not capture Africa specific concerns and does not show the extent to which African states are affected by the prevailing practice.

It would thus not be surprising that considering the geopolitical and economic differences between countries the overall policy restrictions imposed by BITs apply differently depending on the country or region. For instance, with respect to African BITs, subsequent chapters after analysing the evolving jurisprudence and the wording of African treaty standards argue that it is doubtful African states during the negotiations of many of the existing BITs anticipated the consequences of offering generous treaty standards. Indeed, a number of African states on the basis of expansive treaty standards have been sued by foreign investors and forced to defend regulatory measures even when such policies are within the public interest and pursued in accordance with national Constitutions and within the states regulatory competence.

For instance in the case of *Piero Foresti v Republic of South Africa* the claimants alleged that the South Africa Mineral and Petroleum Resources Development Act (MPRDA) and the Mining Charter was in breach of the prohibition of expropriation and the obligation of fair and equitable treatment as articulated in the South Africa-Italy BIT and South Africa-Luxemburg BIT. The claimant postulated that the Mining Charter through requiring mining companies to transfer 26% ownership of mining assets to historically disadvantaged South

Africans was tantamount to indirect expropriation and also breached the obligation of fair and equitable treatment that prohibits discrimination.[23] Furthermore, the claimants argued that operation of the Black Economic Empowerment (BEE) equity divestiture requirement that required foreign investors to sell 26% of their shares to historically disadvantaged South African companies amounted to expropriation.[24] In response, the Respondent pointed out that the MRPDA and the Mining Charter were promulgated for the purpose of ensuring *inter alia* (i) simplifying and modernizing an overly complex legal system; (ii) ameliorating the disenfranchisement of HDSAs and other negative social effects caused by apartheid in general and the 1991 Mineral Rights Act in particular; (iii) reducing the economically harmful concentration of mineral rights and promoting the optimal exploitation of mineral resources; and (iv) protecting the environment and the communities living in the vicinity of mining operations.[25]

According to the Respondent even if one was to admit that the Mining Charter treated foreign investors differently from South African investors the differences in treatment would be justifiable.[26] In essence, the Respondent postulated that the differences in treatment fall squarely within the government's margin of appreciation for determining which measures are reasonable and justifiable in advancing critical public interests.[27] Similarly, the Respondent argued that there can be no indirect expropriation when the government action as the one taken in this case is rational and a proportional means of pursuing legitimate public regulatory purposes.[28] Although the case was eventually discontinued at the request of the claimant the case does indeed demonstrate the extent to which treaty standards included in African BITs have serious consequences for legitimate public policy making even when such regulatory measures are implemented for a public interest.

[23] *Piero Foresti v Republic of South Africa*, ICSID Case No. ARB (AF)/07/1, 4 August 2010, para 56.

[24] Ibid para 64.

[25] Ibid para 69.

[26] Ibid para 72.

[27] Ibid.

[28] Ibid para 75.

More broadly, through reviewing the treaty practice of African states this study generally serves as an example of African practice in international law. Specifically as the next chapter will demonstrate, it is only when we deconstruct Africa's traditional contribution to the development of international law as a whole that we can fully appreciate the need for African states to reassert themselves and the importance of a regional perspective. The African continent has traditionally played an active role in shaping third world perspectives on virtually all branches of international law and this is evidently demonstrated in the numerous declarations and resolutions decolonised African states supported.

However, with respect to the evolving international investment regime, Africa's traditional role of backing third world perspectives on international law appears to have disintegrated with the pursuit of BITs. Indeed, considering the treatment standards contained in African BITs the rhetoric as expressed in various demands such as the NIEO contradict most of the positions African states previously espoused. More broadly, considering the overarching ideological shift in African investment treaty practice, it would be insightful to explore whether African states have taken similar ideological shifts in other areas of international law. Unfortunately such a discussion is beyond the scope of this thesis. However, it is hoped that this study by more generally serving as an example of African practice in international will inspire further research into the extent to which African states are contributing to the development of other spheres of international law. For instance, it would be insightful given Africa's active role in the formulation of the law of the sea to examine whether African states are still relevant players in the further development of this important area of international law.[29]

This thesis aims at filling the existing gap in the literature by systematically examining the investment treaty practice of African states and also explores how African states fit within the broad investment treaty practice and the likely policy implications of the emerging arbitral jurisprudence on African states. Through undertaking a detailed study, the thesis underscores the contribution of

[29] For detailed discussion of Africa's traditional contribution to the development of the international law of the sea see NS Rembe, Africa and the International Law of the Sea (Sijthoff & Noordhoff Publishers 1980).

African states towards the development of international investment law and also highlights the silent features shaping the development of international investment law on the African continent. This is done through reviewing African practices prior to the colonial era, during the colonial period, the period immediately after colonialism and modern Africa investment treaty practice. It is appropriate to note that the evolution and trend of Africa investment treaty practice is of critical importance to the further development of international investment law in part because of the numerical strength of the African continent but also African states have traditionally played an active role in the development of international investment law.

Specifically, as will be discussed in the next chapter and subsequent parts of the thesis, there are considerable changes taking place in the attitude of African states towards foreign investment rules from antagonism as witnessed during the post-colonial era-a period when decolonised African countries used numerical dominance to assert permanent sovereignty over natural resources and the modern investment phase represented through the conclusion of BITs. Manifestly therefore, reviewing international investment law from an African perspective is important because from a historical outlook African states have been at the forefront in shaping rules regulating foreign investors and any future development will undoubtedly be influenced or shaped by the contribution of African states. Lastly, the thesis is timely and comes at a time when foreign investment regulation is experiencing unparalleled attacks from different quarters and with a regional approach focused on Africa, the thesis underscores Africa's nuances on the evolving investment treaty practice.

Research Methodology and Scope of the Thesis

The scope of this thesis focuses on the investment treaty practice of African states and particularly the treaty practice of Sub-Saharan African countries. However, it is practically difficult to thoroughly examine each and every treaty concluded by the forty eight Sub-Saharan African states. As a result, from the forty eight Sub-Saharan African countries, the thesis selected a sample of countries that are descriptive and illustrative of the general investment treaty practice of Sub-Saharan African countries. Accordingly, the thesis selected a sample of Sub-Saharan African countries that can be considered indicative of the investment treaty practice of African states based on the following criteria, (a) the first criteria was twofold, (i) a reforming Sub-Saharan African economy according to the World Bank Doing Business Report[30] and (ii) the reforming Sub-Saharan state should have the most progressive investment treaty. On the basis of this criterion, Rwanda was selected because according to the World Bank Doing Business Report, it is ranked the fastest growing economy within Sub-Saharan Africa[31] and at the same time Rwanda recently concluded an investment treaty with the United States. (b) The second criteria involved selecting countries within the East African Community that have concluded not only BITs but have also experienced litigation under the ICSID arbitral rules. On the basis of this criterion, Burundi, Tanzania and Kenya were selected. (c) The last criteria involved selecting four countries from West and Central Africa that have not only entered into BITs but have also faced litigation under the ICSID arbitral rules. Under this criterion the following four countries qualified, Burundi, Democratic Republic of Congo, Ghana and Cameroon.

The thesis deliberately excluded Southern African countries because apart from South Africa, the remaining countries within this region have social, political and economic conditions similar to the selected countries. However, it should be stressed that although the main thrust of the thesis focuses on seven African states as illustrative of African investment treaty practice where necessary the thesis makes reference to other African countries. However, where such reference is made, this only serves to reinforce the investment treaty practice of African states to provide an even broader perspective of African practice.

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[30] The Doing Business Report is an annual report of the World Bank Group that 'provides objective measures of business regulations and their enforcement across 183 economies and selected cities at the sub-national and regional level. The Doing Business Project, launched in 2002, looks at domestic small and medium-size companies and measures the regulations applying to them through their life cycle. By Gathering and analysing comprehensive quantitative data to compare business regulations environments across economies and over time, Doing Business encourages countries to compete towards more efficient regulations; and serves as a resource for academics, journalists, private sector researchers and other interested in the business climate of each country'. < http://www.doingbusiness.org/about-us> accessed 20 May 2012.

[31] The 2010 World Bank Doing Business Report ranked Rwanda the world's top reformer in improving the overall business environment. Even more, 2011 World Bank Doing Business Report stressed that Rwanda was a constant reformer in Sub-Saharan Africa. For full details see 2011 World Bank Doing Business Report, <http://www.doingbusiness.org/~/media/FPDKM/Doing%20Business/Documents/Annual-Reports/English/DB11-FullReport.pdf> accessed 20 May 2012.

Lastly, in terms of literature, the thesis relies heavily on BITs concluded by the selected African states, national legislation of the selected states, regional investment treaties, and investment cases concluded through international arbitration as well as international law theory and practices.

Structural Outline

The thesis is made up of *six chapters* divided into two broad but interrelated parts, the *first part* deals with the social and political realities shaping the development of foreign investment law in Africa and by extension explores the evolution of modern investment law. Briefly, the chapter examines how African states contributed to the formulation of investment rules as well as the silent features underpinning the development of these rules. The chapter proceeds by reviewing the contribution of African states to the period prior to the colonial era and shows that even prior to the colonial period the contribution of African states was evident. In essence, the chapter notes that the colonial period not only prohibited African states from contributing to the evolving customary law during this period but also more fundamentally colonialism interrupted with Africa's overall contribution to international rule making.

The chapter then discusses the contribution of African states during the colonial period and notes that African states lacked the sovereignty to make any meaningful contribution. After discussing the colonial period, the chapter reviews the practice of African states during the post-colonial period and shows that decolonised African states actively contributed to the development of international rule making. The chapter highlights Africa's specific input and the growing influence Africa exerted on the Non-Aligned Movement (NAM) and within the United Nations General Assembly. Lastly the chapter examines modern treaty practice and demonstrates remarkable ideological differences between the practice of African states during the last century and the subsequent practice of African states in the BIT era. This chapter is of critical importance because the chapter not only demonstrates Africa's traditional contribution to international investment law but also the treaty standards included in African BITs reinforces the discussion in chapters 2-6.

After providing detailed analysis showing Africa's traditional contribution and the general evolution of investment law, the second part of the thesis focuses on key substantive standards included in African BITs. As will readily be apparent, the passive acceptance of BIT treaty standards by African states is surprising considering Africa's resistance to foreign investment rules in the last century. Given the ideological change in African practice, the second part of the thesis thoroughly examines whether treaty standards included in African BITs conform or differ from general investment treaty standards. In so doing, the second part demonstrates how the inclusion of such provisions affects the legitimate policy making space of African states. The *second part* of the thesis is comprised of five different but interconnected chapters.

The thesis selects and examines four of the most contentious treaty standards articulated in African BITs, i.e. expropriation, fair and equitable treatment, dispute settlement and the scope and definition clause. The rationale for selecting these standards is based on the fact that policy making space of African states will seriously be constrained depending on the interpretation arbitral tribunals' accord to these four treaty standards. In addition, foreign investors are more accustomed to submit investment treaty claims based on these four treaty standards. On the basis of this justification, chapter 2 of the thesis starts by examining the scope and definition clauses articulated in African BITs and discusses the critical issues associated with the scope and definition clauses. In line with the themes of the thesis, the chapter also underscores the practical policy implications resulting from the scope and definition clauses of African BITs.

Chapter 3 and 4 examine the standard of expropriation and the obligation of fair and equitable treatment. Chapters 3 and 4 form an integral part of the thesis not only because the two standards have the potential to disproportionately balance the relationship between states and foreign investors but also because African states are evidently the most hard-pressed with the evolving arbitral practice. Chapter 3 specifically focuses on issues such as the scope of expropriation, lawful expropriation, the standard of compensation and the likely policy implication of the emerging expropriation jurisprudence on legitimate policy making in African states. Chapter 4 examines the obligation of fair and equitable treatment and argues that African countries should be more concerned with this standard because of the expansive nature of the standard coupled with the fact that the standard has the potential of being broadly construed to capture other treaty violations. In line with the theme of the thesis, chapter 4 examines the scope, definition and meaning of fair and equitable treatment as spelled out in African BITs and the likely implication modern arbitral jurisprudence has to the understanding of fair and equitable treatment within African investment treaty practice. Chapter 5 examines African dispute settlement clauses and situates not only the current treaty practice of African states but also policy implications resulting from the jurisprudence of arbitral tribunals. Lastly but by no means least, chapter 6 concludes the thesis by underscoring the findings from African treaty practice and suggests policy options that African states should pursue.

Chapter 1

The Protection of Foreign Investment: Historical Evolution of Africa Investment Law

Introduction

This chapter aims at exploring the formulation of investment rules on the African continent and the silent features underpinning the evolution of these rules. Through this, the chapter examines the geo-political factors shaping the development of Africa investment law and situates the contribution of African states towards the development of general international investment law. Undoubtedly, at the onset, it is worth mentioning that this chapter is not by any means exhaustive as such a task is beyond the scope of this chapter and also detailed assessment would best be achieved through a monograph. For the purpose of this thesis, the chapter underscores the formulation of investment rules on the African continent, the internal contradictions central to this evolution and the contribution of African states in shaping such rules. To this end, the chapter postulates that African states have traditionally played a relevant role in shaping foreign investment rules although such a role has gradually diminished. Also, from the historical evolution of Africa investment law, the chapter argues that the ideological differences between developed and developing countries are deeply entrenched such that achieving consensus towards a multilateral investment treaty remains more of an elusive aspiration.

Before situating Africa's contribution to modern investment law, some general preliminary remarks about African practice are important the thrust of which will become evidently clear in subsequent parts of this chapter. There is sufficient evidence alluding to the fact that although African states are at the moment passive participants in the development of international investment law, traditionally the African continent has been a relevant and active player. Moreover, Africa's traditionally contribution spans generations and can be traced back even before colonialism. As numerous scholars demonstrate, prior to the colonial period African states participated in commercial activities within Africa, established diplomatic links and concluded both intra-Africa treaties and international agreements.[1] In essence, the African continent was not a dark continent and passive observe of international rules but rather the continent contained sovereign states that actively participated in the formulation of rules regulating interstate commercial relationships.[2]

Specifically before the advent of colonialism, Africa had sophisticated kingdoms that enjoyed and conducted trade, diplomatic and other forms of contact within African states and the outside world-Asia, the Middle East and European states.[3] This period of considerable influence was interrupted during the colonial period which placed African states under the custodianship of colonial powers and in turn curtailed Africa's contribution to the advancement of international affairs.[4] Professor Elias in a detailed book documenting Africa and the development of international law notes that prior to the colonial period traditional African chiefs and kings were highly respected during the execution of diplomatic, trade and international treaties implying that for all intent and purpose African states operated with full sovereignty.[5] According to Elias the universality of commercial activities coupled with the fact that African states operated with full sovereignty and concluded numerous international treaties clearly disputes the theory that Africa was a dark continent before the colonial period and did not make any contribution to the development of international rules.[6] In essence, the universality of international agreements and the established diplomatic ties between traditional African kingdoms, Asia, and the Mediterranean suggests that since indigenous African chiefs and kings operated with full sovereignty international commercial treaties would not have been concluded without their contribution.[7]

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[1] TO Elias, *Africa and the Development of International Law* (Richard Akinjide ed, 2nd edn, Kluwer Academic Publishers 1988) 3-15.

[2] Ibid.

[3] NS Rembe, *Africa and the International Law of the Sea* (Sijthoff & Noordhoff Publishers 1980) 5.

[4] Ibid.

[5] TO Elias, *Africa and the Development of International Law* (Richard Akinjide ed, 2nd edn, Kluwer Academic Publishers 1988) 19.

[6] Ibid 3-20.

[7] Ibid.

However, during colonialism Africa's contribution was interrupted by European powers who essentially substituted African sovereignty with sovereignties of European states leading to the collapse of historic modes of international intercourses between African indigenous states and the outside world.[8] It was during the colonial period that African states completely ceased contributing to the development of international rules because as a matter of international law African states lacked international legal personality. The only contribution of African states if any was the fact that it was African territories and African resources that supplied raw materials for the ''evolving rules and practices of international relations during the heyday of colonisation''.[9] Particularly during colonialism Africa's social, economic and legal fabric was replaced with European rulers who controlled all external relations involving African states such as boundary, diplomatic engagements and commercial agreements.[10] The control of Africa sovereignty had negative consequences which includes the fact that African states did not participate in the formation of rapidly evolving customary law because only sovereign states were subjects of international law.[11]

More importantly, when the development of customary law was taking place regulating international relations covering important areas such as economic, technical and cultural, the contribution of African states could not be incorporated because African states depended on European states.[12] For instance, in the Berlin Treaty of 1885 which was entered into between European powers to establish routes of the Niger and Congo River and international usage, there was no single African territory or African representative participating in the treaty.[13] As will be discussed in more details, it is unsurprising that immediately after African states regained independence, African states supported and actively participated in the Non-Aligned Movement (NAM) that culminated into the formation of the United Nations Conference on Trade and Development (UNCTAD) and subsequently demands for the establishment of a

[8] Ibid 19.
[9] Ibid 21.
[10] Ibid 19.
[11] Ibid 19-20.
[12] Ibid.
[13] Ibid 20.

new international economic order. With this overview in mind, the following sections detail the progressive development of international investment law and demonstrate Africa's specific input to the development of international investment law.

For practical purposes the chapter starts the discussion by examining the nature of foreign investment rules during the colonial period-a period where African states did not participate in international relations because African states lacked the requisite sovereignty to participate in international rule making. The next section deals with the post-colonial period and shows how decolonised African states using numerical dominance actively participated in influencing and rejecting the status quo so as to shape international rules favourable to the African continent. Specifically, the post-colonial period is an important period because it shows how decolonised African states not only influenced the strategic thinking of the NAM but also captures Africa's traditional thinking. After, demonstrating Africa's specific contribution into demands for a new international economic order and the creation of global institutions such as UNCTAD, the last sections explores the birth of BITs and illustrates the paradoxical nature of African practice. More broadly, the last sections act as a precursor into the substantive analysis of modern African treaty practice that follows in chapters 2-6.

1.1 Regulation of Foreign Investors during the Colonial Era

During the colonial period, foreign direct investment was made mainly in the context of colonial expansion and as such foreign investors exporting capital required minimal protection.[14] Accordingly, foreign investors did not have to worry about sufficient protection because the prevailing legal system in colonised states was similar to that of colonial masters. For instance, in British colonial Africa further to the introduction of a currency economy, the native population was also subjected to English Common law and by extension this accorded colonial powers total control over the prevailing trade and investment

[14] M Sornarajah, *The International Law on Foreign Investment* (2nd edn, Cambridge University Press 2004) 9.

regime.[15] Manifestly therefore, investors transferring capital or engaged in foreign conquests received adequate protection both at the pre-establishment and the post-establishment stage.[16] Generally, the colonial system was designed with ulterior motives of economic exploitation aimed at serving the interests of European powers and as such the system excluded the participation of African states from ownership, control and operation of foreign investment enterprises.[17] During this period, foreign investors entering colonised African states acquired exclusive and plenary rights over natural resources which effectively accorded investors the right to absolute ownership and control.[18] The right to exclusive ownership was safeguarded through expansive imperial laws applicable to foreign controlled assets.

As noted in the foregoing paragraph, during the colonial period colonial exploitation was the order of the day and European colonial powers targeted African states rich in natural resources and untapped raw materials. This indeed explains the hostility preceding the scrabble and partition for Africa because majority of African states contained the much sought for raw materials and natural resources. Throughout colonised Africa, several companies from European countries acquired extensive concession rights to exploit and explore natural resources such as gold, ivory, silver and diamonds.[19] The right over natural resources was granted unwittingly by African traditional chiefs under misguided consent from colonial masters and at times colonial governors issued the rights themselves.[20] For purposes of facilitating deeper economic penetration into colonised states, colonial powers regulated pre-establishment

[15] Victor Mosoti, 'Bilateral Investment Treaties and the Possibility of a Multilateral Investment Framework on Investment at the WTO: Are Poor Economies Caught in Between?' (2005) 26 *Nw.J.Int'l L.& Bus* 95,106-107.

[16] M Sornarajah, *The International Law on Foreign Investment* (2nd edn, Cambridge University Press 2004) 9. According to Sornarajah the legal system in colonised territories was changed to accommodate European notions of individual property rights and freedom of contract.

[17] See SKB Asante, *Transnational Investment Law and National Development* (JIC Taylor Memorial Lecture Series, Lagos University Press 1981) 22-24.

[18] Ibid.

[19] Ibid.

[20] Ibid 24.Asante highlights the classic concession rights that colonisers obtained from impoverished Africa. These include *inter alia*, Sierra Leone Selection Trust had a diamond concession in Sierra Leone for 99 years, Ashanti Goldfields Corporation in Ghana had a term of 90 years, the Consolidated Africa Selection Trust had a cluster of diamond concessions in Ghana whose terms averaged 77 years, in Swaziland, Havilock asbestos had a concession for 100 years. It should be stressed that these companies acquired plenary rights to extract not only one mineral but all minerals.

and post-establishment rights across colonised states.[21] As noted above, traditionally colonised states lacked international personality leaving international relations entirely at the discretion of European colonial powers.[22]

Practically, this meant that international treaties concluded between colonial powers such as foreign relations, trade and commerce directly applied to African states under colonial protectorate.[23] For example in the British Protectorate of Tanzania, Britain concluded seventeen bilateral commercial treaties for and on behalf of the people of Tanzania without seeking approval from Tanzanian tribal chiefs.[24] Unsurprisingly, the government of Tanzania after acquiring independence terminated virtually all commercial treaties concluded during the colonial period on the premise that such treaties had been concluded with British interests in mind rather than Tanzanian interests.[25] Further the government of Tanzania issued declaratory statements to third party states notifying them that Tanzania considered such commercial treaties obsolete and was not bound by the undertakings.[26] More broadly, based on the fact that European powers concluded international agreements without the participation of African states, it is unsurprising that decolonised African states not only terminated such treaties but also resisted traditional international law principles developed during the colonial period.

During the colonial period, the settlement of investment disputes between investors and colonised states was regulated by imperial laws which offered foreign investors superior legal protection.[27] However, it is important to stress that by the 19th century some developing countries such as Mexico and Argentina had attained independence and within these countries different rules applied. In these formerly colonised states, the pattern of solving disputes was either through diplomacy or the use of force and at times this included military

[21] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007) 14-15.
[22] Timothy Hillier, *Sourcebook on Public International Law* (Cavendish Publishing Ltd 1998) 28.
[23] Ibid.
[24] EE Seaton and ST Maliti, *Tanzania Treaty Practice* (OUP 1973) 66.
[25] Ibid.
[26] Ibid.
[27] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007) 14-15.

intervention.[28] During this period, the protracted use of gun boat diplomacy aimed at protecting foreign nationals investing abroad was common.[29] The use of diplomatic protection followed by force is well documented throughout state practice and in fact the approach is supported by many traditional writers of early international law but more profoundly are the views of De Vattel who argued that:

> Whoever offends the State, injures its rights, disturbs its tranquillity, or does it a prejudice in any measure whatsoever, declares himself its enemy, and exposes himself to be justly punished for it. Whoever, uses a citizen ill, indirectly offends the state which is bound to protect this citizen; and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation; since otherwise the citizen would not obtain the great end of the civil association, which is, safety.[30]

The views of Vattel are not without premise considering that traditional international law was developed by states with similar standards of economic development and shared imperialistic sentiments.[31] In particular, early international law sanctioned the use of force as a corrective measure after the exhaustion of peaceful means in the form of diplomatic protection.[32] During this period, it was not uncommon for coercive force to be applied to provoke states to comply with the demands of colonial powers. For instance in 1896, Mexico was the target of such force when three Western allies, Great Britain, Spain and France combined forces to compel Mexico to fulfil its contractual undertakings towards the citizens of France, Britain and Spain.[33] Particularly, as a way of legitimizing excessive force against Mexico, western allies concluded the London Convention permitting direct military intervention to rectify injustices caused to

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[28] TC Wingfield and JE Meven, *Lillich on the Forcible Protection of Nations Abroad: in Memory of Professor Richard B Lillich* (Vol 77, International Law Studies, Naval War College Press 2002) 3 adopted from Emmerich de Vattel, *The Law of Nations (*Joseph Chitty and Edward D Ingraham eds, T.& J.W Johnson & Co. 1883) 16.

[29] Ibid.

[30] Ibid.

[31] CF Amerasinghe, *State Responsibility for Injuries to Aliens* (Clarendon Press 1964) 18-36.

[32] RB Lillich (ed), *International Law of State Responsibility for Injuries to Aliens* (University Press of Virginia1983) 3.

[33] This is just one example, almost all major Western powers exercised force in the interest of their nationals, Great Britain in Abyssinia, French Blockade of Argentina, Great Britain and France in Egypt etc...For a detailed analysis see TC Wingfield and JE Meven, *Lillich on the Forcible Protection of Nations Abroad: in Memory of Professor Richard B Lillich* (Vol 77, International Law Studies, Naval War College Press 2002) 26-36.

their respective nationals.[34] Even more, the use of force was sanctioned not only by European powers but also leading intellectuals thus shaping the progressive evolution of international law in a manner that justified the permissibility of forceful protection.[35]

Quite apart from the use of force, colonial powers also established investment agreements between themselves and the cohort of developing countries that survived colonialism. The framework of investment protection was in treaties commonly known as friendship, commerce and navigation treaties (FCN).[36] The first of such treaties was signed in 1778 between France and the United States.[37] However, it is worth noting that principally early FCN treaties aimed at facilitating trade and commerce between advanced nations as opposed to articulating rules regulating foreign investment.[38] In particular, developed states concluded FCN treaties with the intention of acquiring reliable market for finished goods as well as gaining greater access to expanding markets from developing countries.[39] Substantively, FCN treaties contained extensive provisions regulating the treatment of property belonging to foreign investors.[40]

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[34] Ibid 26.

[35] Ibid 26-36.Wingfield and Meven note further that with the adoption of the United Nations Charter, the traditional view was challenged and this led to the emergence of a new set of international norms.

[36] It should be noted that not all treaties are referred to as FCN, for instance the 1951 Ethiopia treaty was called Treaty of Amity and Economic Relations between the United States of America and Ethiopia, TIAS 284, U.S.T 2134, Sept 7, 1951[Hereafter FCN between United States and Ethiopia]. While the 1836 Morocco treaty was called Treaty of Peace and Friendship between the United States of America and Morocco, TS 244-22, 8 Stat. 484, Sept 16, 1836 [Hereafter FCN between the United States and Morocco]. On the other hand, the 1783 Netherlands treaty was called Treaty of Amity and Commence between Netherlands and United States cited in Charles I Bevans (ed), *Treaties and Other International Agreements of the United States of America 1776-1949* (Vol 10, Dept. State Publication 1972) 6 [Hereafter FCN between the United States and Netherlands].

[37] Robert R Wilson, 'Post-war Commercial treaties of the United States' (1949) 43 *Am.J. Int'l.L* 262, 277.

[38] Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Kluwer Law International 1995)10-11.

[39] Christopher F Dugan, Don Wallace and Noah Rubins, *Investor-State Arbitration* (OUP 2008) 37.

[40] Kenneth J Vandevelde, 'The Bilateral Investment Treaty Program of the United States' (1988) 21 *Cornell Int'l LJ* 201,204.

The standard of treatment was absolute which guaranteed perfect protection to aliens investing abroad.[41]

Also it should be stressed that majority of FCN treaties derived substantive rules regulating foreign direct investment from general international law principles of state responsibility for injuries caused to aliens abroad.[42] As the principal initiator of FCN treaties, the United States contended that principles of state responsibility for injuries caused to aliens articulated in FCN treaties formed part of the international minimum standard.[43] Accordingly, the United States argued for the treatment of foreign investors in accordance with the international minimum standard and amongst other rights the minimum standard entitled foreign investors to compensation based on an external standard requiring the payment of prompt, adequate and effective compensation.[44] In support of this view Elihu Root noted that the standard is perfectly distinct and settled which means that;

> Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injuries which it gives to its own citizens, and neither more nor less: *provided the protection which the country gives to its own citizens conforms to the established standard of civilisation*. This standard of justice is very simple, very fundamental, and of such general acceptance by all civilised countries as to form a part of the international law of the world (emphasis added).[45]

However, it remains contested whether the international minimum standard advanced by the United States and articulated by Root has crystallised into

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[41] See also Article IX of the1859 Treaty of Friendship, Commerce and Navigation between the United States and Paraguay in Charles I Bevans (ed), *Treaties and Other International Agreements of the United States of America 1776-1949* (Vol 10, Dept. State Publication 1972) 889 [Hereafter FCN between the United States and Paraguay]; Article VII of July 1853 Treaty of Friendship, Commerce and Navigation between the United States and Argentina, TS 4, 10 Stat. 1005 July 27, 1853 [Hereafter FCN between United States and Argentina].

[42] CF Amerasinghe, *State Responsibility for Injuries to Aliens* (Clarendon Press 1964)18-36; see also TC Wingfield and JE Meven, *Lillich on the Forcible Protection of Nations Abroad: in Memory of Professor Richard B. Lillich* (Vol 77, International Law Studies, Naval War College Press 2002) 2-35.

[43] M Sornarajah, *The International Law on Foreign Investment* (2nd edn, Cambridge University Press 2004) 37-39.

[44] Ibid 37-38.

[45] Elihu Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 *Am. J. Int'l.L* 517,521-22.

customary international law. As will be shown below, over the years the content of this standard has been the subject of heated debate and particularly the divide in opinion was most visible during early development of international investment law through numerous contestations at the United Nations General Assembly. Over the years, attempts have been made to clarify and articulate the content of this standard. Perhaps more insightful are the views of Schwarzenber who opines that the international minimum standard basically entails three aspects: (a) the organisation of a State must correspond to reasonably defined minimum requirements of the rule of law in the Anglo-Saxon sense and most specifically a state must provide for an independent judiciary, (b) an alien has a right to expect his full, prompt and effective compensation established in judicial or quasi-judicial proceedings whenever his property is expropriated even if such an expropriation was undertaken for public purposes, (c) An alien must first exhaust available local remedies even in cases of an illegal interference with his property rights.[46]

The permissibility of the international minimum standard was intensely resisted by Latin American countries and leading Latin American jurists who opined that the minimum standard was legally implausible.[47] Specifically, Latin American countries argued that interference with alien property rights falls within the domestic competence of host states and by extension this meant that foreign investors are entitled to treatment provided for under domestic laws.[48] It should be stressed that invoking the minimum standard through diplomatic espousal is without doubt controversial and subject to abuse especially when the home state is pursuing political interests. More specifically, diplomatic protection makes the dispute settlement system heavily politicised which has the propensity to create endless interstate conflicts affecting the relationship

[46] Georg Schwarzenberger, *Foreign Investments and International Law* (Stevens & Sons 1969) 2-23.

[47] The international minimum standard was eventually given support in *Mavrommatis Palestine Concessions (Jurisdiction)* by the PCIJ when it ruled that by taking up the case of one of its subjects and resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, its right to ensure, in the person of its subjects, respect for the rules of international law. This precedent was followed by the Permanent Court of International Justice in the *Panevezys Saldutiskis Railway* case (*Estonia v Lithuania*) PCIJ (ser.A/B) No.76 (Feb. 28).

[48] M Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010) 127.

between states. At a practical level, diplomatic protection does not effectively serve foreign investors because it is discretionary and usually based upon the state's willingness to pursue the investment claim.[49] In addition, it is important to stress that when a state is exercising diplomatic protection, the state is fulfilling a political function within the competence of its executive powers.[50] This in essence means that foreign investors cannot compel their home state to act despite experiencing violations to property rights. Commenting on the drawback of diplomatic protection, Borchard notes that;

> Protection by the nation of a citizen abroad reflects one of the most primitive institutions of man-the theory that an injury to a member is an injury to his entire clan. It seems questionable whether in the highly integrated organisation of the world today this practice is either necessary or desirable to secure for the citizen abroad the assurance of international due process of law.[51]

The content of the international minimum standard of treatment remains divisive. Particularly, during this period the minimum standard was rejected by Latin American states on the ground that the standard is inscribed with Western dominance aimed at interfering with internal affairs of sovereign states.[52] As a counter narrative against the international minimum standard, the famous Argentinean jurist Carlos Calvo formulated the Calvo doctrine. Unsurprisingly, the United States and leading European countries rejected the Calvo clause contending that, the clause does not only eliminate the possibility of using diplomatic protection but also relentlessly eliminates the principle without providing plausible alternatives.[53] Briefly, the Calvo doctrine asserts the principle of sovereign equality and contends that foreign investors are entitled to similar or equal treatment as that accorded to nationals and should therefore seek recourse exclusively within domestic courts.[54] The majority of Latin American countries passionately embraced the doctrine and included the clause

[49] Diplomatic protection is regarded as an extraordinary legal remedy. The protection constitutes an appeal by a nation to nation performance of the obligations of one to the other, growing out of their mutual rights and duties. See, MM Whiteman, *Digest of International Law* (Vol 18, US Dept. of State 1967) 1216-17.

[50] Ibid.

[51] EM Borchard, 'Limitations on Coercive Protection' (1927) 21 *Am. J. Int'l.L* 303, 324.

[52] Malcolm N Shaw, *International Law* (5th edn, Cambridge University Press 2003) 734.

[53] Wenhua Shan, 'Is Calvo Dead' (2007) 55 *Am.J.Comp.L* 123, 127.

[54] Malcolm N Shaw, *International Law* (5th edn, Cambridge University Press 2003) 734.

in contracts and within national Constitutions.[55] Writing in 1955, Donald Shea, one of the early writers on the Calvo doctrine noted that;

> It is certain that aliens who establish themselves in a country have the same right to protection as nationals, but they ought not to lay claim to a protection more extended. The rule that in more than one case it has been attempted to impose on American states is that foreigners merit more regard and privileges more marked and extended than those accorded even to nationals of the country where they reside. The principle is intrinsically contrary to the law of equality of nations.[56]

Put differently, the Calvo doctrine postulates that foreign investors should not receive treatment better than that accorded to domestic investors and restrains home states from pursuing investment claims through the ambit of diplomatic protection. Practically, this means that aggrieved foreign investors must seek recourse through domestic courts notwithstanding any doubts about impartiality real or perceived that foreign investors may have against domestic courts. Commenting on the Calvo clause the *Commission in North American Dredging* was of the view that the clause is void to the extent that it limits states from exercising diplomatic protection.[57] However, from the decision of the Commission, it is worth noting that the Commission did not rule out the possibility of states adopting the Calvo clause either in contracts, constitutions or national legislation.[58] Principally, the approach of the Commission favoured circumscribed application of diplomatic protection and the Calvo doctrine. Specifically, according to the decision of the Commission provided aggrieved

[55] Wenhua Shan, 'Is Calvo Dead' (2007) 55 *Am. J.Comp.L* 123, 127. For instance Article 31 of 1933 Constitution of Peru stipulates that property, whoever maybe the owner is governed exclusively by the laws of the *Republic of Peru* and is subject to the taxes charged and limitation established in the laws themselves. The same provision regarding property applies to aliens as well as Peruvians except that no case may the said aliens make use of their exceptional position or resort to *diplomatic protection* (emphasis added). Similar trends are followed in legislation of Ecuador and as well as contracts between the United States and Mexico.

[56] Donald R Shea, *The Calvo Clause: A Problem of Inter-America and International Law and Diplomacy* (University of Minnesota Press 1955) 17-19.

[57] *North American Dredging Company of Texas (USA) v United Mexican States*, 4 R.Int'l Arb. Awards 1926, para 22.The Commission held that the Calvo clause is neither completely valid nor competently invalid. The Commission sought to strike a balance between diplomatic protection and the Calvo clause.

[58] Ibid.

foreign investors exhaust local remedies nothing prohibits home states from exercising diplomatic protection on behalf of foreign investors.[59]

From the foregoing, the following can be concluded as the main features of foreign investment regulation during the colonial period; firstly, African states did not participate in the formation of foreign investment rules because African sovereignty was substituted with that of European powers. On this basis European powers controlled international relations for and on behalf of African states. Substantively, during this critical evolution of customary international law principles regulating the treatment of foreign investors African states did not participate in the formation of these important principles because African states depended on European powers. As will be discussed shortly, it is for this reason that after acquiring independence African states rejected much of the evolving customary law developed during the colonial period.

Predominantly, the investment system was imperialist in nature and designed for the purposes of economically exploiting weak states such as indigenous African states. Secondly, provisions articulated in early FCN treaties inadequately protected foreign investors because FCN treaties aimed essentially at promoting commercial relations as opposed to offering foreign investors favourable protection making diplomatic protection followed with coercive excessive force inevitable.[60] Coupled with this, the prevailing investment regime was engrossed with controversy over the status of the applicable international law principles protecting property rights. Lastly but by no means least, compared with modern investment laws where trade and investment provisions are treated separately, during the colonial period treaties combined both trade and investment provisions in single treaties.

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[59] *Mavrommatis Palestine Concessions Case (Jurisdiction),* 1924 PCIJ (ser. B) No.3 (Aug. 30) 12. The PCIJ noted that, ''it is an elementary principle of international law that a state is entitled to protect its subjects, when injured by acts contrary to international law committed by another state… By taking up the case of its subjects and resorting to diplomatic action, or international judicial proceedings on his behalf, a state is in reality asserting its own rights, its rights to ensure, in the person of its subjects, respect for the rules of international law.'

[60] Kenneth J Vandevelde, *Bilateral Investment treaties: History, Policy and Interpretation* (OUP 2010) 38.

1.2 Post Colonial Era: The Battle for Permanent Sovereignty over Natural Resources

At the outset, it is important to stress that there are remarkable differences between the conduct, attitude and practice of states after the First and Second World War. Shortly after the First World War, developed countries generally practiced protectionist measures aimed at improving economic conditions and preserving the social welfare of their citizens.[61] Particularly, during this period, the United States economy witnessed unprecedented shocks which influenced the attitude and conduct of United States towards issues of trade and investment.[62] The United States adopted restrictive measures in reaction to unpredictable stock markets and a weak economy which was progressing from recession to depression.[63] Indeed, the economic turmoil culminated into the adoption of the infamous Smoot-Hawley tariff bill which hiked average tariffs on imports from 38 to 52 per cent.[64] As a counter reaction towards measures pursued by the United States, other industrialised countries retaliated by imposing trade restrictions coupled with competitive devaluation of their currencies.[65] By and large, the aftermath of the First World War was characterised with aggressiveness and protectionist measures and the prevailing economic circumstances made it virtually impossible for countries to even contemplate a multilateral investment agreement later alone agree on eliminating basic trade barriers.

Lessons from the First World War did not go to waste. At the aftermath of World War II, countries realised that trade liberalisation, integration, and multilateralism are more viable policy options than protectionism.[66] Previous negative policies such as beggar-thy-neighbour inspired the United States and leading European countries to pursue international cooperation and actively

[61] Rondo Cameron, *A Concise Economic History of the World*: *From Palaeolithic Times to the Present* (3rd edn, OUP 1997) 371-80.

[62] Ibid.

[63] Ibid.

[64] Ibid.

[65] Ibid.

[66] Kenneth J Vandevelde, *Bilateral Investment treaties: History, Policy and Interpretation* (OUP 2010) 38-39.

engage in establishing institutions that strengthen trade liberalisation.[67] Indeed, during the Bretton Woods deliberations, discussions about the political, social and economic circumstances resulted in the creation of two institutions—the International Monetary Fund (IMF)[68] and the International Bank for Reconstruction and Development, commonly known as the World Bank. Each of these institutions was allocated a specific mandate; the IMF was tasked with providing oversight to the international monetary system with the view of regulating exchange rates while the World Bank was assigned the responsibility of post war reconstruction.[69]

Furthermore, the Bretton Woods conferences envisaged the establishment of an International Trade Organisation that would formulate and adopt fair trade rules binding on member states.[70] It should be stressed that deliberations at Bretton Woods though presumptuous and overly ambitious at the time were nevertheless helpful in setting the stage for subsequent negotiations. Indeed, the 1947 Havana charter which aimed at establishing rules for international cooperation including trade, investment regulations and economic development can be attributed to the success of the Bretton Woods conferences. With respect to foreign investment protection, articles 11 and 12 of the Havana Charter are illustrative of such efforts and read as follows;

> Article 11
>
> Means of Promoting Economic Development and Reconstruction
>
> 1. Progressive industrial and general economic development, as well as reconstruction, require among other things adequate supplies of capital funds, materials, modern equipment and technology and technical and managerial skills. Accordingly, in order to stimulate and assist in the provision and exchange of these facilities… (b) No

[67] Rondo Cameron, *A Concise Economic History of the World*: *From Palaeolithic Times to the Present* (3rd edn, OUP 1997) 371-80.

[68] The IMF was established in July 1944, when representatives of 45 countries meeting in Bretton Woods, New Hampshire agreed on a framework for international cooperation. The representatives were inspired by events of the First World War to avoid a repetition of the disastrous economic policies that had contributed to the great depression. <http://www.imf.org/external/about/histcoop.htm> accessed 20 May 2012.

[69] France was the first beneficially of the reconstruction process with a loan of $250 million in 1947. The World Bank has retained reconstruction as part of the Bank's overall strategies.

[70] Rondo Cameron, *A Concise Economic History of the World*: *From Palaeolithic Times to the Present* (3rd edn, OUP 1997) 371.

> Member shall take unreasonable or unjustifiable action within its territory injurious to the rights or interests of nationals of other Members in the enterprise, skills, capital, arts or technology which they have supplied…
>
> Article 12
>
> International Investment for Economic Development and Reconstruction
>
> 1.The Members recognize that: (a) International investment, both public and private, can be of great value in promoting economic development and reconstruction, and consequent social progress; (b) The international flow of capital will be stimulated to the extent that Members afford nationals of other countries opportunities for investment and security for existing and future investments; (c) without prejudice to existing international agreements to which Members are parties, a Member has the right: (i) to take any appropriate safeguards necessary to ensure that foreign investment is not used as a basis for interference in its internal affairs or national policies; (ii) to determine whether and, to what extent and upon what terms it will allow future foreign investment; (iii) to prescribe and give effect on just terms to requirements as to the ownership of existing and future investments; (iv) to prescribe and give effect to other reasonable requirements with respect to existing and future investments…(2) Members therefore undertake:…(i) To provide reasonable opportunities for investments acceptable to them and adequate security for existing and future investments and (ii) to give due regard to the desirability of avoiding discrimination as between foreign investments…

It was envisaged that the Havana Charter would be enforced through the International Trade Organisation (ITO) which would int*er alia* make recommendations to promote bilateral or multilateral agreements.[71] Accordingly such subsequent agreements would provide and regulate fair and equitable treatment, skills, capital, arts as well as technology brought from one member country to another.[72] However, these efforts remained wishful thinking. The Havana Charter and the International Trade Organisation never materialised and instead contracting parties agreed to a more restricted General Agreement on

[71] Todd S Shenkin, 'Trade Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Towards a Multilateral Investment Treaty' (1994) 55*U.pitt.L.Rev* 541, 555.

[72] Article 11(2) of the Havana Charter <http://www.worldtradelaw.net/misc/havana.pdf> accessed 20 May 2012.

Tariffs and Trade (GATT).[73] Specifically, contracting parties committed themselves to *inter alia* most-favoured nation treatment,[74] national treatment on internal taxation and regulation, anti-dumping and countervailing measures, valuation for customs purposes, restrictions to safeguard and balance of payments.[75] It should be stressed that the GATT did not contain any substantive principles regulating foreign investment and such omission is not without cause.[76] Including investment regulation under the GATT framework would have been disastrous particularly because contracting parties such as United States would have rejected such provisions and made it further difficult for compromise on basic trade principles.[77] Even more, the experience of ITO was still unprocessed especially the reasons that attributed to its demise in the United States senate. Specifically, three overlapping issues remained of essential concern; domestic politics within the United States notwithstanding the fact that United States was the initiator of the concept, the Korean War and dissatisfaction by members of the business community with provisions related to investment in the ITO Charter.[78]

The GATT though marred with watered down provisions was nevertheless instrumental in giving birth to the World Trade Organisation (WTO). Particularly, the GATT became the principal framework within which subsequent trade negotiations were successfully conducted.[79] However, the failure of the Havana Charter was detrimental towards efforts of having clear rules regulating foreign investment because the Charter included within it the ITO which was negotiated with the intention to regulate key aspects of international economic policy that

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[73] Kenneth J Vandevelde, *Bilateral Investment treaties: History, Policy and Interpretation* (OUP 2010) 41.

[74] For instance the MFN treatment provides that with respect to customs duties and charges…any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

[75] The General Agreement on Tariffs and Trade (GATT 1947).

[76] Kenneth J Vandevelde, *Bilateral Investment Treaties: History Policy and Interpretation* (OUP 2010) 41.

[77] Ibid.

[78] Todd S Shenkin, 'Trade Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Towards a Multilateral Investment Treaty' (1994) 55*U.pitt.L.Rev* 541, 556-557.

[79] Kenneth J Vandevelde, *Bilateral Investment Treaties: History Policy and Interpretation* (OUP 2010) 41.

included *inter alia*, investment, trade, restrictive business practices and primary products.[80] On the basis of the failed Havana Charter, the United States reintroduced FCN treaties similar to those under the colonial era particularly because during this period United States industries had become highly competitive and export oriented.[81] The United States launched its modern FCN treaty program from 1946 up to 1966 and under this framework the United States successfully concluded a total of 21 FCNs.[82]

Equally important, provisions articulated in modern FCN treaties contained more nuanced provisions than those pursued during the colonial era. Essentially, modern FCN treaties combined previous FCN principles with elaborate investment provisions.[83] By and large, the content and structure were closely related though adjusted to suite the United States post World War investment interests.[84] Substantively, the structure of modern FCN treaties included a preamble, general purpose clause, entry, movement and residence of individuals, MFN provision, provision on fair and equitable treatment, liberty of conscience and communication, protection of persons from molestation and police malpractices, protection of acquired property, standing in the courts, right to establish and operate businesses, formation and management of corporations, non-profit activities, acquisition and tenure of property, tax treatment, administration and exchange controls, rules on international trade and customs administration, rules governing the state in business, treatment of ships and shipping, transit of goods and persons, reservations, definitions and general provisions and settlement of disputes.[85]

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[80] Todd S Shenkin, 'Trade Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Towards a Multilateral Investment Treaty' (1994) 55*U.pitt.L.Rev* 541, 555.

[81] Kenneth J Vandevelde, *Bilateral Investment Treaties: History Policy and Interpretation* (OUP 2010) 39.

[82] Ibid 56. Among countries the United States concluded FCN include *inter alia* Greece, Japan, United Kingdom, Ethiopia and Argentina. The United States concluded its last FCN with Togo and Thailand in 1966.

[83] Ibid 49.

[84] Ibid.

[85] Ibid 50-53. For analysis of the United States FCN treaty practice see RR Wilson, *United States Commercial Treaties and International Law* (Hauser Press 1960); Herman Walker, 'Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice' (1956) 5 *AJCL* 229; for an analysis of United Kingdom FCN Treaty practice see Georg Schwarzenberger, *Foreign Investments and International Law* (Stevens & Sons 1969).

Comparatively, modern FCN treaties sought to protect not only investors but also companies and property belonging to investors and further accorded investors national and MFN treatment both in the pre-establishment and post-establishment phases.[86] For instance the FCN treaty between United States and Japan provided that; nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity.[87] Accordingly, nationals and companies shall be permitted within United States and Japan territories to: (a) establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired.[88] The treaty further provided that enterprises controlled by investors of both states whether in the form of individual proprietorships, companies or otherwise, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favourable than that accorded to like enterprises controlled by nationals and companies of either states.[89]

By far the principal innovation of modern FCN treaties was the provision on peaceful settlement of state to state disputes.[90] Quite apart from the colonial period, under modern FCN treaties jurisdiction over investment treaty claims involved the International Court of Justice (ICJ).[91] For example the Japan and

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[86] Kenneth J Vandevelde, *Bilateral Investment Treaties: History Policy and Interpretation* (OUP 2010) 49-51.

[87] Article VII Friendship Commerce and Navigation Treaty and Protocol between the United States of America and Japan, TIAS 2863, April 2, 1965 [Hereafter FCN between United States and Japan].

[88] Ibid.

[89] See also Friendship Commerce and Navigation Treaty between the United States of America and Greece, TIAS 3057,Aug 3,1951[Hereafter FCN between United States and Greece].The FCN between United States and Greece provides that each Party shall at all times accord equitable treatment to the persons, property, enterprises and other interests of nationals and companies of the other party.

[90] Kenneth J Vandevelde, *Bilateral Investment Treaties: History Policy and Interpretation* (OUP 2010) 52.

[91] Ibid.

United States FCN treaty provided that disputes regarding interpretation or application of the treaty which are not satisfactorily adjudicated by diplomacy shall be submitted to the ICJ unless both contracting states agree to settlement by some other peaceful means.[92] Obviously, aggrieved foreign investors had to first exhaust local remedies before requesting home states to refer treaty claims to the ICJ. However, despite this innovation, problems associated with pursuing diplomatic protection on behalf of investors persisted because international law at the time accorded only states the right to international personality and as such only states could refer cases to international arbitration.[93] Moreover, substantively FCN treaties did not contain the possibility of direct investor-state arbitration. Consequently, and as a result foreign investors' espoused claims to home states which undoubtedly had major shortcomings because unfettered discretion of disputes to homes states is subject to abuse and political manipulation.[94]

From the stand point of investors, this system was ineffective and inadequate based on the fact that pursuing investment claims was discretionary and dependent upon state bureaucrats who may not be as enthusiastic about the investment claim as the aggrieved foreign investor. Equally important during this period, the content of international law regulating foreign investment disputes was disputable as there was no multilateral investment treaty articulating acceptable foreign investment rules. More specifically, formerly colonised states universally disputed the premise and content of the international minimum standard and were not prepared to negotiate sensitive issues of national sovereignty.[95] Similarly, modern FCN treaties experienced unprecedented rejection from developing countries and newly independent states which not

[92] Ibid. For instance the FCN between United States and Japan provided that 'Any dispute between the parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means.

[93] See Chapter 5 for detailed discussion on dispute settlement.

[94] Todd S Shenkin, 'Trade Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Towards a Multilateral Investment Treaty' (1994) 55 *U.pitt.L.Rev.*541, 572.

[95] Ibid.

only questioned but also rejected substantive provisions articulated in these treaties.[96]

Developing states were apprehensive about sensitive issues of national sovereignty and allowing unregulated foreign investors entry to domestic markets without adequate safeguards.[97] The unified resistance towards modern FCN treaties was inspired by the allegiance of formerly colonised states to the Soviet Union and Communist China.[98] From this new allegiance, formerly colonised states viewed any form of cooperation with the United States and other western powers as ideologically compromising.[99] Moreover, the general perception among formerly colonised states was that the broad spectrum of political, social, economic and cultural cooperation contained in FCNs was more appropriate for developed countries at the same level of development.[100]

Furthermore, because of the desire to achieve economic independence over natural resources, decolonised states started questioning principles of international law governing foreign investment.[101] As will shortly be discussed formerly colonised states demanded for the establishment of a New International Economic Order included within it political and economic independence.[102] Moreover, throughout formerly colonised states, it increasingly become acceptable that nationalisation aimed at economic reform or reorganisation is legitimate under international law.[103] To this end, interaction between formerly colonised states and foreign investors became characterised by nationalisation and seizure of foreign owned property.[104] At a doctrinal level especially in newly independent African states the common theme among

[96] Ibid.

[97] Ibid.

[98] Ibid 573.

[99] Ibid.

[100] Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Kluwer Law International 1995)10-11.

[101] Jeswald W Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 *Int'l L.* 655, 659-60.

[102] Ibid.

[103] M Sornarajah, *The International Law on Foreign Investment* (2nd edn, Cambridge University Press 2004) 23.

[104] DM Hanink, *The International Economy: A Geographical Perspective* (John Willey & Sons 1994) 235.

African nationalists was the notion that African states should first and foremost seek political freedoms as the impetus to economic realignment.[105] Influential African nationalists like Kwame Nkrumah of Ghana argued fervently for nationalisation of natural resources and postulated that it is possible for state revenue, profits from mines and marketing boards to be shared equally despite the size of the state.[106] With a view of securing equitable distribution of wealth and economic freedom over natural resources, newly independent states launched series of expropriation without according the internationally required level of compensation.[107]

Unsurprisingly, the practice of widespread expropriation without adequate compensation pieced controversy into the perceived standard of compensation. Developed countries insisted on the existence of an international minimum standard protecting duly acquired property rights while formerly colonised states argued against the existence of such a standard.[108] It is imperative to note that insisting on an international minimum standard was inevitable because memory of the Mexican oil nationalisation of 1938 was still fresh.[109] In addition, the Anglo-Iranian Oil company dispute was on going and widespread nationalisation was taking place or seriously being considered.[110] To be sure, newly independent states used the acquired freedom to categorically reject the existence of binding customary international law.[111] Principally, formerly colonised states argued that state practice did not conform to the Hule formulae and as such the standard lacked broad support required for rules to become customarily binding.[112] It should be stressed that the theory of property rights and international law

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[105] Michael Barratt Brown, *Models in Political Economy* (2nd edn, Penguin Books 1995) 193-274.

[106] Ibid.

[107] M Sornarajah, *The International Law on Foreign Investment* (2nd edn, Cambridge University Press 2004) 23.

[108] Jeswald W Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 *Int'l L* 655, 659-61.See also M Sornarajah, *The International Law on Foreign Investment* (2nd edn, Cambridge University Press 2004) 13.

[109] Nico Schrijver, *Sovereignty over Natural Resources, Balancing Rights and Duties* (Cambridge University Press 1997) 5.

[110] Ibid.

[111] Jeswald W Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 *Int'l L* 655, 659-60.

[112] Andrew T Guzman, 'Why LDC's Sign Treaties that hurt them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 *Va. J. Int'l L* 640, 648.

standards postulated by developed countries received widespread condemnation from virtually all newly independent states whether from Africa, Asia and Latin America.[113] By and large, the universal rejection of foreign investment rules was furthered by cold war struggles between the East and West.[114]

Furthermore, struggles between the West and East reinvigorated the work of the NAM which was formed purposely to oppose western dominance.[115] In particular, the NAM became the mouthpiece exerting pressure on Western countries to ensure that newly independent states acquired complete sovereignty over natural resources and attained economic independence.[116] The resistance pursued by the non-aligned movement received widespread support from ideological allies of Soviet Union and Communist China who encouraged newly independent states to reject forces of capitalism and any form of western dominance.[117] Furthermore, formerly colonised states believed that economic independence over natural resources and wealth was an integral component of acquiring other state rights such as the right to self-determination, sovereignty, exploration, exploitation, use and marketing of state natural resources.[118] In addition, it was asserted that these rights and activities are subject to national laws within the exclusive competence of sovereign states.[119]

The movement for permanent sovereignty over natural resources complicated matters for developed countries which heavily depended on raw material from formerly colonised countries.[120] During much of this period, newly independent states pursued ideological sentiments of nationalisation over natural resources with the intention of alienating developed countries.[121] Inevitably, the only

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[113] Michael Barratt Brown, *Models in Political Economy* (2nd edn, Penguin Books 1995) 193-274.

[114] Fath El Rahman and Abdalla El Sheikh, *The Legal Regime of Foreign Private Investment in Sudan and Saudi Arabia* (2nd edn, Cambridge University Press 2003) 3.

[115] Ibid.

[116] Ibid.

[117] Michael Barratt Brown, *Models in Political Economy* (Penguin Books, USA, 2nd edn. 1995) 193-272.

[118] Eejima Nina M, 'Sustainable Development and the Search for a Better Environment, a Better World: A work in Progress' (1999) 18 *UCLA J. Envt'l. L. & Pol'y* 99, 100.

[119] Ibid.

[120] Nico Schrijver, *Sovereignty over Natural Resources, Balancing Rights and Duties* (Cambridge University Press 1997) 4.

[121] Ibid.

recourse available to developed countries was to rally support for the existence of an international minimum standard which culminated in the rhetoric that every state should take into account the interests of other states and of the world economy as a whole when claiming sovereignty over natural resources.[122] Particularly, this ambitious agenda for shared responsibility is reflected in agreements such as the GATT and the World Bank. For instance the GATT envisaged a world economy based on (a) reciprocity and mutual advantage (b) substantial reduction in customs tariffs and other impediments to trade, and (c) eliminating discriminatory practices in international trade.[123] The pursuit of sovereignty coupled with a pro-nationalisation stance precipitated the birth of a declaration of permanent sovereignty over natural resources.

This initiative was spearheaded by Latin American countries led by Chile and Uruguay. It later gained momentum with the support of Soviet Union, Asia and African countries resulting into the adoption of General Assembly Resolution 523 (VI) of 1952.[124] In adopting General Assembly Resolution 523(VI) the alliance of developing countries basically postulated that developed and developing countries are allowed to enter into commercial contracts provided the contracts do not contain economic or political conditions violating sovereign rights including the right to determine plans for economic development.[125] The ideals of this resolution are further elaborated and captured in GA Resolution 626 (VII) which articulated the doctrine of economic self-determination. This resolution was the subject of heated debate and faced strong resistance by the United States and leading European countries; particularly the United States rejected this resolution because the resolution failed to mention obligation of states to recognize the rights of private investors under international law as well as obligations of states contained in treaties and other international agreements.[126]

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[122] Ibid.

[123] The General Agreement on Tariffs and Trade (GATT 1947).

[124] See International Legal Material, *United Nations: General Assembly Resolution on Permanent Sovereignty over Natural Resources* (Vol 6, America Society of International Law 1967) 147-149.

[125] Ibid Article 1(b) (ii) General Assembly Resolution on Permanent Sovereignty over Natural Resources 523 (VI) 1952.

[126] For detailed analysis of this resolution see Stephen M Schwebel, 'The Story of the U.N's Declaration on Permanent Sovereignty over Natural Resources' (1963) 49 *A.B.A. J* 463.

The resilience of developing countries saw the adoption of GA Resolution 1314 (XIII) of 1958. Specifically, this resolution was a victory for developing countries as it effectively recognised that the right to self-determination includes permanent sovereignty over natural resources. On the basis of this resolution, a Commission on Permanent Sovereignty over Natural Resources was established made up of Afghanistan, Chile, Guatemala, the Netherlands, the Philippines, Sweden, Soviet Union, United Arab Republic and the United States. The commission was tasked with ascertaining the relationship between permanent sovereignty over natural resources with the right of self-determination. The work of the Commission resulted into the adoption of GA Resolution 1803 (XVII) which effectively declared permanent sovereignty over natural resources. Essentially, Resolution 1803 (XVII) enshrined permanent sovereignty over natural wealth and resources as an inherent component of the right to self-determination.[127] However, although the Resolution was adopted, this was not without heated debate in three sessions of the United Nations Commission on Permanent Sovereignty over Natural Resources followed by the thirty second session of the Economic and Social Council and the seventeenth session of the General Assembly.[128]

During much of the deliberations, developed states unwaveringly opposed many draft provisions arguing that the spirit of the resolutions would enable developing countries to breach previously agreed contracts and concessions undertaken during the colonial era. Indeed, the wording of Resolution 1803 (XVII) shows a delicate balancing of interests between developed and developing countries. Moreover, it should be noted that consensus of developed countries on sensitive issues such as expropriation, compensation, observance of investment agreements illustrates general understanding of earlier rules governing foreign investments.[129] Further, the adoption of numerous resolutions and especially the adoption of the Resolution on Permanent Sovereignty over

[127] United Nations General Assembly Resolution 1803 (XVII) of 14 December 1962. Specifically see articles 1 to 8 which highlight the right to self-determination as a cardinal component of the resolution.

[128] For a detailed report of the work of the Secretariat see The Status of Permanent Sovereignty over Natural Wealth and Resources, (Study by the Secretariat, UN Pub. Sales No. 62. V.6. 1962).

[129] Stephen M Schwebel, 'The Story of the U.N's Declaration on Permanent Sovereignty over Natural Resources' (1963) 49 *A.B.A. J* 463, 468-269.

Natural Resources cannot be underestimated not only in the content the various resolutions articulated but also the successful convergence of developing countries along the same ideological reasoning demonstrates systemic rejection of previous rules regulating foreign investors. This thesis will not go into a detailed discussion of the resolution because a lot of ink has been dedicated to the substance of this resolution.[130] Generally, it is critical to stress the importance of paragraph 4 and 8 of Resolution 1803 (XVII) which provide as follows:

> 4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be *paid appropriate compensation,* in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication (emphasis added).
>
> 8. *Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith*; States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution (emphasis added).

It should be noted that although Resolution 1803 (XVII) attempted to balance competing interests between developed and developing countries, by and large, developed countries won the argument of the day. Specifically, the possibility of nationalisation of foreign property was accepted but with a caveat for appropriate compensation. Obviously, one can engage in semantics about whether compensation provided for under paragraph 4 above means prompt, adequate and effective compensation as articulated by Western scholars. Moreover, this can be followed with arguments whether foreign investors are entitled to no more than compensation stipulated under national laws-a position supported by Latin American countries, African states and Communist States.

[130] For detailed discussion see Nico Schrijver, *Sovereignty over Natural Resources, Balancing Rights and Duties* (Cambridge University Press 1997).

However, what is evidently clear and based on the evolution of foreign investment rules during the colonial period such arguments would be flawed. At the heart of paragraph 4 is a silent reaffirmation of the international minimum standard advanced by developed states and rejected by developing states. Contextually, paragraph 4 should be read together with paragraph 8 which sought to reaffirm the credence of *pacta sunt servanda* as a binding principle of international law. Particularly, paragraph 8 imposes obligations on developing countries to respect commitments in good faith and ensures that developing countries although previously colonised are bound by contracts and concessions entered into with colonial powers. Inevitably, according to paragraph 8, this includes international agreements signed during colonialism despite the fact that colonised states did not have international personality. More broadly, the resolution remains aspirational in its efforts to clarify rules regulating foreign investment and the development of customary international law.

1.3 From Permanent Sovereignty over Natural Resources to Demands for a New International Economic Order

The African continent played a pivotal role in the demands for a new international economic order (NIEO) and in the creation of international institutions to articulate such demands. However, before situating Africa's specific input, a few preliminary remarks are important highlighting the state of Africa in the period leading to decolonisation and the silent features influencing Africa's participation in demanding for NIEO. As a starting point, it is worth mentioning that 1960's are perhaps the most significant years in the history of contemporary Africa because this is the period when the African continent re-asserted her role and place in international law.[131] Even more, it was during this period that majority of African states acquired political independence and joined the league of sovereign states.[132] During the early years of decolonisation, there was widespread faith that political independence and legal equality would

[131] A Akinsanya, 'Host Government's Responses to Foreign Economic Control: The Experience of Selected African Countries' (1981) 30 *Int'l & Comp. L.Q* 766, 769; see also NS Rembe, *Africa and the International Law of the Sea* (Sijthoff & Noordhoff Publishers 1980) 5.

[132] Ibid. For instance in 1960 alone, 15 African states acquired independence, i.e. Benin, Cameroon, Central Africa Republic, Chad, Republic of Congo, Gabon, Ivory Coast, Malagasy Republic, Mali, Mauritania, Niger, Nigeria, Senegal, Somali republic, Togo, Upper Volta and Zaire.

permit decolonised African states achieve autonomy and economic development.[133] However, it was soon realised by African leaders that obstacles to self-determination were more formidable than had been previously anticipated.[134] Particularly, despite acquiring independence the African continent remained impoverished and by far the most underdeveloped of Third World countries.[135]

As correctly observed by numerous scholars, underdevelopment in the 1960's throughout decolonised Africa can be partly attributed to the legacy of colonialism and the political institutions inherited after the colonial period.[136] For instance, in the aftermath of colonialism Britain ensured that even though African states under British protectorate achieved political independence African states would nevertheless be locked into a process of political dependency.[137] Specifically, formerly colonised African states under British control remained politically dependent on Britain because the institution of government under which the transition to legal independence was pursued depended on the British Westminster model of government.[138] Obviously, given the structural dependence on former colonial powers and underdevelopment, newly decolonised African countries with the support of the NAM that represented Third World political and economic interests started demanding not only for political sovereignty but also complete economic liberation.

More broadly, the gradual decolonization of African states coincided with and indeed catalysed the take-off stage of the Third World movement beyond the foundations laid at the 1955 Asian-African Conference in Bandung.[139] At the first Asian-African Conference in Bandung, participants of the conference included 23 Asian countries and 6 African countries i.e. Ethiopia, Egypt, Ghana, Liberia,

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[133] Karin Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (1998) 16 *Wis. Int'l L. J* 353, 362.

[134] Ibid.

[135] Hugh M Arnold, 'Africa and the New International Economic Order' (1980) 2 *Third World Quarterly* 295, 295.

[136] Ibid 296.

[137] Linus A Hoskins, 'The New International Economic Order: A Bibliographic Essay' (1981) 3*Third World Quarterly* 506, 506.

[138] Ibid.

[139] Ali A Mazrui and C Wondji (eds), *UNESCO General History of Africa since 1935* (Vol.VIII, UNESCO 1993) 830.

Libya and Sudan.[140] Despite Africa's low representation at the conference because at that time majority of African states were still under colonial administration, the contribution of participating African states was significant; Egypt's Gamal Abd al-Nasser was influential during the drafting committees, leading one analyst to label him as ''the hero of Bandung' and indeed this paved the way for his ''rapid emergence as one of the most prominent architects and leaders of the burgeoning Third-World movement''.[141]

Similarly, Africa's contribution and influence at Bandung is demonstrated in the importance the conference assigned to human rights and self-determination of newly decolonized African states.[142] It is on this basis that as more African countries acquired independence, the NAM grew in importance because African states provided the NAM the numerical strength to legitimately express third world concerns within the Third-World framework.[143] Aside from the African continent playing host to summits of the NAM, from the 1960's onwards, African countries represented the majority of the participants. Specifically, starting with the 1964 Cairo Non-Aligned Summit out of 47 participating countries 29 were African. At the 1970 Lusaka Summit out of the 53 participating countries 32 were African states. During the 1973 Algiers Summit out of the 75 participating countries 40 were African states. At the 1976 Colombo Summit out of 85 participating countries 47 were African states. Finally in the 1979 Havana Summit out of the 92 participating countries 50 were African states.[144]

Aside from strengthening the membership base of the Non-Aligned Movement in the most critical years, Africa provided some of the most instrumental leaders that shaped the direction the movement followed to articulate third world concerns. For example, Ghana's Kwame Nkrumah was one of the founding members of the NAM and significantly influenced newly independent African states to join the movement and unite under a common agenda.[145] Similarly, other African leaders such as Kenneth Kaunda of Zambia, Julius Nyerere of

[140] Ibid 839.
[141] Ibid.
[142] Ibid.
[143] Ibid.
[144] Ibid 863.
[145] Ibid 864.

Tanzania through transforming the NAM ensured that African developments and concerns bore profoundly on the movement's purpose and direction.[146] Most importantly, Julius Nyerere of Tanzania provided the intellectual and ideological position through which third world countries could express demands for the establishment of a NIEO.[147] Furthermore, Africa was instrumental to the birth of the NAM through hosting the preparatory meeting of Representatives of Non-Aligned Countries for the Belgrade Summit.[148] More importantly, it is also at this Cairo meeting of 1961 that the movement proposed the First United Nations Conference on Trade and Development within which the Group of 77 was born of which majority of states were African countries.[149] Subsequently after the Belgrade Summit, Cairo hosted the July 1962 Conference on the Problems of Developing Countries and among the eleven sponsors seven were African countries.[150]

Among the resolutions of the Cairo conference included the Cairo Declaration of Developing Countries which called for an international conference within the United Nations framework on ''all vital questions related to international trade, primary commodity trade and economic relations between developing and developed countries''.[151] It is after the Cairo solidarity that developing countries gained momentum to numerically influence the United Nations General Assembly to annex the Declaration of seventy five developing countries to the United Nations General Assembly Resolution 1897(XVII) which called for the creation of the United Nations Conference on Trade and Development (UNCTAD).[152] African states actively participated and rapidly signed the Declaration.[153] The passage of the Declaration was not without stiff resistance from developed countries. The passage of the Declaration portrays how African states used numerical

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[146] Ibid.

[147] Ibid.

[148] Laurent Zang, 'The Contribution of African Diplomacy to the Non-Aligned Movement and the Group of 77' (1998) 1 *African Journal of International Affairs* 1, 5.

[149] Ibid.

[150] Ibid.

[151] UNCTAD, *UNCTAD: A Brief Historical Overview* (UNCTAD Secretariat, UNCTAD/GDS/2006/1) 3.

[152] Laurent Zang, 'The Contribution of African Diplomacy to the Non-Aligned Movement and the Group of 77' (1998) 1 *African Journal of International Affairs* 1, 6.

[153] Ibid.

dominance to influence international economic issues favourable to the African continent. Generally, considering the stiff resistance developed countries mounted against the UNCTAD Declaration, it is plausible to note that without Africa's active participation the General Assembly would never have adopted the Declaration. More broadly, during much of the NAM and General Assembly deliberations, the attitude adopted by African states towards various international law issues was influenced by a number of factors that include *inter alia*, Africa's historical background especially the colonial past, the negative impact of traditional international law on African states, Africa present preoccupation with national reconstruction, and the existing disparity in wealth, trade and power between developed and developing countries.[154] Also, African countries identified traditional international law with the past order and viewed existing international rules as a detriment to the promotion of African national interests and international personality.[155]

It is the deep-rooted resentment towards customary international law principles developed during Africa's colonisation that influenced Africa's decisive participation in shaping the agenda of the Non-Aligned Movement. Indeed, this subsequently influenced African states to use their numerical dominance within the United Nations General Assembly[156] to demand for the establishment of a New International Economic Order (NIEO). Outside the corridors of the United Nations, African municipal investment laws also witnessed rapid transformation because majority of African states believed that investment laws created the desired framework necessary for the implementation of development plans.[157] Given this, it is unsurprising that in decolonised Africa of all the existing laws, investment laws were the first set of laws to undergo detailed revision.[158]

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[154] NS Rembe, *Africa and the International Law of the Sea* (Sijthoff & Noordhoff Publishers 1980) 9.

[155] Ibid 9-10.

[156] There was no better forum to take the battlefield for a NIEO than the United Nations. The United Nations is premised on the ideal of sovereign equality of all states. According to Article 2 of the UN Charter all sovereign states are equal irrespective of size, resources and geographical location.

[157] A Akinsanya, 'Host Government's Responses to Foreign Economic Control: The Experience of Selected African Countries' (1981) 30 *Int'l & Comp. L.Q* 766, 770.

[158] Ibid.

As African states implemented changes in national investment laws, the African continent at an international level with the alliance of other formerly colonised states used the newly acquired freedom to question the status quo and demanded for balanced international rules. Specifically, African states and other third world countries asserted that although the existing economic order worked well for developed countries this was to the detriment of developing states.[159] This argument was not without merit; for example in early 1950's developing countries accounted for 32 per cent of world trade and by the end of 1972 excluding oil exporting countries developing countries accounted for 10% of world trade.[160] By contrast, from 1952 to 1972 the GDP of developed countries raised from $1,250 billion to $ 3,070 billion about three and a half times the aggregate GDP of developing countries.[161]

Furthermore, exploration and regulation of oil products was dominated by multinationals which intensified sentiments of nationalism among oil producing countries.[162] Particularly distressing for oil producing countries was the fact that multinationals controlled pricing policies, refinement, transport and marketing and earned exorbitant profits for themselves at the expense of oil producing countries.[163] In addition, multinationals through the support of home states imposed high prices for oil products and provided quotas for national companies participating in the industry.[164] As a result of the severe restrictions, oil producing countries started demanding effective control and formed the Organisation of the Petroleum Exporting Countries (OPEC).[165] After inception, OPEC set in motion an agenda of reappraising existing regulations, public awareness campaigns and started the first oil revolution defining new parameters for oil related policies.[166] The Middle East war in October 1973

[159] Kamal Hossain (ed), *Legal Aspects of the New International Economic Order* (Frances Pinter 1980) 2-5.

[160] Ibid.

[161] Ibid.

[162] Ibid.

[163] Kamal Hossain, *Law and Policy in Petroleum Development, Changing Relations between Transnationals and Governments* (Frances Pinter 1979) 6.

[164] Ibid 10.

[165] Ibid.

[166] Ibid 10-12.

became the catalyst to unilaterally raise prices, impose embargoes and take total control of the oil industry and production line.[167]

The Middle East power dynamics inspired developing countries interested in petroleum exploration as well as nationalisation to demand more national ownership which in turn refocused nationalisation from theoretical rhetoric to actual implementation.[168] It was at the height of the oil crisis and the prevailing resistance over foreign dominance that the solidarity of formerly colonised states through the United Nations General Assembly passionately demanded for the establishment of a NIEO. This resulted into the adoption without a vote the Declaration on the establishment of NIEO and a programme of action for its implementation. The demands for nationalisation and the basis for a NIEO are elaborated in paragraph 4 of the declaration and stipulate as follows:

> 4. The new international economic order should be founded on full respect for the following principles… (e) Full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right…

Developing countries followed this strongly worded declaration with a programme of action for its implementation which included the following important provisions:

> 1. Raw materials
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> All efforts should be made: (a)To put an end to all forms of foreign occupation, racial discrimination, apartheid, colonial, neo-colonial and alien domination and exploitation through the exercise of permanent sovereignty over natural resources; (b)To take measures for the recovery, exploitation, development, marketing and distribution of natural resources, particularly of developing countries, to serve their national interests, to promote collective self-reliance among them and to strengthen mutually beneficial international

[167] Ibid 21.

[168] Ibid.

> economic co-operation with a view to bringing about the accelerated development of developing countries; …
>
> 3. General Trade
>
> All efforts should be made… (b)To be guided by the principles of non-reciprocity and preferential treatment of developing countries in multilateral trade negotiations between developed and developing countries, and to seek sustained and additional benefits for the international trade of developing countries so as to achieve a substantial increase in their foreign exchange earnings, diversification of their exports and acceleration of the rate of their economic growth.
>
> VIII. Assistance in the Exercise of Permanent Sovereignty of States over Natural Resources
>
> All efforts should be made: (a) To defeat attempts to prevent the free and effective exercise of the rights of every State to full and permanent sovereignty over its natural resources; (b)To ensure that competent agencies of the United Nations system meet requests for assistance from developing countries in connexion with the operation of nationalized means of production.

The declaration establishing a NIEO and its programme of action are a reflection of the thinking and influence of the third world movement. Specifically, the passage of the Declaration demonstrates the robust efforts by African countries; Asia and Latin American countries to repeal laws on expropriation after realising that political independence does not necessarily translate into economic independence.[169] Despite the legitimate demands of African states and the third world coalition, it is important to stress that the demands articulated in the NIEO are inherently contradictory and unbalanced because the advancement of permanent sovereignty over natural resources, nationalisation and sovereignty was pushed to the extreme. Specifically, third world countries through adopting the declaration of a NIEO attempted imposing a new economic order that accords developing countries rights without obligations. In addition, the declaration of NIEO provided insufficient protection to foreign investors and unilaterally eliminated the possibility of applying the international minimum standard. Given the above, it is not surprising that developed countries rejected claims advanced under the NIEO framework.

[169] For detailed discussion on the controversial nature of expropriation see Chapter 3.

Aside from pressing for the establishing of a NIEO third world countries using numerical superiority further pressed for the adoption of the Charter of Economic Rights and Duties of States.[170] The Charter envisaged creating a new system of international economic relations based on equity, sovereign equality and interdependence of the interests of developed and developing countries. Unlike the Declaration for a NIEO, the Charter intended creating binding legal rules regulating economic relations between states. The Charter was overwhelmingly criticised and rejected by developed countries with a vote of 120 in favour majority of whom are African states, 6 developed countries voted against (Belgium, Germany, Luxembourg, United Kingdom and United States) and 10 states abstained (Australia, Canada, France, Ireland, Israel Japan, Netherlands, Norway and Spain).[171]

The Charter is a broad statement of principles covering *inter alia* the following; international trade, international economic co-operation, development of natural resources, industrialisation, sovereign equality of all states, transfer of technology, peaceful settlement of disputes, peaceful coexistence and non-aggression.[172] Whether the Charter constitutes customary international law rules regulating foreign investment is beyond the scope of this thesis. However, the voting pattern and circumstances surrounding the adoption renders such an argument doubtful. Article 2 regulating foreign investment serves as an illustration. It reads as follows;

> 2. Each State has the right:
>
> (a) To regulate and exercise authority over foreign investment within its national jurisdiction in *accordance with its laws* and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment…
>
> (c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant

[170] UN Documents, United Nations General Assembly Resolution 3281(XXIX): Charter of Economic Rights and Duties of States (A/RES/29/3281, 12 December 1974).

[171] UNCTAD, *Proceedings of the United Nations Conference of Trade and Development Third Session* (Vol.1, Report and Annexes 1A UN Pub., Sales NO: E.73.II.D4).

[172] Ibid.

> laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

The purpose of article 2 is to replicate the famous Calvo doctrine that was contentious but popular among Latin American nations. Generally, it should be emphasised that the adoption of Article 2 demonstrates remarkable progress by Latin American nations in converging support among decolonised states of Africa and Asia for this controversial doctrine. Substantively, the unambiguous support for Article 2 by virtually all developing countries clearly illustrates that the Calvo doctrine was popular among African and Asian decolonised states. As mentioned above the adoption of article 2 shows that at a doctrinal level third world countries preferred national laws to supersede international law. However, doctrinally the standard of compensation adopted by the Charter was suspicious because the standard not only incorporated national laws but also overstated the interests of sovereign states above foreign investors. Furthermore, the Charter limited investor-state disputes to national jurisdiction without providing room for recourse to international arbitration. Similarly, although the Charter contributes to the evolution of foreign investment rules, the language of the Charter is one sided and does not balance the interests of developing countries *vis-a-vis* interests of developed states. More broadly, the Charter demonstrates the importance the United Nations played in serving as a platform for newly independent states as well as the unified position of formerly colonised states in demanding for investment rules favourable to national interests of third world countries.

1.4 From New International Economic Order Demands to the Birth of Bilateral Investment Treaties

The difficulty of concluding a binding multilateral investment framework and uncertainties about the scope and content of customary international law protecting foreign investors resulted in the pursuit of BITs.[173] More broadly, failed efforts towards multilateralism occurred alongside heated ideological differences between third world countries and Western states as espoused in the numerous United Nations declarations. This in turn stimulated developed countries seeking investment opportunities overseas to pursue such efforts at a bilateral level. More importantly, the successful adoption of numerous UN resolutions questioning the content of foreign investment rules illustrates difficulties of achieving consensus under a binding multilateral investment framework. Indeed, prior to BITs taking shape, there was attempt in the early 1950's to establish a magna charter for the protection of foreign investment containing binding standards and a permanent tribunal to enforce the Charter with authority to impose economic sanctions both for violating member states and non-signatory states.[174]

Unsurprisingly, like other previous attempts in the United Nations, the Abs-Shawcross Draft was not adopted because the Charter lacked sufficient backing from developing countries.[175] However, this resulted in a second attempt under the auspices of the Organisation for Economic Cooperation and Development-a forum of capital exporting countries.[176] Unfortunately, the second attempt was also unsuccessful because of substantive differences between developed and developing countries about the content of international law regulating the protection of foreign investors.[177] The underlying differences aside, elsewhere Germany was healing from losses suffered during World War II and was in need of overseas foreign revenue earnings.[178] Against this backdrop, Germany initiated the first BIT in 1959 through the signing of the Pakistan-Germany BIT and thereafter ratified in 1962 its first BIT with Dominican Republic.[179] Specifically, Germany opted for BITs as a mechanism of negotiating favourable investment

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[173] United Nations Centre on Transnational Corporations, *Bilateral Investment Treaties* (United Nations 1998) 1.

[174] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008)18.

[175] Ibid.

[176] Ibid 18.

[177] Ibid 19.

[178] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 18.

[179] Ibid. See also Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Kluwer Law International 1995) 267.

protection so as to regain foreign investment earnings lost in negotiated settlements for its role in violating rules of international law.[180] Germany anticipated that by concluding BITs offering German investors adequate protection this would encourage German investors to undertake overseas foreign investment risks notwithstanding foreign investment losses suffered during the Second World War.[181]

The successful conclusion of BITs between Germany and developing countries inspired enthusiasm among European countries searching for overseas investment opportunities to pursue similar initiatives.[182] Even more, the success of Germany BITs was a relief to several European countries that had witnessed aggressive resistance to the international minimum standard, heated debates in the United Nations General Assembly and lukewarm support for United States FCN treaties. Accordingly, Switzerland concluded its first BIT with Tunisia in 1961, France with Tunisia in 1972, Sweden with Ivory Coast in 1965, Denmark with Madagascar in 1965 and Italy with Guinea in 1964.[183] As rhetoric for sovereignty and nationalisation deepened as well as continuous erosion of customary international law principles through adoption of numerous United Nations resolutions, the signing of BITs intensified.[184] More industrialised countries such as the United Kingdom joined the BIT movement in 1975 followed by Japan in 1977 and finally the United States in 1977.[185]

Generally, developed countries pursued the BIT option for purposes of obtaining superior legal protection for their home investors to circumvent protection accorded under domestic laws of capital importing states. As noted above, it was hoped that through offering foreign investors favourable legal protection this would incentivise foreign investors to invest in developing countries. On the other hand, developing countries concluded BITs as a means of attracting foreign

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[180] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 18.

[181] United Nations Centre on Transnational Corporations, *Bilateral Investment Treaties* (United Nations 1998) 8.

[182] Kenneth J Vandevelde, *Bilateral Investment treaties: History, Policy and Interpretation* (OUP 2010) 55.

[183] Ibid.

[184] United Nations Centre on Transnational Corporations, *Bilateral Investment Treaties* (United Nations 1998) 9.

[185] Ibid.

investors who are normally swayed by international protection and sceptical about national laws. In essence, developing countries pursue BITs for two intertwined objectives i.e. developing countries hope that BITs will offer sufficient legal protection to foreign investors who will subsequently be attracted to make long term financial investments. As previously noted, whether the reciprocal relationship envisaged by BITs is attainable remains doubtful. However, it should be noted that historically developed states found the BIT option attractive because BITs safeguarded against uncompensated expropriation which in turn minimised the possibility of foreign investors losing foreign investment undertakings but also consensus on a multilateral investment agreement was unattainable. Lastly, BITs as international agreements institutionalised the possibility for direct investor state arbitration through international arbitral tribunals.[186]

Originally BITs were concluded between developed and developing countries although since the late 1980's and especially in the 1990's the pattern changed to also include BITs concluded between developing countries themselves.[187] However, despite the change in pattern significantly BITs remain largely between a developed and a developing country.[188] Over the years the number of BITs has steadily increased, in the 1990s alone the number of BITs quintupled from 385 at the end of the 1980s and increased to 1,857 at the end of the 1990s.[189] The increase is attributed to the prevailing political, social and economic circumstances of the early 1990s and particularly during this period, the world witnessed collapse of the Soviet Union, unprecedented economic growth by the Asian tigers[190] or newly industrialising countries and reduction in

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[186] Federal Republic of Germany and Burundi Treaty Concerning the Encouragement and Reciprocal Protection of Investment (No. 26278, 8 Nov 1984) [Hereafter Germany-Burundi BIT]. Article 10 of the Germany-Burundi BIT stipulates that divergences between the contracting parties concerning the interpretation or application of the present treaty should as far as possible be settled by the governments of the two contracting parties. If a divergence cannot thus be settled, it shall…be submitted to an arbitral tribunal. The arbitral tribunal shall be constituted ad hoc.

[187] United Nations Conference on Trade and Development, *Bilateral Investment Treaties 1959-1999* (UNCTAD/ITE/IIA/2, 2000) 1-2.

[188] This trend is most evidenced in African treaty practice whereby majority of African BITs are still concluded between an African state and a developed country.

[189] Ibid.

[190] The Asian Tigers is a term used to depict the success of a number of South East Asian countries notably Singapore, Hong Kong, Taiwan and South Korea.

foreign aid.[191] More significantly, the collapse of the Soviet Union and success of the Asian tigers augmented in favour of liberalism as the best strategy for economic growth and prosperity.[192] The economies of Asian tigers grew at a rate almost three times that of Latin American countries and about twenty five times that of African countries.[193]

The remarkable growth experienced during this period persuaded advocates of liberalism that negative growth in developing countries resulted from excessive state intervention in the market place.[194] Accordingly, free market theorists opined that developing countries needed to pursue policies that stimulated increased efficiency and economic growth which included *inter alia* policies promoting competitive free markets, privatising public enterprises, eliminating barriers to foreign investment, removing regulations and price distortions.[195] The liberal school of thought was endorsed by the IMF and the World Bank and in turn this dominated economic policies designed for developing countries.[196] Furthermore, economists at the IMF and the World Bank conditioned financial support to developing countries based on economic policies that conformed to the ideals of the Washington Consensus.[197] To this end, developing countries hard-pressed with economic uncertainties and without any better option subscribed to liberal economic policies.[198] As a result, developing countries signed investment treaties as one mechanism of attracting foreign investment and show allegiance to free market advocates.[199] In Africa, the collapse of the Soviet Union meant that Africa leaders no longer had to balance competing ideological differences between socialism and capitalism.[200] Comparatively,

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[191] Wayne E Nafziger, *The Economics of Developing Countries* (3rd edn, Prentice Hall 1996)106-10.

[192] Ibid.

[193] World Bank, *The East Asian Miracle: Economic Growth and Public Policy* (OUP 1993) 2.

[194] Wayne E Nafziger, *The Economics of Developing Countries* (3rd edn, Prentice Hall 1996)106-10.

[195] Ibid.

[196] Ibid.

[197] Ibid 110.The Washington Consensus is a compact of economic policies supported by IMF, World Bank, US Government, and other major Bank-IMF shareholders and high-income OECD governments.

[198] Ibid.

[199] Ibid.

[200] Jeremy I Levitt, *Africa: Mapping New Boundaries in International Law* (Hart Publishing 2008) 278-9.

unlike Latin American countries, Africa leaders easily embraced the Washington consensus without major resistance. The World Bank's intense support for liberalism is conservatively based on its earlier stance towards demands for PSNR by developing countries.[201]

Indeed, despite relentless debates for permanent sovereignty, the World Bank enthusiastically supported Aron Broches initiative augmenting protection of foreign investors.[202] This initiative materialised in 1965 when the Convention for the Settlement of Investment Disputes between States and Nationals of other States (ICSID) was brought for ratification and signature.[203] The ICSID Convention become operational on 14 October 1966 and contained within it the establishment of an International Centre for the Settlement of Investment Disputes and as will be exhaustively discussed in chapter 5, the ICSID framework was deemed as a unique innovation for promoting international investment and cooperation among poorer nations.[204] Specifically the Convention introduced the following innovations; (i) investors acquired the right to directly bring investment disputes against sovereign states,[205] (ii) contracting states were prohibited from using diplomatic protection,[206] (iii) international law was the applicable law for investment disputes, (iv) exhaustion of local remedies was removed, (v) awards by the tribunal were binding and not subject to any appeal.[207]

During the early years, provisions dealing with settlement of disputes under ICSID appeared only as standard clauses in international investment contracts.[208] However, as momentum for BITs and investment agreements intensified, ICSID arbitration clauses become the standard blueprint. As will be discussed in

[201] Charles Barbour and George Pavlich (eds), *After Sovereignty on the Question of Political Beginnings* (Routledge Cavendish 2010) 106-7.

[202] For a full discussion see Christoph H Schreuer and Others, *The ICSID Convention: A Commentary* (Cambridge University Press 2009) 2-9.

[203] Ibid 3.

[204] See Chapter 5 for detailed discussion.

[205] Article 25(1) of the ICSID Convention.

[206] Article 27(1) of the ICSID Convention

[207] Article 53(1) of the ICSID Convention.

[208] See generally Elihu Lauterpacht, 'Foreword' in Christoph H Schreuer and Others, *The ICSID Convention: A Commentary* (Cambridge University Press 2009); for detailed discussion see Chapter 5 of this thesis.

Chapter 5, direct investor-state arbitration is valuable from the point of view of investors because it minimises political complications involved in the use of diplomatic protection. In essence, through relying on BITs, investors have the right to directly bring investment claims against sovereign states. For instance from 1987, the year of the first investor-state dispute based on a BIT up to April 1998, investors brought 14 cases against host states before the ICSID arbitral framework.[209] Over the years, foreign investors have maximised the dispute resolution mechanism and by the end of 2011, treaty based disputes totalled 369 cases.[210] Presently, over two thousand BITs have self-contained clauses submitting jurisdiction of investment disputes under the ICSID arbitral system.[211] The raise in investor state disputes can be attributed to exponential growth in BITs that elevated the jurisdiction of investment disputes from domestic courts to international arbitration.

The acceptance of investment arbitration is exceptional especially from the perspective of Latin American nations that resisted previous attempts in support of the Calvo doctrine. However, lately there seems to be a breakdown in the Washington Consensus with continuous claims that arbitral tribunals have expansively interpreted provisions contained in investment treaties.[212] The backlash is akin to the numerous UN deliberations and resolutions resenting the content of international law and the avowed support for the Calvo doctrine. If we are to go by the current denunciation of ICSID Convention by Ecuador, Bolivia and Venezuela,[213] the present resentment towards international arbitration suggests history may be repeating itself within a short period. Although, it is premature to write the obituary of modern investment arbitral system, the denunciation sheds light about the feelings of countries towards international investment arbitration. As will be discussed in subsequent parts of this thesis

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[209] UNCTAD, *Latest Development in Investor-State Dispute Settlement* (Issue note No.1, UNCTAD April 2012) 3 <http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10_en.pdf> accessed 20 May 2012.

[210] ICSID, *The ICSID Caseload-Statistics Issue 2012-1*(ICSID Secretariat 2012) 7.

[211] UNCTAD, *World Investment Report: Non-Equity Modes of International Production and Development* (UN Pub. Sales No. E.11.II.D.2, 2011) 100.

[212] For a quick synopsis of varying opinions see Michael Waibel and others, *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010).

[213] Article 71 of the ICSID Convention stipulates that contracting states may denounce the convention by written notice. On the basis of this article Ecuador denounced the convention on 7th July 2009, Bolivia on May 2007 and Venezuela on January 24, 2012.

through an in-depth analysis of substantive provisions of African BITs, it is only a matter of time before African countries join the chorus of resistance.

Aside from BITs, a number of regional agreements have been concluded between developed and developing countries as well as between developing countries. However, it should be noted that there are remarkable differences between provisions included in regional agreements and those included in BITs. Specifically, regional agreements contain both trade and investment provisions presumably because of the need for market access and elimination of non-tariff barriers across the regional trading block. For instance, in 1994 the United States, Canada and Mexico concluded the North American Free Trade Agreement (NAFTA) which contains trade and under Chapter 11 investment provisions.[214] Other regional agreements include, the Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement,[215] the Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA),[216] the Unified Agreement for the Investment of Arab Capital in the Arab States[217] and the Energy Charter Treaty.[218]

It should be stressed that the approach of African states in the 1960's and 1970's sharply differs from existing practice of African states. Specifically, in the 1960's and 1970's African states articulated views as one bloc and actively participated in deliberations of the Non-Aligned Movement. Indeed, African states provided both the intellectual leadership as well as the required numerical strength at the United Nations General Assembly which provided broad support for declarations demanding a New International Order and the establishment of institutions such as UNCTAD. As noted above, throughout this period, the prevailing view in African states was a deep resentment towards customary international law principles. This resentment lead majority of African states to implement

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[214] NAFTA, North American Free Trade Agreement <http://www.nafta-sec-alena.org/en/view.aspx?conID=590&mtpiID=142> accessed 20 May 2012.

[215] ASEAN Comprehensive Investment Agreement, Cha-am Thailand, 26 February 2009, <http://www.aseansec.org/22244.htm> accessed 20 May 2012.

[216] Common Market for Eastern and Southern Africa (1993) <http://www.comesa.int> accessed 20 May 2012.

[217] Unified Agreement for the Investment of Arab Capital in the Arab States (1980) <http://www.trans-lex.org>accessed 20 May 2012.

[218] The Energy Charter Treaty, (1994) < http://www.encharter.org> accessed 20 May 2012.

national investment laws contradicting customary law standards on expropriation. Considering, the fierce resistance mounted by African states rejecting international investment rules, subsequent practice of African states is surprising. The rhetoric pursued by African states has not only subdued through undertaking BITs as a mechanism of attracting foreign investors but also African states have remained generally passive and easily accepted treaty standards. In fact clauses of modern BITs as will shortly be seen in subsequent parts of this thesis offer investors substantive protection above that articulated by traditional international law. For instance, in addition to the international minimum standard of treatment, modern BITs provide investors with rights such as fair and equitable treatment, full security and protection, national treatment and MFN treatment.

Whether arbitral tribunals have expansively interpreted BIT provisions will be examined in later parts of the thesis but in the interim, it is worth mentioning that BITs have been embraced by virtually all developing countries and surprisingly this includes African countries, Latin American countries with the exception of Brazil and Mexico. Through embracing detailed international arbitration, Latin American countries and formerly colonised states have but in one voice swallowed the pride of the Calvo doctrine requiring domestic jurisdiction over international arbitration. Indeed, the deep-rooted rhetoric in UN buildings about formation of a NIEO and related resolutions can optimistically be described as historical statements contributing to the advancement and understanding of international law. More broadly, at the core of the BIT consensus begs the question whether the patchwork of BIT provisions can be said to have crystallised into customary international law regulating foreign investment.[219]

[219] Whether BITs have crystallised into customary international law is beyond the scope of this thesis. For varying opinions on this issue see FA Mann, 'British Treaties for the Protection of Investments' (1981) 52 *BYIL* 241; Stephen M Schwebel, 'The Influence of Bilateral Investment Treaties in Customary International Law' (2004) 98 *Am.Soc'y Int'l L. Proc* 217; Andrew T Guzman, 'Why Countries Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 *Va. J. Int'l L* 639.

1.5 The Paradox and Structure of African BITs

Three preliminary remarks about the practice of African states deserve mention before a brief commentary on the structure of African BITs. Firstly, as seen from the historical rivalry discussed above and especially attempts to rewrite rules of international investment law through numerous United Nations resolutions and declarations, the practice of African states suggests that when African states are acting collectively at the international level, African states are usually apprehensive about rules regulating foreign investors and as a result profoundly contest international attempts aimed at building consensus towards multilateral investment framework. Secondly, the practice of African states is remarkably contradictory because the same rules regulating foreign investment African states resist in numerous international forums easily find passage without much resistance at the bilateral level. Lastly and most importantly, substantive investment rules African states consent to at the bilateral level through BITs offer foreign investors far superior protection compared to similar rules African states reject at the international level. Given this, the practice of African states suggests that at a bilateral level, African states are driven by political and economic realities peculiar to each state while at the international level African states are motivated by the collective desire to safeguard state sovereignty. In light of this consideration and especially because collective rejection of investment rules at the international level has minimum consequences to respective African constituencies there is more latitude for African states to assert sovereignty centred sentiments at the international level.

However, at the bilateral level, since each African state acts individually raising sovereign centred arguments against powerful developed states is difficult especially when the intention and language of the treaty includes the reciprocal duty to encourage the transfer of capital into the African state. Briefly without an in-depth assessment of the substantive provisions as these provisions will thoroughly be discussed in chapters 2,3,4,5 and 6; African BITs generally follow the following structure; typically, African BITs proceed with a title section that usually indicates contracting states part to the treaty and the intended purpose of the treaty. Generally, the title sections of African BITs follow two formalities; the first formality, for example is captured in the United Kingdom-Kenya BIT that reads as follows; ''Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the Promotion and Protection of Investments''.[220] Another variation is the Cameroon-United States BIT which reads as follows; ''Treaty between the United States of America and the Republic of Cameroon Concerning the Reciprocal Encouragement and Protection of Investment''.[221] The wording of the two titles though different have minor substantive differences because each of the formalities clearly encapsulate the principal purpose of the BIT as protecting and promoting foreign investment between the two contracting states.

However, from the wording of the two formalities, since the two contracting states have an asymmetrical relationship where the title envisages reciprocal encouragement of investment, there is scope for African states with such

[220] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the Promotion and Protection of Investments (Treaty Series No. 8, 2000). See also similar wording in the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the United Republic of Tanzania for the Promotion and Protection of Investments (Treaty Series No. 90, 1996); Agreement between the United Republic of Tanzania and the Government of the Italian Republic for the Promotion and Protection of Investments (2001); Agreement between the Government of the Republic of Finland and the Government of the Republic of Kenya for the Promotion and Protection of Investments (19 June 2001); Agreement between the Kingdom of Denmark and the Government of the Republic of Ghana for the Promotion and Protection of Investments (13 January 1992);Agreement for the Protection and Promotion of Investments between the Republic of Ghana and the Arab Republic of Egypt (11 March 1998); Agreement between the Government of the Republic of Ghana and the Government of the Republic of Guinea for the Promotion and Protection of Investments ; Agreement between the Government of the Republic of Ghana and the Government of Malaysia for the Promotion and Protection of Investments ; Agreement between the Government of the Republic of Korea and the Government of the Democratic Republic of Congo for the Promotion and Protection of Investments (March 17, 2005). For a complete database of African BITs see <http://www.unctadxi.org/templates/DocSearch.aspx?id=779>accessed 20 May 2012.

[221] Treaty between the United States of America and the Republic of Cameroon Concerning the Reciprocal Encouragement and Protection of Investment (USTR, Nov 27, 1984). See also similar wording in the Federal Republic of Germany and Burundi Treaty Concerning the Encouragement and Reciprocal Protection of Investments (No. 26278, 10 Sept 1984); Agreement betwen the Government of the Peoples Republic of China and the Government of the Republic of Ghana Concerning the Encouragmenet and Reciprocal Protection of Investments (12 October 1989); Treaty Between Federal Republic of Germany and the Republic of Kenya Concerning the Encouragement and Reciprocal Protection of Investments (3 May 1996) [Hereafter Germany-Kenya BIT]; Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Ghana; Treaty between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment ;Treaty between Federal Republic of Germany and the Republic of Tanzania Concerning the Encouragement and Reciprocal Protection of Investments (20 Jan 1965);Treaty between the United States of America and the Government of the Republic of Zaire Concerning the Reciprocal Encouragement and Protection of Investment.

wording to argue for special and differential treatment in the interpretation of the BIT as a whole. Moreover, it should be stressed that encouragement in the title section suggests the capital exporting state (usually developed state) must and should facilitate investment flows to an African state part to the BIT. In essence considering that the BIT is concluded between two unequal parties i.e. African state (weak party/capital importing state) and capital exporting state (usually superior states) when the title clearly emphasizes reciprocity towards encouraging investment between the two states, arbitral tribunals should cumulatively give equal weight to both the protective aspect of the BIT and the reciprocal duty to encourage investments.[222]

Put succinctly when the title section explicitly mentions ‘‘encouragement’’ this suggests that arbitral tribunals interpreting substantive treaty standards or the totality of the BIT must be mindful of both the protective and developmental aspects of the BIT.[223] African BITs usually follow the title section with a preamble which essentially details the intended purpose of the BIT. Although the content and scope of African preambles will be discussed shortly, in the interim it is worth noting that the preamble language of African BITs are elaborate but conclusively vague.[224] Generally, African preambles are followed with a definition section that defines key concepts and the overall scope of the treaty and this is further followed with treaty standards that include *inter alia*, MFN, national treatment, expropriation, fair and equitable treatment, arbitrary and discriminatory treatment, full protection and security.[225] Last but by no means least, African treaty standards are often followed with detailed dispute settlement clauses and provisions for entry into force and termination of the treaty. Clearly from the structure of African BITs, it would be beyond the scope of this thesis to exhaustively scrutinise each of the treaty provisions. Given this, the second part of the thesis selectively examines the most contentious treaty provisions articulated in African BITs and discusses how inclusion of such provisions restrains legitimate policy making space of African states. Specifically, the second part of this thesis focuses on the scope and definition

[222] For a detailed discussion of this issue and related issues see Chapter 2.

[223] For more details on the developmental aspect see Chapter 2.

[224] For a detailed discussion of African preambles see Chapter 2.

[225] For detailed discussion see Chapter 2, 3, 4 and 5.

clause, expropriation, fair and equitable treatment, and dispute settlement mechanisms. As previously stressed the selection of these provisions is premised on the fact that policy making space of African states will seriously be constrained depending on the interpretation arbitral tribunals' accord to these four treaty provisions.

1.6 Conclusion

This chapter has reviewed the evolution of modern investment law and demonstrated the contribution of African states at each of the evolutional stages. Specifically, through reviewing African treaty practice the chapter has shown that although the contribution of Africa was interrupted during the colonial period, after decolonisation Africa played an active role in shaping international investment rules favourable to the African continent. The contribution of African states is evident not only in African states comprising majority membership as well as hosting majority of the NAM conferences but also through the critical leadership African states provided. Indeed, it was through the solidarity of African states and the stewardship of African leaders that the NAM successfully institutionalised UNCTAD and pressed for the Declaration demanding a NIEO.

Moreover, African leaders provided the ideological framework within which to articulate third world interests and also galvanised support for the NAM agenda. In essence therefore, Africa has traditionally played an active role in the development of international investment law though such a role seems to have receded after the inception of BITs. Presently, the African voice so to speak remains largely confirmatory to the status quo with each African state driven by political and economic realities peculiar to its own economic interests. This in essence has resulted into a situation where African states generally acquiesce to model BITs developed by capital exporting states without questioning the premise of these treaties. The general passiveness of African states in the development of international investment law has consequences which will be discussed in subsequent chapters. As the investment regime undergoes increased resistance based on Africa's traditional participation, one would have expected African countries to be part of the cohort of countries advocating for changes to existing rules. However, as Latin American countries express increased resistance to the prevailing system, African states with the exception of South Africa have remained silent. The thesis now proceeds to a detailed discussion of African BITs focusing on the most controversial provisions and the evolving jurisprudence that an awakened Africa should and must seriously reconsider in future treaty negotiations.

Part Two Introductory Note: Analysis of the Most Contentious Treaty Provisions in African Treaty Practice

The first part of the thesis reviewed the evolution of foreign investment law and highlighted the contribution of African states at various stages of the evolutionary process. Specifically, the first part of the thesis demonstrated that traditionally African states have played a relevant role in the development of international investment law although this has significantly diminished after the inception of BITs on the African continent. Obviously, the reasons underlying Africa's passive participation are many but the most important one seems the premise on which African states pursue BITs. Having reviewed Africa's contribution to the development of international investment law and concluded that Africa states have regressed from the status of relevant participants to passive observes, the second part of the thesis builds on this foundation and examines whether African BITs conform or differ from general investment treaty practice. While exploring Africa's investment treaty practice, chapters 2-6 also raises awareness to the policy effects of African treaty standards which are usually ignored by African states in BIT negotiations.

The second part of the thesis focuses on actual treaty standards included in African BITs and how the treaty standards have been interpreted in arbitral practice. The reasons for focusing on actual treaty standards are fairly straightforward-African states have traditionally rejected the internationalisation of foreign investment rules based on sentiments of sovereignty but have in equal measure passively submitted to the conclusion of BITs containing far-reaching treaty provisions. It is such peculiar inconsistencies within the foundation of African investment law that makes a detailed review of African treaty provisions important. Given this, the second part of the thesis examines whether African treaty standards conform or differ from general investment treaty practice and the extent to which the articulated treaty provisions restrain legitimate policy making of African states. This in turn raises awareness to the controversy entrenched in substantive treaty standards, the suitability of treaties concluded by African states and the possibility of drafting more acceptable rules that balance the interests of African states *vis-à-vis* interests of foreign investors.

One preliminary remark is important, part two of the thesis only discuses four treaty standards which in the opinion of the present author are the most controversial and far-reaching. It should be stressed that although ideally the thesis should have examined all African BIT treaty standards but for purposes of a more focused study such pursuit would have been beyond the scope of this thesis. Nevertheless, the thesis discusses the most controversial standards that foreign investors usually invoke in investment arbitral practice. The discussion proceeds with Chapter 2 which examines the scope and definition clauses articulated in African BITs followed with the standard of expropriation (Chapter 3), the obligation of fair and equitable treatment (Chapter 4), the dispute settlement provisions (Chapter 5) and finally the thesis concludes with a forward looking section (Chapter 6).

In terms of jurisprudence, the analysis in chapter 2-5 includes African cases and other arbitral cases where arbitral tribunals have interpreted provisions similar to those stipulated in African BITs. As noted above, African states have concluded close to 767 BITs of which 622 have been concluded between an African state and a developed country while 145 have been concluded between African state parties.[226] Comparatively within Africa, the majority of BITs have been concluded between developed states and Sub-Saharan African countries and cumulatively Sub-Saharan African have entered into 507 BITs of all existing African BITs. In terms of regional distribution, the West African region has concluded 205 BITs, East African region has concluded 178 BITs and the Southern Africa region has concluded 124 BITs.[227] However, it should be noted that although BITs remain popular on the African continent, not all of them have been applied in litigation. It is for this reason that Chapters 2-5, look to arbitral practice outside Africa especially where the wording of the treatment standard is similar to that articulated in African treaty practice. Similarly, as will be discussed shortly, the investment treaty practice of African states generally conforms to general treaty practice followed elsewhere. Given the similarities, the evolving arbitral jurisprudence though not binding serves a persuasive value to the interpretation of African BITs.

[226] Karel Daele, 'Investment Disputes across Africa: Lessons to Be Learned From' (2012) 2 <http://www.africanlaw.org/images/papers/daelepaper.pdf>accessed 20 May 2012.
[227] Ibid.

Chapter 2

The Scope and Definition Clauses of African Bilateral Investment Treaties

Introduction

Over the last decade, the scope and definition clauses articulated in BITs have undergone unprecedented scrutiny as more claimants and respondents enforce them with the objective of either constraining or expanding the jurisdiction of arbitral tribunals. As expounded in recent cases such as *Biwater v Tanzania*, *Hamester v Ghana*, *Patrick Mitchell v Congo*, *Fedax v Venezuela*, *Salini v Morocco*, the wording of the scope and definition clauses can and do raise a range of interconnected procedural challenges which include issues such as, whether the transaction constitutes an investment, whether the investor or transaction complied with host state laws and whether the investor has *locus standi*. At the jurisdictional level therefore, scope and definition clauses are the basis upon which arbitral tribunals assess whether assets and investors qualify for treaty protection and thereby decide whether the tribunal has jurisdiction over the dispute. In essence, the wording of a treaty's scope and definition clauses articulate the contracting state's obligations towards investors and covered investments and is the basis upon which arbitral tribunals acquire jurisdiction over treaty claims.[1]

However, as subsequent parts of this chapter will demonstrate, the scope and definition clauses contained in most BITs are vaguely worded and the intention of contracting states is unclear. In addition, vital concepts such as what constitutes an investment are not defined coupled with the fact that there is no universally accepted definition for the term investment. This indeed stresses the importance of making treaty language unambiguous. Given the lack of a precise definition for the concept 'investment', arbitral tribunals use their own discretion to determine whether transaction constitute an investment. On the basis of this discretion, arbitral tribunals have developed a set of characteristics used to establish whether transactions qualify for treaty protection. However,

[1] Jeswald W Salacuse, *The Law of Investment Treaties* (OUP 2010) 158.

the characteristics developed through arbitral practice have created conflicting opinions especially when the disputed transaction is not explicitly articulated as an investment in the relevant treaty.[2] Moreover, since the concept of investment is broadly construed, a number of key challenges have arisen such as, what criteria should be used to determine the distinction between an ordinary commercial transaction and an investment and whether bank guarantees, loans and promissory notes qualify as investments.[3] Apart from the definition of investment, the definition of investor remains contentious especially the need for investors to establish an effective link between corporate nationality and contracting states.[4]

Taken as a whole therefore, whether a person or company is an investor or whether transactions constitute 'investments' are important jurisdictional challenges that cannot be taken lightly.[5] More importantly, if transactions or investors fall outside the scope of the treaty this simultaneously means that the investor or transactions cannot claim treaty protection and by extension arbitral tribunals lack jurisdiction over the dispute.[6] To this end, procedural requirements encapsulated in the scope and definition clauses are as important as the substantive standards stipulated in the treaty. Against this backdrop, this chapter examines the scope and definition clauses articulated in African BITs and situates the practice of African states within the broad investment treaty practice. For purposes of clarity and contextualising the scope of African BITs, the chapter commences the discussion by briefly exploring the intention and purpose of African BITs as expressed in the preamble. The chapter then undertakes a detailed discussion of the most pressing concerns associated with the scope and definition clauses of African BITs which include *inter alia*, what constitutes an investment, the meaning of in accordance with laws and regulations, the definition of investor as well as the territorial and temporal

[2] See, *Fedax N.V. v Venezuela*, ICSID Case No. ARB/96/3, Jurisdiction, July 11, 1997 [Hereafter *Fedax v Venezuela*]; *Salini Costruttori S.P.A and Italstrade S.P.A v Morocco*, ICSID Case No. ARB/00/4, Jurisdiction, July 23, 2001 [Hereafter *Salini v Morocco*]; *Biwater Gauff Ltd v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 18, 2008 [Hereafter *Biwater v Tanzania*].

[3] UNCTAD, *Scope and Definition Clause: UNCTAD Series on Issues in International Investment Agreements II* (UNCTAD/DIAE/IA/20120/2, UN Pub. Sales No. 11.II.D.9, 2011) 6-10.

[4] Ibid.

[5] Jeswald W Salacuse, *The Law of Investment Treaties* (OUP 2010) 158.

[6] Ibid.

scope. Through this analysis, the chapter underscores the practical policy implications resulting from the scope and definition clauses of African BITs.

2.1 The Preambles of African BITs

Before examining the preamble language, some preliminary remarks about the titles of African BITs are worth emphasising. As noted earlier, African BITs have some slight variations in the titles used and such phrases include reciprocal and mutual protection,[7] encouragement and reciprocal protection of investment,[8] economic cooperation.[9] However, substantively, there appears to be no apparent difference between the various phrases used by African BITs. In essence, as stressed above whether the title of African BITs are worded using the expression promotion and protection of foreign investment or reciprocal and

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[7] Agreement between the Government of the Republic of Mauritius and the Government of the Republic of Ghana for the Promotion and Reciprocal Protection of Investments [Hereafter Mauritius-Ghana BIT]; Agreement between the Government of the People's Republic of Bulgaria and the Government of the Republic of Ghana Concerning the Mutual Promotion and Protection of Investments [Hereafter Bulgaria-Ghana BIT]; Belgo-Luxembourg Economic Union and the United Republic of Cameroon Convention Concerning the Reciprocal Promotion and Protection of Investments (No. 21155, 27 March 1980) [Hereafter Belgium-Cameroon BIT]; Agreement between the Government of the Republic of India and the Government of the Republic of Ghana Concerning the Reciprocal Promotion and Protection of Investments (June 23, 2000) [Hereafter India-Ghana BIT]; Agreement of United Republic of Tanzania and the Government of the Kingdom of Sweden on the Promotion and Reciprocal Protection of Investments (1 Sept 1999) [Hereafter Tanzania-Sweden BIT].

[8] Treaty Between Federal Republic of Germany and the Republic of Kenya Concerning the Encouragement and Reciprocal Protection of Investments (3 May 1996) [Hereafter Germany-Kenya BIT]; Treaty between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment [Hereafter United States-Rwanda BIT]; Federal Republic of Germany and Burundi Treaty Concerning the Encouragement and Reciprocal Protection of Investments (No. 26278, 10 Sept 1984) [Hereafter Germany-Burundi BIT]; Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Ghana [Hereafter Netherlands-Ghana BIT]; Treaty between the United Republic of Tanzania and Government of the Kingdom of Denmark Concerning the Promotion and Reciprocal Protection of Investment (22 April 1996) [Hereafter Tanzania-Denmark BIT]; Agreement on Encouragement and Reciprocal Protection of Investment between the United Republic of Tanzania and Government of the Kingdom of the Netherlands (27 Sept 2002) [Hereafter Tanzania-Netherlands BIT]; Agreement between the Government of the People's Republic of China and the Government of the Republic of Ghana Concerning the Encouragement and Reciprocal Protection of Investments (12 October 1989) [Hereafter China-Ghana BIT]; Treaty between the United States of America and the Republic of Cameroon Concerning the Reciprocal Encouragement and Protection of Investment (USTR, Nov 27, 1984) [Hereafter United States-Cameroon BIT]; Belgo-Luxembourg Economic Union and Rwanda Convention Concerning the Reciprocal Promotion and Protection of Investments (No. 23577, 2 Nov 1988) [Hereafter Belgium-Rwanda BIT]; Treaty Between Federal Republic of Germany and the United Republic of Tanzania Concerning the Encouragement and Reciprocal Protection of Investments (30 Jan 1965) [Hereafter Germany-Tanzania BIT].

[9] Agreement on Encouragement Economic Co-operation between the Kingdom of the Netherlands and the Government of the Republic of Kenya [Hereafter Netherlands-Kenya BIT].

mutual protection, the difference is one of choice of words rather than substance. After lengthy worded titles, African BITs follow the title section with elaborate but vague preambles. The preamble language as expressed in African BITs can be categorized into three broad categories, (i) preambles stressing the desire to create favourable conditions for greater economic cooperation,[10] (ii) preambles incorporating favourable economic conditions with the obligation of fair and equitable treatment and MFN,[11] (iii) preambles that seek to strengthen traditional ties of friendship so as to extend and intensify economic relations to encourage investments on an equal basis for mutual benefit.[12]

From the three formulations, predominantly most African BIT preambles stress the desire to create favourable economic conditions for both contracting states as the principle purpose of the treaty. Furthermore, the preamble language suggests that African states envision protecting foreign investors as a necessary requirement to increased foreign investment flows. Clearly from the spirit and purpose of the preamble language, it is evident that African states undertake BITs under the perceived notion real or imagined that the BIT will contribute to increased transfer of foreign capital. For instance the preamble of the Tanzania-Italy BIT reads as follows:

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[10] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the United Republic of Cameroon for the Promotion and Protection of Investments (Treaty Series No. 40, 1985) [Hereafter United Kingdom-Cameroon BIT]; Agreement between the Government of the Republic of Ghana and the Government of the Republic of Benin for the Promotion and Protection of Investments [Hereafter Ghana-Benin BIT]; Agreement for the Protection and Promotion of Investments between the Republic of Ghana and the Arab Republic of Egypt (11 March 1998) [Hereafter Ghana-Egypt]; Ghana-Mauritius BIT; Germany-Kenya BIT; United States-Rwanda BIT; Agreement between the United Republic of Tanzania and the Government of the Italian Republic for the Promotion and Protection of Investments (2001) [Hereafter Tanzania-Italy BIT] ;Burundi-Germany BIT; Agreement between the Government of the Republic of Korea and the Government of the Democratic Republic of Congo for the Promotion and Protection of Investments (March 17, 2005) [Hereafter Congo-Korea]; Agreement between the Government of the Republic of Ghana and the Government of the Republic of Guinea for the Promotion and Protection of Investments [Hereafter Ghana-Guinea BIT]; Belgium-Cameroon BIT; United Kingdom-Congo BIT; Agreement betwen the Government of the Peoples Republic of China and the Government of the Republic of Ghana Concerning the Encouragmenet and Reciprocal Protection of Investments (12 October 1989) [Hereafter China-Ghana BIT]; India-Ghana BIT; Agreement between the Government of Ghana and the Government of the Socialist Republic of Romania on the Mutual Protection and Guarantee of Investments (14 Sep 1989) [Hereafter Ghana-Romania BIT]; United Kingdom-Kenya BIT; Tanzania-Finland BIT; Malaysia-Ghana- BIT; United Kingdom-Ghana BIT; Germany-Tanzania- BIT; United Kingdom-Tanzania BIT.

[11] See for instance Netherlands-Ghana BIT; Tanzania-Denmark BIT; Tanzania-Finland BIT; United States-Cameroon BIT; United States-Congo BIT; Ghana-Denmark BIT and Belgium-Rwanda BIT.

[12] See for e.g. Netherlands-Kenya BIT and Netherlands-Tanzania BIT.

> Desiring to expand and strengthen economic and industrial cooperation on a long term basis, and in particular, to create favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party; Recognizing the need to protect investments by investors of both Contracting parties and to stimulate the flow of investments and individual business initiative with a view to promoting the economic prosperity of both Contracting Parties;

Aside from this formulation, some preambles of African BITs are negotiated with the intention of strengthening traditional ties of friendship and intensifying economic relations.[13] Surprisingly the formulation of 'strengthening traditional ties of friendship' is included in BITs of capital exporting states that have had limited or no traditional ties with African states.[14] Clearly, one would have expected this formulation to be more profound in BITs of capital exporting states with colonial ties to African states. At the core of the preamble formulation is the assumption that protecting foreign investors will stimulate capital and technology flows and lead to economic development mutually beneficial to both contracting states.[15] Perhaps the most expansive preambles even though these are rarely used are preambles incorporating the obligation of fair and equitable treatment.[16] There are a number of ways the obligation of fair and equitable treatment is incorporated into the preamble language and typically such clauses read as follows:

> Desiring to create favourable conditions for investments in both states and to intensify the cooperation between private enterprises in both states with a view to stimulating the productive use of resources, recognizing that a *fair and equitable treatment* of investments on a reciprocal basis will serve this aim…

In the vast majority of preambles of African BITs, the last paragraph normally envisions that the encouragement and reciprocal protection of investments will be conducive to the stimulation of business initiatives and will increase

[13] Ibid.

[14] This provision is included in BITs between Netherlands and African states. For example see Netherlands-Kenya BIT and Netherlands-Tanzania BIT.

[15] See for instance United Kingdom-Tanzania BIT; Germany-Kenya; Italy-Tanzania BIT; Germany-Burundi BIT and United Kingdom-Congo BIT.

[16] See Chapter 4 for a detailed discussion on Fair and Equitable Treatment.

prosperity in both contracting states.[17] Whether this objective is achieved upon entering into the BIT or at any point during the course of the BIT's existence remains questionable. However, the jurisprudence of arbitral tribunals stresses that although preambles are vaguely worded they form an important component in determining the intention of contracting states and as a result arbitral tribunals rely on them to interpret the totality of treaties. For instance, the tribunal in *LG&E v Argentine Republic* examined the preamble language of the US and Argentina BIT to ascertain the intention of United States and Argentina for including the obligation of fair and equitable treatment as part of the BIT.[18] The preamble stipulated that, fair and equitable treatment of investment was desirable in order to maintain a stable framework for investment and maximize effective use of resources. On the basis of the preamble language, the tribunal posited that:

> In entering the Bilateral Investment Treaty as a whole, the Parties desired to 'promote greater economic cooperation' and stimulate the flow of private capital and the economic development of the parties.' In light of these stated objectives, this Tribunal must conclude that stability of the legal and business framework is an essential element of fair and equitable treatment in this case, provided that they do not pose any danger for the existence of the host state itself.[19]

The body text of preambles presents nuanced challenges to arbitral tribunals especially when both investors and states tailor arguments on the basis of article 31 of the Vienna Convention on the Law of Treaties (VCLT) which requires treaties to be interpreted in accordance with their object and purpose.[20] Article 31(2) elaborates further that the context for the purpose of treaty interpretation shall comprise in addition to the text, the preamble, the annexes, any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty, any instrument which was made by

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[17] See for example United Kingdom-Congo BIT; United Kingdom-Cameroon BIT; Ghana-Benin BIT; Germany-Kenya BIT; Italy-Tanzania BIT and Netherlands-Tanzania BIT.

[18] *LG&E v Argentina*, ICSID Case No. ARB/02/1 Jurisdiction 3 October 2007, para 85-88 [Hereafter *LG&E v Argentina*].

[19] Ibid para 99.

[20] See for example in *Siemens v Argentina* where both parties based their arguments on the interpretation of the Treaty in accordance with Article 31(1) of the Vienna Convention. The tribunal noted that the treaty has to be interpreted neither liberally nor restrictively. For a detailed discussion of the tribunal's approach see *Siemens v Argentina*, ICSID Case No. ARB/02/8 Decision on Jurisdiction, para 80-81 [Hereafter *Siemens v Argentina*].

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.[21] The wording of article 31 clearly underscores the importance of the preamble as a vital component in determining the object and purpose of the treaty as well as the intention of contracting states. However, under investment treaty arbitration, it remains unclear whether foreign investors' accrual additional legal protection from preambles or whether capital exporting states have a legal duty to encourage foreign investors to invest in host states.

For instance, in *Biwater v Tanzania*, the investor argued unsuccessfully that the preamble language of the Tanzania-UK BIT stressing that ''more favourable conditions for investors, must be taken to be a promise to investors such as BGT of the more favourable treatment found in the BIT, including its dispute resolution settlement procedures.''[22] The tribunal rejected this argument on the basis that such a reading was an expansive interpretation of the preamble language and held that the investor sought to elevate generalized introductory language into specific obligations.[23] Although the tribunal did not directly address the issue raised by the investor, this does however underscore the difficulties African states have placed themselves into through concluding generalized preambles. Even more, African states that have concluded BITs with preambles incorporating fair and equitable treatment and MFN obligation will encounter further difficulties because this sends a clear message to arbitral tribunals to interpret the BIT in a manner that accords full effect to the rights of the investor.[24]

Although the Vienna Convention requires tribunals to look first to the ordinary meaning of treaty terms over generalized principles such as preambles,[25] it is

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[21] Vienna Convention of the Law on Treaties, 1155 U.N.T.S.331, 81. L.M. 679. Jan 27, 1980 [Hereafter VCLT]. Specifically see Article 31(2) VCLT.

[22] *Biwater v Tanzania*, para 333.

[23] Ibid.

[24] *Methanex Corp v United States*, Partial Award, para 103-105 <http://ita.law.uvic.ca/documents/Methanex-1stPartial.pdf> accessed 20 May 2012 [Hereafter *Methanex v United States*]; See also *Aguas del Tunari S.A v Republic of Bolivia*, ICSID Case No. ARB/02/3 Jurisdiction October 21 2005, para 91 [Hereafter *Aguas del Tunari v Republic of Bolivia*].

[25] See particularly in *Aguas del Tunaris v Republic of Bolivia* , para 99, where the tribunal noted that 'the Vienna Convention's directive to look to the ordinary meaning of a word in its

worth stressing that provisions in most African BITs are as generalized as the preambles.[26] Substantively, this means that African states have entered into demanding treaties that have the potential of benefiting foreign investors to the detrimental of African states. Furthermore, even though the intention of African treaties as spelled out in preambles clearly points towards a dual obligation of protecting and promoting foreign investment, there is an imbalance in the overall treaty framework. For example, foreign investors can hold African states accountable for breach of treaty obligations through investor-state arbitration but on the contrary the equivalent duty to promote foreign investors cannot easily be enforced or measured by African states.[27]

In recent cases, although arbitral tribunals have sought to dissuade interpretations that exaggerate protection accorded to foreign investors[28] the fact remains preambles as supplemented by treaty provisions are more favourable to foreign investors and lack sufficient safeguards to ensure foreign capital is actually transferred to African states. To my mind, although the wording of nearly all African preambles appears *prima facie* reasonable however when juxtaposed to the entire text of the treaty, it becomes remarkably clear that African treaties are negotiated between two unequal partners. Specifically, the wording places strenuous obligations on African states to protect foreign investors and does not equally elevate the obligation to encourage foreign investment flows into African states. By and large, the emphasis of the preambles as correctly opined by Luke Peterson reflects the interests and

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context and in light of the object and purpose of the treaty is intended to (1) to find the intent of the parties in the specific instrument, (2) to respect the possibility that the parties have used the instrument to address issues of mutual concern in innovative ways, and (3) to not forcibly conform the specific aims of a treaty to general assumptions about the intent of assessment of past practices'. More generally see UNCTAD, *Scope and Definition Clause: UNCTAD Series on Issues in International Investment Agreements II* (UNCTAD/DIAE/IA/20120/2, UN Pub. Sales No. 11.II.D.9, 2011).

[26] See Chapter 3 for detailed discussion on Expropriation and subsequent Chapters.

[27] Despite preambles articulating dual obligations evidence suggests that investment flows accruing from concluding BITs remains scant. On the contrary evidence indicates that investors have successfully brought claims on the basis of BITs. See Mann Howard and K von Moltke, *A Southern Agenda on Investment? Promoting Development with Bilateral Rights and Obligations for Investors, Host States and Home States* (International Institute for Sustainable Development 2005) 4.

[28] *Saluka Investments BV v Czech Republic*, Partial Award of 17 March 2006,para 300 [Hereafter *Saluka Investments v Czech Republic*]; see also *Plama Consortium Limited v Bulgaria*, ICSID Case No. ARB/03/24 Award 27 August 2008, para 193 [Hereafter *Plama Consortium v Bulgaria*].

concerns of investors expressed through their home governments without taking into account interests of host states.[29] In other words, through signing BITs with expansive preambles containing unbalanced rights and duties, African states have by extension constrained their ability to regulate domestic policy with minimal investment flows in return.

Having said that, it is worth pointing out that, there are few preambles in African treaty practice that do not follow the general trend though such BITs are rare and precaution should be exercised not to over emphasize them. For example, the Tanzania-Finland BIT explicitly states that the objective of the BIT should be achieved without relaxing healthy, safety, and environmental measures of general application.[30] The preamble of the United States-Rwanda BIT also contains a provision stressing the desire to achieve the objectives of the BIT in ''a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labour rights''.[31] The wording of the two preambles suggests that when interpreting the BIT as a whole, arbitral tribunals should seek to balance interests of foreign investors but with deference to interests of the capital importing African state. In conclusion, with minor exceptions, the preambles of African BITs are inherently biased to benefit foreign investors to the detriment of African states and while this would be justifiable if foreign investment flows actually accrued to African states, the reality from available evidence suggests that BITs contribute little in accelerating foreign direct investment.[32]

2.2 The Definition of 'Investments' in African BITs

African BITs follow the preamble with definition clauses articulating *inter alia* the concept 'investment' and 'investors'. In virtually all African BITs, the first

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[29] Luke Eric Peterson, 'South Africa's Bilateral Investment Treaties, Implications for Development and Human Rights, Dialogue on Globalisation' (Vol 26 November 2006) 10 <http://library.fes.de/pdf-files/iez/global/04137-20080708.pdf>accessed 20 May 2012.

[30] Paragraph 7of the preamble of the Finland-Tanzania BIT.

[31] Paragraph 6 of the preamble of the United States-Rwanda BIT.

[32] For thorough discussion on the spectrum of varying opinions see Karl P Sauvant and Lisa E Sachs, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (OUP 2009). Karl Sauvant and Lisa Sachs note that the analysis suggests difficulty in firmly establishing the contribution of BITs in attracting FDI.

article in the definition clause focuses on transactions contracting states consider as protected investments under the treaty. Generally, African BITs formulate the definition of investment in two broad categories; (a) the first formulae followed by majority of African BITs defines investments broadly and sometimes includes the connotation 'in accordance with host state legislation'[33] (b) the second formulae though rarely used defines investment broadly but includes substantive characteristics of the form an investment must take to qualify for treaty protection.[34]

Irrespective of the formulae used, all African BITs define the concept 'investment' broadly to include any kind of assets and usually this is followed with a non-exhaustive list of assets that are considered as examples of investments. The definition of covered investments includes both tangible and intangible assets.[35] Evidently, this removes any doubts regarding the protection of intangible assets and also dispels early reservations that international law does not protect intangible property rights.[36] Typically the definition of the concept 'investment' in African treaty practice follows wording similar to the United Kingdom-Burundi BIT which provides as follows:

> The term 'investment' shall comprise every kind of asset, in particular: (a) Movable and immovable property as well as any other rights in rem, such as mortgages, liens and pledges; (b) Shares of companies and other kinds of interest; (c) Claims to money which has been used to create an economic value or claims to any performance having an economic value; (d) Copyrights, industrial property rights, technical processes, trademarks, trade-names, know-how and goodwill; (e) Business concessions under public law, including

[33]The definition of investment in African BITs conforms to the predominate formulation of BITs elsewhere, for a detailed discussion see Noah Rubins, 'The Notion of 'Investment' in International Investment Arbitration' in Norbert Horn and Stefan M Kroll (eds), *Arbitrating Foreign Investment Disputes, Procedural and Substantive Legal Aspects* (Kluwer Law International 2004) 283-324; see also UNCTAD, *Scope and Definition Clause: UNCTAD Series on Issues in International Investment Agreements II* (UNCTAD/DIAE/IA/20120/2, UN Pub. Sales No. 11.II.D.9, 2011).

[34] For example see the United States-Rwanda BIT that not only provides specific characteristics of the form an investment must take but also includes a footnote emphasising that 'some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.'

[35] Ibid.

[36] M Sornarajah, *The International Law on Foreign Investment* (2nd edn, Cambridge University Press 2004) 220-221.

> concessions to search for, extract and exploit natural resources; any alteration of the form in which assets are invested shall not affect their classification as investment.

As stressed above, African BITs generally define the concept ‘investment’ using terms similar to those of the United Kingdom-Burundi BIT. However, some African BITs incorporate the same formulae but slightly expand the definition. For instance, article 1 of the Belgium-Rwanda BIT provides as follows; ‘‘The term ‘investment’ shall mean any direct or indirect medium or long term contribution of movable or immovable property intended for the development of an economic activity acknowledged to be in the national interest at the time the contribution is made under the laws of the State in whose territory such contributions are made’’.[37] Obviously no difficulties will arise when envisaged assets neatly fit within the illustrated list[38] but more often than not, assets usually fall outside the illustrated list but comply with the generalized definition of investment. The genesis of this expansive definition appears to have originated from institutions such as the World Bank and IMF that require countries in search of new forms of investments to demonstrate their commitment through defining investments broadly.[39]

From the wording of the term investment, it would not be unsurprising for assets that African states did not envisage as investments during treaty negotiations to qualify as protected investments under the investor-state dispute settlement system. The investment clause therefore has the propensity to bring about policy and legal ramifications unforeseen by African states at the time of concluding the treaty. Indeed, as stressed in the *Patrick Mitchell v Congo* annulment proceedings, treaties containing an enumerative and non-exhaustive approach to investment make it possible to apply the protection provided by the treaty to a range of rights and assets of the foreign investor.[40] The recent UNCTAD study points out that broad asset based definitions have significant implications for the

[37] Article 1 of the Belgium-Rwanda BIT.

[38] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 62.

[39] For general discussion see Ibrahim F.I Shihata, *Legal Treatment of Foreign Investment: The World Bank Guidelines* (Martinus Nijhoff 1993).

[40] Patrick Mitchell v The Democratic Republic of Congo, Annulment Proceedings Case No. ARB/99/7 November 1 2006, para 26 [Hereafter *Patrick Mitchell v Democratic Republic of Congo*].

range of possible disputes that could come before arbitral tribunals.[41] According to UNCTAD, generalized definitions have led to a widening of the types of transactions that tribunals have felt able to include as 'investments' which has in turn given arbitral tribunals' subject matter jurisdiction over a wider range of claims.[42]

In other words, what the parties might have believed to be purely commercial transactions at the time the investment treaty was signed could now potentially be viewed as investments under the broad assets based definition contained in BITs.[43] Schreuer aptly observes that in the vast majority of ICSID cases, arbitral tribunals have found nearly all disputes before them meet the threshold of investments as defined in respective BITs.[44] On the contrary, arbitral tribunals have found only a few cases where activities of claimants fall outside the definition of investments as stipulated in the BIT.[45] In light of these considerations, the definition of the term 'investments' as articulated in the relevant BIT cannot be taken lightly because it is the primary source of reference that demonstrates the intention of contracting states. Moreover, the existence of an investment is the premise on which arbitral tribunals acquire jurisdiction over treaty claims.

Historically, the concept 'investment' has been the subject of heated debate and the differences between developed and developing countries are well illustrated during the drafting of the ICSID Convention.[46] Particularly, the failure to agree on a universal definition during the deliberations demonstrates the difficulty of narrowing the meaning of the term investment.[47] As a solution to the lengthy discussions, a compromise was reached to leave the concept

[41] UNCTAD, *Scope and Definition Clause: UNCTAD Series on Issues in International Investment Agreements II* (UNCTAD/DIAE/IA/20120/2, UN Pub. Sales No. 11.II.D.9, 2011) 48-49.

[42] Ibid.

[43] Ibid.

[44] Christoph H Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) 124.

[45] Ibid.

[46] A discussion of the historical disagreements is beyond the scope of this thesis for a detailed analysis see ibid 114-117; see also Julian Davis Mortenson, 'The Meaning of 'Investment': ICSID's Travaux and the Domain of International Investment Law' (2010) 55 *Harvard International Law Journal* 257, 258-317.

[47] Ibid.

‘investment’ open-ended with the view that an appropriate definition will be determined by countries through treaties or contracts.[48] Indeed, the failure to agree on a mutually acceptable definition explains why the ICSID convention does not define the term investment.[49] In this regard, when determining whether the requirements for an investment have been met arbitral tribunals first examine the treaty followed by whether the activity is an investment in the sense of the ICSID Convention.[50] As will shortly be discussed, the failure of the ICSID Convention to define investment has often created conflicting methodological results in arbitral practice. Briefly, the contention has mainly been whether arbitral tribunals should play a screening role beyond what is articulated in the treaty especially because of the open ended nature of assets considered as protected investments under BITs.[51]

Based on the fact that the ICSID Convention does not define the concept investment, arbitral tribunals have developed objective characteristics or criteria applied when examining whether assets are protected investments. The application and influence of these characteristics differs between tribunals with some tribunals using the criterion as yardsticks or benchmarks to help the tribunal assess the existence of an investment while other tribunals view the elements of an investment as requiring cumulative compliance.[52] Proponents favouring the latter approach argue that the characteristics should be applied flexibly and on a case by case basis.[53] Under this approach, the characteristics of an investment are indicative and the existence of any of the characteristics can suffice to classify a transaction as an investment.[54] The alternative perspective views the characteristics as a *sine qua non* for the existence of an investment.[55] According to this viewpoint, transactions failing to cumulatively satisfy the

[48] Christoph H Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) 116.

[49] Ibid 115.

[50] Ibid 117.

[51] Julian Davis Mortenson, ‘The Meaning of ‘Investment’: ICSID’s Travaux and the Domain of International Investment Law’ (2010) 55 Harvard International Law Journal 257,317.

[52] *Saba Fakes v Republic of Turkey*, ICSID Case No. ARB/07/20 July 14 2010, para 99 [Hereafter *Saba Fakes v Republic of Turkey*].

[53] Ibid.

[54] Ibid para 99-100.

[55] Ibid para 101.

characteristics of an investment do not qualify as investments under the ICSID Convention.[56] However, it should be stressed that there is no unanimous approach emerging from the jurisprudence and the constitutive elements remain contentious.[57]

For instance the tribunal in *Fedax v Venezuela* examined whether promissory notes constitute covered investments protected under article 25 of the ICSID Convention and the Venezuela-Netherlands BIT. The tribunal stressed that the ICSID Convention contemplates the definition of investment is controlled by contracting states through the relevant treaty.[58] The tribunal then made reference to article 1(a) of the Venezuela-Netherlands BIT and found that the parties intended a very broad meaning to the term investments. On the basis of the BIT, the tribunal rejected the respondent's argument that titles to money as defined in the BIT are restricted to foreign investment or portfolio investments.[59] In the tribunal view titles to money are not necessary excluded from the concept of foreign direct investment.[60] According to the tribunal, the basic features of an investment can be described as involving, certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment, and a significance of a host state's development.[61] Based on the facts of the case, the tribunal found promissory notes met the basic features of investments for the following reasons;

> The duration of the investment in this case meets the requirements of the law as to contracts needing to extend beyond the fiscal year in which they are made. The regularity of profit and return is also met by the scheduling of interest payment through a period of several years. The amount of capital committed is also relatively substantial. Risk is also involved as has been explained. And most importantly, there is clearly a significant relationship between the transaction and

[56] Ibid.

[57] Ibid para 97-102. The tribunal posited that the proposed solutions are inconsistent, if not conflicting and do not provide any clear guidance to future tribunals.

[58] *Fedax v Venezuela*, para 31.

[59] Ibid para 32.

[60] Ibid.

[61] Ibid para 43.

> the development of the host state as specifically required under the law for issuing the pertinent financial instrument. [62]

Similarly in *Salini v Morocco,* the respondent alleged that the road construction contract did not constitute an investment protected both under the ICSID Convention and the Italy-Morocco BIT. The tribunal acknowledged that various objective criteria must be met before a transaction can qualify as a protected investment under the Italy-Morocco BIT and the ICSID Convention.[63] According to the tribunal;

> Doctrine generally considers that investment infers: contribution, certain duration of performance of the contract and a participation in the risks of the transaction...In reading the Convention's preamble. One may add the contribution of the economic development of the host State of the investment as additional condition.[64]

The tribunal further emphasized that the constitutive elements may be interdependent, for example the risks of the transaction could depend on the contributions and the duration of performance of the contract.[65] Based on the Italy-Morocco BIT as well as the ICSID Convention, the tribunal was of the view that:

> The Italian company made a contribution in money, in kind and in industry through *inter alia* providing the necessary equipment's, qualified personnel and issuing of bank guarantees, the transaction was for 36 months complying with the minimum length of time upheld by doctrine, there were risks involved such as risks associated with prerogatives of owner permitting him to prematurely bring an end to the contract, unforeseen incidents that could be considered as *force majeure,* the contract contributed to economic development of Morocco because the highway in question serves a public interest and it is within the duty of states to construct infrastructure.[66]

Taken as a whole the tribunal found the contract constituted an investment as articulated both under the Italy-Morocco BIT and article 25 of the ICSID Convention. The criteria used to determine whether disputed transactions

[62] Ibid.

[63] *Salini v Morocco*, para 52.

[64] Ibid.

[65] Ibid.

[66] Ibid.

constitute investments are now commonly known as the 'Salini test'[67] and have been followed with measurable degree in subsequent cases. For instance, in the *Patrick Mitchell v Congo* annulment proceedings, the *ad hoc* committee recognized four characteristics of investment identified by ICSID case law and noted that these characteristics are interdependent and need to be examined comprehensively.[68] In *casu*, the *ad hoc* committee rejected the award on the grounds that services of the law firm did not sufficiently contribute to the development of Congo.[69] According to the *ad hoc* committee, before services of the law firm could be regarded as investments, it was necessary that such services should contribute to economic development or at least the interests of the state should somehow be present in the operation.[70] Furthermore, the *ad hoc* committee opined that the award should have indicated that, ''through his know-how, the claimant had concretely assisted the DRC, for example by providing it with legal services in a regular manner or by specifically bringing investors''.[71] In sum, the *ad hoc* committee concluded that the award had to be rejected on the ground of manifest excess of power and inadequacy of reasons showing how the claimant's services contributed to the development of the host state.[72]

Opinion remains divided in arbitral practice about whether the *Salini* criteria are compulsory prerequisites required for a transaction to qualify as an investment. For example in *Biwater v Tanzania*, the respondent argued that a loss lender could not qualify as an investment because the elements of risk and substantial commitment were not satisfied. According to the respondent, even though the shareholder's loan might qualify as an investment under the Tanzania-United Kingdom BIT, the tribunal's jurisdiction is founded upon the objective requirements of Article 25 of the ICSID Convention and the scope of that

[67] Christoph H Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) 116-129, *Saipem S.p.A v The People's Republic of Bangladesh*, ICSID Case No.ARB/05/07 21 March 2007, para 99 [Hereafter *Saipem v Bangladesh*]; *Joy Mining Machinery Limited v Egypt*, ICSID Case No. ARB/03/11 6 August 2004, para 51 [Hereafter *Joy Mining Machinery v Egypt*].

[68] *Patrick Mitchell v Democratic Republic of Congo*, para 27.

[69] Ibid.

[70] Ibid para 39.

[71] Ibid.

[72] Ibid para 39-41.

jurisdiction cannot be expanded through the BIT.[73] The tribunal rejected the respondent's argument and asserted that the criterion of 'investment' adopted in Salini and subsequent cases are not fixed or mandatory as a matter of law.[74] According to the tribunal there was no basis for an overly restrictive application of the S*alini* test. In the tribunal's view, ''given that 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 to all cases and for all purposes''.[75]

The tribunal also found the *Salini* test problematic and stated that if the elements of an investment are identified into a fixed and inflexible test, there is risk that certain transactions will be excluded from the scope of the convention.[76] In the tribunal's view this would lead to a definition that may contradict individual agreements which could be contrary to the intention of contracting states.[77] In addition, the tribunal held that since BITs define investments more broadly than the *Salini* test, it is implausible for the ICSID Convention to be read narrowly.[78] The tribunal further opined that the concept 'investment' should be approached flexibly taking into account elements of the *Salini* test as well as all the circumstances of the case including provisions in the relevant BIT.[79] Most importantly, the tribunal noted that even if the claimant were to fail meeting all the elements of an 'investment' spelled out in *Salini*, this would not necessarily mean that the transaction should not be deemed as an investment.[80]

The ruling of the *Biwater* tribunal departures from the *Salini* test towards an approach that combines elements developed in *Salini* as well as the definition of investment spelled out in the respective treaty. This approach was subsequently found persuasive in *Malaysian Historical Salvors v Malaysia*. In *casu,* the *ad hoc*

[73] *Biwater v Tanzania,* para 288.
[74] Ibid para 310.
[75] Ibid para 313.
[76] Ibid para 314.
[77] Ibid.
[78] Ibid.
[79] Ibid para 316.
[80] Ibid para 318.

committee rejected the notion that the ICSID Convention imposes outer limits on the definition of investment contained in BITs.[81] The *ad hoc* committee was of the view that ignoring or devaluing the definition of investment as stipulated in BITs undermines the importance of jurisdiction BITs accord ICSID tribunals.[82] According to the *ad hoc* committee, the failure by the Sole Arbitrator to consider or apply the definition of investment as contained in the BIT was a gross error of law that gave rise to manifest failure to exercise jurisdiction.[83] In addition, the *ad hoc* committee was not impressed with the Sole Arbitrator's decision elevating contribution to the host state's economic development to a jurisdictional condition.[84] Lastly, the *ad hoc* committee asserted that the award was inconsistent with the ICSID *travaux* because according to the tribunal drafters of the ICSID Convention rejected a monetary threshold attached to the definition of an investment and instead entrusted the definition of investment to contracting states.[85]

The *Biwater* and *Malaysia Historical* approaches are not without difficulty based on the fact that majority of BITs generally define the term investment broadly. The approaches espoused by the *Biwater* and *Malaysia Historical* tribunals are problematic because the approaches inevitably result in arbitral tribunals having jurisdiction virtually for all disputable transactions. Indeed, as aptly noted by Judge Mohamed Shahabuddeen in his dissenting opinion in *Malaysian Historical Salvors*, the role of the ICSID Convention is to subject the will of the parties to some 'outer limits' beyond those outer limits their consent is ineffectual to create transactions considered as investment under the ICSID framework.[86] Persuasively, Judge Shahabuddeen argues that there is nothing that stops contracting states from consenting to broad investment definitions provided this is within acceptable limits and beyond those limits, the parties consent is

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[81] *Malaysian Historical Salvors SDN BHD v Malaysai,* ICSID Case No. ARB/05/10, Decision on the Application of Annulment, April 16 2009, para 69 [Hereafter *Malaysian Historical Salvors v Malaysia*]. The 2007 decision by the Sole Arbitrator was annulled because the Sole Arbitrator exceeded his powers by failing to exercise jurisdiction with which it was endowed by the terms of the Agreement and the Convention.

[82] Ibid para 73.

[83] Ibid para 74.

[84] Ibid para 80.

[85] Ibid.

[86] Ibid Dissenting Opinion of Judge Mohamed Shahabuddeen, para 8.

ineffective.[87] Judge Shahabudden's reasoning was reinforced in *Global Trading Resources v Ukraine* where the tribunal noted that the generous margin left under the ICSID Convention is not absolute.[88] In the tribunal's view the margin does not extend to allowing states to deem activities as an investment without regard to whether such transactions meet the requirement of an investment under the ICSID Convention.[89] Jezewski notes that the asset based definition basically yields two possible results; either one accepts that all investor activities considered as assets under the relevant BIT are investments within the jurisdiction of an ICSID tribunal or the tribunal should be left with the discretion to make a determination on its own.[90] According to Jezewski, an approach that overtly stresses the intention of contracting states under the relevant BIT renders article 25 of the ICSID Convention meaningless.[91]

From the foregoing discussion, it is plausible to argue that the ICSID Convention requires an objective interpretation to the term investment independent of the intention of state parties under the relevant BIT. Put differently, if the claimant fails to demonstrate that the transaction at hand meets the characteristics of 'investments' irrespective of whether the transaction complies with the BIT definition, arbitral tribunals should decline jurisdiction. Even more, when the definition of investment explicitly states that assets should be in the host state's national interests, arbitral tribunal should evaluate whether such assets indeed contribute to the host state's development.[92] It should be noted that although majority of BITs concluded by African states contain an asset based definition with a non-exhaustive list of assets that qualify for treaty protection there are

[87] Ibid.

[88] *Global Trading Resources Corp and Globex International Inc. v Ukraine,* ICSID Case No. ARB/09/11 Award 1 December 2010, para 44 [Hereafter *Global Trading Resources v Ukraine*].

[89] Ibid.

[90] Marek Jezewski, 'Development Considerations in Defining Investment' in Cordonier Segger and others (eds) *Sustainable Development in World Investment Law* (Kluwer Law International 2011) 217-218.

[91] Ibid 218.

[92] For example, the definition of investment in the Belgium-Rwanda BIT clearly indicates that the economic activity must be in the national interest of the host state. It reads as follows 'The term investment shall mean any direct or indirect or medium or long term contribution of movable or immovable property intended for the development of an economic activity acknowledged to be in the national interest at the time the contribution is made under the laws of the State in whose territory such contributions are made'.

some exception such as the United States Rwanda BIT and the Ghana-Denmark BIT.

Particularly, the United States-Rwanda BIT goes beyond the typical asset based definitions and the non-exhaustive list by explicitly mentioning substantive characteristics that 'investments' must comply with to qualify for treaty protection.[93] Specifically, the 'investment' clause in the United States-Rwanda BIT reads as follows, ''investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk''.[94] To be sure, the United States-Rwanda BIT inserts a footnote that provides as follows ''for greater certainty, where an enterprise does not have the characteristics of an investment that enterprise is not an investment regardless of the form it may take''.[95] Although the United States-Rwanda BIT defines investments broadly, it is remarkably different from other African BITs because it offers a set of criteria that an investment must display to qualify for treaty protection. Manifestly therefore if disputable transactions do not demonstrate that the investor has committed capital, expects to gain and has incurred risk, then under the terms of the United States-Rwanda BIT the investor cannot claim treaty protection.

Aside from the United States-Rwanda BIT, another notable departure from Africa treaty practice is the Denmark-Ghana BIT. According to the Denmark-Ghana BIT, transactions qualifying as investment must be acquired for purposes of establishing lasting economic relations.[96] Salacuse suggests that the underlying motivation of BITs with this wording is the conviction that short term investments do not contribute to the host state's economic development.[97] By and large, countries with such treaty language believe that short term transactions bring about undesirable speculation and through the treaty process,

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[93] The United States-Rwanda BIT. The BIT also indicates that footnotes and annexes shall form an integral part of the treaty implying therefore that arbitral tribunals interpreting the meaning of investment must give credence to characteristics of the form of investment as stipulated in the footnotes and annexes.

[94] Ibid.

[95] Ibid.

[96] Article 1 of the Ghana-Denmark BIT.

[97] Jeswald W Salacuse, *The Law of Investment Treaties* (OUP 2010) 164.

the countries seek to accept only transactions that contribute to the state's economic development.[98] It should be stressed that although the United States-Rwanda BIT and the Denmark-Ghana BIT are outliers, the two BITs illustrate nuanced approaches through which the term investments can be defined broadly but also considerably take into account the interests of the capital receiving African state.

From the foregoing, the following observations can be made about the definition of 'investments' in African treaty practice; with the exception of the United States-Rwanda BIT and the Denmark-Ghana BIT, majority of African BITs define investments broadly using the phrase 'every kind of assets'. In addition, African BITs contain a non-exhaustive list of assets that African states *prima facie* consider as investments. Comparatively, the definition of 'investment' across different African states is substantively similar notwithstanding the contracting states part to the BIT. In other words, whether the BIT is signed between African states and the traditional capital exporting countries or among African states themselves, the definition of investments remains nearly the same. The only substantive variation among African BITs is the additional requirement included in some African BITs that the investment must be made 'in accordance with the laws or regulations of the host state'. As will shortly be discussed, this is an important qualification to the definition of investment and the meaning of this requirement has created conflicting opinions in arbitral jurisprudence. The investment clause articulated in African BITs has inherent flaws because the clause can essentially enable even worthless assets to qualify for treaty protection. From a sovereign and policy perspective, there is need for a redefinition of the investment clause and this is more apparent considering the array of inconsistent decisions coming from arbitral practice.

As shown in the analysis above, the jurisprudence suggests that arbitral tribunals are gradually shifting towards the direction of giving more weight to the definition of investment articulated in the relevant treaty. Indeed, as correctly observed by one commentator, there is need for a paradigm shift in the definition of investment especially because the durability of *Salini* test is

[98] Ibid.

uncertain.[99] For instance, in a recent case, *Saba Fakes v Turkey*, the tribunal remained unconvinced that contribution to the host state's economic development was a necessary requirement for determining an investment within the ICSID framework.[100] According to the tribunal, even though economic development of the host state is one of the proclaimed objectives of the ICSID Convention, contribution to the economic development of the host state is an expected consequence and cannot be perceived as an independent criterion.[101] In light of the existing jurisprudence, it remains to be seen whether African states negotiating future BITs will qualify the definition of investment with a set of objective characteristics.

2.3 The Qualification of Investment with 'In Accordance with the Laws and Regulations of the Host State

As mentioned above, the investment clause of nearly all African BITs broadly defines the term investment. However, there are a few African BITs which qualify the investment clause with an additional requirement that the investment must be made ''in accordance with the laws and regulations of the host state''. Typically, African BITs incorporating the definition of investment with an 'in accordance with the host state law' clause follow the formulation of the Tanzania-Finland BIT and read as follows:

> The term investments means every kind of asset established or acquired by an investor of one Contracting Party in the territory of the other Contracting Party in *accordance with the laws and regulations* of the latter Contracting Party…(emphasis added).[102]

Alternatively, some African BITs insert the qualification 'in accordance with the laws and regulations' in the admission provision.[103] When the clause is included as part of the admission provision, substantively this means that investments

[99] Marek Jezewski, 'Development Considerations in Defining Investment' in Cordonier Segger and others (eds) *Sustainable Development in World Investment Law* (Kluwer Law International 2011) 235.

[100] *Saba Fakes v Republic of Turkey*, para 111.

[101] Ibid.

[102] Article 1 of the Finland-Tanzania BIT.

[103] Christina Knahr notes that most frequently the qualification in accordance with the laws and regulations appears in the definition clause but also may be inserted in provisions on protection or admission of investment. Christina Knahr 'Investments in accordance with the host state law' (2007) 5*TDM* 1. This statement is true for African BITs as well.

must comply with local laws and regulation at the time of initiating the investment and not necessarily throughout the life of the investment.[104] The Netherlands-Ghana BIT is illustrative, it specifically provides under article 2 that, ''either Contracting Party shall within the framework of its *laws and regulations*, promote economic cooperation through the protection in its territory of investments of nationals of the other Contracting Party. Subject to its right to exercise powers conferred by *its laws or regulations*, each Contracting Party shall admit such investments'' (emphasis added).[105]

From this provision, the reference to laws and regulations ensures that only lawful investments are protected by the treaty.[106] Even more, the clause limits the jurisdiction of arbitral tribunals to only investments undertaken in accordance with domestic laws and regulations. However, African BITs like other existing treaties do not explain the exact meaning of the clause 'in accordance with laws and regulations.'[107] In addition, the qualification contributes little in explaining or delimiting the types of investments covered by the treaty.[108] As a result of this uncertainty, arbitral tribunals grapple with giving content to the meaning of 'in accordance with the laws and regulation of the host state.' In particular, arbitral tribunals constantly struggle with determining the scope of the obligation as well as establishing whether investors complied with existing host state laws.

For instance, in *Inceysa v El Salvador*, the respondent argued successfully that the tribunal lacked jurisdiction because the claimant obtained the bid without complying with El Salvador's domestic law. The tribunal concurred with the respondent based on the wording of the BIT which explicitly accorded protection

[104] *Gustav F W Hamester v Republic of Ghana,* ICSID Case No. ARB/07/24 Award 18 June 2010, para 127 [Hereafter *Hamester v Republic of Ghana*].

[105] Article 2 of the Netherlands-Ghana BIT; see also article 10 of the Germany-Ghana BIT.

[106] Anna Joubin-Bret, 'Admission and Establishment in the Context of Investment Protect' in August Reinisch (ed), *Standards of Investment Protection* (OUP 2008) 18.

[107] This is comparatively similar for example with Chinese BITs which have also not explained the meaning of the qualification. See Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policies and Practices* (OUP 2009) 55.

[108] In *Salini v Morocco*, para 46 the tribunals noted that 'in accordance with laws and regulation' refers to the legality of an investment and not to the definition of investment.

only to investments that comply with domestic laws and regulations.[109] In the tribunal's view, there was no doubt that contracting states obviously included this clause as an integral part of the BIT as reflected in the *travaux preparatoires* of the agreement. The tribunal observed that the only correct interpretation of the BIT must be that any investments made against the laws of El Salvador are outside the protection of the treaty and therefore beyond the scope of the tribunal.[110]

Regarding the laws of the host state, the tribunal stated that the Constitution of El Salvador considers duly enacted international agreements as valid El Salvador law which therefore elevates the BIT as the primary and special legislation of the tribunal.[111] The tribunal then observed that the BIT as valid El Salvador law does not contain substantive principles that would permit a determination about whether the investment was made in accordance with the laws of El Salvador.[112] As a result, the tribunal resorted to general principles of international law such as good faith, *nemo auditor propiam turpitudinem allegans*, violation of international public policy and violation of unlawful enrichment.[113] In conclusion the tribunal found it lacked jurisdiction to hear the dispute because the ''investment was made in a manner that was clearly illegal, it was not included within the scope of consent expressed by Spain and El Salvador in the BIT and, consequently, the disputes arising from it are not subject to the jurisdiction of the Centre''.[114]

Similarly, the tribunal in *Fraport v Philippines* declined jurisdiction on the basis that the investment was not carried out in accordance with the laws and regulations of Philippines as articulated in the BIT. According to the tribunal, the fact that the claimant knowingly concealed violations of Anti Dummy Law (ADL) mitigates against any good faith endorsements accruing to the investor through

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[109] *Inceysa Vallisoletana S.L v Republic of El Salvador*, ICSID Case No. ARB/03/26 Award 2 August 2006, para 195-196 [Hereafter *Inceysa Vallisoletana v Republic of El Salvador*].

[110] Ibid para 203.

[111] Ibid para 219-220.

[112]Ibid para 224-225.

[113] Ibid para 230-256.

[114] *Fraport AG Frankfurt Airport Services Worldwide v Philippines,* ICSID Case No. ARB/03/25 Award 16 August 2007, para 257 [Hereafter *Fraport AG Frankfurt Airport Services v Philippines*].

the actions of the Philippines government.[115] The tribunal further observed that the BIT explicitly required that for an investment to qualify for treaty protection the investment had to be in accordance with host state law and therefore since the claimant knowingly and intentionally circumvented the ADL, the investor cannot claim protection from the BIT.[116] In the tribunal's view, since the investment was not made in accordance with the laws and regulations of the Philippines and also since the claimant cannot claim estoppel the tribunal therefore lacked jurisdiction *ratione materiae*.[117] The tribunal further noted that 'in accordance with the host state laws and regulation' applies at the time the investment was initiated and not throughout the life of an investment. In conclusion, the tribunal was of the view that:

> If, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of violations of its law in the course of the investment, as a justification for state action with respect to the investment, might be a defence to claimed substantive violations of the BIT, but could not deprive a tribunal acting under the authority of the BIT of its jurisdiction. [118]

Furthermore, in *World Duty Free v The Republic of Kenya*, the respondent successfully demonstrated that the investment contract was obtained through bribery and corrupting senior government officials including the former President of the Republic, Daniel Arap Moi which was contrary to Kenyan laws and regulations as well as English laws. The tribunal noted that contracts obtained through corruption are not only contrary to domestic laws but also against international conventions and international public policy.[119] The tribunal rejected the claimant's assertion that the bribe was an independent collateral transaction severable from the Parties agreement.[120] In the tribunal's view corruption and bribery of senior government officials was rationally connected to the Agreement and formed an intrinsic part of the overall transaction without

[115] Ibid para 387.

[116] Ibid Para 398.

[117] Ibid para 401.

[118] Ibid para 345.

[119] *World Duty Free Company Limited v The Republic of Kenya*, ICSID Case No. ARB/00/7 Award October 2006, para 157 [Hereafter *World Duty Free v Kenya*].

[120] Ibid para 174

which no contract would have been agreed upon by the parties.[121] With respect to the claimant argument that bribery extended to both the claimant and government of Kenya, the tribunal held that as a matter of public policy 'the law protects not the litigating parties but the public and in this case, the mass of tax-payers and other citizens making up one of the poorest countries in the world.'[122] In sum, the tribunal concurred with the ruling in *Holman v Johnson* where Lord Mansfield stressed that;

> ''…the objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, but accidentally, if I may say so. *The principle of public policy* is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted…''(emphasis added).

Equally, the tribunal in *Anderson v Costa Rica*, declined jurisdiction on the ground that the claimants did not comply with Costa Rica's laws and regulations as specified under the Costa Rica-Canada BIT. Arriving at its decision, the tribunal stressed that by specifically including 'in accordance with laws of host state' the parties manifestly showed the importance they attached to legality of investments made by investors.[123] The tribunal found the process through which the claimants obtained assets was not consistent with the Organic Law of the Central Bank because Villalobos brothers were engaged in financial intermediation without authorization of the Central Bank.[124] According to the tribunal, Costa Rica, 'like any other country has a fundamental interest in securing respect of its laws' and this interest was clearly articulated in the BIT which required that investments under the BIT be owned and controlled in accordance with Costa Rica laws.[125] The tribunal further noted that, foreign

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[121] Ibid para 175

[122] Ibid para 181.

[123] *Alasdair Ross Anderson and Others v Republic of Costa Rica,* ICSID Case No. ARB (AF) 07/3 Award, 19 May 2010, para 53 [Hereafter *Ross Anderson v Costa Rica*].

[124] Ibid.

[125] Ibid para 58.

investors have a duty to assure themselves that their investments comply with host state laws and regulations. On the basis of the evidence, the tribunal found that the claimants did not exercise the kind of due diligence reasonable investors would have taken to assure themselves.[126]

In *Hamester v Ghana*, the respondent argued unsuccessfully that the tribunal did not have jurisdiction because the claimant presented false and fraudulent documents at the time of acquiring the investment and also committed multiple fraudulent act during the life of the investment.[127] The tribunal observed that the obligation ''in accordance with host state laws'' relates to legality at the initiation of the investment and not during performance of the investment.[128] According to the tribunal, the wording of the BIT stressed that legality of creating an investment is a jurisdictional issue while ''the legality of the investor's conduct during the life of the investment is a merits issue''.[129] The tribunal then examined whether the joint venture agreement (JVA) was illegal from its inception because of the foreign investor's alleged fraudulent behaviour. The tribunal found that there was inadequate evidence to show the existence of fraudulent behaviour at the time of initiating the JVA.[130] Moreover, the tribunal noted that even if there had been fraudulent behaviour, the respondent would still have entered into the joint venture irrespective of the overstated figures.[131] Evidence from arbitral tribunals reaffirms that 'in accordance with host state laws and regulations' is an important qualification to the definition of investment.

The tribunal in *Hamester v Ghana* emphasized further that the qualification is a general principle that exists independently of the specific language of the treaty. Specifically, the tribunal stressed that:

> An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself

[126] Ibid.

[127] *Hamester v Republic of Ghana,* para 127.

[128] Ibid.

[129] Ibid.

[130] Ibid para 134.

[131] Ibid para 132-135.

constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law.[132]

From the foregoing, the following are worth pointing out about the evolving jurisprudence; ''in accordance with the laws and regulations of the host state'' is a substantive legal obligation that investors should comply with irrespective of whether the obligation is articulated in the BIT or not. Even more, when contracting states explicitly include the qualification, arbitral tribunals must examine investor's compliance with host state laws and regulations at the jurisdictional level.[133] Conversely, when contracting states do not include the qualification, arbitral tribunals should evaluate compliance with host state laws and regulations at the merits level.[134] In essence, this means that in investor-state claims based on BITs that do not make reference to ''in accordance with laws and regulation'', compliance with host state laws is examined at the admissibility level rather than as part of the jurisdictional threshold analysis.

It should be stressed that approaches taken by arbitral tribunal remain unsettled in as far as determining specific host state laws that should be applied to a particular dispute. For example, in *Inceysa v El Salvador*, the tribunal viewed the BIT as El Salvador law and interpreted 'in accordance with host state laws' using benchmarks of general international law while the tribunal in *Anderson v Costa Rica*, viewed the Costa Rica-Canada BIT constituting part of Costa Rica law and interpreted ''in accordance with host state laws'' following principles articulated under Costa Rica laws and regulations. However, it should be stressed that methodology used in *Inceysa v El Salvador* is unconvincing because the tribunal did not give sufficient credence to the domestic laws of El Salvador. Indeed, as seen from the cases above subsequent tribunals did not follow this approach and instead concentrated on examining actual host state laws that are being disputed. To my mind, this methodology is preferable because it would be presumptuous to assume that contacting states intended international law to be the applicable law rather than duly enacted domestic regulations and

[132] Ibid para 123-124.

[133] Rahim Moloo and Alex Khachaturian, 'The Compliance with the Law Requirement in International Investment Law' (2011) 34 *Fordham Int'l L.J* 1437, 1499.

[134] Ibid.

legislation. Obviously, if domestic laws manifestly contradict international law then the requisite international law can be considered but logically the starting point requires an examination of local laws and regulations.

From the jurisprudence of arbitral tribunals, it should be stressed that although majority of African BITs do not contain the clause ''investment must be made in accordance with local laws and regulations'' foreign investors still have a duty to comply with domestic laws and regulations because complying with domestic laws is a general principle that exists independently of the specific language of the treaty.[135] Put differently, foreign investors investing in African States containing BITs that do not explicitly mention ''in accordance with host state laws' must still disengage from illegal transactions. However, the omission of ''in accordance with host state laws'' in majority of African BITs means that arbitral tribunals will easily accept jurisdiction in investor-state disputes involving African states especially when the breach of host state laws is not manifest from investor's conduct. In essence, by not explicitly stipulating that investors must comply with domestic laws, majority of African States have indirectly consented to the jurisdiction of arbitral tribunals to determine investor-state disputes on the merits.[136] Finally, majority of African BITs contain a generalized definition of investment and do not include any legal qualification, the problem underlying this wording is that any asset qualifies for treaty protection and implicitly this accords arbitral tribunals unrestrained discretion to decide nearly all disputes at the substantive level.

2.4 The Definition of Investor in African Treaties

Aside from the claimant having to demonstrate that the transaction is an investment, the claimant must as a threshold matter prove that he or she is an 'investor' as specified in the relevant treaty.[137] Generally, the definition of

[135] *Hamester v Republic of Ghana,* para 134.

[136] See for general discussion see Rahim Moloo and Alex Khachaturian, 'The Compliance with the Law Requirement in International Investment Law' (2011) 34 *Fordham Int'l L.J* 1437, 1489-1491.

[137] Rachel Thorn and Jennifer Doucleff, 'Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of Investor' in Michael Waibel and others (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010) 5.

investor through limiting the jurisdiction of arbitral tribunals aims at ensuring that benefits of the treaty do not apply to domestic investors of the host state. The wording of the concept 'investor' varies among African BITs with some BITs explicitly indicating covered 'investors'[138] while others simply make reference to 'nationals and companies' without necessarily mentioning the term investor.[139] For instance the Malaysia-Ghana BIT stipulates that an investor means ''any natural person possessing the citizenship of, or permanently residing in the territory of a Contracting Party in accordance with its laws; and any corporation, partnership, trust, joint-venture, organization, association or enterprise incorporated or duly constituted in accordance with applicable laws of that Contracting Party''.[140]

African BITs making reference to nationals and companies usually have two separate paragraphs; one mentioning 'nationals' and the other mentioning 'companies'.[141] In addition, African BITs following this formula do not use the term contracting states to encapsulate national and companies of both parties. The typical formula as illustrated in the Burundi-Germany BIT provides as follow; 'nationals' means; (a) in respect of the Federal Republic of Germany, Germans within the meaning of the Basic Law for the Federal Republic of Germany; (b) In respect of the Republic of Burundi, Burundi citizens within the meaning of the law in force in the Republic of Burundi''.[142] Substantively, although there are variations in African BITs, it's important to note that African states protect foreign investors who are able to establish a link to the contracting states either on the basis of nationality or through corporate nationality. Given the overall

[138] See the China-Ghana BIT; Ghana-Egypt BIT; Mauritius-Ghana BIT; Ghana-Romania BIT; United States-Rwanda-BIT; Finland-Tanzania BIT; Italy-Tanzania BIT; Tanzania-Sweden BIT; Bulgaria-Ghana BIT; Ghana-Denmark BIT; Malaysia-Ghana BIT; Tanzania-Denmark BIT and Netherlands-Tanzania BIT.

[139] See for instance Belgium-Cameroon BIT, United Kingdom-Cameroon- BIT; United Kingdom-Congo BIT; Ghana-Benin BIT; India-Ghana BIT; Germany- Kenya BIT; Germany- Burundi BIT; United States-Cameroon BIT; Korea-Congo BIT; United States-Congo BIT; Ghana-Guinea BIT; Netherlands-Ghana BIT; United Kingdom -Ghana BIT; Belgium-Rwanda BIT and United Kingdom-Tanzania BIT.

[140] Article 1(c) of the Ghana-Malaysia BIT.

[141] Belgium-Cameroon BIT; United Kingdom-Cameroon BIT; United Kingdom-Congo BIT; Ghana-Benin BIT; India-Ghana BIT; Germany-Kenya BIT; Germany- Burundi BIT; United States-Cameroon BIT; Congo-Korea BIT; United States-Congo BIT; Ghana-Guinea BIT Netherlands-Ghana BIT; United Kingdom-Ghana BIT; Belgium-Rwanda BIT; United Kingdom-Tanzania BIT.

[142] Article 1(3) of the Germany-Burundi BIT, this formulation is similar to the BITs mentioned above.

importance of the concept 'investor' in determining jurisdiction, subsequent parts of this chapter assess the two main elements stipulated in African BITs under which an investor can qualify for treaty protection.

2.4.1 The Nationality Requirement in African BITs

In all African BITs, for a claimant to qualify as an investor, the claimant must establish that he or she is a national of the contracting state under which the claimant is seeking treaty protection.[143] However, the wording of the nationality requirement differs among African BITs though predominately most African BITs explicitly stipulate that nationality should be based on national laws of contracting states. For instance in the Belgium-Rwanda BIT, a national is said to mean: ''(a) with regard to the Belgian-Luxembourg Economic Union, any individual who under Belgian or Luxembourg law is considered to be a citizen of Belgium or Luxembourg; (b) with regard to Rwanda, any individual who under Rwandese law is considered to be a citizen of the Rwandese Republic''.[144] In contrast, the Tanzania-Finland BIT simply defines an investor as ''any natural person who is a national of either contracting party in accordance with its law''.[145]

Aside from this general requirement, exceptionally some African BITs recognize not only the citizenship or nationality of contracting states but also claimants who are permanently residing in contracting states.[146] This wording though rarely used in Africa treaty practice can have unintended consequences especially when the claimant has permanent residence of a contracting state and at the same time the nationality of the host state. From the phrasing of this clause, it should be stressed that African states with BITs containing such wording risk the possibility of domestic investors bringing claims against them alleging that the

[143] This is a universal requirements in all African BITs for instance see Belgium-Cameroon BIT; United Kingdom-Cameroon BIT; United Kingdom-Congo BIT; Ghana-Benin BIT; India-Ghana BIT; Germany-Kenya BIT; Germany- Burundi BIT; United States- Cameroon BIT; Korea-Congo BIT; United States-Congo BIT; Ghana-Guinea BIT; Netherlands-Ghana BIT; United Kingdom-Ghana BIT; Belgium-Rwanda BIT; United Kingdom-Tanzania BIT; China-Ghana BIT; Ghana-Egypt BIT; Mauritius- Ghana BIT; Ghana-Romania BIT; United States- Rwanda BIT; Finland-Tanzania BIT; Italy-Tanzania BIT; Tanzania-Sweden BIT; Ghana-Bulgaria BIT; Denmark-Ghana BIT; Ghana-Malaysia; Denmark-Tanzania BIT and Netherlands-Tanzania BIT.

[144] Article 1 of the Belgium-Rwanda BIT.

[145] Article 1(5) of the Finland-Tanzania BIT.

[146] Article 1(5) of the Tanzania-Denmark BIT.

domestic investor is a foreign investor as spelled out in the definition of covered investors. The possibility of such claims is without doubt not unlikely, for example in *Feldman v Mexico*, the tribunal had to decide whether a claimant possessing United States Citizenship as well as permanent residence in Mexico had standing to bring claims against Mexico under Chapter Eleven of NAFTA.

The tribunal in the above case rejected the argument that article 201 of NAFTA makes permanent residence tantamount to nationality and is an instance of dual nationality which requires a determination of dominant or effective nationality.[147] In the view of the tribunal such contextual interpretation of equal treatment of nationals and permanent residents leads to the result that permanent residents are treated like nationals in a given State Party only if that State is different from the State where the investment is made.[148] The tribunal essentially made a distinction between permanent residence and dual citizenship and held that since the claimant was a citizen of only the United States there was no prohibition under both international law and NAFTA barring the claimant from protection of the treaty because of possessing permanent residence in Mexico.[149]

However, the decision of the arbitral tribunal is implausible because it perpetuates abuse of arbitral procedure through treaty shopping. Essentially, contracting states include the notion of permanent residence in investment treaties as a manifestation that states consider permanent residence to be functionally equivalent to nationality. In essence therefore, although permanent residents should benefit from treaty protection, arbitral tribunals must decline jurisdiction in situations where claimants possessing permanent residence and citizenship of two different states bring disputes against one of the contracting states under the same treaty. Finally, unlike other existing BITs, African BITs hardly address the issue of dual or multiple nationalities. Among the treaties examined, only the United States-Rwanda BIT explicitly limits the possibility of dual citizens seeking protection from both contracting states. Specifically, the

[147] *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No. ARB (AF) 99/1, Jurisdiction Award, 6 December 2000, para 33-34 [Hereafter *Feldman v Mexico*].

[148] Ibid para 34.

[149] Ibid para 36.

United States-Rwanda BIT stipulates that natural persons with dual nationalities are deemed to be exclusively nationals of the State of dominant and effective nationality.[150]

2.4.2 The Requirement of Corporate Nationality

The determination of corporate nationality is more complicated than natural persons because of the ever changing landscape within which modern corporate enterprises operate. This is especially more apparent in situations where companies are created and owned by investors who have no real or genuine connection to the state granting corporate nationality.[151] All African BITs like many of the existing treaties incorporate economic entities into the definition of protected juristic persons.[152] Specifically, under African treaty practice protection accorded to corporate nationality can take any of the following forms; some African BITs require that the corporation, enterprise, partnership, trust, joint venture or association should be established or incorporated in the territory of the contracting state in accordance with domestic laws,[153] other African BITs require that the entity be located in the contracting state and controlled either directly or indirectly by nationals of the contracting party.[154] Other African BITs simply require the juristic person with or without legal personality should have the seat in the contracting state.[155]

Generally, the acquisition of corporate nationality under African treaty practice usually follows two different formulas; some African BITs use the combined system whereby companies must undergo multiple tests to qualify for treaty protection[156] while others simply provide for single criteria.[157] For example, the

[150] Section A of the United States-Rwanda BIT.

[151] Jeswald W Salacuse, *The Law of Investment Treaties* (OUP 2010) 181.

[152] For a comprehensive review of region specific treaties, see Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policies and Practices* (OUP 2009) 53-104.

[153] See for example the Malaysia-Ghana BIT; Denmark-Ghana BIT; Ghana-Guinea BIT; United Kingdom-Cameroon BIT.

[154] See for instance the Netherlands-Ghana BIT; Italy-Tanzania BIT.

[155] See particularly the Germany-Burundi BIT and the Germany- Kenya BIT.

[156] Article 2 Belgium-Cameroon BIT; Article 1(b) Netherlands-Ghana BIT; Article 1(2) Belgium-Rwanda BIT; Article 1(b) Tanzania-Denmark BIT and Article 1(b) Netherlands-Tanzania BIT.

[157] Article 1(d) United Kingdom-Congo BIT; Article 1 (d) of the Ghana-Benin BIT; Article 1(2) of the Ghana-Egypt BIT; Article 1(c) of the Ghana-Mauritius BIT; Article 1(4) of the Germany-Kenya BIT, Article 1(5) of the Tanzania-Finland BIT; Article 1(2) of the Italy-Tanzania BIT;

Netherlands-Ghana BIT provides that an investor shall comprise of 'any legal persons located either in Ghana or the Netherlands and controlled, directly or indirectly, by nationals of that Contracting party.''[158] According to the Netherlands-Ghana BIT therefore, corporate enterprises must not only be based in Ghana or the Netherlands but should also be controlled by nationals of the contracting states. The Netherlands-Ghana BIT can be contrasted with for example the Tanzania-UK BIT which simply requires that the corporate entity should be incorporated under the laws and regulations of the contracting states.[159]

The combination of different criterion has the advantage of limiting the scope of the treaty to only those corporate companies with real or continuous links to the home country.[160] In arbitral practice where BITs contain incorporation as the sole criteria, arbitral tribunals have generally not pierced the corporate veil and declined looking at the nationality of the owners of the company.[161] For instance, in *Saluka v Czech Republic* the tribunal strictly followed the definition of corporate nationality in the Czech Republic-Netherlands BIT which required only that the claimant should be an investor incorporated under the laws of the contracting states.[162] Although the tribunal was sympathetic to the argument that companies which have no real connection with the contracting states should not benefit from the treaty, the tribunal declined imposing any additional criteria other than those the parties articulated in the treaty.[163] The tribunal was of the view that ''the parties had complete freedom of choice in this matter, and they chose to limit entitled "investors" to those satisfying the

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Article 1(4) of the Germany-Burundi BIT; Article 1(d) of the United Kingdom-Congo BIT; Article 1(2) of the Bulgaria-Ghana BIT; Article 1(3) of the Denmark-Ghana BIT; Article 1 (d) of the Ghana-Guinea BIT; Article 1(b) of the United Kingdom-Ghana BIT; Article 1(c) of the Malaysia-Ghana BIT and Article 1(c) of the United Kingdom-Tanzania BIT.

[158] Article 1(b) of the Netherlands-Ghana BIT.

[159] Article 1(c) of the United Kingdom-Tanzania BIT.

[160] Rachel Thorn and Jennifer Doucleff, 'Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of Investor' in Michael Waibel and others (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010) 9.

[161] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 50.

[162] *Saluka Investments BV v Czech Republic*, para 240.

[163] Ibid.

definition set out in Article 1 of the Treaty''.[164] Respectively, the tribunal held that the corporate entity met the sole incorporation criteria as articulated in the BIT and refused to ''add any other requirement which the parties could themselves have added but which they omitted to add''.[165]

Similarly, a subsequent tribunal in *Rompetrol Group v Romania* followed the reasoning adopted in *Saluka v Czech Republic* and *Tokios Tokeles v Ukraine*.[166] The facts and decision of *Rompetrol Group v Romania* are revealing on the continued reliance on formalities even when there is sufficient evidence showing the investor suspiciously acquired corporate nationality. In this case the facts clearly suggest that the tribunal should have looked beyond formalities and pierced the corporate veil. The facts are briefly as follows; an investor group led by Mr. Patriciu, a Romanian national, purchased a controlling stake in Rompetrol, a Romanian petroleum company. Subsequently, Mr. Patriciu incorporated a private limited liability company in the Netherlands called Waverton which was a wholly owned subsidiary of a Luxembourg company called ROGI owned by Mr. Marin. Shortly thereafter, Waverton and ROGI become controlling shareholders of Rompetrol S.A and Waverton changed its name to The Rompetrol Group. Under this arrangement, Mr. Marin and Mr. Patriciu between them owned 74% of ROGI, which owned 100% of The Rompetrol Group. Subsequently, Mr. Marin was bought out by Mr. Patriciu and Mr. Stephenson; Mr. Patriciu then owned 80% and Mr. Stephenson 20% of the shares in Rompetrol Group. It was not disputed that the claimant in this arbitration was a company duly established in the Netherlands and in compliance with the formal requirements of the BIT but what was disputable was whether the claimant can bring a claim against Romania yet he is a Romanian citizen. According to the respondent based on the facts of the case, the dispute fell exclusively within the domestic jurisdiction of Romanian courts and is not within the purview of an ICSID tribunal.

The respondent argued unsuccessfully that even though the claimant met the formal requirements of corporate nationality as articulated in the Romania-

[164] Ibid para 241.

[165] Ibid.

[166] *Tokios Tokeles v Ukraine*, para 53-71.

Netherlands BIT, there was a clear exception to this where it can be shown that the real and effective nationality of the legal entity in question is that of the respondent state.[167] While rejecting this reasoning, the tribunal emphasized that the definition of corporate nationality as stipulated in the BIT is the decisive factor for establishing jurisdiction. According to the tribunal, there was 'simply no room for an argument that a supposed rule of 'real and effective nationality' should override either the permissive terms of Article 25 of the ICSID Convention or the prescriptive definitions incorporated in the BIT.' Based on the terms of the BIT the tribunal held that ''neither corporate control, effective seat, nor origin of capital has any part to play in the ascertainment of nationality under The Netherlands-Romania BIT and that the Claimant qualifies as an investor entitled to invoke the jurisdiction of this Tribunal by virtue of Article 1(b)(ii) of the BIT''.[168]

The approach by arbitral tribunals to strictly rely on formalities without looking beyond corporate nationality could result in extending treaty protection to fictitious companies which would be against the intention of contracting states. As mentioned above, African states have either combined or separated the criteria of corporate nationality implying therefore that the jurisprudence as developed by arbitral tribunals also has consequences for African states. Particularly, it should be stressed that strict reliance on formalities disproportionately affects African states compared to other developing countries with similar BITs because the legal infrastructure of African states is generally perceived as inadequate and lacks the necessary ingredients required for a stable business environment. Given this deficiency, foreign investors are likely to acquire treaty protection from contracting states that have BITs with African states even though the corporate enterprise has no real or actual connection with the contracting state granting corporate nationality. Furthermore, domestic investors from African states with the intention of benefiting from both domestic courts and international arbitration could potentially bring claims against the host state provided the domestic investor has corporate nationality of any contracting state part to the BIT. In light of these considerations, the present jurisprudence has serious consequences for African states because not only will

[167] *The Rompetrol Group v Romania*, para 54-78.

[168] Ibid.

African states be subjected to disputes by foreign investors with little or no connection to the contracting states but also African states face a real threat of domestic investors bringing claims against them.

2.5 The Territorial and Temporal Scope of African BITs

Generally, a discussion of the scope and definition clauses of African BITs would be incomplete without a brief assessment of the territorial and temporal provisions because of the centrality of these provisions in the scope and definition clauses. Taken as a whole, territorial and temporal provisions are important because their set the geographical boundaries within which the treaty applies as well as the duration of the treaty and in so doing complement the definition of assets and covered investor. With this in mind, the remaining parts of this chapter briefly review issues rising from territorial and temporal provisions which in turn conclusively complete the analysis of the scope and definition clauses of African BITs.

It should be stressed that the definition section of nearly all African BITs contains a clause highlighting the territory within which an investment must be made for the investment to qualify for treaty protection.[169] The wording of the territorial scope of most African BITs usually alternate between three different formulations; some African BITs have one clause incorporating territories of both contracting states[170] while others have separate clauses which individually specify the territory covered by the African state and the contracting state[171] and lastly a number of African BITs do not explicitly define the territory covered by the BIT.[172] However, based on the wording of these BITs, it can be presumed that if the BIT is silent about the territorial scope, the territory envisaged is that

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[169] See for example, Korea-Congo BIT; Ghana-Benin BIT; Denmark-Ghana BIT; Ghana-Guinea BIT; Malaysia-Ghana BIT; Netherlands-Ghana BIT; Denmark-Tanzania BIT; Netherlands-Tanzania BIT; United Kingdom-Cameroon BIT; Ghana-Egypt BIT; Italy-Tanzania BIT.

[170] Finland-Tanzania BIT; United States-Cameroon BIT; Korea- Congo BIT; Netherlands-Ghana BIT; Tanzania-Denmark; Tanzania-Netherlands BIT; Ghana-Egypt; Finland-Tanzania BIT; Italy-Tanzania BIT.

[171] Germany-Burundi BIT; Ghana-Benin BIT; Denmark-Ghana BIT; Ghana-Guinea BIT; Malaysia-Ghana BIT; United Kingdom-Ghana BIT; United Kingdom-Tanzania BIT; United Kingdom-Cameroon-UK BIT; United States-Congo BIT; India-Ghana BIT; Mauritius-Ghana BIT; United States-Rwanda BIT.

[172] For instance see Belgium-Rwanda BIT; Belgium-Cameroon BIT; China-Ghana BIT; Romania-Ghana BIT; Germany-Kenya BIT and Sweden-Tanzania BIT.

provided for under the respective national constitutions of contracting states. It should be stressed that only investments made within the sovereign boundaries of the contracting states will qualify for treaty protection. The territorial scope aside, all African BITs also contain a clause articulating the entry into force and termination of the treaty. With regard to entry into force of the treaty, some African BITs indicate that the BIT shall enter into effect after 30 days upon notification,[173] of the BIT's approval while other African BITs only require notification and do not provide any specific time frames.[174]

African BITs contain remarkable differences related to protected rights before entry into force of the BIT; specifically, some African BITs explicitly indicate that investments made by investors prior to entry into force of the BIT are protected,[175] while other BITs remain silent on this issue.[176] Generally, provisions protecting investors prior to entry into force of the BIT have negative consequences than sometimes anticipated by host states. Particularly, from the host state's perspective, some previous investments might not have been approved had the host state known that the rights and privileges of investors could potentially be expanded beyond what was agreed to at the time the investment was made.[177] Moreover, there is potential for the BIT to turn into an instrument protecting existing foreign investors while making insignificant contribution in stimulating new foreign investment flows. In such situations, the host state will not only have constrained its ability to make legitimate policy through entering the BIT but also granted existing foreign investors additional protection without acquiring substantial increase in foreign investments.

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[173] Germany-Burundi BIT; United States -Cameroon BIT; Korea-Congo BIT; Denmark-Ghana BIT; Ghana-Guinea; Malaysia-Ghana BIT; Netherlands-Ghana BIT; United Kingdom-Ghana BIT; Belgium-Rwanda BIT; Netherland-Tanzania BIT; Belgium-Cameroon BIT; United States-Congo BIT; China-Ghana BIT; Germany-Kenya BIT; United States-Rwanda BIT; Sweden-Tanzania BIT.

[174] Ghana-Benin BIT; Netherlands-Kenya BIT; Denmark-Tanzania BIT; United Kingdom-Tanzania BIT; United Kingdom-Cameroon BIT; Ghana-Egypt BIT; India-Ghana BIT; Mauritius-Ghana BIT; Ghana-Romania BIT; United Kingdom-Kenya BIT; Finland-Tanzania BIT; Italy-Tanzania BIT.

[175] Ghana-Benin BIT; Ghana-Guinea BIT; Malaysia-Ghana BIT; Netherlands-Ghana BIT; United Kingdom-Ghana BIT; Denmark-Tanzania BIT; Netherlands -Tanzania BIT; United Kingdom-Tanzania BIT.

[176] Denmark-Ghana BIT; Ghana-Egypt BIT; Belgium-Cameroon BIT; see also Article 12 of the Netherlands- Kenya BIT which reads as follows 'The present Agreement shall apply to all approved investments made in the territory of the one Contracting Party by a national of the other Contracting Party'.

[177] Jeswald W Salacuse, *The Law of Investment Treaties* (OUP 2010) 173.

Given this potential drawback, a number of African BITs explicitly exclude from the realm of the treaty any investment made prior to the entry into force of the BIT.[178] The entry into force aside, the duration of African BITs is usually anticipated to last between ten to twenty years with a presumption that the treaty will remain in force unless terminated by one of the contracting party.[179] Furthermore, African BITs normally provide that the termination of the BIT takes effect after twelve months upon receipt of the intention to terminate it.[180] Upon termination of the treaty, African BITs stipulate that approved investment made prior to termination of the treaty remain protected for a period of about 10 years.[181] The Malaysia-Ghana BIT is typical of African treaty practice and it reads as follows; 'With respect to investments made or acquired prior to the date of termination of this Agreement, the provisions of all of the other Articles of this Agreement shall continue to be effective for a period of ten (10) years from such date of termination''.[182]

[178] For instance the Belgium-Rwanda BIT explicitly provides that 'investments made before the entry into force of this Convention shall not be covered by it. A similar provision is articulated in the India-Ghana BIT and Mauritius-Ghana BIT.

[179] Mauritius-Ghana provides for 10 years, while the United States-Congo BIT provides for 20 years. See also the following Ghana-Egypt BIT provides for 10 years; China-Ghana BIT provides for 10 years, United States-Congo BIT provides for 10 years; United Kingdom-Cameroon BIT provides for protection for 10 years; Germany-Burundi BIT provides for 10 years; United States-Cameroon BIT provides for 10 years while Ghana-Benin BIT; Denmark-Ghana BIT; Ghana-Guinea BIT; Ghana-Malaysia BIT; Netherlands-Ghana BIT provide for 15 years. On the other hand, United Kingdom-Ghana BIT; Netherlands-Kenya provide for 5 years and Belgium-Rwanda BIT provide for 5 years while Denmark-Tanzania BIT provides for 10 years; Netherlands-Tanzania provides for 10 years; United Kingdom-Tanzania BIT provides for 10 years; Belgium-Cameroon BIT provides for 10 years and lastly India-Ghana provides for 10 years.

[180] Egypt-Ghana BIT; China-Ghana BIT; United States-Congo BIT; Mauritius-Ghana BIT; India-Ghana BIT; United Kingdom-Cameroon BIT; United Kingdom-Tanzania BIT; Germany-Burundi BIT; United States- Cameroon BIT; Mauritius-Ghana BIT; United Kingdom-Congo BIT; Ghana Benin BIT; Denmark- Ghana BIT; Ghana-Guinea BIT; Malaysia-Ghana BIT. On the other hand, the following African treaties provide for 6 months Netherlands-Ghana; United Kingdom-Ghana BIT; Netherlands-Kenya BIT; Belgium-Rwanda; Denmark-Tanzania BIT; Netherlands-Tanzania and the Belgium-Cameroon-BIT.

[181]China-Ghana BIT; United States-Congo BIT; Ghana-Egypt BIT; United States-Cameroon BIT; Denmark-Tanzania BIT; Germany- Burundi BIT; United States-Cameroon BIT; United Kingdom-Congo BIT provided for twenty years; Denmark-Ghana BIT; Ghana-Guinea BIT; Malaysia-Ghana BIT; Netherlands-Ghana BIT. However, the United Kingdom-Ghana BIT provides for 15 years, Netherlands -Kenya BIT provides for 5 years; Belgium-Rwanda BIT provides for 5 years; Netherlands-Tanzania provides for 15 years; United Kingdom-Tanzania BIT provides for 20 years; United Kingdom-Cameroon BIT provides for 20 years and the India-Ghana provides for 15 years.

[182] Article 12(4) of the Malaysia-Ghana BIT.

From the wording of this clause, potentially foreign investors can bring investment claims against Ghana ten years after termination of the treaty. This provision has developmental implications not only for Ghana but also African states with BITs that protect investment made prior to the entry into force of the treaty. Given the wording of this provision especially the fact that it extends protection even to investments concluded prior to the treaty, it is doubtful African states with such BITs anticipated the consequences of according additional years of protection to prior investments after expiry of the treaty. It should be stressed that although some African BITs have explicitly excluded investment disputes arising prior to the entry into force of the treaty other African BITs with the same provision are silent on the issue.[183] The protection accorded to prior investments was possibly included without anticipating the likelihood of such disputes arising. However, given increasing claims against African states without an explicit restriction to such disputes, the threat of investors bringing claims for investments that existed prior to the entry into force of the treaty and after the expiry of the treaty is a really possibility.

2.6 Conclusion

This chapter has reviewed the scope and definition clauses contained in African BITs and the approaches through which arbitral tribunals have interpreted such clauses. From the wording of African preambles it is evident that African preambles and more broadly African BITs are negotiated between two asymmetrical parties. Particularly, the preamble language of African BITs requires African states to protect foreign investors and the protection is further reinforced in treaty standards but the dual obligation to encourage foreign investment flows into African states is not elevated to the level of enforceable treaty obligations. Similarly, the chapter has shown that the majority of African BITs define the concept ‘investment’ broadly to include every kind of asset. In the majority of African BITs this is usually followed with a broad based asset

[183] See Article 13 of the Ghana-Benin BIT that reads as follows ‘This Agreement shall apply to investments made prior to and after its entry into force by investors of one Contracting Party in the territory of the other Contracting Party. It shall not, however, apply to investment disputes arising before its entry into force. See also for example article 10 of the Malaysia-Ghana BIT which reads as follows ‘‘This Agreement shall apply to investments made in the territory of either Contracting Party in accordance with its laws and regulations or national policies by investors of the other Contracting Party prior to, as well as after the entry into force of this Agreement’’.

definition containing a non-exhaustive list of examples of assets African states consider as investments. The wordings of African investment clauses have inherent flaws because basically treaty protection extends virtually to all assets including insignificant assets that may have little impact on the economic development of the respective African state. Given the array of inconsistent decisions from arbitral practice grappling with the definition of investment the chapter suggests that future African BITs should insist on redefining the definition of investment with unambiguous development characteristics.

Chapter 3

The Standard of Expropriation in African Bilateral Investment Treaties

Introduction

The expropriation of foreign investors is one of the most controversial issues in the relationship between foreign investors and sovereign states because it directly attacks duly acquired property rights.[1] When left unconstrained, expropriation has the propensity to reshape and disproportionately balance the relationship between foreign investors and sovereign states. Most importantly, expropriation involves the complicated poise of balancing between two competing and disenchanted interests. Generally under international law, the entry of foreign investors into sovereign states is discretionary based upon a state's overall social, political and economic realities.[2] However, international law recognises that when foreign investors are permitted entry, there is an equally compelling responsibility to offer compensation for damages resulting from expropriation measures.[3] While the duty to compensate foreign investors is

[1] The interest expropriation has generated is testament to the controversy entrenched in the philosophy of expropriation. For a cursory view of divergent opinions on expropriation see Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration* (OUP 2007) 265-313; M Sornarajah , *The International Law on Foreign Investment* (2nd edn, Cambridge University Press 2004) 344-401;Andreas F Lowenfeld, *International Economic Law* (2nd edn, OUP 2008) 559-570; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 89-118; Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policies and Practices* (OUP 2009) 253-298; Fath El Rahman and Abdalla El Sheikh, *The Legal Regime of Foreign Private Investment in Sudan and Saudi Arabia* (2nd edn, Cambridge University Press 2003)114-140, 263-304;Yvon Heckscher and Jan Schokkaert, *International Investment Protection: Comparative Law Analysis of Bilateral and Multilateral Interstate Conventions, Doctrinal Texts and Arbitral Jurisprudence Concerning Foreign Investments* (Bruylant 2009) 365-422; Burns H Weston, 'Constructive Takings Under International Law: A Modest Foray into the Problem of Creeping Expropriation' (1975) 16 *Va. J.Int'l L* 103; Rudolf Dolzer, 'New Foundations of the Law of Expropriation of Alien Property' (1981) 75 *Am. J.Int'l. L* 553, George C Christie, 'What Constitutes a Taking of Property Under International Law' (1962) 32 *Brit. Y.B.Int'l L* 307; Vicki L Been and Joel C Beauvais, 'The Global Firth Amendment: NAFTA's Investment Protections and the Misguided Quest for an International Regulatory Taking's Doctrine' (2003) 78 *NYU Law Rev* 30; Reisman W Michael and Sloane D Robert, 'Indirect Expropriation and its Valuation in the BIT Generation' (2003) 74 *BYIL* 115.

[2] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 89.

[3] Ibid.

fairly straightforward, international law falls short on delimiting or deconstructing measures that constitute indirect expropriation.[4]

As stated in the introductory chapter, the 20th century witnessed probably the most intensive period in the relationship between developed and developing countries.[5] To recap, during this period, there was unprecedented consensus in developing countries expressed through numerous resolutions and declarations unanimously rejecting the standard of compensation. Particularly, the prevalent view among many developing countries was that the standard of compensation is an extension of foreign dominance and a form of neo-colonialism. However, as stressed earlier, the rhetoric espoused by many developing states appears to have subdued following the signing of BITs that essentially condition expropriation upon the payment of prompt, adequate and effective compensation.[6] This pragmatic change in attitude towards foreign investors is premised on the perceived notion that foreign direct investment promotes social and economic development and investment treaties are the catalyst through which foreign capital is attracted.[7] Moreover, protecting foreign investors against uncompensated expropriation through treaties is considered important because modern investment treaties offer foreign investors discretion to pursue direct arbitration conducted by 'neutral tribunals'. It then becomes the responsibility of arbitral tribunals to determine whether government conduct

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[4] David A Gantz, 'The Evolution of FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement' (2004) 19 *Am.U.Int'l L. Rev* 679, 704; Jurgen Kurtz, 'A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment' (2002) 23 *U. Pa. J. Int'l Econ. L* 713, 738.

[5] See Chapter 1 for in-depth discussion.

[6] UNCTAD notes that the general direction of global investment policies is towards openness for and facilitation of foreign investment. For instance between December 2009 and March 2010, 73 countries concluded 37 International investment agreements. UNCTAD, Investment Policy Monitor (UNCTAD Secretariat 20 April 2010) <http://www.unctad.org/en/docs/webdiaeia20102_en.pdf>accessed 20 May 2012. The number of bilateral investment treaties is skyrocketing; according to UNCTAD statistics over three thousand BITs have been concluded and the number continues to increase. For example in 2002 alone African countries had signed a total of 533 BITs. It should be stressed that all BITs concluded by African countries contain an expropriation clause requiring expropriation to serve a public purpose, follow due process, non-discriminatory and accompanied by the payment of compensation.

[7] Whether BITs indeed attract foreign capital is not entirely clear. Some authors take the view that BITs do indeed influence FDI flows while others conclude that BITs play a limited role in increasing FDI flows. For a thorough discussion on the spectrum of varying opinions see, Karl P Sauvant and Lisa E Sachs, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (OUP 2009). Karl Sauvant and Lisa Sachs note that the analysis suggests difficulty in firmly establishing the effect of BITs on FDI.

amounts to expropriation as well as the amount of compensation awarded to damages suffered by foreign investors.

The delicate balance between government interests *vis-à-vis* the interests of foreign investors appears to have revived the bitter rivalry between developed and developing countries. Put succinctly, arbitral tribunals are faced with the dilemma of deciding whether government regulatory measures have crossed the line into compensable expropriation and quite often the conclusion from such determinations have not necessarily satisfied sovereign states. Moreover, considering that BITs do not define what constitutes expropriation the discretion to determine measures' amounting to expropriation entirely rests in the hands of arbitral tribunals. It is the outcome of that determination that has created unprecedented controversy between foreign investors and capital importing states. In light of these considerations, this chapter thoroughly examines the standard of expropriation as articulated in African BITs and by so doing underscores the practice of African states as well as situates African treaty practice within the context of general investment law treaty practice. Briefly, the chapter examines issues such as the scope and definition of expropriation, indirect expropriation, lawful expropriation and the standard of compensation. Lastly, in line with the overall themes of the thesis, this chapter also assess likely policy implications of the emerging expropriation jurisprudence towards legitimate policy making of African states.

3.1 Mapping the Doctrine of Expropriation

International law holds that states have the sovereign right to expropriate foreign property provided this is followed with the payment of prompt, adequate and effective compensation.[8] In other words, the payment of compensation is a

[8] This principle is a restatement of international law as reflected in the United Nations General Assembly Resolution of 1962 on Permanent Sovereignty over Natural Resources cited in International Legal Material, United Nations: General Assembly Resolution on Permanent Sovereignty over Natural Resources (Vol 6, America Society of International Law 1967) 147-149. The tribunal in Amoco *v Iran* noted that while the responsibility of states to respect contracts has been questioned since its inception this rule has been confirmed in numerous cases and is not disputed anymore. See *Amoco International Finance Corporation v Iran*, 14 July 1987, 15 Iran-U.S CTR 189, para 177; see also Garcia Amador Special Rapporteur for State Responsibility 'The right of expropriation even in its widest sense is recognised in international law, irrespective of the patrimonial rights involved or of the nationality of the person in whom they are vested. This international recognition has been confirmed on

sine qua non for the exercise of legitimate expropriation. Brownlie aptly notes that expropriation per se is lawful provided it is carried out for a public purpose, follows due process is non-discriminatory and the measures are accompanied with the payment of prompt adequate and effective compensation.[9] Contextually, it is important to draw a distinction between, confiscation, nationalisation and expropriation. In essence, although these concepts appear analogous and often are used interchangeably a distinction between the concepts is warranted to avoid ambiguity. Sornarajah defines confiscation as the capricious taking of property for personal enrichment and notes that usually such measures are implemented by dictators.[10] Traditionally, international law prohibits confiscatory taking and pronounces such takings as unlawful and unjustifiable.[11] On the other hand, nationalisation is defined as the systemic taking of foreign property to curtail economic dominance.[12] Nationalisation usually leads to the creation of state monopolies, termination of all foreign investments and the total takeover of means of production by state machinery.[13]

Generally, the nationalisation of foreign owned property as part of government sanctioned policy was once commonly practiced by formerly colonised states from Africa, Asia and Latin America. Particularly, from post-World War II until the early 1980s, nationalisation was pursued by formerly colonised states as a strategy to safeguard newly acquired liberty.[14] Coupled with this nationalisation was pursued because formerly colonised states viewed economic prosperity as the impetus to sovereignty and independence. In contrast, expropriation is said to be actions that are taken, authorised, ratified or condoned by the

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innumerable occasions in diplomatic and in the decisions of courts and arbitral commission, and, more recently, in the declarations of international organisations and conferences' Garcia FV Amador , Special Rapporteur's Report on State Responsibility (Vol. II, Yearbook of the International Law Commission 1959) para 41.

[9] Ian Brownlie, *Principles of Public International Law* (6th edn, OUP 2003) 508-12. Brownlie notes that since international law recognises exceptions to the requirement of compensation this should be articulated in treaties so as to allow legitimate regulation.

[10] M Sornarajah, *The International Law on Foreign Investment* (2nd edn, Cambridge University Press 2004) 346. See also Schwarzenberger observing that confiscation is a form of interference that amounts to an international tort, Georg Schwarzenberger, *Foreign Investments and International Law* (Stevens & Sons 1969) 17.

[11] Ibid.

[12] Ibid.

[13] Ibid.

[14] See Chapter 1 for in-depth discussion.

government which result in a divestment of investors' property rights.[15] At an elementary level, expropriation involves interfering with investors' rights to freely enjoy the fruits from his duly acquired property rights.[16] Comparatively and in legal terms, nationalisation is a form of expropriation although it differs in scope and breadth from other forms of expropriation.[17] Distinctively, Martin Domke suggests that in reality the distinction between nationalisation and expropriation may have little practical effect on the relationship between states and foreign investors.[18] In essence, this is because interfering with investors' property rights includes not only an outright taking but also any interference with the use and enjoyment of property rights.[19]

The definition of the term expropriation continues to be the subject of heated debate in scholarly literature and arbitral practice. Over 40 years ago, Professor Christie in his influential piece analysing precedent setting cases concluded without offering a clear definition and opined that each case must be considered on its own merits.[20] Christie arrived at this conclusion after thoroughly reviewing landmark cases of *German Interests in Polish Upper Silesia* and the *Norwegian Claims* as well as the body of jurisprudence of the American Foreign Settlement Commission.[21] A similar attempt was initiated by Friedmann who noted that expropriation is a legal procedure that involves government taking away private property.[22] With this in mind Friedmann defined expropriation as a procedure through which states in time of peace and for reasons of public utility

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[15] The Overseas Private Investment Corporation (OPIC) administers the American Foreign Investment Guarantee Program. It is a government of the United States agency established in 1971 for financing political risk insurance so as to help United States businesses of all sizes to complete in emerging markets and meet the challenges of investing overseas when the private sector support is not available.

[16] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 89.

[17] BA Wortley, *Expropriation in Public International Law* (Cambridge University Press 1959) 36.

[18] Martin Domke, 'Foreign Nationalisations: Some Aspects of Contemporary International Law' (1961) 55 *Am.J. Int'l L* 585,588.

[19] Article 10 (3) (a) Harvard Draft Convention of the International Responsibility of States for Injuries to Aliens, 15 April 1961 prepared by Louis B Sohn and Richard Baxter (1961) 55 *Am. J. Int'l L* 553.

[20] George C Christie, 'What Constitutes a Taking of Property under International Law' (1962) 32 *BYIL* 307,388.

[21] Ibid.

[22] Fath El Rahman and Abdalla El Sheikh, *The Legal Regime of Foreign Private Investment in Sudan and Saudi Arabia* (2nd edn, Cambridge University Press 2003) 118.

appropriate private property rights with or without compensation so as to place the property at the disposal of its public services.[23] However, the definition espoused by Friedmann is simplistic and underestimates the sophistication through which governments can interfere with property rights without an overt taking.

Generally, the philosophical underpinnings of expropriation are premised on traditional international law theory that seeks to enforce and protect duly acquired property rights. The theory is premised on basic assumptions of property that are prevalent in liberal regimes and uphold the inviolability of private property as well as the sanctuary of contract.[24] The notion of property rights is not without controversy and opinions differ depending on the legal system and culture. For instance in Africa, traditionally land ownership was communal; land was allocated to people as a group and controlled by chiefs.[25] Distinctively, the African system of land ownership was shaped by the creation of communal land ownership as well as dependent land structures that are resistant to change.[26]

The aftermath of western dominance and civilisation witnessed a shift in this paradigm as liberalism took centre stage. The values entrenched in African traditional understanding of property rights succumbed to western liberal ideals which uphold and protect individual property rights.[27] Moreover, through signing extensive property provisions, African countries effectively undermined their own traditional understanding of property rights as well as limited the right to regulate even in the public interest. However, it should be submitted that although African countries lost the argument of the day such traditional sentiments over property rights are rekindled when African states find

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[23] Ibid 119.

[24] Samuel KB Asante, 'International Law and Foreign Investment: A Reappraisal' (1988) 37 ICLQ 588, 595.

[25] Sandra F Joireman, 'Applying Property Rights Theory to Africa: The Consequences of Formalising Informal Land Rights' (2006) 5 <http://www.isnie.org/ISNIE06/Papers06/11.2/joireman.pdf>accessed 20 May 2012.

[26] Ibid 6.

[27] Ibid.

themselves at the centre of expropriation claims.[28] As seen from the practice of Latin American countries, such sentiments have the tendency to resurface sovereign centred arguments and can create unexpected hostilities in the overall investment regime.[29] Be that as it may, through initiating BITs, capital exporting countries have succeeded in exporting extensive property provisions in the over two thousand eight hundred BITs.[30] For instance, as this chapter will shortly demonstrate, the right to property under African BITs not only accentuates the international law position but also extensively protects foreign investors against any state interference.

Moreover, expansive property provisions notwithstanding ambiguity in expropriation clauses offers foreign investors' sufficient opportunity to claim compensation for any measure vaguely perceived as an expropriation.[31] Comparatively, it is for instance asserted that the definition of property in United States model BIT goes beyond the definition of property articulated under the Fifth Amendment of the United States Constitution because the model BIT allows conceptual severance and consideration of money as property.[32] According to Vicki and Joel the broadly construed provisions clearly demonstrate that foreign investors from capital exporting countries such as the United States enjoy superior protection than that accorded under the Fifth Amendment despite the fact that the Fifth Amendment already provides extensive protection.[33] Moreover, it should be stressed that expansively worded expropriation provisions have an impact on a country's political, social and

[28] See for example, *Biwater v United Republic of Tanzania*, ICSID Case No ARB/05/22 Award 18 July 2008 [Hereafter *Biwater v Tanzania*]; *Bernardus Henricus Funnekotter and others v Zimbabwe*, ICSID Case No. ARB/05/6 Award 22 April 2009 [Hereafter *Bernardus v Zimbabwe*].

[29] Most recently Ecuador and Bolivia denounced the ICSID arbitration process and withdrew from ICSID.

[30] Vicki L Been and Joel C Beauvais, 'The Global Firth Amendment: NAFTA's Investment Protections and the Misguided Quest for an International Regulatory Taking's Doctrine' (2003) 78 *NYU Law Rev* 30, 38.

[31] Moreover, the expansive nature of the clause offers foreign investors the right to bring any investment claim broadly perceived as an expropriation. The pursuant of such claims can have far-reaching implication on the social political and economic realities of poorer nations

[32] Vicki L Been and Joel C Beauvais, 'The Global Firth Amendment: NAFTA's Investment Protections and the Misguided Quest for an International Regulatory Taking's Doctrine' (2003) 78 *NYU Law Rev*. 30, 63-8.

[33] Ibid 63.

economic circumstances.[34] As a result any costs associated with implementing expropriation measures falls disproportionately on developing countries which inevitably benefits foreign investors at the detriment of sovereign states.[35]

3.2 An Overview of the Expropriation Terminology used in African BITs

There are different terms used by investors when pursuing expropriation claims and these include, indirect expropriation, disposition, de facto expropriation, confiscation, a taking, disguised expropriation, creeping expropriation, measures having equivalent effect to, or tantamount to expropriation.[36] These concepts are used on a case by case basis although the use is usually dependent on the creativity of aggrieved foreign investors. The terminology is a hatchback for a fishing expedition because investors are offered expansively construed possibilities within which to bring expropriation claims. For instance aggrieved American nationals with investments in Cameroon can initiate expropriation claims under the Cameroon-United States BIT alleging that the measures Cameroon has taken amount to an indirect expropriation, a disposition, *de facto* expropriation, confiscation, disguised expropriation, creeping expropriation, measures having equivalent effect to, or tantamount to expropriation.[37] This is not unique to Cameroon; virtually all BITs signed by African countries contain expropriation clauses with similar or equivalent guarantees.[38]

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[34] Jeswald W Salacuse and Nicholas P Sullivan, 'Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46 *Harv. Int'l L. J* 67, 74.

[35] Ibid.

[36] Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Kluwer Law International 1995) 98. See also Errol P Mendes, 'The Canadian National Energy Program: An Example of Assertion of Economic Sovereignty or Creeping Expropriation in International Law' (1981) 14 *Vand. J. Transnat'l L* 475, 498-501.

[37] Article III of the Treaty between the United States of America and the Republic of Cameroon Concerning the Reciprocal Encouragement and Protection of Investment (USTR, Nov 27, 1984) [Hereafter United States-Cameroon BIT].

[38] See for instance article 5 of the Treaty between the United Republic of Tanzania and Government of the Kingdom of Denmark Concerning the Promotion and Reciprocal Protection of Investment (22 April 1996) [Hereafter Denmark-Tanzania BIT]; Article 4 of the Federal Republic of Germany and Burundi Treaty Concerning the Encouragement and Reciprocal Protection of Investments (No. 26278, 10 Sept 1984) [Hereafter Germany-Burundi BIT]; Article 5 of the Agreement between the United Republic of Tanzania and the Government of the Italian Republic for the Promotion and Protection of Investments (2001) [Hereafter Tanzania-Italy BIT]; Article 3 of the Treaty Between Federal Republic of Germany and the United Republic of Tanzania Concerning the Encouragement and Reciprocal Protection of

Although all African BITs contain expropriation clauses, none of the clauses specifically defines what constitutes an expropriation. Typically, African BITs contain a generalised expropriation clause that does not explain the scope of expropriation and the extent of government interference required for compensable regulatory expropriation.[39] Essentially African BITs contain vaguely worded expropriation clauses with the hope that arbitral tribunals will interpret the expropriation clause in accordance with Article 31 of the Vienna Convention.[40] For instance, Article 5 of the United Kingdom-Kenya BIT explains expropriation in the following terms:

> Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation […] except for a public purpose related to the internal needs of that party on a non-discriminatory basis and against prompt, adequate and effective compensation…

The language of Article 5 of United Kingdom-Kenya BIT is analogous to Article 5(1) of the Tanzania-UK BIT which provides that nationals or companies of either contracting party shall not be:

> "Nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation...in the territory of the other Contracting Party except for a public purpose related to the

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Investments (30 Jan 1965) [Hereafter Germany-Tanzania BIT] and Article 5 of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the Promotion and Protection of Investments (Treaty Series No. 8, 2000) [Hereafter United Kingdom-Kenya BIT].

[39] Ibid.

[40] Article 31of the Vienna Convention of the Law on Treaties, 1155 U.N.T.S.331, 81. L.M. 679. Jan 27, 1980 [Hereafter VCLT]. Particularly article 31(1) of the VCLT provides that 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 light of its object and purpose. Even more article 31(2) stipulates that 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 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 other parties as an instrument related to the treaty. Similarly, article 31(3) stipulates that 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 interpretation; (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. Lastly, article 31(4) stresses that there any special meaning shall be given to a term if it is established that the parties so intended.

> internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation…”

The expropriation clauses mentioned above are not limited to Kenya and Tanzania, BITs signed by other African countries contain similar clauses *inter alia* Rwanda, Burundi, Cameroon, Zambia, Ghana and Democratic Republic of Congo. Although the expropriation clause contained in the Tanzania-UK BIT does not explicitly state concepts such as indirect expropriation, creeping expropriation and *de facto* expropriation, these terms can be construed from the wording of the expropriation clause. Indeed, the tribunal in *Biwater v United Republic of Tanzania* found that Article 5 (1) of the Tanzania-United Kingdom BIT was broadly framed to encompass both formal taking (direct expropriation) but also *de facto* expropriation or indirect taking that does not involve actual taking of title but nonetheless results in effective loss of property.[41] Broadly, despite the level of ambiguity in African expropriation clauses, it is worth stressing that all African treaties contain an expropriation clause and the expropriation clause complies with customary international law standards requiring that expropriation measures should be followed with compensation.

Reflectively, the language of the expropriation clause reveals that at least theoretically the rhetoric of post-World War II when African countries demanded for the establishment of a New International Economic Order are over. As will be discussed in subsequent parts of this chapter, the expropriation clause contained in African BITs have generally settled for either parts of the Hull formula or the full Hull formula requiring expropriation to be accompanied with the payment of prompt, adequate and effective compensation. Also the expropriation clauses included under National Investment Codes of African states are similar to the expropriation clauses articulated in African BITs. For instance, article 30 of the Rwanda Investment Code provides that the government can only expropriate for a public purpose, on a non-discriminatory basis and in accordance with due process of the law and upon the payment of prompt, adequate and effective compensation.[42] Equally, under the Kenya Foreign Investment Protection Act, it is stipulated that expropriation measures are permissible when such measures

[41] *Biwater v Tanzania*, para 452.

[42] Article 30 of the Rwanda Law No. 26/2005 of 17/12/2005 Relating to Investment and Export Promotion and Facilitation [Hereafter Rwanda Investment Act].

are for a public purpose, non-discriminatory, in accordance with due process and followed with the full and prompt payment of compensation.[43] Similarly, section 78 of the Ghana Investment Act guarantees against expropriation and stipulates that there shall not be any acquisition of an enterprise unless the acquisition is in the national interest, for a public purpose and followed by payment of fair and adequate compensation.[44] At a regional level, the language of the expropriation clause is remarkably similar to National Investment Acts and African BITs. For example, Article 20 of the Investment Agreement for the Common Market for Eastern and Southern Africa provides as follows;

> Member States shall not nationalise or expropriate investment in their territory or adopt any other measures tantamount to expropriation of investments except: (a) in the public interest ;(b) on a non-discriminatory basis; (c) in accordance with due process of law; and (d) on payment of prompt adequate compensation.[45]

Expropriation clauses in African BITs contain variations in the use of the terminology direct and indirect expropriation. Generally, most expropriation clauses in African BITs do not explicitly mention the term indirect expropriation. For example, although the Democratic Republic of Congo has concluded 13 BITs only the United States and France BITs explicitly mention the term indirect expropriation.[46] A similar trend is followed in Tanzania which has BITs mentioning both direct and indirect expropriation as well as BITs that do not explicitly mention indirect expropriation. For example Article 4 of the Tanzania-Sweden BIT stipulates that ‘‘neither party shall take measures depriving directly or indirectly…’’while Article 5(1) of the Tanzania-UK BIT simply states that either contracting party shall not be “nationalised, expropriated or subjected to

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[43] Article 8 of the Kenya Foreign Investments Promotion Act Chapter 518 (1964, 15 December, Rev 2010) [Hereafter Kenya Investment Act].

[44] The Ghana Investment Promotion Centre Act, 1994 (Act 478) [Hereafter Ghana Investment Act].

[45] COMESA is made up of the government of Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe. Collectively, the countries are called Member States of the Common Market for Eastern and Southern Africa.

[46] Specifically article 3 of the United States-Congo BIT stipulates that investment shall not be expropriated or nationalised either directly or indirectly through measures tantamount to nationalisation except for public purpose, in a non-discriminatory manner upon payment of prompt and adequate compensation. Similarly, article 3 of the France-Congo BIT explicitly uses the term direct and indirect expropriation.

measures having effect equivalent to nationalisation or expropriation…''[47] This trend is also followed by Zambia which has concluded 6 BITs, with a number of BITs omitting the terminology indirect expropriation. For example, the Zambia-Switzerland BIT explicitly mentions indirect expropriation while the Zambia-Germany BIT only mentions direct expropriation.[48]

From the foregoing, it can be stated that the lack of a clear expropriation clause is a common trend in African BITs. However, this is not peculiar to African states alone, within NAFTA arbitral jurisprudence the tribunal in *Feldman v United Mexican States*, attempted to interpret the expropriation clause contained in Article 1110(1) of NAFTA and arrived at the conclusion that the language of this article is of such generality and its applicability in practical cases is difficult.[49] Evidently, this observation would astutely apply to expropriation clauses contained in African BITs as well as the National Foreign Investment Codes. In summary, African investment treaties envisage three forms of expropriation, direct expropriation, indirect expropriation and measures tantamount to expropriation.

3.2.1 The Principle of Direct Expropriation

As highlighted above, BITs signed by African countries explicitly undertake not to pursue measures that directly expropriate foreign property without the payment of compensation. For example the Cameroon-US BIT makes reference to the principle that investments shall not be *expropriated or nationalized either directly* or indirectly except for a public purpose and in accordance with due process of law (emphasis added).[50] The meaning of direct expropriation is fairly clear, the government takes over a mine or factory which deprives the investor

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[47] See further variations in Tanzanian BITs especially article 5 of the Italy-Tanzania BIT which provides for 'measures having effect equivalent to…'; article 5 of the Finland-Tanzania BIT provides specifically for indirect expropriation. However, see also article 5 of the Tanzania-Denmark BIT which does not mention indirect expropriation.

[48] Article 5 of the Agreement on the Promotion and Reciprocal Protection of Investments between Switzerland-Zambia BIT (No. 0.975.282.3, August 3 1994); Article 3 of the Treaty between the Federal Republic of Germany and the Republic of Zambia Concerning the Encouragement and Reciprocal Protection of Investments (10 Dec 1966).

[49] *Martin Roy Feldman Karpa v United Mexican States*, ICSID Case No. ARB (AF)/99/1, Award, December 16, 2000, para 98-9 [*Feldman v Mexico*].

[50] Article 3 of the United States-Cameroon BIT.

of all meaningful benefits of ownership and control[51] or as stated in *Amoco v Iran* direct expropriation is the compulsory transfer of property rights.[52] In sum, direct expropriation is understood as ''the forcible appropriation by the State of the tangible or intangible property of individuals by means of administrative or legislative action''.[53]

Although cases of direct expropriation have become increasingly rare[54] such cases cannot completely be ruled out. For instance in South Africa, the 2008 Expropriation Bill gives the Minister of Public Works the authority to expropriate any property for public purpose or in public interest subject to compensation.[55] Within the South African context the Bill underscores public interest to include South Africa's commitment to land reform and other reforms that bring about equitable access to natural resources.[56] Essentially, this means that the South African government has the discretion to carry out direct expropriation as part of legitimate government policy to address historic injustices provided such measures are followed with the payment of compensation. Similarly, Namibia has undertaken land reform measures giving the Namibian government the power to bring about equitable redistribution of natural resources.[57] According to the Namibian land reform law, the Minister of Lands may acquire in the public interest agricultural land and make such land available for agricultural purposes to Namibian citizens who do not own land.[58] Furthermore, the Minister has the authority to acquire agricultural land and make it available to those Namibian citizens who have been socially, economically or educationally disadvantaged by

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[51] *Feldman v Mexico,* para 100.

[52] *Amoco International Finance Corporation v Iran,* Iran-U.S. C.T.R, para 220 [Hereafter *Amoco v Iran*].

[53] *LG&E Capital Corp. and LG&E International Inc v Argentina Republic* ICSID Case No. ARB/02/1, October 2006, para 187 [Hereafter *LG&E v Argentina*].

[54] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 92.

[55] Republic of South Africa, Expropriation Bill, Government Gazette No.30963 of April 2008. Particularly see Chapter 2 of the Bill titled Powers of the Minister to Expropriate Property.

[56] Ibid.

[57] International Institute for Sustainable Development, 'Investment Treaty News' <http://www.iisd.org/pdf/2006/itn_may31_2006.pdf>accessed 20 May 2012. See also Sidney L Harring and Willem Odendaal, '*One day we will all be equal*': *A Socio-Legal Perspective on the Namibian Land Reform and Resettlement Process* (Legal Assistance Centre 2002).

[58] Ibid.

past discriminatory laws or practices.[59] On the basis of this law, the government of Namibia has notoriously exercised this power and expropriated foreign owned farms against the principles of 'willing buyer, willing seller.'[60] This has resulted to legal proceedings in the Namibian High Court alleging breach of the Namibia Land Act as well as violation of the expropriation clause contained in the Namibia-Germany BIT.[61] In essence, although direct expropriation seldom happen because of political, social and economic ramification associated with such measures, countries still nevertheless impose discreet forms of direct expropriation.

3.2.2 The Principle of Indirect Expropriation

Conceptually, indirect expropriation is a concept of deep controversy because it leaves investor's legal title untouched but deprives the investor meaningful enjoyment of the investment.[62] The concept has come of age because states that are serious about attracting foreign capital will not directly expropriate foreign property. Moreover, the prevailing investment system rewards governments that do not hinder the operation of foreign investors. Through this governments are compelled to respect commitments so as to leverage the rewards from the system to prosper and develop. Governments are forced to respect rules and commitments through architects of the media, big corporation and institutional design that serve as watch dogs for government compliance. This oversight function ensures that countries are reluctant to design policies pursuing outright takings for fear of negative publicity which can result in decreased investment flows. Because of severe consequences associated with direct expropriation, this has resulted in countries devising other creative means to interfere with property rights without a formal taking.

There are a number of creative ways governments can deploy to deprive investors effective control without actually taking the investor's property. Such measures include but are not limited to the use of legislation, withdraw of a

[59] Ibid.

[60] Ibid.

[61] Ibid.

[62] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 92.

licence, refusal to renew permits, higher taxes, and sometimes simply omitting to act. Obviously, countries that pursue measures tantamount to expropriation will deny the existence of such measures and will not contemplate paying compensation.[63] Cases of indirect expropriation are complicated because compensation is not guaranteed and the investor has to sustain a claim that the state's conduct has the effect of depriving meaningful use and enjoyment of the property.[64] Using the cases *Norwegian Claims* and *German interests in Polish Upper Silesia*, Christie correctly summarises the dilemma in the following words:

> A State may expropriate property, where it interferences with it, even though the State expressly disclaims any such intention. More important, the two cases taken together illustrate that even though a State may not purport to interfere with rights to property, it may, by its actions, render those rights so useless that it will be deemed to have expropriated them. [65]

African BITs like many other BITs do not define the concept indirect expropriation leaving arbitral tribunals to grapple with unearthing conduct that amounts to indirect expropriation. As a result of this ambiguity, the term indirect expropriation is used interchangeably by tribunals and investors to include expressions such as *de facto* expropriation, disguised, constructive, regulatory, consequential, or creeping expropriation.[66] The difficulty arbitral tribunals, scholars, investors and governments face is underscored by the not so clear line between on one hand government's regulatory measures that do not require compensation and on the other hand illegal expropriation that requires compensation.[67] Soloway aptly captures the dilemma in the following words:

> If the definition is too expansive the argument goes, it could impose potentially huge financial obligations on governments, create disincentives to enact health and safety regulations and introduce multiple distortions and social inefficiencies. On the other hand, a

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[63] Ibid.

[64] Ibid.

[65] George C Christie, 'What Constitutes a Taking of Property under International Law' (1962) 32 *BYIL* 307, 312.

[66] August Reinisch, 'Expropriation' in Peter Muchlinski and others (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 423.

[67] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 91-93.

> definition that is too restrictive would obliterate a key investment guarantee that protects foreign investors.[68]

Soloway's observations are not without merit; the tribunal in *Feldman v Mexico* highlighted this intricacy and concluded that it is fair to say that no one has come up with a fully satisfactory means of drawing this line.[69] David Gantz observes that where regulatory measures are taken for a public purpose, non-discriminatory, fair and equitable, the potential cost of requiring compensation may discourage desirable policy including necessary environment and social regulation.[70] Delimiting the contours of expropriation has proved difficult with one commentator concluding that in identifying expropriation 'I know it when I see it'[71] while Dolzer acknowledges that the reality is indirect expropriation is difficult to define with precision in the abstract.[72] Some authors such as Higgins even question the significance of drawing a distinction between taking for public use requiring compensation and non-compensable indirect expropriation for regulatory purposes. Analysing the United States taking law, Higgins asks:

> Is this distinction intellectually viable? Is not the State in both cases (that is, either by a taking for a public purpose, or by regulation) purporting to act in the common good? And in each case has the owner of the property not suffered loss? Under international law standards, a regulation that amounted (by virtue of its scope and effect) to a taking would need to be "for a public purpose" (in the sense of in the general, rather than for a private interest). And just compensation would be due.[73]

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[68] Julie Soloway, 'Environmental Expropriations under NAFTA Chapter 11: The Phantom Menace' in John J Kirton and Virginia W Maclaren (eds), *Linking Trade, Environment and Social Cohesion: NAFTA Experiences, Global Challenges* (Ashgate 2002) 31.

[69] *Feldman v Mexico*, para 100.

[70] David A Gantz, 'The Evolution of FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement' (2004) 19 *Am.U. Int'l L. Review* 679, 704.

[71] LY Fortier and SD Drymer, 'Indirect Expropriation in the Law of International Investment: I know It When I See It, or Caveat Investor' (2004) 19 *ICSID Review FILJ* 293, 327. Fortier and Drymer conclude that 'Given that the law is, truly in a state of flux, the best answer to the question 'when, how or at what point does otherwise valid regulation become, in fact and effect, an expropriation?' may be: I know it when I see it' Furthermore the authors note that 'certain government measures in certain instances will almost always give rise to a finding of indirect expropriation, and hence to compensation. Others will not. In between lies a rough and sketchy area of large lacunae in the law'.

[72] Rudolf Dolzer, 'Indirect Expropriation of Alien Property' (1986) I *ICSID Review FILJ* 41, 59.

[73] Rosalyn Higgins, 'The Taking of Property by the State: Recent Developments in International Law' (1982) 176 *Recueil de Cours* 259, 331.

Despite the misgivings, conceptually cases of indirect expropriation are not a new phenomenon.[74] By and large, even under customary international law the jurisprudence shows ambiguity in determining when government conduct interfering with broadly defined property rights constitutes an illegal compensable expropriation.[75] In sum, indirect expropriation in whatever form will be the most common battle between African states and investors and will thus attract profound differences.

3.2.3. Is there a Distinction between Indirect Expropriation and Measures Tantamount to Expropriation?

Although African countries have some BITs that do not explicitly make reference to indirect expropriation, the use of phrases such as measures having effect equivalent to nationalisation or expropriation[76] and measures tantamount to expropriation can be construed as implying indirect expropriation.[77] There is overlap and inconsistence within the approach of arbitral tribunals when deciding whether cumulatively these concepts mean indirect expropriation. For instance the tribunal in *Waste Management v Mexico* opined that cumulatively these concepts require more than indirect expropriation. In the words of the tribunal:

> Where a measure tantamount to an expropriation is alleged, there may have been no actual transfer, taking or loss of property or entity, but rather an effect of property which makes formal distinctions of ownership irrelevant…Evidently the phrase 'take a measure tantamount to nationalisation or expropriation of such investment' in article 1110(1) was intended to add to the meaning of the prohibition, over and above the reference to indirect expropriation. Indeed there is some indication that it was *intended to have a broad meaning*

[74] The jurisprudence of the Iran-United States Claims Tribunal eloquently captures early expropriation claims consisting of both direct and indirect expropriation. For a good exposition of the jurisprudence, see George H Aldrich, *The Jurisprudence of the Iran-US Claims Tribunal: An Analysis of the Decisions of the Tribunal* (OUP 1996).

[75] David Gantz, '*The* Evolution of FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement' (2004) 19 *Am.U.Int'l L. Review* 679, 704.

[76] See for example Denmark-Tanzania BIT; Germany-Burundi BIT; Italy-Tanzania BIT; United Kingdom- Tanzania BIT; United Kingdom-Kenya BIT; United Kingdom-Burundi BIT.

[77] Ibid.

> otherwise it is difficult to see why Article 1110(8) was necessary (emphasis added).[78]

Arbitral tribunals have subsequently rejected the superficial approach enunciated in *Waste Management v Mexico*. By and large, the majority of arbitral tribunals favour restricting the phrase tantamount to expropriation simply to mean indirect expropriation. Indeed, the tribunal in *Feldman v Mexico* deemed the expression 'measures tantamount to an expropriation' to be functionally equivalent to indirect expropriation.[79] Similarly in *Pope & Talbot v Canada*, the investor argued unsuccessfully that the phrase tantamount to expropriation went beyond customary international law. The tribunal rejected this view and accordingly held that:

> It does not believe that the phrase measures tantamount to nationalisation appearing in Article 1110 of NAFTA broadens the ordinary concept of expropriation under international law to require compensation for measures affecting property interests without regard to the magnitude or severity of that effect….Tantamount means nothing more that equivalent. Something that is equivalent to something else cannot logically encompass more.[80]

Similarly, although the Tanzania-UK BIT does not explicitly refer to indirect expropriation the tribunal in *Biwater v Tanzania* viewed the BIT as broadly framed to cover cases of indirect expropriation. According to the tribunal, the Tanzania-UK BIT includes not only direct expropriation (i.e. a formal government taking) but also *de facto* or indirect expropriation which does not involve actual takings of title but nonetheless result in the effective loss of property.[81] However, as a practical matter the distinction between indirect expropriation and measures tantamount to expropriation is one of form rather than substance. It would be implausible for a tribunal to find measures tantamount to expropriation not simultaneously amounting to indirect expropriation. The decision in *Waste Management* is questionable and unattainable because measures tantamount cannot realistically go beyond indirect expropriation.

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[78] *Waste Management Inc v United Mexican States*, ICSID Case No. ARB (AF)/00/3 2004, para 995 [Hereafter *Waste Management v Mexico*].

[79] *Feldman v Mexico*, para 100.

[80] *Pope & Talbot Inc v The Government of Canada* (2001) 7 ICSID Reports, 85-87 [Hereafter *Pope & Talbot v Canada*].

[81] *Biwater v Tanzania*, para 452.

Indeed, as correctly opined in *S.D Myers Inc v Canada* ‘‘something that is “equivalent” to something else cannot logically encompass more.’’[82]

In sum, although some BITs concluded by African countries do not explicitly mention the term indirect expropriation substantively indirect expropriation is implied based on the spirit and purpose of African treaties. Even more, all expropriation clauses contained in African BITs that make reference to indirect expropriation do not define the scope and content of indirect expropriation. Generally, African BITs usually articulate conditions for lawful expropriation without spelling out the meaning of expropriation. Dolzer and Stevens postulate that the general reluctance of states to plainly define measures amounting to expropriation may be explained by the fact that ‘a host state as is well known can take a number of measures which have similar effects to expropriation or nationalisation, although they do not de jure constitute an act of expropriation.’[83]

3.2.4 The Concept of Creeping Expropriation

There is a remarkable trend in Africa treaty practice not to include the concept creeping expropriation. It is not clear whether the omission is deliberate or whether it is by default. The reasons behind the omission are unimportant because arbitral tribunals view creeping expropriation as a series of government action or inaction and hence a form of indirect expropriation. This reasoning is endorsed in various tribunals and articulately stated in *Tecmed v Mexico* where the tribunal observed that;

> …the term “creeping” refers only to a type of indirect expropriation — and may be carried out through a single action, through a series of actions in a short period of time or through simultaneous actions. Therefore, a difference should be made between creeping expropriation and de facto expropriation, although they are usually included within the broader concept of “indirect expropriation” and although both expropriation methods may take place by means of a broad number of actions that have to be examined on a case-by-case

[82] *SD Myers Inc v Government of Canada* (Partial Award 2000) para 286 <http://italaw.com/alphabetical_list.htm >accessed 20 May 2012 [Hereafter *SD Myers Inc v Canada*].

[83] Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Kluwer Law International 1995) 99.

> basis to conclude if one of such expropriation methods has taken place.[84]

Similarly, in *Generation Ukraine Inc v Ukraine*, the tribunal viewed creeping expropriation as:

> …a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property.[85]

Finally, the tribunal in *Feldman v Mexico* observed that ''if the measures are implemented over a period of time, they could also be characterised as creeping expropriation which the tribunal believed is not distinct in nature, form and *is subsumed by the terms indirect expropriation or tantamount to expropriation…*''.[86] There is consistency in the practice of arbitral tribunals to describe creeping expropriation as a form of indirect expropriation, nothing more and nothing less. In conclusion, although many of the expropriation clauses in African BITs do not include the concept creeping expropriation, it would not be peculiar for a series of government action to constitute creeping expropriation.[87]

3.3 The Protection of Property Rights: What Constitutes Indirect Expropriation

As mentioned above distinguishing between government regulatory measures that do not require compensation and indirect expropriation that requires compensation remains problematic. There are many approaches or tests tribunals use to distinguish between non compensable regulatory measures *vis-à-vis* direct or indirect expropriations requiring compensation. As a preliminary

[84] *Tecnicas Medioambientales Tecmed S.A v United Mexican States*, ICSID Case No. ARB/AF/00/2 May 19 2003, para 114 [Hereafter *Tecmed v Mexico*].

[85] *Generation Ukraine Inc v Ukraine,* ICSID Case No. ARB/00/9 May 16 September 2003, para 20-22 [Hereafter *Generation Ukraine v Ukraine*].

[86] *Feldman v Mexico,* para 101.

[87] This was the line of reasoning in an analogous treaty that did not contain the term creeping expropriation. The Ghana Investment Act under section 22 stipulates that no enterprise approved under the Act shall be expropriated by the government... *Biloune and Marine Drive Complex Ltd v Ghana Investment Centre and the Government of Ghana*, Award on Jurisdiction and Liability of 27 October 1989, (1994) 95 ILR 183, para 209-10 [Hereafter *Biloune v Ghana*].

remark, it should be noted that virtually all African BITs do not contain or explain the distinction between indirect expropriation and legitimate government measures that do not require compensation. To this end, the approaches developed by arbitral tribunals are particularly important in examining whether government measures have crossed the line to compensable expropriation. Principally, when distinguishing the two, tribunals seek to balance between government interests to regulate for public purposes and the interests of investors to maximise profits from the investment enterprise. The debate on whether tribunals have been successful in striking the right balance between the two competing interests continues to stimulate disagreements. Considering that the majority of African BITs contain vaguely worded expropriation clauses, the following section reviews the various approaches arbitral tribunals use to interpret broadly worded expropriation clauses and the underlying rationale of these approaches.

3.3.1 The Effect of Government Measures on the Investor

Dolzer refers to the effect of the government measure as the ''sole effect doctrine''[88] and argues that there is assumed *prima facie* taking of property whenever the effect of the government measure is substantial and lasts a significant period of time.[89] According to Dolzer, the answer to deciding whether measures amount to indirect expropriation requires an evaluation of the effect of the government measure on the economic benefit, value and control over the investment.[90] Tribunals have predominantly followed the sole effect doctrine and undermined the importance or intention of the government measure.[91] However, the outcome accruing from applying the sole effect test can be quite dramatic and indifferent to government regulatory powers. One remarkable

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[88] Rudolf Dolzer, 'Indirect Expropriation: New Developments?' (2002) 11 *N.Y.U. Envtl L. J* 64, 79. Dolzer notes that in claims of indirect expropriation the question is whether the focus on the effect of the government measure will be the only and exclusive relevant criterion or whether the purpose and the context of the government measure may also be considered as part of the takings analysis.

[89] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 101.

[90] Ibid.

[91] Rudolf Dolzer, 'Indirect Expropriation: New Developments?' (2002) *11 N.Y.U. Envtl L.J.* 64, 90. After surveying the jurisprudence Dolzer notes that 'the language in number of decisions clearly points to the effect of the government measure as a major criterion or even the sole factor in determining whether or not a taking has occurred.'

extreme with such dramatic results was the reasoning adopted in *Santa Elena v Costa Rica*. In this case, the tribunal without giving sufficient credence to environment measures held that:

> Expropriatory environmental measures-no matter how laudable and how beneficial to society as a whole-are in this respect, similar to any other expropriatory measure that a state may take in order to implement its policies… where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.[92]

This disengagement with the purpose of the government measure and considering only the effect of the government measure is not a new controversy and remains an on-going debate. Much of the controversy stems from the practice of the Iran-United States Claims Tribunal which devalued the intention of the government measure and only considered the effect of the measure.[93] Over the years, the Iran-United States claims cases have offered inspiration and a favourable source of jurisprudence for arbitral tribunals adopting the sole effect criterion. While stressing the precedent of the Iran-United States claims cases is important, the extent to which this jurisprudence has influenced modern arbitral practice is beyond the scope of this thesis.[94] The first case, *Starrette*

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[92] *Compania del Desarrollo de Santa Elena, S.A v Republic of Costa Rica*, ICSID Case No. ARB/96/1 February 17 2000, para 71-72 [Hereafter *Santa Elena v Costa Rica*].

[93] For a comprehensive discussion of the Iran-United States Claims Tribunal's approach on expropriation, see, George H Aldrich, *The Jurisprudence of the Iran-US Claims Tribunal: An Analysis of the Decisions of the Tribunal* (OUP 1996) 171-276. The Iran- United States Claims Tribunal was established in 1981 to adjudicate claims by nationals of United States and Iran following the Iranian revolution. It is estimated by the end of 1995; the tribunals had disposed nearly 3,900 cases and awarded close to 3 Billion USD to the United States and United States nationals and close to 900 Million USD to Iran and Iranian nationals. Also by the end of 1995 only 44 cases were pending.

[94] For a thorough analysis of the influence of Iran-United States Claims Tribunal on investment arbitration see, Christopher R Diahoral and Christopher S Gibson, *The Iran-US Claims Tribunal at 25: The Cases Everyone Needs to Know for Investor-State & International Arbitration* (OUP 2007). David Caron writing in chapter 10 of the book notes the following as a must know for anybody interested in knowing the link between the United States Claims tribunal and BITs; First the Iran Islamic Revolution of 1979 shredded legal and economic relations between Iran and the United States. Second, one of the documents comprising the 1981 Algiers Accords settling differences between the two nations was the Claims Settlement Declaration and that instrument created the Iran-United States Claims Tribunal. Third, although the Tribunal has had a complex docket of jurisprudence over various types of disputes, the Claims Settlement Declaration can be viewed for one of these categories of disputes as in essence a retrospective BIT. *Thus, if the newcomer to the Tribunal can identify the cases decided in the retrospective category of disputes, then those Tribunal Awards are relevant as any decision of the usual ad hoc or ICSID BIT arbitrations (*emphasis added). See also Veijo Heiskanen, 'The Contribution of the Iran-US Claims Tribunal to the Development of the Doctrine of Indirect Expropriation' (1003) 5 *Int'l L.F.D* 176.

Housing Corp v Iran involved a construction project and the rights of shareholders to control and manage Shah Goli Apartment a subsidiary of Starrette.

In *casu*, the Ministry of Housing appointed Mr. Erfan to temporarily manage Shah Goli and direct all activities connected with the project on behalf of the Iranian government. Starrette Housing argued that the appointment of Mr. Erfan as a temporary manager deprived the shareholders their right to manage Shah Goli and thus deprived Starrette Housing the possibilities of effective use and control. The claims tribunal ruled in favour of Starrette Housing and held that:

> …it is recognised by international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.[95]

Similarly, the claims tribunal in *Phillips Petroleum Company v Iran* stressed that it does not need to determine the intent of the government measure.[96] According to the tribunal, the purpose of the measures is not a determining factor when considering government's liability to compensate for the effect of the expropriation.[97] Similarly, in *Trippetts v Iran*, the United States engineering and architectural consulting partnership entered into joint venture with AFFA Consulting Engineers. Under the terms of the agreement both companies consented to have an equal stake in the management of the company with each having equal representation on the coordination committee. On the basis of this agreement two people had the authority to sign documents creating obligation for TAMS-AFFA. However, as a result of the Iranian revolution the company stopped operating and subsequently, the Iranian government appointed a new

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[95] *Starrett Housing Corp v Iran*, (14 August 1987) 4 Iran-US C.T.R 122, 154.

[96] *Philips Petroleum Company Iran v Iran*, (29 June 1989) 21 Iran-US C.T.R 79, 97.

[97] This case is also important for the distinction between lawful/unlawful compensation sought by the Respondents. The Respondents argued that the taking of property was lawful and as such a lesser standard of compensation was required. According to the Claims Tribunal such a distinction in the standard of compensation was unwarranted because whatever the relevance of that question as a matter of customary international law, it is irrelevant under the Treaty of Amity. In other words, there is a single standard of compensation, 'just compensation' representing the 'full equivalent of the property taken', which applies to all property regardless of whether the taking was lawful or unlawful

manager to run the joint venture. The new manager was authorised to sign cheques and made management decisions violating the terms of the joint venture. The claims tribunal held that:

> While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The *intent of the government is less important than the effects of the measure on the owner,* and the form of the measure of the control or interference is less important than the reality of their impact (emphasis added).[98]

From the foregoing, it is important to stress that the United States-Iran Claims Tribunal emphasised the effect of government measures and accorded minimal consideration to the intention of the Iranian government.[99] To this effect, Sornarajah cautions arbitral tribunals against relying profoundly on the jurisprudence of the Iran-United States Claims tribunal because of the context with which the cases were adjudicated.[100] According to Sornarajah, ''although the awards of the Iran-United States Claims Tribunal have been a fruitful source for the identification of indirect takings, they dealt with takings that took place in the context of a revolutionary upheaval and the propositions the tribunal formulated may not have relevance outside the context of the events".[101] Been and Beauvais also echo this view and caution against zealous reliance on the jurisprudence of Iran-United States Claims tribunal based on the context of these cases.[102] Specifically, Been and Beauvais contend that the mandate and scope of the Iran-United States Claims Tribunal was limited to ''post-revolutionary actions such as government appointment of managers or supervisors of foreign companies, *de facto* nationalisation, and failure to permit

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[98] *Tippetts v TAMS-AFFA Consulting Engineers of Iran* (1984) 6 Iran-US CTR 219, 225.

[99] *Sea-Land Service Inc v Iran* (1984) 6 Iran-US CTR 149, see also *The Oscar Chinn Case* (*Britain v Belgium Judgment*) 1934 P.C.I.J. (Ser. A/B) No.63 (Dec 12) para 129.

[100] M Sornarajah, *The International Law on Foreign Investment* (2nd edn, Cambridge University Press 2004) 350-51.

[101] Ibid.

[102] Vicki L Been and Joel C Beauvais, 'The Global Firth Amendment: NAFTA's Investment Protections and the Misguided Quest for an International Regulatory Taking's Doctrine' (2003) 78 *NYU Law Rev.* 30, 56.

the exportation of foreign owned equipment''.[103] Accordingly, although the jurisprudence of the Iran-United States Claims tribunal is persuasive and reaffirms customary international law principles, modern tribunals should internalise the jurisprudence and apply it with restraint.[104] However, as will be shown below, a spate of modern arbitral tribunals have erroneously relied exclusively on the effect of the government measure as the sole criterion.

For instance, in *Metalclad v Mexico*, the federal government of Mexico authorized Conterin a wholly owned subsidiary of Metalclad to construct and operate a landfill transfer station for hazardous waste in La Pedrera, a valley located in Guadalcazar. When construction started the municipality alerted Metalclad that it was operating without a municipal construction permit. While the application for the permit was pending Metalclad continued and completed constructing the landfill. However, community and environmental activists resented the landfill and exerted considerable pressure on the government to revoke the operating licence on environmental grounds. Three days before the expiry of his term, the Governor issued an Ecological Decree declaring a Natural Area for the protection of rare cactus which included the area of the landfill. Metalclad brought a claim alleging that the ecological decree permanently precluded it from operating the landfill. The tribunal ruled in favour of Metalclad and held that:

> …expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the *effect of depriving the owner, in whole or in significant part,* of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.[105] Emphasises added

The tribunal further opined that the motivation or intent of the government in passing the ecological decree was irrelevant.[106] According to the tribunal the implementation of the ecological decree in itself constitutes an act tantamount

[103] Ibid.

[104] Ibid.

[105] *Metalclad Corp v United Mexican States*, ICSID Case No. ARB (AF)/97/1 August 30 2000, para 103 [Hereafter *Metalclad v Mexico*].

[106] Ibid para 111.

to expropriation because the decree had the effect of barring forever the operation of the landfill.[107] Similarly, this approach was adopted in *Tecmed v Mexico* where the Mexican government refused renewal of a licence necessary to operate a landfill. Tecmed a Spanish incorporated company argued that this refusal amounted to an expropriation contravening the Spain-Mexico BIT. In the view of Tecmed, the non-renewal of the licence was arbitrary and resulted into the complete loss of the investment and cessation of economic viability. The Mexican government argued unsuccessfully that regulatory powers are discretionary and the government can grant and revoke licenses as it deems appropriate. Mexico also contended that Tecmed violated certain requirements of maintaining its license which included restriction on improperly transporting toxic waste. The tribunal rejected Mexico's argument and held that:

> … Government's intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; and the form of the deprivation measure is less important than its actual effects.[108]

Similarly, in *Biloune v Ghana Investment Centre*, Antoine Biloune a Syrian national owned majority interest in a Ghana incorporated corporation established to undertake a hotel construction project.[109] However, Biloune lost his interest due to claims by the Accra City Council that he did not have the required building permit to pursue the construction project. Subsequently, after financial scrutiny was conducted by the Accra City Council, Biloune was arrested and held in custody for thirteen days without due process, deported to Togo and issued with restraining order never to return to Ghana. From the facts of this case, Ghana's motivation for pursuing this course of action was unclear. However, the tribunal noted that establishing the motivation of the government of Ghana was irrelevant in arriving at a conclusion.[110] According to the tribunal when viewed in conjunction, ''the issuance of the stop work order, the demolition of the construction, the summons, the arrest and detention, the requirement of filing assets declaration forms, and the deportation of Biloune without possibility of re-entry had the effect of causing irreparable cessation of

[107] Ibid.

[108] *Tecmed v Mexico*, para 116.

[109] *Biloune v Ghana*, para 209-10.

[110] Ibid.

the project''.[111] In addition, the tribunal noted that given Biloune's leadership position in promoting, financing and managing the project, his expulsion from Ghana effectively prevented him from pursuing the project resulting in constructive expropriation.[112]

Also in *Simens v Argentina*, the Argentinean government argued unsuccessfully that the tribunal should not only consider the effect of the government measure but also should take into consideration the intention and purpose of the government measure.[113] The tribunal making reference to the Argentina-Germany BIT postulated that the BIT only refers to measures which have the effect of an expropriation and does not refer to the intent of the State to expropriate.[114] Relying on Norwegian Ship owners and the Argentina-Germany BIT, the tribunal held that the purpose of the expropriation is a different matter and is one of the requirements for determining whether expropriation complies with the treaty and not for determining whether an expropriation has occurred.[115]

In the view of the present author, the *Simens v Argentina* decision is flawed and severely constrains legitimate policy making because a finding of expropriation naturally leads to the responsibility to pay compensation. Moreover, strict application of the sole effect test rewards investors at the detriment of legitimate government policy and as a result hampers the ability of sovereign states to function effectively. Indeed, as the preceding arbitral cases demonstrate application of the sole effect test simultaneously leads to economic interests of investors outweighing the purpose of government measures which inevitably means governments will be slow to act even when the policy is in the public interest.

[111] Ibid.

[112] Ibid.

[113] *Siemens A.G v Argentina Republic,* ICSID Case No. ARB/02/8 February 2007, para 270 [Hereafter *Siemens v Argentina].*

[114] Ibid.

[115] Ibid.

3.3.2 The Extent of Government Interference with Property Rights

Aside from the sole effect test, tribunals also consider the extent to which government measures interfere with an investor's property rights. In the influential and often quoted 1961 *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens*, drafted by Sohn and Baxter, an expropriation is said to occur when there is "unreasonable interference with the use, enjoyment or disposal of property as to justify an interference that the owner thereof will not be able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference".[116] It can therefore be said that when government measures severely interfere with an investor's property rights for a long time, tribunals are likely to find the measures amount to an expropriation. Conversely, if government measures minimally interfere with an investor's property rights and the interference is for short time, tribunals are likely to find that the measure does not amount to an expropriation.[117] Numerous arbitral tribunals have followed this line of thinking without offering a nuanced approach of what constitutes severity or how one determines that the duration of the measure is long enough to constitute an expropriation.

The leading case applying the theory of interference is the case of *Pope and Tabolt Inc v Canada*. In *casu, a* United States wholly owned company with a subsidiary in Canada challenged the implementation of the Softwood Lumber Agreement which imposed an Export Control Regime. The investor alleged unsuccessfully that the Export Control Regime amounted to an expropriation under Article 1110 of NAFTA. The tribunal opined that an interference with the

[116] Article 10 (3) (a) Harvard Draft Convention of the International Responsibility of States for Injuries to Aliens, 15 April 1961 prepared by Louis B Sohn and Richard Baxter. The text of the draft is accompanied by a comprehensive and insightful commentary. The purpose of the draft Convention is 'to codify with some particularity the standards established by international law for the protection of aliens and thereby to obviate, as far as possible, the necessity of looking to customary international law.' Louis B Sohn and Richard Baxter (1961) 55 *A.J.I.L* 553,547. Indeed, the draft has become one of the most powerful source of reference in international investment law and tribunals have abidingly refereed to it in a number of expropriation cases, see for example, *Saluka Investments BV v Czech Republic*, Partial Award of 17 March 2006, para 256-57 < http://www.pca-cpa.org/upload/files/SAL CZ%20Partial%20Award%20170306.pdf>accessed 20 May 2012 [Hereafter *Saluka Investments v Czech Republic*]; *Pope &Talbot v Canada*, para 102.

[117] This position is reinforced in the Harvard Draft Convention of the International Responsibility of States for Injuries to Aliens, Louis B Sohn and Richard Baxter (1961) 55 *A.J.I.L* 553, 559

investor's property must be substantial enough to be characterised as an expropriation.[118] In the words of the tribunal to determine interference, ''the test is whether the interference is sufficiently restrictive to support a conclusion that the property has been taken from the owner''.[119] The tribunal reasoned that expropriation requires a substantial interference and not minor interference.[120] In the tribunal's view although there had been interference this did not raise to the level of expropriation because the investor retained full rights of ownership and control over the business.[121] The same line of thinking has been followed in other tribunals but most remarkably in *Sempra Energy International v Argentina* where the tribunal arrived at the conclusion that:

> Substantial deprivation results…from depriving the investor of control over the investment, managing the day to day operations of the company, arresting and detaining company officials or employees, supervising the work of officials, interfering in administration, impeding the distribution of dividends, interfering in the appointment of officials or managers, or depriving the company of its property or control in the whole or in part.[122]

According to the tribunal, although the list of government measures could be extended significantly but the interference of the government measures must still meet the standard of having as a result substantial deprivation of rights.[123] Even then, the deprivation should be such that the investor no longer has control of the business operation, or that the value of the business has been virtually annihilated.[124] The tribunal found the Argentinean government did not renegade the legal and regulatory framework governing privatisation.[125] This approach was also echoed in *Occidental Exploration and Production Company v Ecuador* where the tribunal held that although the investor was denied a VAT refund this did not result in substantial deprivation. According to the tribunal:

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[118] *Pope & Tabolt v Canada* 102.

[119] Ibid.

[120] *Pope & Tabolt v Canada*, para 96.

[121] Ibid para 101.

[122] *Sempra Energy International v Argentina*, ICSID Case No. ARB/02/16 May 2005, para 284 [Hereafter *Sempra Energy International v Argentina*].

[123] Ibid.

[124] Ibid para 285.

[125] Ibid.

> …there had been no deprivation of the use or reasonably expected economic benefit of the investment, let alone measures affecting a significant part of the investment. The criterion of substantial deprivation under international law in Pope & Talbot *and adopted in Sempra* is not present in the instant case. If narrower definitions of expropriation under international law are examined, the finding of expropriation would lie still further away (emphasis added).[126]

Similarly, the tribunal in *Biwater v Tanzania* stressed that expropriation requires a certain severity and the severity does not have to be economic in nature.[127] The tribunal made a distinction between interference with rights and economic loss observing that ''a substantial interference with rights may well occur without actually causing any economic damage.''[128] In the tribunal's view there can be a substantial interference with an investor's rights even if that interference does not necessary amount to a quantifiable economic loss.[129] The tribunal considered an expropriation taking place by reason of a substantial interference with rights, even if there is no quantifiable economic loss.[130]

In sum, the tribunal found the Tanzanian government severely interfered with the investor's contractual rights although the investor would still have suffered economic loss even if the government had not interfered with the property rights.[131] From the analysis of the tribunal what matters is the intensity or extent of the interference and not necessarily whether the interference resulted in economic loss. The approach is analogous to *PSEG Global Inc v Turkey* where the tribunal was not persuaded that any extreme forms of interference depriving the investor of his duly acquired property rights took place. The tribunal noted that although many things were wrongly handled, none could justify a conclusion of regulatory taking.[132] In essence for a measure to amount to a regulatory taking there must be strong interference with clearly defined contract rights.

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[126] *Occidental Exploration and Production Company v Republic of Ecuador*, 12 ICSID Rep Award of 1 July 2004, para 194 [Hereafter *Occidental v Republic of Ecuador*].

[127] *Biwater v Tanzania*, para 464.

[128] Ibid.

[129] Ibid para 465.

[130] Ibid para 781.

[131] Ibid.

[132] *PSEG Global Inc v The Republic of Turkey*, ICSID Case No. ARB/02/05 January 2007, para 279 [Hereafter *PSEG Global v Turkey*].

The tribunal stressed that the value of property rights is irrelevant and only important when addressing issues of damages.[133]

The extent of government interference was also stressed in *SD Myers v Canada* where the tribunal ruled in favour of Canada because the measure was for a short time. Based on the facts of the case, the tribunal found that Canada did not materially benefit from the regulatory measures and the evidence did not support a transfer of property from the investor to the government.[134] In the tribunal's view for government regulations to amount to an expropriation there must be lasting interference in the ability of an investor to make use of his economic rights.[135] The tribunal added a caveat stressing that ''in some contexts and circumstances, it is appropriate to view a regulation as amounting to an expropriation, even if it were partial or temporary''.[136] This decision is important to the extent that it confirmed that regulatory measures do not usually amount to an expropriation,[137] but falls short in explaining how much interference amounts to an expropriation. Compared to *Wena v Egypt* where 1 year was found to be a severe interference, the tribunal in *SD Myers* did not find 18 months constituting a severe interference.

Specifically, in *Wena v Egypt*, Egypt argued that the 1 year deprivation was merely "ephemeral" and therefore did not constitute an expropriation. The tribunal rejected this argument and noted that ''putting aside various other improper actions, allowing an entity (over which Egypt could exert effective control) to seize and illegally possess the hotels for nearly a year is more than an ephemeral interference in the use of that property or with the enjoyment of its benefits''.[138] Thereafter Wena sought an interpretation of the arbitral award and still the tribunal concurred with the arbitral decision. According to the tribunal after ''assessing the weight of the actions described above, there was no doubt in the tribunal's mind that the deprivation of Wena's fundamental rights of

[133] Ibid para 280.

[134] *SD Myers v Canada*, para 287.

[135] Ibid para 283.

[136] Ibid.

[137] Ibid para 281.

[138] *Wena Hotels Ltd v Arab Republic of Egypt,* ICSID Case No. ARB/98/46 December 2010, para 120 [Hereafter *Wena Hotels v Egypt*].

ownership was so profound that the expropriation was indeed a total and permanent one''.[139]

On the basis of the foregoing, it can be observed that tribunals give serious consideration to the extent of government interference. When using this approach, arbitral tribunals normally find government measures amounting to an expropriation when there is severe interference with investors' property rights. On the other hand, government measures that do not seriously interfere with investor's property rights will not amount to expropriation. However, tribunals have so far failed to clearly point out what precisely constitutes a severe interference as well as when do measures become severe enough to amount to a deprivation.

3.3.3 The Intention and Purpose of Government Measures

Arbitral tribunals have also given considerable importance to the underlying purpose of the government measure and the intention thereof. Objectively, tribunals pursuing this approach balance the purpose of the regulation *vis-à-vis* the effect of the measure towards an investor's duly acquired property rights. When undertaking the analysis tribunals explore whether the measure falls within government's regulatory competence. Proponents of the sole effect test fault this approach because it weighs broad government policy against economic considerations. According to adherents of the sole effect test, the issue should not be about legitimacy of government policy but rather whether investors should be forced to pay for the protection of government policy.[140]

In essence adherents of the sole effect test postulate that the rights of foreign investors are an empty shell when government measures outweigh economic considerations.[141] On the contrary, Christie questions the premise of the sole effect test and accurately observes that in circumstances where regulatory measures have a plausible relationship to the action taken there should be due

[139] Ibid.

[140] Rudolf Dolzer and Felix Bloch, 'Indirect Expropriation: Conceptual Realignments' (2003) 5 *International Law Forum Du Droit International* 155, 164.

[141] Ibid.

consideration to such measures.[142] Despite the importance of weighing government measures, tribunals have been more favourable to the sole effect criterion and reluctantly considered the intention of government measures. From the Iran-United States claims tribunal to modern arbitral tribunals, there has been more convergence towards following the sole effect test.[143]

Be that as it may, there are a number of important arbitral awards that have stressed the importance of considering both the purpose as well as the effect of the government measure. For instance, the jurisprudence of the Iran-United States claims tribunal shows that apart from *Sea-Land Services Inc v The Islamic Republic of Iran* all other cases followed the sole effect criterion. The claims tribunal in *Sea-Land Services* endorsed the approach that takes into consideration the intention of the government measure *vis-à-vis* the effect of the government measures towards an investors property rights. Substantively, the tribunal believed that a finding of expropriation requires at the very least deliberate government interference which has the effect of depriving an investor use and enjoyment of his property.[144] Whereas this decision was progressive and unconventional, it was rejected in the dissenting opinion of Judge Howard Holtzmann and subsequent claims tribunals. Specifically in *Phillips* v *The Islamic Republic of Iran* the claims tribunal revived the sole effect criterion and asserted that it is not within its mandate to determine the intention of the Iranian government.[145] Even more, the tribunal noted that ''the government's liability to compensate for expropriation does not depend on proof that the expropriation was intentional''.[146]

Dolzer aptly notes that modern arbitral tribunals are also more bent towards following the sole effect test as the main criterion for determining whether government measures amount to expropriation. Indeed when placed with actual

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[142] George C Christie, 'What Constitutes a Taking of Property Under International Law' (1962) 32 *BYIL* 307, 338.

[143] Rudolf Dolzer, 'Indirect Expropriation: New Developments?' (2002) *11 N.Y.U. Envtl L.J* 64, 91. Dolzer correctly writes that 'the more recent jurisprudence of arbitral tribunals reveals a remarkable tendency to shift the focus of the analysis away from the context and the purpose and focus more heavily on the effects on the owner.'

[144]*Sea-Land Services Inc v Republic of Iran,* (1984) 6 US CT. Rep 149, para 166.

[145] *Phillips v Iran*, para 97-8.

[146] Ibid.

cases, the majority of arbitral tribunals have explicitly rejected the purpose of the government measure and found such consideration irrelevant in expropriation analysis.[147] Despite this shortcoming in the jurisprudence, a number of arbitral tribunals have deviated from the norm and stressed the importance of considering both the purpose as well as the effect of government measures. Although such was the position adopted in *SD Myers v Canada* the approach was not well developed because the tribunal's analysis relied mainly on severe interference. Particularly, in deciding whether the government measures amounted to an expropriation, the tribunal in *SD Myers* tribunal noted that:

> …tribunal should not be deterred by technical or facial considerations from reaching a conclusion that an expropriation or conduct tantamount to an expropriation has occurred. It must look at the real interests involved and the *purpose and effect of the* government measure (emphasis added).[148]

More astutely the arbitral tribunal in *Methanex v United States* considered the purpose of the government measure *vis-à-vis* the interests of the investor. This case arose out of an order by the state of California to ban the use of methyl tertiary butyle ether (MTBE) a product used to increase oxygen content and acts as an octane enhancer in unleaded gasoline. California argued that it was acting within its regulatory powers because MTBE contaminated drinking water supplies causing threat to human health, safety and the environment. On the other hand, Methanex a Canadian company specialising in methanol which is used to manufacture MTBE claimed that by banning MTBE, the State of California effectively expropriated its investment. The tribunal rejected this argument and held that:

> as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alias, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to

[147] *Metalclad Corporation v The United Mexican States*, ICSID Case No. ARB (AF)/97/1 August 2000, para 111 [Hereafter *Metalclad v Mexico*].

[148] *SD Myers v Canada*, para 285.

> the then putative foreign investor contemplating investment that the government would refrain from such regulation.[149]

Similarly, the tribunal in *LG&E v Argentina* also followed this reasoning and persuasively offered a balanced approach within which to consider both the effect and purpose of the government measure. The facts of this case are relatively simple; the government of Argentina pressed with the need to attract foreign investors granted LG&E licenses for local gas distribution until 2027. Some of the concessions included guarantees that tariffs for gas distribution would be calculated using United States dollars and automatic semi-annual adjustments of tariffs would be based on the United States Producer Price Index (PPI). However, the government faced with severe economic hardships adjusted the local gas tariff structure which resulted in economic losses to LG&E. According to LG&E, adjusting local gas tariff structure amounted to an indirect expropriation because the new gas tariff structure was contrary to previously agreed concessions. Differing from other cases, the tribunal correctly noted that in evaluating whether there has been an expropriation both the purpose and effect of the measure must be considered. Even more, the tribunal observed that in expropriation claims the question was whether one ''should only take into account the effects produced by the measure or if one should consider also the context within which a measure was adopted and the host State's purpose''.[150] In answering the question the tribunal held that:

> It is this Tribunal's opinion that there must be a balance in the analysis both of the causes and the effects of a measure in order that one may qualify a measure as being of an expropriatory nature. It is important not to confound the State's right to adopt policies with its power to take an expropriatory measure…With respect to the power of the State to adopt its policies, it can generally be said that the State has the right to adopt measures having a social or general welfare purpose. In such a case, the measure must be accepted without any imposition of liability, except in cases where the State's action is obviously disproportionate to the need being addressed.[151]

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[149] *Methanex Corporation v United States of America* (UNCITRAL Arbitration) Final Award on Jurisdiction and Merits of 3 August 2005, para 7 [Hereafter *Methanex v United States of America]*

[150] *LG&E v Argentina*, para 194.

[151] Ibid 194-5.

To sum up, approaches taken in arbitral tribunals assessing both the effect of the measure and the purpose of the measure reveals the following: (a) applying the sole effect test produces dramatic results in favour of investors, (b) awards of cases applying the sole effect test would be different if arbitral tribunals considered both the purpose of the measure and effect thereof, (c) ultimately fairness demands a proper balance between the effect of the government *vis-à-vis* the intended purpose of the measure.

3.3.4 The Legitimate Expectations of Investors

Arbitral tribunals also consider legitimate expectations of investors at the time of pursuing the investment enterprise. Typically, tribunals focus on representations made by government representatives at the time of luring foreign investors.[152] When examining legitimate expectations, tribunals also focus on foreign investor's reasonably to be expected economic benefit at the time of undertaking the investment enterprise. Although few arbitral tribunals have considered legitimate expectations as part of the overall expropriation analysis, the trend is likely to increase. In large measure this is because many foreign investors make investment decisions on the basis of government representations and commitments at the time of investment conception.

For instance, as common practice, the majority of African states use investment promotion campaigns as an integral part of attracting foreign investors.[153] This approach is used as a strategy to attract reluctant foreign investors who would otherwise be reluctant to invest in African states. Specifically, African countries persuade investors through offering targeted concessions, incentives and other government commitments which include *inter alia* stabilisation clauses, tax reductions and regulatory overhaul. Inevitably foreign investors make strategic investment decisions on the basis of such representation and expect that

[152] For a thorough review on the extent to which BITs act as an instrument to FDI see Karl P Sauvant and Lisa E Sachs, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (OUP 2009).

[153] More broadly, it can be said that African countries conclude BITs as part of an overall investment promotion strategy with the intention of competing and maximising the flow of foreign direct investments.

governments will honour these undertakings.[154] In addition, through offering definite investment assurances, African countries and other developing states seek to guarantee prospective foreign investors that upon investing special protection will be accorded.[155] These unilateral undertakings are binding under international law[156] and will continue to be critical in expropriation claims. Indeed where host states make specific representation to investors, arbitral tribunals have considered investor's legitimate expectation as part of the overall expropriation analysis. As correctly stated by Thomas Walde and Abba Kolo when host states undertake unanticipated regulatory change foreign investors suffer excessive detrimental losses because this was not factored into in prior calculations.[157] The authors aptly point out that:

> Investors are ready, and can be expected to be ready to accept the regulatory regime in situations in which they invest. Investment protection rather turns around the issue of unexpected change with an excessive detrimental impact on the foreign investor's prior calculation, and the-in domestic politics natural-favouring of national competitions.[158]

It should be stressed that arbitral tribunals have been careful to draw a distinction between objective and subjective expectations. This distinction was endorsed in earlier awards of Iran-United States claims tribunals and specifically in *Starrette Housing Corporation v Iran* where the tribunal ruled in favour of the investor but rejected the claim of legitimate expectations. Regarding the investor's claim of legitimate expectations, the tribunal noted that ''investors in all countries have to assume a risk that the country might experience strikes, lock-outs, disturbances, changes of economic and political system and even revolution''.[159] The tribunal observed that the materialised risk does not necessarily mean that property rights affected by such events can be deemed to

[154] Michael W Reisman and Mahnoush H Arsanjani, 'The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes' in Pierre-Marie Dupuy and others (eds), *Common Values in International Law: Essays in Honour of Christian Tomuschat* (N.P Engel 2006) 409.

[155] Ibid.

[156] Ibid 410.

[157] Thomas Waelde and Abba Kolo 'Environmental Regulation, Investment Protection and Regulatory Taking in International Law' (2001) 50 *Int'l & Comp. L.Q* 811,819.

[158] Ibid.

[159] *LG&E v Argentina*, para 154.

have been expropriated.[160] In essence, the tribunal rejected investors' expectations that are subjective and cannot objectively be evaluated.

Similarly the *Metalclad v Mexico* tribunal seriously considered representations made by the Mexican government to Metalclad and the reliance thereof. In *casu*, Metalclad basing itself on the representations of a government affiliated entity began construction before applying for a building permit. Although Metalclad did not have the building permit there was implicit representation that the building permit would be granted. Moreover, while Metalclad was constructing and waiting for the building permit, the government did not object. Subsequently, after Metalclad accomplished substantial amount of work, the government issued a stop order. The tribunal systematically considered representation of the Mexican government on which Metalclad relied and found that the Municipality's refusal to issue the construction permit was flawed and unlawfully prevented Metalclad from operating the landfill.[161] According to the tribunal the government by permitting or tolerating the conduct of the ''municipality in relation to Metalclad and participating or acquiescing in the denial to Metalclad of the right to operate the landfill, notwithstanding the fact that the project was fully approved and endorsed by the federal government, Mexico must be held to have taken a measure tantamount to expropriation.''[162] Moreover, the absence of a timely, orderly or substantive basis for denying the construction permit amounted to an indirect expropriation.[163]

Additionally, in *Biloune v Ghana Investment Centre*, when evaluating the expropriation claim the tribunal considered the investor's justified reliance on Ghana's representations. In this case, Antoine Biloune invested in renovating and expanding a Ghana resort restaurant. On the basis of representations from government affiliated entities, Antoine commenced construction without applying for a building permit. Subsequently, after substantial amount of construction had been completed, a stop order was issued prohibiting further construction. Consequently, Antoine applied for a construction permit which was

[160] Ibid para 154.
[161] *Metalclad v Mexico*, para 106.
[162] Ibid para 104.
[163] Ibid para 107.

neither denied nor was he stopped from continuing. In evaluating whether there was an expropriation, the tribunal also considered legitimate expectations as part of the overall analysis. The tribunal found the investors objective expectations persuasive on the basis that Ghanaian government officials knew of the construction for more than one year before issuing the stop work order.[164] Moreover, the fact that permits had not been required for other projects and no procedure was in place for dealing with building permit applications meant that the investor would reasonably assume that construction permits are not mandatory.[165] In obiter the tribunal noted that tribunals will not uphold legitimate expectations where the host state has not made any specific commitments or representation to the investor.[166]

Similarly, in *Methanex Corp v United States*, the tribunal distinguished between investors freely entering the market and instances where host states make specific commitments to restrain certain future regulatory actions.[167] According to the tribunal claims of legitimate expectations are viable in circumstances where investors are induced to enter markets and host states fail to honour those commitments.[168] Specifically, the tribunal observed that Methanex entered the United States market aware of the constant changes in the business environment and actively participated in the process.[169] The facts of this case can be contrasted to *Revere Copper v OPIC* where a subsidiary of Revere Copper entered into a mining agreement containing a stabilisation clause. According to the stabilisation clause, the Jamaican government assured the investor that for the next twenty years the rate on taxes will not be raised and no other financial obligations will be imposed. However, after a few years in the mining business circumstances changed, the Jamaican government through legislation introduced disproportionate tax increases. As a result of the unforeseen increase in taxes, Revere Copper discontinued business operations. Revere Copper then sought compensation from OPIC (the insurer) claiming expropriation on the basis of the expropriation clause contained in its insurance policy. With respect to the issue

[164] *Antoine Biloune v Ghana Investment Centre,* para 207-10.

[165] Ibid.

[166] Ibid.

[167] Ibid para 210.

[168] *Methanex v United States of America*, para 10.

[169] Ibid.

of whether the investor had legitimate expectations, the tribunal ruled in the affirmative and opined:

> We regard these principles as particularly applicable where the question is, as here, whether actions taken by a government contrary to and damaging to the economic interests of aliens are in conflict with *undertakings and assurances given in good faith* to such aliens as an inducement to their making the investments affected by the action (emphasis added).[170]

The tribunal in *Azurix v Argentina* also carried out a legitimate expectation analysis although it was not sufficiently persuaded to confirm the investor's claims. According to the tribunal the investor did not lose the attributes of ownership, at all times continued to control the company and its ownership of 90% of the shares was unaffected.[171] Although without doubt management of the company was affected by the Province's actions, this was not sufficient to constitute a breakdown of the investor's expectations.[172] In *LG & E v Argentina*, the tribunal noted that when evaluating the degree of interference with the investor's property rights, one must analyse the measure's economic impact as well as its interference with the investor's reasonable expectations.[173]

Finally, the tribunal in *Tecmed v Mexico* considered whether there was legitimate justification for the investor to believe that authorisation to operate the landfill would be renewed. It found the investor had legitimate reasons to believe authorisation to operate the landfill would extend over a long term. The tribunal contextualised the social, political and economic circumstances and opined that the investor would not have reasonably foreseen the scope, effects and consequences conditioned in the issuance of the resolution.[174] Account was also made of the Environmental Impact Declaration of 1994 which projected a useful life of 10 years for the landfill.[175] This was even before the investor undertook the investment. Therefore it was widely known that any investor

[170] *Revere Copper & Brass Inc v Overseas Private Investment Corporation* (24 August 1978) 56 ILR 258, 256 [Hereafter *Revere Copper v OPIC*].

[171] *Azurix Corp v Argentina Republic*, ICSID Case No. ARB/03/30 July 14 2006, para 332 [Hereafter *Azurix Corp v Argentina*].

[172] Ibid.

[173] *LG&E v Argentina*, para194-5.

[174] *Tecmed v Mexico*, para 149.

[175] Ibid para 150.

expected the investments in the landfill to last for a long term.[176] When investing in the landfill, investors took into account the estimated time and business required to recover such investment so as to obtain the expected return.[177] Taken as a whole after evaluating the government's actions, the tribunal held that the actions violated the agreement as well as international law.[178] Against this backdrop, the tribunal found the investor's expectations legitimate and justifiable.

3.3.5 The Duration of Government Measure

Arbitral tribunals have considered the duration of government measures to establish whether cumulatively government measures amount to expropriation. Measures which have a lasting impact on the ability of the investor to enjoy his property rights have been found to be tantamount to an expropriation. However, this is on a case by case basis, some measures may amount to expropriation even though the measures are partial or temporary provided there is serious deprivation.[179] For instance the tribunal in *SD Myers v Canada* considered the facts at hand and rejected the expropriation claim because the ban on certain hazardous waste was temporary and was not a serious deprivation.[180] Particularly, the tribunal asserted that suspending hazardous waste for a temporary duration of eighteen months was not severe in the broad scheme of things.[181]

More clearly, the tribunal in *LG & E v Argentina* stressed that when examining the degree of interference with investor's property rights, one must also consider the duration of the measure.[182] This position is analogous to the approach taken in *SD Myers v Canada* requiring the duration of government interference to be permanent. Essentially, the tribunal in *LG & E v Argentina* contended that for government measures to reach the threshold of expropriation

[176] Ibid.
[177] Ibid.
[178] Ibid.
[179] *SD Myers v Canada*, para 283.
[180] Ibid.
[181] Ibid.
[182] *LG & E v Argentina*, para 193.

the duration of such measures cannot be temporary in nature ''unless the investment's successful development depends on the realization of certain activities at specific moments that may not endure variations.''[183] Just like in *SD Myers v Canada*, the tribunal in *LG&E v Argentina* found the actions taken by Argentina were not permanent to justify an expropriation because the investor's investment continued to exist. In essence, without a permanent severe deprivation the tribunal could not find the duration of the measures sufficient enough to constitute an expropriation.[184]

With respect to the precise duration of government measures, the tribunal in *Azurix Corp v Argentina* asserted that under international law there is no fixed period of time classified as being more than ephemeral.[185] In this case both the investor and the government offered conflicting views on the duration required for a measure to amount to an expropriation. Particularly, the government objected to the investor's claim that international law fixes a strict threshold when government measures are tantamount to an expropriation.[186] In the government's view only a reasonable period of time is required.[187] The tribunal adopted the common law approach of treating each case on its own merits and on the basis of the facts presented concluded that ''there is no mathematical formula to reach a mechanical result''.[188] In other words, for the duration to be sufficiently serious, it depends on the cumulative effect of the government measure based on the specifics of a given case.[189] The tribunal drew parallels with the case of *Wena Hotels v Egypt* which found the seizure of the investor's hotel ephemeral but nevertheless amounted to an expropriation. Distinctively, the tribunal noted that the *Wena Hotels* case involved a single measure but when considering multiple measures emphasis must be placed on the duration of the cumulative effect.[190]

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[183] Ibid.

[184] Ibid para 200.

[185] *Azurix Corp v Argentine*, para 285.

[186] Ibid para 294.

[187] Ibid.

[188]Ibid para 313.

[189] Ibid.

[190] Ibid.

3.3.6 The Requirement of Proportionality

Generally the use of proportionality as an approach to examine expropriation claims in investment arbitration is still in its early stages of development and has only recently been endorsed by arbitral tribunals. When proportionality is used as an approach to ascertain the viability of an expropriation claim, arbitral tribunals weigh whether government measures are proportional to the public interest presumably protected.[191] This involves taking into account the significance of such measures as well as the overall impact of such measures on an investors' property rights. Practically, this means tribunals achieve two objectives; respect for the right of the state to determine the suitability of public policy and determine whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations suffered from such deprivation.[192] Accordingly, arbitral tribunals hold that when public interest measures are pursued ''there must be a reasonable relationship of proportionality between the charge or weight imposed on the foreign investor and the aim sought to be realised by any expropriatory measure''.[193]

It should be noted that, when evaluating the principle of proportionality arbitral tribunals are influenced by the human rights jurisprudence of the European Court of Human Rights (ECHR) and notably the famous case of *James and Others v United Kingdom*. In *casu*, the ECHR examined the United Kingdom Lease Hold Reform Act which was alleged to interfere with the right to property enshrined in article 1 of the First Protocol.[194] According to the ECHR, for government measures to amount to a substantial interference with property rights:

> Not only must the measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim 'in the public

[191] *Tecmed v Mexico*, para 122.

[192] Ibid.

[193] Ibid.

[194] Article 1 of the First Protocol to some extent is analogous to expropriation provisions found in BITs. It reads 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contribution or penalties.

> interest," but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realized…The requisite balance will not be found if the person concerned has had to bear 'an individual and excessive burden'… The Court considers that a measure must be both appropriate for achieving its aim and not disproportionate thereto (emphasis added).[195]

Essentially, the ECHR sought to balance both the interests of the state as well as individual property rights. It cautiously underscores the difference in the way government measures affect nationals and non-nationals.[196] According to the ECHR when safeguarding public interests less should be expected from non-nationals because they "will generally have played no part in the election or designation of its authors nor have been consulted on its adoption''.[197] The court was of the view that it is reasonable to require more of the nationals to carry a greater burden in the public interest than non-nationals.[198] In other words, government measures are disproportionate when they impose an excessive burden to foreign investors as compared to nationals. On the basis of this line of reasoning, the *Azurix Corp v Argentina* tribunal without much elaboration found the guidelines in *James and Others* persuasive and helpful in its expropriation analysis.[199] Further, the tribunal endorsed the use of proportionality as enunciated in the award of Tecmed which had also fundamentally adopted the reasoning in *James and Others*.[200]

However, tribunals need to be cautious when importing the test of proportionality especially using the ECHR as the source of inspiration. There are fundamental differences between arbitral tribunals constituted to settle foreign investment claims and the ECHR but more importantly the ECHR was established purposely to interpret core human rights values. Essentially, provisions in BITs are unique and contain a dual mandate to protect as well as attract foreign investors while the protocol is generic in nature. In addition, substantively while

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[195] *Case of James and Others v United Kingdom* (App 8793/79) ECHR 21 February 1986, para 50-63 [Hereafter *Case of James and Others v United Kingdom*].

[196] Ibid.

[197] Ibid para 63.

[198] Ibid.

[199] *Azurix Corp v Argentina*, para 312.

[200] Ibid.

the protocol permits a margin of appreciation the same cannot be said about customary international law and BITs.[201] More importantly, the ECHR is dedicated to protecting democracy and is mindful that democratic nations should be permitted to make policy changes without being held at ransom by powerful corporations.[202] Although such is a notable undertaking the same cannot be said of arbitral tribunals that are constituted purposely to bring about a balance in the business relationship between states and foreign investors which has little to do with promoting democratic values.

3.4 The Consequences of the Emerging Expropriation Jurisprudence on African Countries

The approaches used by arbitral tribunals to determine whether measures constitute indirect expropriation clearly demonstrate the need for further clarification and the need for appropriate consideration of government measures. To recap, the majority of the expropriation clauses such as the clause in the United States-Congo BIT contain remarkably expansive provisions favouring foreign investors at the detriment of African states. Specifically, in the United States-Congo BIT expropriation is defined as ''broad and flexible.'' According to the BIT, ''any measure regardless of form, which has the effect of depriving an investor of his management, control or economic value in a project can constitute expropriation requiring compensation equal to the fair market value''.[203] In essence the BIT does not only emphasise the effect of the government measure which is detrimental but also protects investors from any kind of expropriatory measures.

Against this backdrop, as a theoretical and practical matter arbitral tribunals examining African expropriation clauses must inevitably rely on the existing jurisprudence. This would be fundamentally justifiable to the extent that the jurisprudence is precise and thoughtful to the interests of sovereign states. However, as the above cases have shown, much of what the jurisprudence says and achieves is a presumption in favour of investors at the detriment of

[201] *Siemens v Argentina*, para 354.

[202] Helen Mountfield, 'Regulatory Expropriations in Europe: The Approach of the European Court of Human Rights' (2003) 11 *N.Y.U. Envtl L. J* 136,146.

[203] United States-Congo BIT, letter of submittal.

government regulatory powers even when such policies are in the public interest. For instance, the *Metalclad* tribunal not only rejected the environmental measures but also asserted that the motivation or intention of the Mexican government was immaterial. The approaches taken in *Metalclad* and *Tabolt* unequivocally underscore that government measures will be faulted if the measures interfere with investor's property rights with the effect of significantly depriving the use of property rights. Writing in 2002,[204] and most recently in 2008, Dolzer accurately notes that the deciding criterion if not the main criterion continues to be the effect of government measures.[205] Dolzer's observation with exception to *LG&E v Argentina* correctly captures the evolving jurisprudence. Particularly, the approach in *LG&E v Argentina* is exceptional because the tribunal weighed both the effect of the measure as well as the purpose of the government measure. Rightly so, the tribunal concisely balanced both the effect and purpose of the measure so as to avoid confounding Argentina's right to adopt policies within its power.

There is reason for concern when the effect of government measures weighs over and above the purpose of the measure. The sole effect test undermines and deters governments from taking regulatory measures even in the midst of legitimate government policy benefiting the entire public. Although nothing should preclude arbitral tribunals from making independent judgements such discretion should not overtly undermine the purpose of government measures. More importantly, economic considerations should not be considered over and above legitimate government policy that seeks to benefit the entire population. It should be stressed that if all government measures are to be regarded as compensable expropriations, African countries will simply forego regulating even in the public interest. Specifically, it should be noted that when examining regulatory measures involving African countries to achieve equitable outcomes regulatory measures for public purpose, non-discriminatory and in accordance with due process should not qualify as measures tantamount to expropriation.[206]

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[204] Rudolf Dolzer, 'Indirect Expropriation: New Developments?' (2002) *11 N.Y.U. Envtl L.J* 64, 90.

[205] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 101.

[206] It should be stressed that there obviously dangers in using the public interest approach because government regulatory measures might sometimes be pursued with a hidden agenda.

Undoubtedly the spill offs of finding all government measures interfering with property rights constituting compensable expropriation will disproportionately affect African countries.

In stark contrast compared to developed countries, African countries face overwhelming challenges which include environmental, public health, safety, labour standards and capacity constraints. Particularly, the challenges in African countries require constant and on-going improvements in the regulatory environment which undoubtedly conflicts with interests of foreign investors. To this end, when used as the sole criteria, the sole effect test has the likelihood of discouraging African countries from undertaking regulatory policy even when such measures are in the public interest. Specifically, the sole effect test and the government interference approach have the propensity to overburden African countries which are at the peril of environmental degeneration and other regulatory standards. For instance as a hypothetical example, if the Tanzanian government wanted to increase foreign investment earnings from the mining sector and introduced regulations imposing additional levies on the mining industry. Creative foreign investors involved in the Tanzanian mining sector could potentially argue that the increased levy amounts to an expropriation. Indeed, as seen for example in the case of *Paushok v Mongolia*, usually the argument would be that the additional levies have the effect of severely depriving the investor's from the use and enjoyment of his property rights.

Specifically, in *Paushok v Mongolia*, the investor argued unsuccessfully that introducing a Windfall Profit Tax by the Mongolian government was tantamount to indirect expropriation. The tribunal postulated that ''foreign investors are acutely aware that significant modifications of taxation levels represents a serious risk, especially when investing in a country at an early stage of economic and institutional development''.[207] Furthermore, the tribunal was of the view that provided foreign investors have not negotiated appropriate guarantees such as stability agreements which limit or prohibit the possibility of tax increases

Even more, there is potential for government regulatory measures to be captured by vested interests. In essence, therefore although considering the purpose of government measures is important this is not without risks.

[207] *Paushok v The Government of Mongolia*, UNCITRAL Arbitration Rules, Award on Jurisdiction and Admissibility, April 28, 2011, para 302.

then it is within the discretion of sovereign states to introduce additional levies.[208] As the discussion in Paushok demonstrates, although the investor's claim was unsuccessful, creative investors can bring claims alleging that increase in taxes amount to indirect expropriation. Moreover, as the approach of the tribunal suggests, there is scope for investors to successfully pursue such claims when the state explicitly through stability agreements guarantees that additional taxes will not be levied.

It should be stressed that compared to other African BITs, the United States-Rwanda BIT elaborates approaches or factors arbitral tribunals should consider when determining indirect expropriation. Annex B Article 4 of the expropriation clause provides:

> …where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure. (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by case, fact-based inquiry that considers, among other factors: (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action.

Taken as a whole, the criteria outlined in the United States-Rwanda BIT should not be construed as a hierarchy but rather should be applied and balanced on a case by case basis. Furthermore, article 4 (b) provides that ''except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations''. Although the United States-Rwanda BIT attempts to distinguish between non-compensable regulatory measures and regulatory expropriations the BIT falls short in drawing the parameters of that distinction. The language in the United States-Rwanda BIT is analogous to the reasoning adopted in *Methanex*. In this case the tribunal postulated that ''non-discriminatory regulation for a public purpose, which is enacted in accordance with due process

[208] Ibid.

and, which affects, *inter alia*, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government…''.[209] This is the same caveat the United States-Rwanda BIT invokes in the terminology ''rare circumstances''. However, this caveat is problematic because it does not clarify what constitutes rare circumstances thus arbitral tribunals have the discretion to determine circumstances that can be regarded as rare. Obviously, it is hoped arbitral tribunals will interpret rare circumstances on a case by case basis and it should be the exception rather than the norm.[210]

From the foregoing, the following conclusions can be drawn from the practice of African states; save for a few exceptions like the United States-Rwanda BIT, expropriation clauses contained in African BITs do not offer approaches within which arbitral tribunals can determine indirect expropriation. Furthermore, most African BITs do not demarcate what constitutes non-compensable regulatory measure and regulatory expropriation requiring compensation. As a result, arbitral tribunals have the discretion to use any of the elaborated approaches mentioned above. Particularly, with respect to arbitral approaches, it should be stressed that the sole effect criterion when applied to African countries has the propensity to severely constrain the ability of African countries to regulate even in the public interest. Generally, compared to other countries, African countries face numerous challenges which require continued regulation; inadvertently this means that interests of foreign investors will be affected. Although African countries have undertaken broad and expansive expropriation provisions, there is need to contextualise African BITs and interpret them in such a way that African countries are not severely constrained. Specifically, when interpreting African expropriation clauses, tribunals should consider both the purpose and effect of the government measure so that African countries are able to implement measures for public interest which include the environment, labour, human rights and public safety. Finally, although the United States-Rwanda is more nuanced and could potentially serve as a model to other African countries there is still need to clarify what constitutes rare circumstances.

[209] *Methanex v United States of America*, chapter D para 7.

[210] See generally *Methanex v United States* for a brief interpretation of the tribunal's approach on the meaning of specific commitment, Chapter D, para 7-10.

3.5 Principles Regulating Lawful Expropriation in African BITs

As mentioned earlier, international law recognises the right of sovereign states to expropriate foreign property provided the measures are carried out for a public purpose, non–discriminatory and upon the payment of compensation.[211] With respect to African states, the rules of customary international law permitting lawful expropriation are pronounced in all African BITs. This clearly demonstrates that previous disagreements over the content of customary law rules regulating expropriation have at least at the moment through the conclusion of BITs been put to rest. Specifically, African expropriation clauses condition lawful expropriation for a public purpose, non-discriminatory, in accordance with due process,[212] and accompanied with the payment of compensation. It should however be noted that although nearly all African expropriation clauses consent to customary international law standards, there are significant variations in the scope and content of customary law articulated by the various African BITs. Moreover, it is unclear whether African countries deliberately or unintentionally sought to include or omit some of the customary law standards. The reasons underlying the omission or inclusion are peripheral. Remarkably important is the fact that African countries through BITs have consented to the very principles that these states vigorously opposed.

For purposes of clarity a sample of principles regulating lawful expropriation in African states as enunciated in African BITs is necessary. However, this is by no means an exhaustive illustration of all expropriation clauses contained in African BITs as such a task would be impossible given the number of African BITs. The

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[211] According to Schwarzenberger the requirement of public interest and compensation are generally understood as customary international law standards for a lawful expropriation. On the other hand non-discrimination is part of the minimum standard of international customary law applicable to foreign property. Georg Schwarzenberger, *Foreign Investments and International Law* (Stevens & Sons 1969) 4, 117. See also Garcia FV Amador , Special Rapporteur's Report on State Responsibility (Vol.II, *Yearbook of the International Law Commission* 1959) para 41; Jan Schokkaert and Yvon Heckscher also stress the requirements of lawful expropriation under international law. Yvon Heckscher and Jan Schokkaert, *International Investment Protection: Comparative Law Analysis of Bilateral and Multilateral Interstate Conventions, Doctrinal Texts and Arbitral Jurisprudence Concerning Foreign Investments* (Bruylant 2009) 373-80.

[212] It is unclear whether due process represents an additional requirement for lawful expropriation. Principally, due process forms part of international minimum standard as well as fair and equitable treatment. Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 91.

expropriation clause in majority of African BITs typically follow the following patterns; in the Germany-Burundi BIT for instance the formula of the expropriation clause stipulates that ‘‘investment by nationals or companies of either Contracting Party shall not be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party except for the *public benefit* and *against compensation*’’.[213]

Manifestly, from the wording of this clause it is clear that under the Germany-Burundi BIT non-discrimination and due process are not part of the conditions for lawful expropriation. Comparatively, the conditions for lawful expropriation in the Germany-Burundi BIT differ from the Belgium-Rwanda BIT which provides under article 4(2) that ‘‘…should considerations of public interest necessitate derogation…such measures shall be taken exceptionally…for (a) in accordance with the legal procedures; (b) shall not be discriminatory; (c) shall be accompanied by provisions for the payment of an adequate and effective compensation’’.[214] On the other hand, the expropriation clause in the Tanzania-Italy BIT follows the approach in Belgium-Rwanda BIT with minor modification. According to article 5 of the Italy-Tanzania BIT ‘‘investment of nationals or companies of either contracting party shall not be de jure or de facto nationalised, expropriated or subjected to measures having equivalent effect…except for a public purpose related to the internal needs of that party on a non-discriminatory basis and against prompt, full and effective compensation’’.[215] The United Kingdom-Kenya BIT is without exception, it reads in article 5 ‘‘investment of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation…except for a public purpose related to internal needs of that party on a non-discriminatory basis and against prompt, adequate and effective compensation’’.[216]

[213] Article 4(2) of the Germany-Burundi BIT.

[214] Article 4(2) of the Belgium-Rwanda BIT.

[215] Article 5of the Italy-Tanzania BIT.

[216] Article 5 of the United Kingdom-Kenya BIT.

Similarly, the United Kingdom-Ghana BIT excludes non-discrimination as a condition for lawful expropriation. Specifically, article 7 of the expropriation clause provides that ‘‘investment of nationals or companies or either contracting party shall not be nationalised, expropriated or subjected to measures having equivalent effect to nationalisation or expropriation…except for a public purpose related to its internal needs…accompanied by provision for the payment of compensation amounting to the full and genuine value of the property as well as prompt and effective’’.[217] The language in the most recent United States-Rwanda BIT differs from the United Kingdom-Ghana by including non-discrimination as a condition for lawful expropriation. According to Article 6 of the United States-Rwanda BIT, neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process.[218]

On the other hand, article III of the United States-Cameroon BIT does not include non-discrimination as a condition for lawful expropriation. It stipulates that ‘‘investments shall not be expropriated or nationalized either directly or indirectly except for a public purpose and in accordance with due process of law…and upon payment of prompt adequate and effective compensation’’.[219] This provision can be contrasted with the Denmark-Tanzania BIT which provides in article 6 that ‘‘investments of investors of each contracting party shall not be nationalised or expropriated or subjected to measures tantamount to expropriation…except in the public interest, on the basis of non-discrimination, carried out under due process of law, and against prompt, adequate and effective compensation’’.[220] However, the expropriation clause in the United States-Congo BIT has more conditions for lawful expropriation than other African countries. Under article 3 of the United States-Congo BIT the expropriation clause provides that ‘‘no investment or any part of an investment of a national

[217] Article 7 of the United Kingdom-Ghana BIT.

[218] Article 6 of the United States-Rwanda BIT.

[219] Article III of the United States-Cameroon BIT.

[220] Article 6 of the Denmark-Tanzania BIT.

shall be subjected to any other measure…,unless the expropriation: (a) is done for a public purpose; (b) is accomplished under due process of law; (c) is not discriminatory; (d) does not violate any specific provision on contractual stability or expropriation contained in an investment agreement between the national or company concerned and the Party making the expropriation; and (e) is accompanied by prompt, adequate and effectively realizable compensation''.[221]

Finally, the last example is article 7 of the Netherlands-Zambia BIT which includes four conditions for lawful expropriation. It provides that neither ''contracting party shall take any measures depriving directly or indirectly, nationals of the other contracting party of their investments unless… (a) the measures are taken in the public interest and under due process of law; (b) the measures are not discriminatory or contrary to any undertaking which the contracting party which takes such measures may have given; (c) the measures are taken against just compensation''.[222] To sum up, the preceding provisions of African expropriation clauses clearly demonstrate that African states have consented to customary international law principles regulating lawful expropriation. In light of these considerations, the following section analyses the four main criteria required for the implementation of lawful expropriation in African treaty practice.

3.5.1 Lawful Expropriation in Africa Requires Public Purpose

As a starting point BITs signed by African countries permit lawful expropriation when it is pursued for a public purpose or in the public interest. Generally, in all African BITs the requirement of public purpose is the first criteria for lawful expropriation.[223] While African BITs use public purpose or public interest interchangeably, this is a linguistic difference rather than a substantive difference. Substantively, the expropriation clause complies with customary international law standard even though the content of public purpose differs

[221] Article 3 of the United States-Congo BIT.

[222] Article 7 of the Netherlands-Zambia BIT.

[223] For instance see Article 5 of the United Kingdom-Kenya BIT; Article 7 of the United Kingdom-Ghana BIT; Article 6 of the United States-Rwanda BIT; Article III of the United States-Cameroon BIT; Article 6 of the Denmark-Tanzania BIT; Article 3 of the United States-Congo BIT; Article 7 of the Netherlands-Zambia BIT; Article 4(2) of the Germany-Burundi BIT; Article 4(2) of the Belgium-Rwanda BIT and Article 5of the Italy-Tanzania BIT.

among African countries. Particularly, the majority of African countries condition lawful expropriation aimed at serving a public purpose to be related to the internal needs of the country. Moreover, it should be emphasised that except for minor linguistic differences, the public interest requirement fully complies with customary international law.[224] In light of these considerations, the logical question is whether all government measures pursued for public interest amount to non-compensable regulatory expropriation and the threshold required for such public interest measures to amount to compensable regulatory expropriation.

As discussed above, in answering this question arbitral tribunals have contended that the requirement of public purpose is useful only when considering whether the expropriation complies with the BIT and plays a limited role in the determination of whether an expropriation has occurred. Accordingly, respondent governments must adduce sufficient evidence demonstrating that the government measures indeed serve a public purpose. In essence, although sovereign states have the discretion to take measures in the public interest such discretion is challenged if there is an error of judgement or an abuse of power or a clear misunderstanding of the issue.[225] Particularly, when examining whether measures serve a public purpose, tribunals also consider the context within which the government arrives at such a conclusion. For instance, the tribunal in *Siemens v Argentina* rejected the Argentinean Decree because the circumstances surrounding the Decree were not rationally connected to the 2000 Argentina fiscal emergency law.[226] According to the tribunal, although there was no doubt that the 2000 Emergency Law served a public purpose its application through Decree 669/01 was questionable within the specific settings of Siemens investment.[227]

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[224] UNCTAD, *Taking of Property: UNCTAD Series on Issues in International Investment Agreements* (UNCTAD/ITE/IIT/15, UN Pub, Sales No. E.00.II.D.4, 2000) 12.

[225] *Antoine Goetz and Others v Republic of Burundi*, ICSID Case No. ARB/95/3 February 10 1999 cited in Yvon Heckscher and Jan Schokkaert, *International Investment Protection: Comparative Law Analysis of Bilateral and Multilateral Interstate Conventions, Doctrinal Texts and Arbitral Jurisprudence Concerning Foreign Investments* (Bruylant 2009) 646.

[225] *Siemens v Argentina*, para 273.

[226] Ibid.

[227] Ibid.

Similarly, the tribunal in *Tecmed v Mexico* examined whether the public interest underlying refusal to renewal the landfill permit was proportional to the negative economic effect the investor suffered. The tribunal noted that although tribunals give states limited deference to determine measures that fit the realm of public interest such deference does not prevent them from questioning the premise of the measures.[228] Put differently, whatever the public interest, the measure must be proportional to the economic harm suffered by the investor and essentially this means that the public interest should not unfairly supersede the foreign investor's economic interests. Within the context of African BITs, arbitral tribunals are likely to find nearly all measures taken by African countries comply with the criteria of public interest. However, it is doubtful whether equally all the public interest measures will amount to non-compensable regulatory measures.

3.5.2 Lawful Expropriation in Africa must be Non-Discriminatory

The language in most expropriation clauses signed by African countries requires lawful expropriation to be carried out in a manner that is non-discriminatory.[229] Although the United Kingdom-Ghana BIT and Germany-Burundi expropriation clause do not require non-discrimination as a condition for lawful expropriation, this does not imply that discriminatory expropriations are permitted in Ghana and Burundi. Furthermore, arbitral tribunals interpreting the United Kingdom-Ghana BIT and Germany-Burundi expropriation clause can interpret such measures in light of the MFN clause.[230] Moreover, it is generally accepted that expropriations targeting foreign investors or particular nationals are illegal and may automatically amount to payment of compensation notwithstanding the public interest.[231] For instance government procedures, practices and policies that are racially motivated would be evidence of illegal expropriations.[232]

[228] *Tecmed v Mexico*, para 122.

[229] As seen above, the United Kingdom-Ghana BIT does not subject non-discrimination as a condition for lawful expropriation. This line of drafting is also followed in the Germany-Burundi BIT.

[230] This position is based on the MFN clause in both BITs. See Chapter 5 for detailed discussion of MFN clauses.

[231] American Law Institute, *Restatement of the Law Third, The Foreign Relations Law of the United States* (Vol. 1, American Law Institute 1987) Section 712.

[232] August Reinisch, 'Legality of Expropriation' in August Reinisch (ed), *Standards of Investment Protection* (OUP 2008)186.

Clearly from a doctrinal point of view, it is evident that the wording of the requirement of non-discrimination in African BITs complies with the customary international law standard requiring expropriation measures to be carried out without discrimination.

There is broad consensus both in academia and arbitral practice confirming non-discrimination as a yardstick for lawful expropriation under international law.[233] The presence of discrimination is determined by considering ‘‘individual factual circumstances of each particular case’’.[234] For instance, in *British Petroleum v Libyan Arab Republic*, the government of Libya passed a Nationalisation Law ceasing concessions retaliating against the Iranian occupation of three islands which were regarded as Arab.[235] Libya and other Arab States blamed the occupation on Great Britain as the islands were still technically under British control and the government did not react to the occupation.[236] The tribunal found Libya’s nationalisation law violated international law because it was made for purely extraneous political reasons and was discriminatory in character.[237]

Similarly, the tribunal in *Letco v Liberia* found measures taken by the Liberian government depriving Letco concessionary rights discriminatory.[238] In the tribunal’s view this was because ‘‘areas of concession taken away from Letco were granted to other foreign owned companies which were run by people who were good friends of the Liberian authorities’’.[239] Lastly, in *ADC v Hungary*, the government argued that the prohibition applied not only to the claimants but all foreign operating the Airport. According to the government, ADC as the only foreign investor involved in the operation of the airport cannot raise any claim

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[233] Ibid 187. See also AFM Maniruzzaman, ‘Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview’ (1999) 8 *J.Transnat’l L. & Pol’y* 58, 58.

[234] Ibid 67.

[235] *British Petroleum v Libya Arab Republic* (10 October 1973) cited in James Crawford and others, *Foreign Investment Disputes: Cases, Materials and Commentary* (Kluwer Law International 2005) 946.

[236] Ibid.

[237] Ibid 947.

[238] *Letco v Liberia*, (Award of 31 March 1986) cited in James Crawford and others, *Foreign Investment Disputes: Cases, Materials and Commentary* (Kluwer Law International 2005) 904.

[239] Ibid.

of being treated discriminatory.[240] The tribunal postulated that the government ''misses the point because the comparison of different treatments is between treatment received by the Respondent-appointed operator and that received by foreign investors as a whole''.[241] Against this backdrop, the tribunal found that government actions amounted to discrimination because nationals received favourable treatment compared to foreign investors. From the preceding discussion, it is important to note that African states by including non-discrimination as a ground for lawful expropriation, African states have in essence consented to pursue expropriation measures without discriminating between nationals and foreign investors. Such restraint in African treaty practice is manifestly apparent as the majority of African expropriation clauses plainly indicate that government expropriation measures must apply equally to foreign investors and nationals.

3.5.3 Lawful Expropriation in Africa Must Follow Due Process

Nearly all BITs signed by African countries condition lawful expropriation to comply with due process. Specifically, the majority of African treaties make reference to due process using the phrase measures must be ''carried out under due process of law'' while other African BITs make use of the phrase measures ''shall be taken under due process of law''.[242] Comparatively, the Belgium-Rwanda BIT is unique in this respect, it uses the phrase ''measures shall be taken in accordance with the legal procedures''.[243] However, substantively the various phrases used are analogous to one another. Put differently, within the context of Belgium-Rwanda BIT expropriation would have to follow legal procedures and such legal procedures would inevitably require elements of due

[240] *ADC Affiliate Limited & ADC and ADMC Management Limited v The Republic of Hungary*, ICSID Case No. ARB/03/16 October 2 2006, para 441 [Hereafter *ADC v Hungary*].

[241] *ADC v Hungary,* para 442.

[242] Article 5 of the United Kingdom-Kenya BIT; Article 7 of the United Kingdom-Ghana BIT; Article 6 of the United States-Rwanda BIT; Article III of the United States-Cameroon BIT; Article 6 of the Denmark-Tanzania BIT; Article 3 of the United States-Congo BIT; Article 7 of the Netherlands-Zambia BIT; Article 4(2) of the Germany-Burundi BIT; Article 4(2) of the Belgium-Rwanda BIT; Article 5 of the Italy-Tanzania BIT.

[243] Article 4(2) of the Belgium-Rwanda BIT.

process. It should also be stressed that occasionally some African BITs do not make reference to due process as a condition for lawful expropriation.[244]

Arbitral tribunals have shed light to the standard of due process and more elaborately in the case of *Antoine Goetz v Burundi* concerning the revocation of a free trade zone permit. In this case, Burundi claimed that revocation of the free trade zone permit was legal and complied with domestic legislation as well as Burundian regulations.[245] The arbitral tribunal held that the requirement of due process required Burundi to respect both domestic law and provisions of the Belgium-Burundi BIT.[246] Manifestly, through signing the BIT with Belgium, Burundi committed to place Belgium investors under both international protection and Burundian law.[247] According to the tribunal, ''however commanding the control of the State of Burundi may draw from its sovereignty, it is held, by reason of this very sovereignty, to respect its international commitments''.[248]

Most recently, the tribunal in *ADC v Hungary* explained the standard of due process as it relates to expropriation demands actual and substantive legal procedures foreign investors can use to raise claims against depriving actions already taken or about to be taken.[249] There is an expectation on the government to provide '' basic legal mechanisms such as reasonable advance notice, a fair hearing and unbiased and impartial adjudicators to assess the actions in dispute...''.[250] When the government fails to provide legal procedures with which such a mechanism exists ''the argument that the action are taken under due process of law rings hollow''.[251] The tribunal concluded that the

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[244] There are a number of African BITs that do not make reference to due process inter alia Italy-Tanzania BIT; Germany-Burundi BIT; United Kingdom-Kenya BIT; United Kingdom- Ghana BIT.

[245] *Antoine Goetz and Others v Republic of Burundi* (10 February 1999) ICSID Case No. ARB/95/3 cited in Yvon Heckscher and Jan Schokkaert, *International Investment Protection: Comparative Law Analysis of Bilateral and Multilateral Interstate Conventions, Doctrinal Texts and Arbitral Jurisprudence Concerning Foreign Investments* (Bruylant 2009) 646.

[246] Ibid.

[247] Ibid 647.

[248] Ibid 648.

[249] *ADC v Hungary*, para 435.

[250] Ibid.

[251] Ibid.

expropriation did not meet the standard of due process as envisaged in Article 4 of the Hungary-Cyprus BIT. These two arbitral awards highlight the fact that due process is a substantive condition thus African countries implementing expropriation measures need to ensure that domestic legislation encapsulates fair procedures before expropriations are carried out. Specifically, when envisaging expropriations, African countries should engage aggrieved foreign investors and provide them avenues within which their concerns are fairly adjudicated.

As noted in *Antoine Goetz v Burundi*, due process blends both requirements of domestic laws as well as international law. The obiter in the case is particularly relevant to African countries because expropriation clauses contained in African BITs do not elucidate the meaning of due process. Essentially, in the majority of African BITs the discretion is placed on African countries to decide within domestic legal settings the parameters of due process. The effect of this practice is that African countries could potentially assume that due process has been followed on the basis of national laws but in reality African domestic laws may provide unacceptable legal procedures.

3.5.4 Lawful Expropriation in Africa Requires the Payment of Compensation

Generally, compensation for government measures interfering with property rights is justified on three grounds. First, cost internalisation theorists suggest that compensation is necessary because it ensures that the government takes only those regulatory actions that are efficient and maximise aggregate social welfare.[252] On the other hand, insurance theorists justify compensation on the basis that it acts as an insurance against the risk of government regulatory measures.[253] Lastly, proponents of fairness assert that fairness demands compensation to prevent investors from bearing excessive burdens that should be spread more broadly.[254] It should be stressed that as a practical matter, states do not argue against compensation per se but against the standard of

[252] Vicki L Been 'Does an International Regulatory Takings Doctrine Make Sense' (2002) 11 *N.Y.U.Envtl. L.J* 49, 50.

[253] Ibid.

[254] Ibid.

compensation. As earlier noted the standard of compensation is one of the most controversial issues that divided states during the twenty century. Specifically, African states inspired with the newly acquired independence rejected the standard of prompt, adequate and effective compensation and postulated that the standard of compensation should be determined in accordance with domestic laws. Be that as it may, this rhetoric at least on the African continent can safely be said to have been settled through the inception of BITs on the African continent.

Indeed, all expropriation clauses contained in African BITs require expropriation to be accompanied by the payment of compensation. Although, there are variations in the wording, it is worth noting that all African BITs condition lawful expropriation upon the payment of compensation. The standard of compensation pronounced in African BITs fits into three categories; most of African BITs condition expropriation upon the payment of prompt, adequate and effective compensation, some make reference to adequate and effective compensation,[255] while others simply require payment of just or adequate compensation.[256] Despite the variations, substantively African BITs neatly follow the 'Hull formula' which had been relentlessly fought by African countries. In addition, African BITs offer guidance into the standard of compensation by precisely indicating the amount of compensation aggrieved investors will be paid for lawful expropriation. Again here African BITs use different formulas, while most African countries recognise that compensation should consist of the full and genuine value of the expropriated property,[257] some African countries stipulate that compensation should entail the payment of fair market value at the time immediately before the expropriation or impending expropriation.[258]

[255] Belgium-Rwanda BIT makes provision for the payment of adequate and effective compensation while the Korea-Congo BIT; Denmark-Tanzania BIT; United Kingdom-Kenya BIT; Sweden-Tanzania BIT; United States-Cameroon BIT; United Kingdom-Cameroon BIT; Mauritius-Ghana BIT and the Tanzania-Italy BIT follow prompt adequate and effective compensation.

[256]For instance see Germany-Burundi BIT; Ghana-Egypt BIT; Germany-Tanzania BIT; Netherlands-Tanzania BIT and the Belgium-Cameroon BIT.

[257] For e.g. see United Kingdom-Tanzania BIT; Ghana-Benin BIT; India-Ghana BIT; United Kingdom- Kenya BIT; China-Ghana BIT; Italy-Tanzania BIT; Netherlands-Tanzania BIT and Ghana-Guinea BIT.

[258] See generally United States- Cameroon BIT; Denmark-Tanzania BIT; Ghana-Malaysia BIT; United States-Rwanda BIT; Korea-Congo BIT and Sweden-Tanzania BIT which determine compensation on the basis of fair market value immediately before the expropriation measures.

Occasionally, other African countries envisage compensation amounting to the equivalent value of the investment.[259] Whereas African BITs articulate the standard of compensation and the amount thereof, most treaties fall short on providing the methodology to follow when determining the appropriate value for compensation.

Generally, African BITs give arbitral tribunals discretion to determine an appropriate valuation methodology and occasionally some treaties make reference to acknowledged international valuation methods.[260] The application of the valuation methodology can raise controversy when the fair market value is not easily determinable or when the actual value of the property has significantly diminished. For instance in *Biwater v Tanzania,* the investor was of the view that the question as to what valuation methodology is appropriate for calculating "fair market value" depends on the nature of the investment and the timing of the expropriation. The investor claimed that the discounted cash flow method involving the analysis of future profits and the discounting of these to calculate a net present value is only appropriate where the future profits of the investment can be determined with a degree of certainty or when the expropriated entity has had a history of profitable operations. The tribunal rejected this argument on the basis of the facts and the unprofitable status of the investor at the time of expropriation. According to the tribunal, ''City Water had no economic value on 1 June 2005; that as of that date, BGT was not willing to spend another shilling to keep City Water from collapsing and no rational buyer with reasonable knowledge of the relevant facts would have spent a shilling to buy it''.[261]

3.6 Conclusion

As shown throughout this chapter, although expropriation clauses contained in African BITs have variations and wording differences such differences are

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[259] Germany-Burundi BIT; Netherlands-Ghana BIT; Germany-Tanzania BIT; Finland-Tanzania BIT; Kenya-Germany BIT.

[260] However, it should be stressed that African treaties making reference to international valuation methods are the exception. Nearly all treaties leave the discretion to arbitral tribunals. To this end, the Italy-Tanzania BIT is an exception because it specifically makes reference to international valuation standards.

[261] *Biwater v Tanzania,* para 795.

inconsequential. For instance some African countries have expropriation provisions that do not explicitly capture indirect expropriation but contain related phases such as measures tantamount to expropriation which is functionally equivalent to indirect expropriation. The common denominator amongst all African expropriation clauses is that the expropriation clause is of a general nature and does not delimit the contours of indirect expropriation. Manifestly, therefore arbitral tribunals have the discretion to decide African cases on the basis of the evolving jurisprudence on expropriation. This emerging jurisprudence though forms the basis of legal reasoning would justifiably be applicable to African states to the extent that the jurisprudence is precise and considers the purpose and intention of government measures. However, as the preceding analysis has demonstrated arbitral tribunals are reluctant to consider the intention of government measures. Specifically, arbitral tribunals predominantly apply the sole effect test which has the propensity to constrain African countries from pursuing regulatory measures even in the public interest. Moreover, the failure to seriously balance the purpose of government measures *vis-à-vis* interests of foreign investors may reinvigorate sovereign centred arguments especially in African countries that previously opposed rules regulating foreign investment. Lastly, as far as the various expropriation approaches are concerned, it is unlikely that these approaches will be clarified unless the approaches are clarified in future BITs or through the introduction of an appellate body charged with the authority to bring some degree of nuanced consistency.

Chapter 4

The Standard of Fair and Equitable Treatment in African Bilateral Investment Treaties

Introduction

Although the standard of fair and equitable treatment easily finds passage in nearly all BITs, it is probably the most controversial and complex undertaking for states engaged in modern investment treaty practice.[1] Over the last decade, the standard has acquired significant prominence both in commentary and investor-state disputes superseding even traditional expropriation claims.[2] For instance in 2008, arbitral tribunals considered thirteen awards on the merits and in each of the cases, investors alleged a violation of fair and equitable treatment.[3] Out of the thirteen cases, foreign investors successfully demonstrated violation of fair and equitable treatment in seven of the awards and in contrast to expropriation, of the seven claims based on expropriation, arbitral tribunals ruled in favour of foreign investors in two instances.[4] The trend therefore suggests that the possibility of foreign investors succeeding through claims of fair and equitable treatment is higher compared to other substantive treaty rights encapsulated in investment treaties. On this basis, it is prudent for investors to fashion treaty claims through the broad allegation of fair and equitable treatment. Moreover, as will shortly be discussed since the language of the standard is broadly construed and captures other treaty violations, this affords arbitral tribunals a window within which to adjudicate other ambiguous provisions. Particularly, as demonstrated by arbitral practice there is remarkable similarity between the

[1] Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration* (OUP 2007) 200.

[2] Over the last few years, there has been gradual increase in the number of monographs reviewing fair and equitable treatment. For detailed review see Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP 2008). In part the renewed interest is because majority of cases before ICSID arbitral tribunals include an allegation of fair and equitable treatment.

[3] UNCTAD, *Latest Developments in Investor-State Dispute Settlement* (IIA Monitor No. 1, UNCTAD/WEB/DIAE/IA/2009/6/Rev1, 2009) 8.

[4] Ibid.

reasoning adopted in expropriation awards and that adopted in fair and equitable treatment awards.[5]

Aside from the conflicting views expressed in arbitral practice, fair and equitable treatment has also aroused significant academic scrutiny.[6] The divide in opinion as will be subsequently discussed relates to whether fair and equitable treatment is equivalent to the minimum standard or whether it is an autonomous treaty standard.[7] Quite apart from this, is the question about whether fair and equitable treatment represents two standards or is simply a single standard.[8] In light of these differences, arbitral tribunals continue to grapple with issues surrounding the two distinctive approaches so as to satisfy both the interests of states and investors. Whether tribunals have succeeded in balancing the two competing interests is beyond the scope of this chapter but evidently the vigorous reaction from states disputing interpretation accorded to fair and equitable treatment has been unprecedented. For instance, Bolivia withdrew from the ICSID arbitral framework on the basis that fair and equitable treatment has been expansively expanded. Specifically, Bolivia asserted that ICSID arbitral tribunals have notoriously interpreted the standard in favour of multinational corporations at the detriment of sovereign states.[9] Aside from Bolivia, there are indications that other Latin American countries have also been appalled by the interpretation accorded to the standard of fair and equitable treatment.[10]

These recent developments deserve not to be taken lightly considering the fact that the standard has been in existence for over fifty years without any major

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[5] Ibid.

[6] Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration* (OUP 2007) 199-264; M Sornarajah , *The International Law on Foreign Investment* (2nd edn, Cambridge University Press 2004) 349-363, Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 119-149; Jeswald W Salacuse, *The Law of Investment Treaties* (OUP 2010) 218-244.

[7] Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP 2008) 56; see also Stephen Vasciannie, 'Fair and Equitable Treatment in International Investment Law and Practice' (1999) 70 *BYIL* 99, 104.

[8] Ibid.

[9] Luck Eric Peterson, 'Investment Treaty News' (2007) 15 <www.iisd.org/pdf/2007/itn_may27_2007.pdf>accessed 20 May 2012.

[10] Ibid.

controversy.[11] Commenting on the recent backlash, Professor Schreuer reminisced that fair and equitable treatment has been 'a sleeping beauty' inserted in a number of documents but rarely used in state practice.[12] Professor Schreuer's metaphoric expression is not without merit considering the growing number of investors relying on fair and equitable treatment as well as the increased scrutiny the standard has generated in academic discourse. In light of these considerations, this chapter thoroughly examines the scope, the definition and meaning of fair and equitable treatment as spelled out in African treaty practice. In so doing, the chapter not only contextualises the silent features underpinning the development of fair and equitable treatment but also situates African treaty practice within general investment law treaty practice. Lastly, the chapter explores the extent to which the distinctive arbitral approaches shape the understanding of fair and equitable treatment within African treaty practice.

4.1 The Historical Evolution of Fair and Equitable Treatment

The concept of fair and equitable treatment has been in existence for over fifty years and first appeared as a non-binding legal obligation in the unsuccessful Havana Charter of 1946.[13] As noted in Chapter 1, the Havana Charter constituted an effort that was supposed to galvanise the establishment of the International Trade Organisation.[14] Although the Havana Charter was mainly a trade compact with few investment articles, the Charter itself highlights the difficulties involved in negotiating investment related issues. There are many factors that contributed to the failure of the Havana Charter but notably as observed by one commentator contracting states feared that ''investment provisions negotiated at a multilateral conference might express the lowest common denominator of protection to which any of the participants would be willing to agree''.[15] As a

[11] Federico Ortino and others, *Investment Treaty Law: Current Issues II: Nationality and Investment Treaty Claims and Fair and Equitable Treatment in Investment Treaty Law* (British Inst of Intl & Comparative 2007) 92.

[12] Ibid.

[13] Ibid.

[14] See Chapter 1 for detailed discussion.

[15] Comments by Principal American negotiator extracted from Andreas F Lowenfeld, *International Economic Law* (2nd edn, OUP 2008) 482.

result of such considerations, the draft chapter on economic development containing international investment related issues was rejected by all member states.[16] With respect to the standard of fair and equitable treatment, article 11 (2) empowered the Organization to make recommendations for and promote bilateral or multilateral agreements on measures designed to assure ''just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another''.[17]

It should be stressed that although the Charter contained a clause on just and equitable treatment, the clause was included as an aspiration without envisaging the creation of any binding legal obligations.[18] This is mainly because developing countries did not participate in the negotiation of the Havana Charter and also there was lack of consensus among developed countries about the content of international investment rules.[19] Particularly, during negotiations of the Havana Charter provisions related to investment protection contracting parties did not have the disposition or intent to draft binding legal norms.[20] Moreover at a doctrinal level, states participating in the Havana Charter did not perceive just and equitable treatment as part of the corpus of customary international law.[21] After the demise of the Havana Charter, several unsuccessful negotiations both at the regional and multilateral level were attempted. Particularly, the pioneering regional initiatives included the 1948 Economic Agreement for Bogota that contained a clause expressly contemplating fair and equitable treatment for foreign capital.[22] Subsequently, this was followed by the 1959 private initiative known as the Abs-Shawcross Draft Convention on Investment Abroad.[23]

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[16] Ibid.

[17] Final Act of the United Nations Conference on Trade and Employment: Havana Charter for an International Organization. <http://www.worldtradelaw.net/misc/havana.pdf>accessed 20 May 2012.

[18] Comments by Principal American negotiator extracted from Andreas F Lowenfeld, *International Economic Law* (2nd edn, OUP 2008) 482.

[19] Ibid.

[20] Ibid.

[21] Ibid.

[22] UNCTAD, *Fair and Equitable Treatment: UNCTAD Series on International Investment Agreements* (Vol. III UNCTAD/ITE/IIT/II, Sales No. E.99.II.D.15, 2009) 7.

[23] Abs Hermann and Hartley Shawcross, 'Draft Convention on Investments Abroad' in *The Proposed Convention to Protect Private Foreign Investment: A Roundtable* (1960) 9 J of Public L 119, 119-124.

Particularly, article 1 of the Abs-Shawcross draft provides that, ‘‘each party shall at all times ensure fair and equitable treatment to the property of the nations of the other party…’’.[24] Noteworthy, provisions of the Abs-Shawcross Draft put considerable emphasis on the protection of foreign investors and as a result the draft is widely perceived as having favoured the perspectives of capital exporting countries.[25] Although the Abs-Shawcross Draft was unsuccessful, the initiative conspicuously inspired the 1967 OECD Draft Convention on the International Protection of Foreign Property which also included a clause providing for fair and equitable treatment.[26]

Indeed, the wordings of the two drafts are remarkably similar and tailored towards protecting foreign investors. For instance, Article 1 of the OECD draft stipulates that ‘‘each party shall at all times ensure fair and equitable treatment to the property of the nations of the other party…’’.[27] The inclusion of fair and equitable treatment in the draft OECD Convention, ‘reflects the dominant trend and perspectives among capital exporting countries in investment matters’’.[28] Although these initiatives produced unsuccessful results, taken as a whole the initiatives clearly illuminate the differences in opinion between developed and developing countries.[29] In part, the failure of these initiatives suggests that the concept of fair and equitable treatment cannot be said to form part of customary international law because both the OECD Draft Convention and the Havana Charter were drafted without the support of developing countries. At the multilateral level, the concept of fair and equitable treatment is articulated in a scaled down agreement establishing the Multilateral Investment Guarantee Agency of 1985.[30] Article 12 of this agreement requires that ‘‘in guaranteeing an investment, the Agency shall satisfy itself as to…(iv)

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[24] Ibid.

[25] UNCTAD, *Fair and Equitable Treatment: UNCTAD Series on International Investment Agreements* (Vol. III UNCTAD/ITE/IIT/II, Sales No. E.99.II.D.15, 2009) 8.

[26] Ibid.

[27] See 1967 OECD Draft Convention on the International Protection of Foreign Property. <http://www.oecd.org/dataoecd/35/4/39286571.pdf>accessed 20 May 2012.

[28] UNCTAD, *Fair and Equitable Treatment: UNCTAD Series on International Investment Agreements* (Vol. III UNCTAD/ITE/IIT/II, Sales No. E.99.II.D.15, 2009) 8.

[29] Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP 2008) 2.

[30] MIGA is a member of the World Bank Group and its core mission is to promote foreign direct investment into developing countries to help support economic growth, reduce poverty, and improve people’s lives. <http://www.miga.org/whoweare/index.cfm>accessed 20 May 2012.

the investment conditions in the host country, including the availability of fair and equitable treatment and legal protection for the investment''.[31] A similar provision can be found in the 1992 guidelines of the Board of Governors of the International Monetary Fund and the World Bank which reads ''Each State will extend to investment established in its territory by nationals of any other State fair and equitable treatment according to the standards recommended in these Guidelines''.[32]

In close parallel with the Havana Charter, the United States pursued Friendship Commerce and Navigation Treaties (FCNs). The nuanced FCNs included property protection clauses that had appeared in the colonial era and guaranteed ''equitable treatment'' and ''most constant protection and security'' to property of foreign nationals and companies.[33] It is important to stress that FCN provisions encapsulating fair and equitable treatment were wide in scope and covered a wide range of legal issues.[34] For instance, the FCN with Ethiopia stipulated that ''each Contracting Party shall at all times accord fair and equitable treatment to nationals…shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws''.[35] Furthermore, FCN treaties concluded after the aftermath of colonialism also guaranteed national treatment and MFN treatment with respect to the right to establish investment.[36] Also, modern FCN interchangeably used the terminology 'equitable treatment' and 'fair and equitable treatment'.[37]

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[31] Article 12 (iv) of MIGA <http://www.miga.org/news/index_sv.cfm?stid=1506&aid=1347#3>accessed 20 May 2012.

[32] Word Bank Guidelines on Treatment of Foreign Investments. For the detailed guidelines see <http://ita.law.uvic.ca/documents/WorldBank.pdf >accessed 20 May 2012.

[33] Kenneth J Vandevelde, 'Romancing the Foreign Investor: BIT by BIT: A Brief History of International Investment Agreements' (2005) 12 *U.C Davis J. Int'l L. & Pol'y* 157, 163.

[34] Ibid.

[35] Treaty of Amity and Economic Relations between the United States of America and Ethiopia, U.S.T 2134, Sept 7, 1951 [Hereafter FCN between United States and Ethiopia].

[36] Kenneth J Vandevelde, 'Romancing the Foreign Investor: BIT by BIT: A Brief History of International Investment Agreements' (2005) 12 *U.C Davis J. Int'l L. & Pol'y* 157, 163.

[37] Ibid.

For instance while the FCN treaties the United States signed with France, Greece, Belgium, Luxembourg, Ireland, Israel, Nicaragua and Pakistan assured foreign investors with 'equitable treatment',[38] other United States FCN treaties with Germany, Ethiopia, Oman and the Netherlands assured foreign investors with 'fair and equitable treatment''.[39] However, it should be stressed that the interchangeable use between 'fair and equitable treatment' and 'equitable treatment' is of no significant importance.[40] In essence, whether the FCN uses 'fair and equitable treatment' or 'equitable treatment' the desired objective remains the same.[41] Not all FCN treaties follow this trend; for example the China-United States FCN does not contain either of the two standards of treatment.[42] The FCN between the United States and Ethiopia is particularly relevant to African states because it was the first African treaty to explicitly embody the standard of fair and equitable treatment.

Subsequently, as will shortly be discussed the provision found its way into African treaty practice towards the late 1960's and early 1990's when most African countries become active participants in the bilateral investment treaty system. The concept of fair and equitable treatment also found its way into the Draft United Nations Code of Conduct on Transnational Corporations (UN Draft Code).[43] The UN Draft Code is particularly relevant because it demonstrates early views of developing countries with regard to the standard of fair and equitable treatment. Most importantly, the UN Draft Code is balanced because negotiators included both developed and developing countries espousing

[38] See for example the FCN between United States and Greece provides that, 'Each Party shall at all times accord equitable treatment to the persons, property, enterprises and other interests of nationals and companies of the other Party'. Friendship Commerce and Navigation Treaty between the United States of America and Greece, TIAS 3057, Aug 3 and Dec 26, 1951[Hereafter FCN between United States and Greece].

[39] For example see FCN between United States and Ethiopia. See generally Kenneth J Vandevelde, 'Romancing the Foreign Investor: BIT by BIT: A Brief History of International Investment Agreements' (2005) 12 *U.C Davis J. Int'l L. & Pol'y* 157, 163.

[40] For thorough review see Arghyrious A Fatouros, *Government Guarantees to Foreign Investors* (Columbia University Press 1962) 167.

[41] Ibid.

[42] Treaty of Friendship, Commerce and Navigation between the United States and Republic of China, TIAS No. 1871, 63 Stat.1299, Nov 4 1946 [Hereafter FCN between United States and China].

[43] Article 48 of the Draft United Nations Code of Transnational Corporations. For the detailed Code see UNCTC, *The United Nations Code of Conduct on Transnational Corporations* (UN Pub. Sales No. E.86.II.A.15, ST/CTC/SER.A/4).

therefore early understanding of fair and equitable treatment.[44] This is in sharp contrast to the 1967 OECD Draft which predominantly represented the views of developed countries.[45] Significantly, during the UN Draft Code negotiations, one of the outstanding contentious issues was the standard of fair and equitable treatment.[46] As a compromise, developed and developing countries agreed to an ambiguous and broad concept that simply read ''Transnational corporations should receive fair and equitable treatment in countries in which they operate''.[47] Although the standard easily found passage into the UN Draft Code, this should not to be equated to the international minimum standard as advocated by some commentators from developed countries.[48]

Moreover, historical trends of the concept suggest that as of 1986, developing countries simply viewed fair and equitable treatment as an additional standard of treatment and not necessarily equivalent to international minimum standard.[49] Robinson notes that there is nothing in the UN Draft Code which indicates that national treatment, MFN and minimum standard are part of the standard of fair and equitable treatment.[50] Furthermore, it should be stressed that during the negotiations of the UN Draft Code, OECD countries promoted the view that fair and equitable treatment encapsulates international law.[51] However, it remains doubtful whether this position was attained based on the persistent objection of developing countries.[52] To sum up, it can be stated that as of 1986, the content of fair and equitable treatment as well as the relationship between fair and equitable treatment and the minimum standard remained unsettled.[53] Aside from the 1967 OECD Draft, the failed Multilateral

[44] UNCTAD, *Fair and Equitable Treatment: UNCTAD Series on International Investment Agreements* (Vol. III UNCTAD/ITE/IIT/II, Sales No. E.99.II.D.15, 2009) 8.

[45] Ibid.

[46] Patrick Robinson, *The June 1985 Reconvened Special Session on the Code* (No.2, The CTC Reporter Centre on Transnational Corporations 1985) 11.

[47] Ibid 13.

[48] Ibid 14. See also Samuel A Asante, 'The Concept of the Good Corporate Citizen in International Business' (1989) 4 *ICSID Review-FILJ* 1, 1-38.

[49] Ibid 13. See also UNCTAD, *Fair and Equitable Treatment: UNCTAD Series on International Investment Agreements* (Vol. III UNCTAD/ITE/IIT/II, Sales No. E.99.II.D.15, 2009) 33.

[50] Ibid.

[51] Ibid.

[52] Ibid

[53] Ibid.

Agreement on Investment (MIA) also included fair and equitable treatment as part of the overall provisions regulating foreign investment. The MIA in its investment protection clauses under section iv stipulates that ''Each Contracting Party shall accord to investments in its territory of investors of another Contracting Party fair and equitable treatment and full and constant protection and security…''.[54]

The MIA further adds that, ''in no case shall a Contracting Party accord treatment less favourable than that required by international law''.[55] It is pertinent to note that compared to the OECD Draft, the MIA follows the position in the UN Draft Code which incorporated national treatment and MFN in addition to fair and equitable treatment.[56] Although both the OECD draft and MIA are imprints of developed countries, if these agreements had been successful they would have become multilateral investment treaties because of the availability to non OECD members.[57] Vasciannie correctly notes that the character of the OECD draft and MIA draft needs to be distinguished from other regional agreements that targeted a limited category of countries.[58] In comparison to regional agreements, OECD drafters intended the drafts to serve as multilateral investment treaties covering the broad spectrum of foreign investment protection and binding on all countries.[59] Having looked at multilateral initiatives, it is important to briefly examine the second phase of regional agreements containing fair and equitable treatment. Typically, regional agreements alluding to fair and equitable treatment include *inter alia* the Lome IV Convention, COMESA and NAFTA.

Unlike other regional agreements, the Lome IV Convention is of great significance because it embodies both the views of developed and developing

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[54] <http://www.oecd.org/document/22/0,3343,en_2649_33783766_1894819_1_1_1_1,00.html >accessed 20 May 2012.

[55] Ibid section iv.

[56] Stephen Vasciannie, 'Fair and Equitable Treatment in International Investment Law and Practice' (1999) 70 *BYIL* 99, 116.

[57] Ibid 116. See also Kenneth J Vandevelde, *United States Investment Treaties: Policy and Practice* (Kluwer Law 1992) 616.

[58] Ibid.

[59] Ibid.

countries.[60] Particularly, the Lome IV Convention encapsulates that at a regional level developing countries have accepted to incorporate fair and equitable treatment as a treaty standard. This is in contrast to the line of reasoning advocated by developing countries during the NIEO and also during the drafting of the Code of Transnational Corporations.[61] Furthermore, Lome IV represents the views of African countries which are the majority of countries making up the African, Caribbean and Pacific Group of States (ACP). Specifically, article 258 provides that ACP countries and the European Union shall accord investors fair and equitable treatment provided such investors comply with the objectives and priorities of ACP-EC development co-operation and appropriate laws in their respective States.[62] Aside from Lome IV, the COMESA Investment Agreement further supports the acceptability of fair and equitable treatment among African countries. Particularly, article 14 of the COMESA agreement provides that 'Member States shall accord fair and equitable treatment to COMESA investors and their investments in accordance with customary international law…''.[63] From the wording of article 14 of COMESA and article 258 of Lome IV Convention, it is manifestly clear that African states accept the standard of fair and equitable treatment as part of the protection accorded to foreign investors.

Quite apart from appearing in African regional treaties, the standard of fair and equitable treatment also appears in other regional groupings such as NAFTA and the Energy Charter Treaty. In particular, as will be shown below, the practice under NAFTA is of significant importance because of its contribution to the development of the standard through the numerous awards and the interpretative note by the Free Trade Commission. Aside from NAFTA, another

[60] The Lome IV Convention is an agreement between the European Community and African Caribbean and Pacific States (ACP States). The Convention aims at promoting and expediting economic, cultural and social development between ACP States and the European Community. The majority of ACP States are African states comprised of African countries from East Africa, Central Africa, Southern Africa and West Africa.

[61] Patrick Robinson, *The June 1985 Reconvened Special Session on the Code* (No.2, The CTC Reporter Centre on Transnational Corporations 1985) 11 <http://unctc.unctad.org/data/ctcrep20b.pdf>accessed 20 May 2012.

[62] Article 258 Lome Convention, Fourth ACP-EEC Convention of Lome Signed at Lome on 15 December 1989 <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21991A0817(01):EN:HTML>accessed 20 May 2012.

[63] Article 14 of the Investment Agreement for the COMESA Common Investment Area <http://vi.unctad.org/files/wksp/iiawksp08/docs/wednesday/Exercise%20Materials/invagreecomesa.pdf>accessed 20 May 2012.

regional initiative worth mentioning is the Energy Charter and although relatively new and limited to the energy sector the agreement represents the views of developed countries.[64] Specifically, Article 10 (1) of the Energy Charter provides that ‘‘Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to investments of Investors of other Contracting Parties fair and equitable treatment’’.[65] Commenting on the Energy Charter, Walde Thomas stresses that the Charter is the most sophisticated instrument of foreign investment protection based on the fact that it was adopted along the lines of NAFTA and United Kingdom investment treaty practice.[66] Walde further posits that the Charter aims at crystallizing customary international law principles derived from existing state practice as articulated in NAFTA, BIT practice, World Trade Organization and other international investment standards.[67]

From the foregoing historical background, a number of key principles can be distilled from the evolution of fair and equitable treatment; (i) there is an increasing reference to fair and equitable treatment enhanced by post world war experience which created the need for foreign capital and unprecedented investment protection,[68] (ii) the content of the standard remains ambiguous and unsettled, (iii) historically, fair and equitable treatment is an independent standard and not part of the international minimum standard, (iv) from the historical background, fair and equitable treatment though stipulated in treaties cannot be said to have crystallized into customary international law because of the contradictory views held by developed and developing countries, (v) fair and equitable treatment is included in treaties mainly because of its simplicity in the

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[64] Energy Charter < http://www.ena.lt/pdfai/Treaty.pdf> accessed 20 May 2012. For a good overview see Thomas W Walde, ‘Energy Charter Treaty Based Investment Arbitration, Controversial Issues’ (2004) 5 *The Journal* of *World Investment & Trade* 373.

[65] Article 10(I) of the Energy Charter <http://www.ena.lt/pdfai/Treaty.pdf>accessed 20 May 2012.

[66] Thomas W Walde, ‘Energy Charter Treaty Based Investment Arbitration, Controversial Issues’ (2004) 5 *Journal of World Investment &Trade* 373, 376.

[67] Ibid.

[68] Stephen Vasciannie, ‘Fair and Equitable Treatment in International Investment Law and Practice’ (1999) 70 *BYIL* 99,119.

abstract.[69] Be that as it may and despite the fact that the meaning of fair and equitable treatment is unexplained, there is consensus that when the concept is included in treaties, it is a legal standard and foreign investors can rely on it for protection.[70]

Obviously, the lack of a working definition coupled with the fact that the concept is ambiguous makes its application and interpretation difficult in the ever changing investment climate. Moreover, the concept consists of not only according investors fair or just treatment but also giving weight to equitable treatment.[71] From a purely interpretative stand point, it is possible to speculate that the standard when included as fair and equitable treatment offers superior legal protection compared to when it is included as just and equitable treatment.[72] This would imply that when applied to practical cases the inquiry would be one that considers fairness and equity as two distinct tiers of analysis.[73] However, such speculation would be devoid of the consistency with which states have linked the two terms.[74] The format of the standard in most treaties shows that states believe the standard is one unified standard.[75] It is suggested that if states believed fair and equitable treatment to embody two standards such intention would have been explicitly mentioned.[76] Put differently, states would for instance have set out the fairness standard in one treaty provision and the equity standard in other treaty provision.[77] The failure

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[69] Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration* (OUP 2007) 200.

[70] See generally *Case Concerning Oil Platforms* (*Islamic Republic of Iran v United States of America*) Separate Opinion of Judge Rosalyn Higgins, 1996 *ICJ Rep* 803, 856.

[71] Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration* (OUP 2007) 206.

[72] Jeswald W Salacuse, *The Law of Investment Treaties* (OUP 2009) 222.

[73] Ibid.

[74] UNCTAD, *Fair and Equitable Treatment: UNCTAD Series on International Investment Agreements* (Vol. III UNCTAD/ITE/IIT/II, Sales No. E.99.II.D.15, 2009) 14.

[75] Ibid.

[76] Ibid 14-16.

[77] Jeswald W Salacuse, *The Law of Investment Treaties* (OUP 2009) 222.

thereof simply means that states intend fair and equitable treatment to connote a single treaty standard.[78]

As noted earlier, the concept fair and equitable treatment is a legal standard although its scope, definition and meaning remain unsettled. With respect to its interpretation, there are mainly two schools of thought, some commentators contend that fair and equitable treatment is part of customary international law while others consider it as an independent standard detached from the minimum standard.[79] When viewed as an autonomous standard, it follows that investors will be granted treatment above and beyond that articulated by the minimum standard.[80] On the other hand, when viewed as part of the minimum standard, it is presumed that investors are to be granted treatment in accordance to and limited to the minimum standard.[81] Obviously, proponents of this position proceed from the assumption that the minimum standard of treatment has crystallised into customary law such that treatment falling below this level gives rise to liability on part of the state.[82] However, this position tends to ignore the rejection of the minimum standard by developing countries and also assumes that there is settled practice and *opinio juris* in favour of the minimum standard. The following section examines both viewpoints because such an assessment informs the discussion of fair and equitable treatment in African treaty practice.

4.2 Fair and Equitable Treatment as Part of the International Minimum Standard

The continued reference to fair and equitable treatment as an embodiment of the international minimum standard is supported by NAFTA arbitral practice.[83] However, as pointed out in *Mondev International Limited v United States*, it is

[78] UNCTAD, *Fair and Equitable Treatment: UNCTAD Series on International Investment Agreements* (Vol. III UNCTAD/ITE/IIT/II, Sales No. E.99.II.D.15, 2009) 14-16. See also Jeswald W Salacuse, *The Law of Investment Treaties* (OUP 2009) 222.

[79] Stephen Vasciannie, 'Fair and Equitable Treatment in International Investment Law and Practice' (1999) 70 *BYIL* 99,102-105.

[80] Ibid.

[81] Ibid.

[82] Ibid.

[83] Ioana Tudor, *Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP 2007) 56.

essential to draw a distinction between fair and equitable treatment under NAFTA which clearly refers to the minimum standard and other treaty practices that potentially have their own system of implementation.[84] Some preliminary remarks about the international minimum standard are warranted before situating fair and equitable treatment as part of the international minimum standard. As subsequent chapters have shown, the international minimum standard is a concept of deep rooted controversy and such controversy was most vividly witnessed when formerly colonised states acquired independence. It holds that civilised nations recognise a common standard of treatment applicable to aliens and the application of such treatment is invaluable to the world community.[85] In the words of Root who is probably the most passionate defender of the minimum standard, 'the international standard is nothing else than a set of rules, correlated to each other and deriving from one particular norm of general international law namely that the treatment of aliens is regulated by the laws of nations.[86] Despite the genius of Root's position, legal doctrine has traditionally opposed the articulation of this standard.[87] The opposition to the minimum standard is partly because it has the tendency to test any state conduct by a generalised standard of justice.[88] This is self-evident in the concept itself and the dubious basis upon which the standard is premised.[89]

Even though the international minimum standard is supported by many states, caution should be exercised especially when equating the minimum standard as part of customary international law. A broad and expansive construction of the minimum standard would be ignoring the much heated debates of the early century. Particularly, it should be noted that in the last century, the minimum standard suffered almost unanimous rejection by majority of developing countries whether from Africa, Latin America or Asia. Given the controversy surrounding the minimum standard particular restraint should therefore be

[84] *Mondev International Limited* v *United States of America*, ICSID Case No. ARB (AF)/99/2 October 11 2000, para 121[Hereafter *Mondev International* v *United States of America*].

[85] Elihu Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 *Am. J. Int'l L*, 517, 521-22.

[86] Ibid.

[87] Ian Brownlie, *Principles of Public International Law* (6th edn, OUP 2003) 502.

[88] Alireza Falsafi, 'The International Minimum Standard of Treatment of Foreign Investors' Property: A Contingent Standard' (2007) 30 *Suffolk Transnat'l L. Rev.* 320, 321.

[89] Ibid.

exercised when construing and applying the precedent of early cases to modern investment disputes. The theoretical background as observed in *Mondev* suggests that the international minimum standard was not so much about the treatment of foreign investment but rather designed for the physical security of aliens.[90]

It is worth mentioning that the precedent of the minimum standard developed focusing on physical security of aliens which essentially means that applying the Neer case and other related cases to modern arbitration would be devoid of the context within which these cases were decided.[91] Also, these cases where decided at a time when the status of the individual in international law and the international protection of foreign investments were far less developed.[92] Obviously, this is different from today were the substance and procedural rights of individuals have undergone considerable developments.[93] However, despite the rejection of the minimum standard, treaty practice of certain countries supports the view that fair and equitable treatment merely reflects the international minimum standard. The relationship between the two has been the subject of controversy within NAFTA arbitral practice. This controversy emanates from the wording of article 1105 of NAFTA which provides that;

> Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.[94]

The approach in NAFTA has also been followed in the 2004 United States Model BIT as well as the investment chapters of United States Free Trade Agreements.[95] Specifically, United States Free Trade Agreements explicitly stipulate that fair and equitable treatment is equivalent to the international minimum standard. For instance Article 15.5(2) of the Free Trade Agreement between the United State and Singapore reads as follows;

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[90] *Mondev International* v *United States of America*, para 115.

[91] Ibid para 116.

[92] Ibid.

[93] Ibid.

[94] Article 1105 of NAFTA <http://www.nafta-sec-alena.org/eng/view.aspx?x=343&mtpilD=124#A1105>accessed 20 May 2012.

[95] For instance see Article 10.5 of the United States of America and Morocco Free Trade Agreement<http://www.ustr.gov/sites/default/files/uploads/agreements/fta/morocco/asset_upload_file651_3838.pdf>accessed 20 May 2012.

> For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of fair and equitable treatment and full protection and security *does not require treatment in addition to or beyond* that which is required by that standard, and do not create additional substantive rights (emphasis added).[96]

It should be noted that previously, the lack of clear linkage in the relationship between fair and equivalent treatment and the minimum standard provided arbitral tribunals with an avenue within which to exercise discretionary judgement.[97] This resulted in divergent views including arbitral tribunals interpreting article 1105(1) using sources beyond customary international law thus giving raise to expansive and liberal interpretations.[98] For instance in *SD Myers Inc v Canada* the tribunal opined that ''a breach of a rule of international law by a host Party may not be decisive in determining that a foreign investor has been denied fair and equitable treatment''.[99] However, ''the fact that a host Party has breached a rule of international law that is specifically designed to protect investors will tend to weigh heavily in favour of finding a breach of Article 1105''.[100] More specifically, the tribunal in *Pope & Talbot* found the formulation of the fairness requirement in Article 1105 as being addictive to the minimum standard.[101] Accordingly, investors are entitled to elements constituting fairness notwithstanding other entitlements under international law.[102] In the view of the tribunal a logical corollary of the language in article 1105 demands that ''compliance with the fairness elements must be ascertained free of any threshold that might be applicable to the evaluation of measures under the minimum standard of international law''.[103]

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[96] Article 15.5(2) of the United States-Singapore Free Trade Agreement.

[97] Barnali Choudhury, 'Evolution of Devolution? Defining Fair and Equitable Treatment in International Investment Law' (2005) 6 *Journal of World Investment & Trade* 297, 299.

[98] Ibid.

[99] *SD Myers Inc v Government of Canada* (Partial Award 2000) para 265-266 <http://italaw.com/alphabetical_list.htm >accessed 20 May 2012 [Hereafter *SD Myers v Canada*].

[100] Ibid.

[101] *Pope & Talbot Inc v The Government of Canada* (2001) 7 *ICSID Reports*, para 111 [Hereafter *Pope & Talbot v Canada*].

[102] Ibid.

[103] Ibid.

As a result of the numerous conflicting interpretations, article 1105 became the subject of an official interpretation by the NAFTA Free Trade Commission (FTC), a body compromised of representatives of the three member states with the authority to adopt binding interpretations.[104] With the numerous contradictory decisions, the Note of Interpretation Concerning Article 1105 sought to clarify and reaffirm whether the minimum standard and fair and equitable treatment are parallel. The FTC Note specifically states that;

> (i) Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. (ii) The concepts 'fair and equitable treatment' and full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. (iii) A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105 (1).[105]

Even before the FTC Note, Canada had long supported the proposition that fair and equitable treatment is functionally equivalent to the minimum standard. According to the Canadian Statement on Implementation of the NAFTA, Canada was of the view that Article 1105 of NAFTA is a restatement of the minimum absolute standard of treatment ''based on long standing principles of customary international law''.[106] This position is also followed in Canada's new Foreign Investment Protection and Promotion Agreement (FIPA) model which reads as follows;

> The Minimum Standard of Treatment ensures investments of investors, fair and equitable treatment and full protection and security in accordance with the principles of customary international law. The minimum standard provides a floor to ensure that the treatment of an

[104] Article 1131(2) NAFTA reads as follows 'An Interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this section'. <http://www.nafta-sec-alena.org/en/view.aspx?x=343&mtpiID=142#A1131>accessed 20 May 2012.

[105] Notes of Interpretation of Certain Chapter 11-Investment Provisions (NAFTA Free Trade Commission, July 31, 2001) < http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-interpr.aspx?lang=en&view=d>accessed 20 May 2012.

[106] Government of Canada Department of External Affairs, *North American Free Trade Agreement: Canada Statement on Implementation* (Vol. 28, No. 1, Canada Gazette January 1994) 149.

investment cannot fall below treatment considered as appropriate under generally accepted standards of customary international law.

Similarly, the 1979 statement issued by the Swiss Foreign Office endorses the proposition that fair and equitable treatment is equivalent to the minimum standard of treatment.[107] Although the FTC note attracted criticisms from investors and commentators, subsequent NAFTA decisions have followed the lead.[108] Obviously, from the point of view of investors, the FTC note accords substantially lesser protection compared to when the standard is interpreted as an autonomous standard. Particularly within the NAFTA context, investors alleged that the United States deliberately changed the meaning of a NAFTA provision in the middle of a case in which fair and equitable treatment plays a decisive role.[109] To sum up, investors questioned the motives of United States pursuing such an interpretation and whether the interpretation was carried out in good faith. Despite the misgivings from investors, subsequent arbitral tribunals in *Mondev*, *UPS*, *ADF* and *Loewen* have sided with the conclusive opinion undertaken by the FTC.

However, it should be stressed that the FTC interpretation applies to NAFTA party states and is of limited relevance to other treaties.[110] This is because article 1105 was the subject of an authorised treaty body with jurisdiction over NAFTA parties.[111] More so, in contrast to other treaties, article 1105 makes reference to the 'Minimum Standard of Treatment' in its heading and refers to international law including fair and equitable treatment.[112] Most importantly, according to article 31 of the VCLT, treaty interpretation requires each treaty to

[107] Full length of the statement is cited in Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Kluwer Law International 1995). See also Christoph Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6 *Journal of World of Investment & Trade* 357, 361.

[108] For instance in *Mondev v Canada*, para 102. The claimant professed to be somewhat bewildered by the interpretation of the Free Trade Commission. The claimant argued that the Respondent saw fit to change the meaning of a NAFTA provision in the middle of the case in which that provision plays a major part and questioned whether the Respondent did so in good faith.

[109] Ibid.

[110] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 126. See also Christoph Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6 *Journal of World of Investment & Trade* 357, 364.

[111] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 126.

[112] Ibid.

be interpreted within its context and in light of its object and purpose. However, the NAFTA treaty interpretation may offer inspiration especially where the treaty makes a connection between customary international law and fair and equitable treatment.[113] As will be discussed in more details below, the United States-Rwanda BIT is an example of such an approach. Specifically, the United States-Rwanda BIT explicitly mentions that fair and equitable treatment refers to the minimum standard. Evidently, when there is an unequivocal reference to fair and equitable treatment joined with the minimum standard, NAFTA treaty practice may provide guidance.

4.3 Fair and Equitable Treatment as an Independent Standard

There is considerable support in commentary, arbitral practice and BITs for the proposition that fair and equitable treatment is an independent standard that goes beyond mere restatement of the international minimum standard.[114] Commentaries taking this view argue that the concept fair and equitable treatment should be given its plain meaning.[115] According to this approach, when BITs include fair and equitable treatment as part of treaty standards, tribunals must inquire whether particular treatment accorded to the investor is both fair and equitable.[116] Treatment will be considered fair when it is free from bias, fraud, or injustices and it will be perceived as equitable when it is characterised by equity, fairness or reasonableness.[117] Proponents of this school of thought contend that interpreting fair and equitable treatment following the plain meaning approach is consistent with canons of treaty interpretation espoused in international law.[118] Probably, the leading argument in favour of the plain meaning approach is captured in the words of Mann who argues:

> Nothing is gained by introducing the conception of a minimum standard and, more than this, it is positively misleading to introduce

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[113] Ibid.

[114] Ibid 124.

[115] Stephen Vasciannie, 'Fair and Equitable Treatment in International Investment Law and Practice' (1999) 70 *BYIL* 99, 103.

[116] Ibid.

[117] Ibid.

[118] Ibid.

> it. The terms fair and equitable treatment envisage conduct which goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words. A tribunal would not be concerned with a minimum standard, maximum standard or average standard. It will have to decide whether in all circumstances the conduct in issue is fair and equitable or unfair and inequitable. No standard defined by other words is likely to be material. The terms are to be understood and applied independently and autonomously.[119]

From the foregoing, it is worth mentioning that when fair and equitable treatment is interpreted as an autonomous treaty standard, investors receive the most favourable protection not only as a matter of textual interpretation but also because investors are accorded treatment above or beyond the minimum standard. In light of these considerations, it is evident that investors would prefer fair and equitable treatment to be interpreted as an autonomous treaty standard. Moreover, it should be noted that if states intended to limit fair and equitable treatment to the minimum standard this would have been referred to explicitly rather than using a different expression.[120] The consensus from the latest UNCTAD study reveals that most states and investors subscribe to the theory of fair and equitable treatment not being functionally equivalent to the minimum standard.[121] This according to this study is even more compelling when such a link has not been established.[122] The tribunal in *Saluka v Czech Republic* also supported the opinion that when a treaty does not explicitly refer to the minimum standard the concept fair and equitable treatment is an autonomous standard and tribunals should restrict themselves to the text of the treaty.[123]

According to the tribunal the detachment of fair and equitable treatment to the minimum standard implies that the concept should be interpreted in light of the object and purpose of the treaty.[124] Specifically, in interpreting Article 3.2 of The Netherlands and Czech Republic BIT, the tribunal noted the following;

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[119] FA Mann, 'British Treaties for the Protection of Investments' (1981) 52 *BYIL* 241, 244.

[120] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 124.

[121] UNCTAD, *International Investment Agreements: Key Issues* (Vol.1UNCTAD/ITE/IIT/204/10, UN Pub Sales No.E.05.II.D.6, 2004) 224.

[122] Ibid.

[123] *Saluka Investments v Czech Republic*, para 256-57.

[124] Ibid para 296-309.

> Whichever the difference between the customary and the treaty standards may be, this Tribunal has to limit itself to the interpretation of the "fair and equitable treatment" standard as embodied in Article 3.1 of the Treaty. That Article omits any express reference to the customary minimum standard. The interpretation of Article 3.1 does not therefore share the difficulties that may arise under treaties (such as the NAFTA) which expressly tie the "fair and equitable treatment" standard to the customary minimum standard. Avoidance of these difficulties may even be regarded as the very purpose of the lack of a reference to an international standard in the Treaty. This clearly points to the autonomous character of a "fair and equitable treatment" standard such as the one laid down in Article 3.1 of the Treaty.[125]

In support of the plain meaning approach, Dolzer argues that it's implausible a treaty would refer to a well-known concept like the minimum standard of treatment in customary international law by using the expression fair and equitable treatment.[126] According to Dolzer, although fair and equitable treatment may overlap with the minimum standard with respect to issues such as arbitrary treatment, discrimination and unreasonableness this does not automatically incorporate the minimum standard.[127] In sum, when fair and equitable treatment is invoked the central issue for assessment is whether the actions in question are in all circumstances fair and equitable or unfair and inequitable.[128] The plain meaning approach is without doubt problematic because both fairness and equitable treatment are subjective concepts. In addition, fairness and equitable are evolving terms essentially what may have been unfair in the past might be fair in the present circumstances. Most importantly, members of the international community have different backgrounds, legal heritages and ideological differences which all make the plain meaning approach inherently difficult. For instance, what may be fair and equitable in the developed countries may be perceived as unfair in African countries.

[125] Ibid para 294.

[126] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 124. See also UNCTAD, *Fair and Equitable Treatment: UNCTAD Series on International Investment Agreements* (Vol. III UNCTAD/ITE/IIT/II, UN Pub Sales No. E.99.II.D.15, 2009) 40.

[127] Ibid.

[128] Ibid.

Indeed, the tribunal in *LG&E v Argentina* recognised this difficult and postulated that the concept is of a generic nature and its interpretation varies overtime based on the circumstances of each case.[129] This according to the tribunal makes it difficult to establish fair and equitable treatment as an unequivocal and static concept.[130] Vasciannie correctly notes that the plain meaning approach does not refer to an established body of law or to existing legal precedents.[131] Instead the plain meaning approach assumes that in each case the key question will be whether the state accorded to foreign investors' fair and equitable treatment without reference to any technical understanding of the meaning of fair and equitable treatment.[132] Although there is adequate support for the plain meaning approach, arbitral tribunals have also noted that the minimum standard has evolved and the content is substantially similar whether the terms are interpreted in their ordinary meaning or in accordance with customary international law.[133] However, the convergence approach has its own difficulties especially where the treaty does not make reference to the minimum standard.[134]

4.4 Elements of Fair and Equitable in Arbitral Practice

The jurisprudence of arbitral tribunals has not only concentrated on the relationship between the minimum standard and fair and equitable treatment but also developed further to distil elements of this broadly construed standard. In particular, elements developed through arbitral practice are necessary ingredients to interpret fair and equitable treatment especially when the treaty

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[129] *LG&E Capital Corp. and LG&E International Inc v Argentina Republic*, ICSID Case No. ARB/02/16 September 28 2007, para 123 [Hereafter *LG&E v Argentina*].

[130] Ibid.

[131] Stephen Vasciannie, 'Fair and Equitable Treatment in International Investment Law and Practice' (1999) 70 *BYIL* 99, 104.

[132] Ibid.

[133] *Saluka v Czech Republic*, para 291, *Azurix Corp v Argentina Republic, ICSID* Case No. ARB/03/30 July 14 2006, para 332-361 [Hereafter *Azurix Corp v Argentina*], *Metalclad Corp v United Mexican States*, ICSID Case No. ARB (AF)/97/1 August 30 2000, para 103 [Hereafter *Metalclad v Mexico*], *CMS Gas Transmission Company v Argentina Republic* ICSID Case No. ARB/01/8 May 15 2005, para 282-284 [Hereafter *CMS Gas Transmission v Argentina*].

[134] For an overview of inherent flaws in the convergence approach see Theodore Kill 'Don't Cross the Streams: Past and Present Overstatement of Customary International Law with Connection with Conventional Fair and Equitable Treatment Obligations' (2008) 106 *Mich. L. Rev* 853.

does not contain any reference to the minimum standard or when the treaty merely indicates international law or when the treaty is silent on both.

Given the importance of elements developed in arbitral practice to the application and understanding of fair and equitable treatment, it is necessary to discuss them first before examining the standard of fair and equitable treatment within African treaty practice. Obviously, one must be mindful that the content of the standard remains largely unsettled and controversial. Moreover, arbitral tribunals apply the elements developed to specific set of facts and circumstances which makes it difficult to replicate the principles to new cases.[135] Nevertheless, different themes have emerged from arbitral practice which include *inter alia*, (a) the protection of investor's confidence and legitimate expectation, (b) protection against discrimination and arbitrariness, (c) transparency, (d) denial of procedural due process and denial of justice, (f) the failure to act in good faith.[136] The following section reviews the five main themes developed in arbitral practice as such a discussion informs and is imperative to the understanding of fair and equitable treatment within African treaty practice.

4.4.1 The Protection of Investor Confidence and Legitimate Expectation

The respect of investor's legitimate expectations is the foundation to ensuring that foreign investors receive fair and equitable treatment. The failure to honour such expectations will inevitably come at the forefront for any alleged violation of fair and equitable treatment. Particularly, it should be stressed that when states provide assurances of fair and equitable treatment, presumably such states wish to indicate to the international community that foreign

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[135] *Noble Ventures, Inc v Romania*, ICSID Case, No ARB/01/11 (Award) 12 Oct 2005, para 118. The tribunal in *Mondev International v United States* also observed that judgement of what is fair and equitable cannot be reached in the abstract; it must be determined on the facts of the particular case.

[136] The emerging themes are grouped differently among commentators. For the different variations see Barnali Choudhury, 'Evolution of Devolution? Defining Fair and Equitable Treatment in International Investment Law' (2005) 6 *Journal of World Investment & Trade* 297, Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law (*OUP 2008) 119-48, Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration* (OUP 2007) 226-234, Stephan W Schill, 'Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law' IILJ working Paper 2006/6, 10-23.

investors will receive treatment comparable with some of the main expectations of foreign investors.[137] Generally, as shown above, the respect of legitimate expectations is important because as a matter of practice especially in developing countries during the process of attracting foreign investors, governments make promises to foreign investors that include *inter alia* change of laws, provision of concessions, and uncompromising good will. As expected, investors rely on such government conduct and expressions to make strategic investment decisions. To this end therefore, the failure by the host state to comply with the expectations once the investment is made makes legitimate expectations crucial in the determination of fair and equitable treatment.

However, it should be stressed that only objective expectations are relevant[138] and even then arbitral tribunals have no mandate to evaluate laws and regulations that predate the decision when the investment was made.[139] Significantly, the question for arbitral tribunals is not what the investor subjectively expected to happen but what the investor was objectively entitled to expect.[140] Most importantly, the host state is not responsible for the investor's poor investment decision.[141] To this end, it should be stressed that when the investor takes on unreasonable risks, or when the risks taken actually come to pass, the investor cannot look to the State as guarantor against such risks.[142] As pointed out in the case of *Thunderbird v Mexico*;

> The concept of legitimate expectations relates within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on part of an investor (or investment) to act in reliance on said conduct, such that a

[137] Stephen Vasciannie, 'Fair and Equitable Treatment in International Investment Law and Practice' (1999) 70 *BYIL* 99, 99.

[138] As pointed out in the Biwater, the purpose of fair and equitable treatment standard is to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment as long as these expectations are reasonable and legitimate and have been relied upon by the investor to make the investment. *Biwater Gauff Ltd v United Republic of Tanzania,* ICSID Case No ARB/05/22 July 18 2008, para 602 [Hereafter *Biwater v Tanzania*].

[139] *Gami Investment Inc v The Government of the United Mexican States*, UNCITRAL Arbitration Rules Final Award 15 Nov 2004, para 93 < http://www.state.gov/documents/organization/38789.pdf>accessed 20 May 2012 [Hereafter *Gami Investment v Mexico*].

[140] *Saluka v Czech Republic*, para 304.

[141] *Biwater v Tanzania*, para 564.

[142] Ibid para 564.

> failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages. The threshold for legitimate expectations may vary depending on the nature of the violation alleged under the NAFTA and the circumstances of the case….[143]

Indeed even outside the context of NAFTA, arbitral tribunals view legitimate expectation as a dominant feature to achieving fair and equitable treatment. Specifically out of the NAFTA arena, arbitral tribunals have stressed that host states must ensure that the business environment is predictable, dependable and stable. This was emphasised in *CMS v Argentina* where the tribunal noted that fair and equitable treatment is inseparable from stability and predictability.[144] According to the tribunal fair and equitable treatment is desirable to maintain a stable framework for investment and maximum effective use of economic resources.[145] This principle has been echoed in subsequent tribunals that include *inter alia Enron v Argentina Republic*,[146] *PSEG v Turkey*,[147] and *Parkerings-Compagniet v Lithuania*.[148]

The stability of the business environment constitutes the core of investor's expectations because investors envisage the legal framework to remain stable after the investment has been undertaken.[149] This was precisely the issue in *Occidental Expropriation v Ecuador* where the tribunal found that Ecuador had mischievously changed the legal framework under which the investment was made.[150] According to the tribunal, Ecuador deliberately changed the tax law without providing clarity about its meaning and also the regulations were

[143] *International Thunderbird Gaming Corporation v The United Mexican States, UNCITRA Arbitration Rules* Award Jan 26 2006, para 147-148 [Hereafter *International Thunderbird Gaming v* Mexico] <http://ita.law.uvic.ca/documents/ThunderbirdAward.pdf>accessed 20 May 2012.

[144] *CMS Gas Transmission v Argentina*, para 276.

[145] Ibid.

[146] *Enron Corporation Ponderosa Asserts, L.P v Argentine Republic*, ICSID Case No. ARB/01/13 May 22 2007, para 259-260.

[147] *PSEG Global Inc v The Republic of Turkey*, ICSID Case No. ARB/02/05 January 19 2007 para 254-255 [Hereafter *PSEG Global v Turkey*].

[148] *Parkerings-Compagniet* v *Republic of Lithuania*, ICSID Award Case No. ARB/05/8 Sep 11 2007, para 332-333[Hereafter *Parkerings-Compagniet* v *Lithuania*].

[149] *Occidental Exploration and Production Company v The Republic of Ecuador*, 12 ICSID Rep 59, para 184 [Hereafter *Occidental Exploration v Ecuador*].

[150] Ibid.

inconsistent with Ecuador's own practice.[151] Similarly in *LG & E v Argentina*, the tribunal recognized Argentina's economic hardships as well as the political and social realities which influenced the government's response to the growing economic difficulties.[152] On the balance, the tribunal opined that Argentina exceeded the threshold through completely dismantling the very legal framework constructed to attract foreign investors.[153]

Similarly in the case of *MTD v Republic of Chile*, MTD a Malaysian corporation signed a foreign investment contract with the government of Chile to develop a real estate project consisting of a self-sufficient satellite city with houses, apartments, schools, hospitals, commerce and services (the Project). However, the project was halted after the Chilean government informed the investor that the project is inconsistent with existing zoning regulations. The tribunal ruled in favour of the investor based on the inconsistency of action between two arms of the same Government *vis-à-vis* the same investor.[154] According to the tribunal although it was the responsibility of MTD to make proper judgment especially when investing in unfamiliar environment, Chile was not a passive party to the investment process.[155] The government had the responsibility to ensure that various officials through which Chile functions act coherently.[156] In sum, the tribunal found that the approval of the investment against the urban policy of the government was a breach of the obligation to treat the investor fairly and equitably.[157]

Also, in *ADF Group v United States*, the investor argued unsuccessfully that the refusal of the United States Department of Transport to apply pre-existing case law was a denial of legitimate expectations generated by the case law. According to the tribunal any expectations that the investor may have had with respect to the relevancy or applicability of the case law was not out of any

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[151] Ibid.

[152] *LG&E v Argentina*, para 139.

[153] Ibid.

[154] *MTD Equity Sdn. Bhd and MTD Chile S.A* v *Republic of Chile*, ICSID Award No. ARB/01/7 May 25 2004, para 163 [Hereafter *MTD Equity* v *Chile*].

[155] Ibid.

[156] Ibid para 166.

[157] Ibid.

misleading representations created by government officials.[158] From the wording of this decision, arbitral tribunals will find host states in breach of legitimate expectations when investors are lured to invest on the basis of government misleading representations.

Furthermore, tribunals have noted that investors are entitled to rely on official government representations even when such representations are misleading. For instance in *SPP v Egypt*, the respondent argued that representations made by government officials were against Egyptian law and should therefore be treated as legally non-existent or null and void or susceptible to invalidation. In the tribunal's judgement, whether the representations where legal under Egyptian municipal law was irrelevant because they created expectations protected by established principles of international law.[159] According to the tribunal, the actions were cloaked with the mantle of government authority and communicated to investors who relied on them to make investment judgements therefore the Egyptian government could not claim that the representations violated Egyptian law while the representations were deliberately pursued to induce investors.[160]

4.4.2 The Protection against Discrimination and Arbitrary Conduct

According to proponents of the plain meaning approach fair and equitable treatment is violated if there is unfair discrimination or if investments are subjected to arbitrary or capricious treatment.[161] Accordingly therefore, fair and equitable treatment aims at inherently precluding arbitrary and capricious actions against foreign investors.[162] In the famous case of *ELSI v Italy*, although not entirely related to fair and equitable treatment, the International Court of Justice (ICJ) gave content to the meaning of arbitrariness in international law. In *casu*, the issue was whether the requisition measures where arbitrary and

[158] *ADF Group INC* v *United States of America,* ICSID Case No. ARB(AF)00/1 Jan 9 2003,para 189 [Hereafter *ADF Group* v *United States of America*].

[159] *Southern Pacific Properties (Middle East) Limited* v *Arab Republic of Egypt*, ICSID Case No. ARB/84/3) Award of 20 May 1992, para 82-83.

[160] Ibid.

[161] Stephen Vasciannie, 'Fair and Equitable Treatment in International Investment Law and Practice' (1999) 70 *BYIL* 99, 133.

[162] Ibid.

discriminatory actions prohibited by Article 1 of the Supplementary Agreement. The United States argued that the requisition order prevented Raytheon and Machlett from exercising their control and management of ELSI which resulted in the impairment of their legally acquired rights and interests.

On the basis of the foregoing facts, the ICJ examined whether the requisition order constituted arbitrary and discriminatory treatment prohibited under international law. The ICJ stressed that unlawful acts under municipal law do not necessarily amount to breach of international law.[163] According to the ICJ the findings of domestic courts may be relevant to the argument of unlawfulness but this by and in itself without further evidence of unlawfulness cannot be said to amount to arbitrariness.[164] In essence according to the ICJ, it does not follow from a finding by the municipal courts that an act was unjustified, or unreasonable, or arbitrary, that the act simultaneously becomes characterised as arbitrary in international law.[165] However, the qualification given to the impugned act by a municipal authority may be an invaluable indication and persuasive.[166] Finally, the ICJ was of the view that arbitrariness ''is not so much something opposed to a rule of law…It is wilful disregard of due process of law, an act that shocks, or at least surprises a sense of judicial propriety''.[167]

More recently, the tribunal in *LG &E v Argentina* examined whether forced renegotiation of licensees violated the standard of fair and equitable treatment. The claimant argued that Argentina deliberately adopted measures which discriminated against foreign investors. According to the claimant, the government subjected most of the privatised public-utility sector to the least favourable of the several regimes devised for the conversion of dollar obligation into pesos.[168] In addition, the claimant opined that the standard of what constitutes an arbitrary act is a disregard for the rule of law.[169] On this premise,

[163] *Elettronica Sicula, S.p.A. (ELSI) Judgement* (1989) I.C.J Reports 15, para 124 [Hereafter *Elettronica Sicula, S.p.A. (ELSI) Judgement*].
[164] Ibid.
[165] Ibid.
[166] Ibid.
[167] Ibid para 128.
[168] *LG&E* v *Argentina*, para 150.
[169] Ibid.

the claimant argued that the government ‘‘acted under the trappings of laws, decrees, resolution, regulations and court decisions, but by wilfully repudiating the commitments it made to the gas distribution licensees and their shareholders, the Government followed ‘the rule of power, not the rule of law’’.[170] However, the tribunal disputed this reasoning because the charges imposed by Argentina though unfair and inequitable were the result of reasoned judgement rather than simple disregard of the rule of law.[171]

It follows from this case and as correctly observed by Tudor, host states actions will only amount to arbitrariness when government decisions are taken in violation of the law or are at least not grounded on a legal basis.[172] In essence, throughout the investment duration, investors expect the behaviour of host states to remain consistent and grounded in the rule of law.[173] For instance in *Lauder v Czech Republic*, the tribunal found the conduct of Czech Republic Media Council arbitrary and breached the contractual relationship between the investor and broadcaster.[174] According to the tribunal, the actions of the Media Council were motivated out of fear for political implications emanating from a foreign investor influencing Czech television broadcasts.[175] The tribunal emphasised that conduct which is arbitrary or discriminatory violates the standard of fair and equitable treatment.[176] Similarly, the tribunal in *CMS v Argentina* indicated that measures which involve arbitrariness and discrimination are contrary to fair and equitable treatment.[177] Accordingly, conduct that is arbitrary and discriminates against foreign investors is considered *prima facie* breach of the standard of fair and equitable treatment. It therefore follows that when a host state imposes measures considered as arbitrary and discriminatory such measures will inevitably violate the standard of fair and equitable treatment. However, as pointed out by the ICJ for such discriminatory conduct

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[170] Ibid.

[171] Ibid para 162.

[172] Ioana Tudor, *Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP 2007) 179.

[173] Ibid.

[174] *Ronald S. Lauder* v *The Czech Republic* ,UNCITRAL Arbitration, Final Award 3 September 2001, para 222-32.

[175] Ibid

[176] Ibid para 293-294.

[177] *CMS Gas Transmission v Argentina*, para 290.

to reaches the threshold of international law there must be; (i) an intentional treatment, (ii) in favour of a national, (iii) against a foreign investor, (iv) that is not taken under similar circumstances against another national.[178]

4.4.3 Transparency

Transparency is considered an important component of fair and equitable treatment because it guarantees legal certainty. In essence, transparency in government decisions ensures that investors are left without doubt about the law applicable at a given time, in a given area thus making it possible for investors to know whether certain acts or conduct are lawful or unlawful.[179] Particularly, the principle of transparency requires that the legal framework affecting foreign investor's operations should be readily apparent and decisions affecting the investor's enterprise should be traceable to that legal framework.[180] As noted by the recent UNCTAD, ''if laws, administrative decisions and other binding decisions are to be imposed upon a foreign investor by a host state, then fairness requires that the investor is informed about such decisions before they are imposed''.[181]

It should be stressed that although transparency forms part of fair and equitable, the two concepts overlap. In other words, if an investment treaty does not explicitly provide for transparency but does include fair and equitable treatment then implicitly transparency forms part of the treaty.[182] Most importantly, as a practical matter when an investor pursues action based on fair and equitable treatment, arbitral tribunals are inclined to examine the degree of transparency in the regulatory environment.[183] This gives tribunals the scope

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178 *Elettronica Sicula, S.p.A. (ELSI) Judgement*, para 61-62.

179 Abba Kolo and Thomas Walde, 'Capital Transfer Restrictions under Modern Investment Treaties' in August Reinisch (ed), *Standards of Investment Protection* (OUP 2008) 235.

180 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 131-32.

181 UNCTAD, *Fair and Equitable Treatment: UNCTAD Series on International Investment Agreements* (Vol. III UNCTAD/ITE/IIT/II, UN Pub Sales No. E.99.II.D.15, 2009) 51.

182 Ibid.

183 Ibid.

and framework within which to assess whether an investor has received fair and equitable treatment in any given case.[184]

Within the context of investment arbitration, arbitral tribunals have confirmed transparency as an integral part of fair and equitable treatment. In *Metalclad v Mexico*, transparency was understood ''to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party''.[185] In *casu*, the federal officials reassured Metalclad that if it applied for a municipal construction permit, the Municipality would have no cause to deny the permit. However, shortly after construction commenced, the Governor out of political pressure embarked on a public campaign to denounce and prevent the operation of the landfill. In finding a violation of fair and equitable treatment, the tribunal opined;

> The absence of a clear rule as to the requirement or not of a municipal construction permit, as well as the absence of any established practice or procedure as to the manner of handling applications for a municipal construction permit, amounts to a failure on the part of Mexico to ensure the transparency required by NAFTA.[186]

Obviously, investors cannot expect that circumstances prevailing at the time of the investment will remain totally unchanged during the course of the investment. However, as pointed out by the tribunal in *PSG v Turkey*, particularly in complex negotiations, host states are expected to proceed with greater transparency and discuss any intended changes openly.[187] The facts of this case involved a continuous change in the conditions governing the corporate status of the Project as well as constant alternation between private law status and administrative concessions. In *casu*, the tribunal recognised that in complex negotiations many changes will occur beyond the control of the government but the longer term outlook must not be altered in such a way that there will end up

[184] Ibid.

[185] *Metalclad Corp v United Mexican States*, ICSID Case No. ARB (AF)/97/1 August 20 2000, para 76 [Hereafter *Metalclad v Mexico*].

[186] Ibid para 88.

[187] *PSEG Global v Turkey*, para 131.

being no outlook at all.[188] The tribunal upheld the claimant's contention that the abuse of regulatory power ultimately resulted in the termination of the Project through a process characterized by a total lack of transparency and candour.[189] In arriving at this conclusion the tribunal noted that there was ''a cumulative lack of transparency close to negligence, compounded by the fact that various witnesses admitted not having read key documents or taken appropriate action on them for long periods''.[190]

Similarly, in *Tecmed v Mexico*, the tribunal noted that the manner in which non-renewal of the licence occurred was totally lacking in transparency. According to the tribunal, the lack of transparency in the behaviour leading up to the non-renewal did not reflect the reasons that led to the non-renewal of the permit.[191] More so, the ambiguity of government actions was even greater when it resorted to non-renewal of the permit to overcome obstacles not related to the preservation of health and environment.[192] The tribunal further noted that the lack of transparency within government operations did not permit the investor to adopt behaviour to prevent the non-renewal of the permit.[193] According to the tribunal the conduct of Mexico amounted to a breach of fair and equitable treatment because the standard requires host states to act in a consistent manner, free from ambiguity and;

> …totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.[194]

From the foregoing, it should be noted that the principle of transparency is an objective test based on the given context and the surrounding circumstances. Specifically, in determining whether government measures are transparent, arbitral tribunals have the discretion to determine whether the disputable

[188] Ibid.

[189] Ibid para 228.

[190] Ibid para 174.

[191] *Tecmed v Mexico*, para 164.

[192] Ibid.

[193] Ibid para 162.

[194] Ibid para 154.

conduct, omission or commission amounts to a failure by the host state to act in a transparent and consistent manner. As the cases above have demonstrated the essence of transparency is to enhance predictability in the relationship between host state and investors. Evidently, without a stable and predictable business environment investors would be held at ransom by host states. But most importantly, the objective of investment treaties would be unattainable without the reassurance that the host state is acting in a transparent and consistent manner. Thomas Waide accurately notes that an equitable investment climate requires the host state not to hide behind inconsistencies or different interpretations of the laws by government officials to the detriment of investors.[195] Evidently, from the preceding discussion, the failure by the host state to act in a transparent and predicable manner will inevitably be the most fraught element of fair and equitable treatment.

4.4.4 Denial of Procedural Due Process and Denial of Justice

The right to both substantive and procedural fairness are elementary principles of the rule of law and vital elements of fair and equitable treatment.[196] Procedural due process and denial of justice are grounded in arbitral practice as cardinal requirements for an inquiry whether investors have been treated fairly and equitably.[197] Specifically, the inquiry examines whether the investor was given a fair hearing before an independent tribunal, whether the investor was given specific information in advance of the hearing of the claim and whether there was a reasonable disposition of the investor's case.[198] The lack of due process embodies a process that leads to an outcome which offends judicial propriety ''such as a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in administrative process''.[199] A

[195] Abba Kolo and Thomas W Walde, 'Capital Transfer Restrictions under Modern Investment Treaties' in August Reinisch (ed), *Standards of Investment Protection* (OUP 2008) 235. See also Thomas W Walde, 'Energy Charter Treaty Based Investment Arbitration' (2004) *5 Journal of World Investment & Trade* 373, 387.

[196] Christoph Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6 *Journal of World Investment & Trade* 257, 381.

[197] Ibid.

[198] For a detailed discussion of due process in general international law, see Louis B Sohn and R. R Baxter, 'Responsibility of States for Injuries to the Economic Interests of Aliens' (1961) 55 *Am. J. Int'l L* 545.

Waste Management Inc v United Mexican States, ICSID Case No. ARB (AF)/00/3 (2004) para 98 [Hereafter *Waste Management v Mexico*].

number of arbitral cases are illustrative, for instance in *Metalclad*, the tribunal found a lack of procedural fairness in the process leading up to denial of the construction permit. Particularly, the tribunal upheld a violation of fair and equitable treatment because ''Metalclad was not notified of the Town Council meeting where the permit application was discussed and rejected, nor was Metalclad given any opportunity to participate in that process''.[200] Furthermore, the tribunal found that Metalclad's request for reconsideration of the denial of the permit was rejected without cause and the denial was without any reference to Metalclad's flaws in conduct or failure to comply with rules and regulations.[201]

Similarly, in *Middle East Cement v Arab Republic of Egypt*, the tribunal reasoned that the manner in which the claimant's ship was auctioned cannot be said to have taken place in a process that respected due process.[202] Specifically, the tribunal found the auction procedure and notification process did not comply with due process of law as envisaged in Article 4 of the BIT.[203] According to the tribunal, the respondent was in violation of fair and equitable treatment by failing to directly communicate with the claimant about the seizure and auctioning of his ship.[204] Also, the auctioning was in bad faith and failed to provide certain information relevant for the evaluation of the ship such as the name of the debtor and the existence of cranes and other equipment on the ship.[205] On the basis of these facts, the tribunal found there was lack of due process because the auction price cannot be said to have been an indication of the market value of the ship.

Evidently, when there are flaws in procedural fairness, the investor is inevitably denied justice. However, it should be stressed that there is a thin line between denial of justice and procedural fairness because substantively state conduct leading to violation is similar. Denial of justice broadly refers to ''injury consisting of, or resulting from, denial of access to courts, or denial of procedural fairness and due process in relation to judicial proceedings, whether

[200] *Metalclad v Mexico*, para 54.
[201] Ibid.
[202] *Middle East Cement Shipping v Egypt*, para 147.
[203] Ibid.
[204] Ibid para 143.
[205] Ibid para 147.

criminal or civil''.[206] Specifically, within investor-state arbitration, denial of justice and procedural fairness are synonymous and both encapsulate a violation of fair and equitable treatment. In sum, as demonstrated by the cases above, fair and equitable treatment is breached when the host state through actions or omissions denies an investor due process, justice, and procedural fairness.

4.4.5 The Failure to Act in Good Faith

Under normal circumstances, the relationship between host states and foreign investors is supposed to be based on good faith. Foreign investors expect the host state to abide by well-established fundamental standards such as good faith, due process and non-discrimination.[207] On this premise, host states bound by the obligation of fair and equitable treatment are expected to act in good faith throughout the investment process.[208] Although the principle of good faith has been alluded to in arbitral practice, there has not been a single case decided solely on the basis that the host state acted in bad faith. Practically, arbitral tribunals have found the customary standard of good faith is of negligible assistance in the task of giving content to the standard of fair and equitable treatment.[209] Obviously, this is not only because it is difficult for investors to show that the host state acted in bad fair but also tribunals can rely on different components of fair and equitable treatment to achieve the same result.[210] Moreover, deference is accorded to host states to determine in good faith national policy regulating foreign investors.[211]

Furthermore, deciding whether government authorities acted in bad faith is subjective and tantamount to interfering with sovereignty.[212] Indeed, this is why arbitral tribunals and commentators support the view that bad faith or malicious

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206 The American Law Institute, *Restatement of the Law Third, Foreign Relations Law of the United States* (Vol. I, The American Institute 1987) Section 711.

207 *Saluka Investments v Czech Republic*, para 411.

208 Ibid.

209 *ADF Group* v *United States of America,* para 191.

210 Ibid.

211 Ibid.

212 *The Loewen Group, Inc and Raymond L Loewen v The United States of America*, ICSID Case No. ARB(AF)/98/3 1 March 2002, para 132 [Hereafter *Loewen Group v The United States of America*].

intention is not an essential element of unfair and inequitable treatment.[213] As underscored by the tribunal in *Tecmed v Mexico*, bad faith is not required for the violation of fair and equitable treatment what is unfair or inequitable need not equate with the outrageous or the egregious.[214] In particular, a state may treat a foreign investor unfairly and inequitably without necessarily acting in bad faith.[215] The principle of good faith only requires governments to provide foreign investors treatment that does not affect the basic expectations that were taken into account by the foreign investor while making the investment decision.[216] Indeed, when the government sufficiently shows that it acted in good faith to achieve the objectives of its laws and regulations, this acts as a counterbalance to instances of disregard of legal or regulatory requirements.[217]

4.5 The Standard of Fair and Equitable Treatment in African Investment Treaty Practice

Virtually, all BITs concluded by African countries contain the provision of fair and equitable treatment.[218] However, there are a number of significant

[213] Ibid.

[214] *Tecmed v Mexico*, para 153.

[215] Ibid para 154.

[216] Ibid para 154.

[217] *Gami Investment v Mexico*, para 97.

[218] For instance see article 2(2) of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the United Republic of Cameroon for the Promotion and Protection of Investments (Treaty Series No. 40, 1985) [Hereafter United Kingdom-Cameroon BIT]; Article 3(1) of the Agreement between the Government of the Republic of Ghana and the Government of the Republic of Benin for the Promotion and Protection of Investments [Hereafter Ghana-Benin BIT]; Article 3(1) of the Agreement for the Protection and Promotion of Investments between the Republic of Ghana and the Arab Republic of Egypt (11 March 1998) [Hereafter Ghana-Egypt]; Article 2(2) of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the Promotion and Protection of Investments (Treaty Series No. 8, 2000) [Hereafter United Kingdom-Kenya BIT]; Article 2(2) of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the United Republic of Tanzania for the Promotion and Protection of Investments (Treaty Series No. 90, 1996) [Hereafter United Kingdom-Tanzania BIT]; Article 2(2) of the Agreement between the Italian Republic and the Government of the United Republic of Tanzania for the Promotion and Protection of Investments [Hereafter Italy-Tanzania BIT]; Article 3(1) of the Agreement between the Kingdom of Denmark and the Government of the Republic of Ghana for the Promotion and Protection of Investments (13 January 1992) [Hereafter Denmark-Tanzania BIT]; Article 3(1) of the Agreement between the Government of the Republic of Ghana and the Government of the Republic of Guinea for the Promotion and Protection of Investments [Hereafter Ghana-Guinea BIT]; Article 3(1) of the Agreement between the Government of the Republic of Ghana and the Government of Malaysia for the Promotion and Protection of Investments [Hereafter Malaysia-Ghana BIT]; Article 2(2) of the Agreement between the Government of the Republic of Korea and the Government of the Democratic Republic of Congo for the Promotion and Protection of Investments (March 17,

variations in the way the standard is articulated in the various African treaties. For instance, in some African BITs, the standard is not defined while in other African BITs the standard is qualified by reference to other treaty standards, general international law, international law or domestic law.[219] Given the formulation of African BITs, the question about whether fair and equitable treatment forms part of the minimum standard or whether it is an autonomous standard is equally relevant to African countries. Particularly, within the African context, this debate is compelling considering the vast number of African BITs which have not linked fair and equitable treatment to the minimum standard.[220] Furthermore, throughout the history of the minimum standard, the standard has faced firm resistance from African countries suggesting therefore the minimum standard cannot be said to have fully crystallised into the status of customary international law. Specifically, assuming the minimum standard of treatment as part of customary international would be detrimental for African countries that have not included provisions of fair and equitable treatment in their BITs.[221] On the basis of foregoing discussion, the following section extensively assesses the obligation of fair and equitable treatment as articulated in African BITs.

4.5.1 The Location of Fair and Equitable Treatment in African BITs

Before situating the practice of African states with respect to fair and equitable treatment, some preliminary remarks about the location of fair and equitable

2005)[Hereafter Korea-Congo BIT]; Article 2(4) of the Treaty between the United States of America and the Republic of Cameroon Concerning the Reciprocal Encouragement and Protection of Investment (USTR, Nov 27, 1984) [Hereafter United States of America-Cameroon BIT]; Article 2 of the Federal Republic of Germany and Burundi Treaty Concerning the Encouragement and Reciprocal Protection of Investments (No. 26278, 10 Sept 1984) [Hereafter Germany-Burundi BIT]; Article 3 of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Ghana [Hereafter Netherlands-Ghana BIT]; Article 5 (1) of the Treaty between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment [Hereafter United States-Rwanda BIT]; Article II(4) of the Treaty between the United States of America and the Government of the Republic of Zaire Concerning the Reciprocal Encouragement and Protection of Investment [Hereafter United States-Congo BIT]. For detailed compilation of African BIT see <http://www.unctadxi.org/templates/Docsearch.aspx?id=779>accessed 20 May 2012.

[219] Ibid.

[220] With the exception of the United States-Rwanda BIT, Finland-Ghana BIT, United States-Congo BIT, United States-Ghana BIT, the rest of the remaining African BITs do not link fair and equitable treatment to international law.

[221] For e.g. see the Ghana-Romania BIT while the China-Ghana BIT and Malaysia-Ghana simply refer to equitable treatment.

treatment are important. At the onset, it should be stressed that the standard of fair and equitable treatment serves as a gap filler to ensure that investors obtain the level of investment protection that might have been forgotten in the more specific standards.[222] In addition, the location and place of fair and equitable treatment within the treaty demonstrates the nature of its binding effect.[223] For instance, when it is located only in the preamble this suggests that the standard has a hortatory effect and does not create legal obligations for the parties.[224] On the other hand, when it is expressed both in the preamble and other substantive parts of the treaty this suggests the standard is a binding legal obligation.[225] This is reinforced when fair and equitable treatment is combined with other treaty standards such as full protection and security this suggests greater protection for investors than when the standard is a stand-alone.[226]

The vast majority of African BITs include fair and equitable treatment as a substantive treaty standard encapsulated either under the heading of 'protection and promotion of investment' or under the heading of 'treatment of investors'.[227] Furthermore, African BITs normally provide for fair and equitable treatment in conjunction with full protection and security and typically majority of African BITs stipulate that investors 'shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security'.[228] However, it should also be stressed that there are a number of African BITs

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[222] Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law (OUP 2008) 122.

[223] UNCTAD, *Fair and Equitable Treatment: Series on Issues in International Investment Agreements* (Vol.III UNCTAD/ITE/IIT/II, UN Pub Sales No. E.99.II.D.15, 1999) 18-25.

[224] Ibid.

[225] Ibid.

[226] Ibid.

[227] For instance see article 2(2) of the United Kingdom-Cameroon BIT; Article 3 of the Ghana-Benin BIT; Article 3(1) of the Ghana-Egypt; Article 2(2) of the United Kingdom-Kenya BIT; Article 2 of the United Kingdom-Tanzania BIT; Article 2 of the Tanzania-Italy BIT; Article 3 of the Denmark-Tanzania BIT; Article 3 of the Ghana-Guinea BIT; Article 3 of the Ghana-Malaysia BIT; Article 2 of the Korea-Congo BIT; Article 2 of the United States-Cameroon BIT; Article 2 of the Germany-Burundi BIT; Article 3 of the Netherlands-Ghana BIT; Article of the United States-Rwanda BIT; Article II of the United States-Congo BIT.

[228] For e.g. see Article 3 Denmark-Ghana BIT; Article 3(1) Ghana-Guinea BIT; Article 3 Ghana-Malaysia BIT; Article II(4) United States-Cameroon BIT; Article 2(2) Korea-Congo BIT; Article 3 Netherlands-Tanzania BIT; Article 2 United Kingdom-Tanzania BIT; Article 2(3) Sweden-Tanzania BIT; Article 2(2) Italy-Tanzania BIT; Article 3 Ghana-Mauritius BIT, Ghana-Egypt.

where fair and equitable treatment is a stand-alone.[229] In African treaties when fair and equitable treatment is expressed as a stand-alone, the standard is usually not accompanied with any other treaty obligation.[230] Furthermore, there are also instance where the standard appears both in the provisions of 'protection and promotion' as well as in the provision of 'treatment of investors' It should also be noted that in virtually all African BITs, the standard of fair and equitable treatment rarely appears in the preamble. In essence, the trend in the vast majority of African BITs is either to include fair and equitable treatment in juxtaposition with full protection and security or as a stand-alone and exceptionally not to include the standard at all. Essentially, for African treaties that have included fair and equitable treatment as part of the substantive rights there is no doubt that the standard is part of the substantive treaty obligations and legally binding.[231]

Quite apart from the location, in African BITs the terminology of the standard slightly varies between the concepts of fair and equitable treatment and equitable treatment.[232] However, the prevalent trend among African BITs favours the use of fair and equitable treatment rather than equitable treatment.[233] Obviously theoretically, there might be differences between the two adjectives as well as the extent of protection but undoubtedly this remains at a theoretical level and is not supported by the majority of commentators.[234] There is considerable consensus among commentators that ''the variation in

[229] See e.g. Article 2 Germany-Burundi BIT, Article 3 Belgium-Rwanda BIT, Article 3 and 4 of the Ghana-Mauritius BIT, Article 3 India-Ghana BIT, and Article 3 Belgium Cameroon.

[230] Ibid.

[231] This point is evident on the wording of the following African BITs, article 2(2) of the United Kingdom-Cameroon BIT; Article 3 of the Ghana-Benin BIT; Article 3(1) of the Ghana-Egypt; Article 2(2) of the United Kingdom-Kenya BIT; Article 2 of the United Kingdom-Tanzania BIT; Article 2 of the Tanzania-Italy BIT; Article 3 of the Denmark-Tanzania BIT; Article 3 of the Ghana-Guinea BIT; Article 3 of the Ghana-Malaysia BIT; Article 2 of the Korea-Congo BIT; Article 2 of the United States-Cameroon BIT; Article 2 of the Germany-Burundi BIT; Article 3 of the Netherlands-Ghana BIT; Article of the United States-Rwanda BIT; Article II of the United States-Congo BIT.

[232] However, predominantly majority of African BITs use the phrase fair and equitable treatment.

[233] It should be stressed that of all the BITs reviewed only the China-Ghana BIT and Malaysia-Ghana use the phrase equitable treatment. The rest of the BITs use the terminology fair and equitable treatment.

[234] Arghyrious A Fatouros, *Government Guarantees to Foreign Investors* (Columbia University Press 1962) 167. See also *Parkerings-Compagniet* v *Republic of Lithuania*, para 275-277.

form of words seems to be of no great importance''.[235] Given the broadness between the two adjectives, the majority view holds weight for African treaty practice as well.

Aside from this, there has been discussion whether fair and equitable treatment represents more than one standard.[236] In the view of the present author given the wording of fair and equitable treatment in African BITs such a distinction is moot and logically unpersuasive. Dolzer uses an interesting analogy noting that there are some terms that are usually lumped together such that no distinction is needed.[237] For instance according to Dolzer, we do not distinguish when we talk about law and order because this is reflective of a certain position.[238] From this analogy, he suggests that equally, the term fair and equitable treatment has been lumped together to constitute one concept and this is reflected in arbitral practice whereby no arbitral tribunal ever asks whether 'is it fair and is it equitable'.[239] Within African treaty practice, it is submitted that undoubtedly African states clearly intended fair and equitable treatment to represent one single and unified standard. Presumably, if African states perceived the standard as representing two standards this would have been explicitly indicated. Evidently without such indication, it would be implausible to argue that fair and equitable treatment under African treaty practice represents more than one standard.

4.5.2 African BITs Making No Reference to Fair and Equitable Treatment

As stressed above, although most African BITs contain the standard of fair and equitable treatment, there are some exceptions. Particularly, exceptional African BITs that do not make reference to fair and equitable treatment include the Ghana-Romania BIT and the China-Ghana BIT as well as the Malaysia-Ghana

[235] Ibid.

[236] UNCTAD, *Fair and Equitable Treatment: Series on Issues in International Investment Agreements* (Vol.III UNCTAD/ITE/IIT/II, UN Pub Sales No. E.99.II.D.15, 1999) 13-14.

[237] Federico Ortino and others, *Investment Treaty Law: Current Issues II: Nationality and Investment Treaty Claims and Fair and Equitable Treatment in Investment Treaty Law* (British Inst of Intl & Comparative 2007) 143.

[238] Ibid.

[239] Ibid.

that simply make reference to equitable treatment. Specifically in the Ghana-Romania BIT there is no provision requiring the parties to accord fair and equitable treatment to foreign investors. From the wording of the Ghana-Romania BIT, it seems the omission of fair and equitable treatment is deliberate considering that Ghana has generally included the standard in the majority of its existing treaties. However, whatever the reasons for the omission or reference to equitable treatment rather than fair and equitable treatment this reinforces the view that fair and equitable treatment is an independent treaty standard.

Particularly, this reinforces the view that the standard is included in treaties at the discretion of contracting states which choose from the plenty of variations or deliberately omit the entire standard.[240] With this in mind, it is therefore important to interpret the standard of fair and equitable treatment as contained in the treaty so as to accord with the intention of contracting states explicitly stipulated in the treaty. Specifically, for African BITs that have not included fair and equitable treatment as part of the substantive treaty rights, investors should not expect treatment in accordance with this standard. Equally, arbitral tribunals should not dubiously include fair and equitable treatment through the backdoor of the minimum standard.[241] The minimum standard on its own account is controversial while state practice suggests that fair and equitable treatment has never been fully accepted as part of customary international law.[242] Evidently, as seen above, including the minimum standard as part of fair and equitable treatment would be inconsistent with the intention of African states that have chosen not to include the standard in respective BITs.

[240] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008)121-122.

[241] See above for discussion of fair and equitable treatment as part of the international minimum standard.

[242] UNCTAD, *Fair and Equitable Treatment: Series on Issues in International Investment Agreements* (Vol.III UNCTAD/ITE/IIT/II, UN Pub Sales No. E.99.II.D.15, 1999) 17.

4.5.3 Fair and Equitable Treatment in African BITs without Reference to International Law

The majority of African BITs include the obligation of fair and equitable treatment without reference to international law or any other body of law.[243] It should be stressed that this is the trend both in treaties signed between African countries themselves and with traditional capital exporting states.[244] Moreover, the same trend is followed in treaties signed between African countries and other developing countries.[245] Typically, in nearly all African BITs, the standard of fair and equitable treatment simply reads as follows, ''investment of nationals and companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full and adequate protection and security in the territory of the other Contracting Party''.[246]

Whether fair and equitable treatment represents an autonomous standard or is simply equivalent to the minimum standard will likely generate many disagreements in the interpretation of African BITs. This is mainly because fair and equitable treatment as expressed in majority of African BITs does not make reference to international law. Although there have not been many arbitral cases interpreting the scope of fair and equivalent treatment within African treaty practice, the most recent case of *Biwater v Tanzania* is illustrative. This case is particularly important because the arbitral tribunal gave content to the typical formulation of fair and equitable treatment found in majority of African treaties. Specifically, the tribunal interpreted article 2 (2) of the United Kingdom-Tanzania BIT which contains the obligation of fair and equitable treatment without reference to either international law or customary

[243] See for instance Article 3 of the Denmark-Ghana BIT; Article 3(1) of the Malaysia-Ghana BIT; Article 2 of the Germany-Burundi BIT; Article 2(2) of the Korea-Congo BIT; Article 3(1) of the United Kingdom-Ghana BIT; Article 3(1) of the Belgium-Rwanda BIT; ticle 3(2) of the India-Ghana BIT; Article 1 of the Germany-Tanzania BIT; Article 2(2) of the United Kingdom-Tanzania BIT; Article 3(1) of the Belgium-Cameroon BIT; Ghana-Egypt BIT; Article 4(1) of the Ghana-Mauritius BIT; Article 2(1) of the Germany-Kenya BIT; Article 2(2) of the Italy-Tanzania BIT; Article 3(1) of the Ghana-Benin BIT; Article 3(1) of the Netherlands-Ghana BIT.

[244] See for instance BITs concluded between African states themselves, Ghana-Egypt BIT; Article 4(1) of the Ghana-Mauritius BIT, Article 3(1) of the Ghana-Benin BIT; Article 3(1) of the Ghana-Guinea BIT.

[245] For e.g. see Article 3(1) of the Malaysia-Ghana BIT, Article 3(2) of the India-Ghana BIT.

[246] See e.g. Article 2 of the Korea-Congo BIT; Article 3 of the Denmark-Ghana BIT; Article 3(1) of the United Kingdom-Ghana BIT; Article 2(2) of the United Kingdom-Tanzania BIT; Article 3(1) of the Ghana-Benin BIT; Article 3 (1) of the Ghana-Guinea BIT; Article 2(2) of the United Kingdom-Kenya BIT.

international law. In *casu*, the claimant and respondent disagreed on the meaning of fair and equitable treatment as stipulated in the United Kingdom-Tanzania BIT. The claimant was of the view that the obligation was an autonomous treaty standard while the respondent contended that the obligation meant no more than the minimum standard.

In response, the tribunal pointed out that caution must be exercised in any generalized statement about the nature of fair and equitable treatment since the standard finds different expression in different treaties.[247] Specifically, with reference to Article 2(2) of the Tanzania-UK BIT the tribunal acknowledged that the contracting states intended fair and equitable treatment to be an autonomous standard even though the content of the standard is not materially different from the content of the minimum standard.[248] The tribunal concurred with the view expressed by Professor Schreuer that ''if the parties to a treaty want to refer to customary international law, it must be presumed that they will refer to it as such rather than using a different expression''.[249] The tribunal observed that the standard is not defined in the BIT which gives it much latitude to determine whether in all the circumstances the conduct at issue is fair and equitable or unfair and inequitable.[250] On this basis, the tribunal noted that it has discretionary powers to explore the range of principles necessary to achieve the objectives and purpose of the BIT in accordance with the treaty standard.[251] Accordingly, this requires the tribunal to examine the entire conduct of the respondent in accordance with relevant components of fair and equitable treatment such as protection of legitimate expectations, good faith, transparency, constituency and non-discrimination.[252]

From the foregoing, the tribunal noted that although the claimant had a poor record and despite the public criticism, the claimant still had the right to proper and unhindered performance of the contractual termination process.[253] In the

[247] *Biwater v Tanzania*, para 591-592.
[248] Ibid.
[249] Ibid para 591.
[250] Ibid para 593-595.
[251] Ibid.
[252] Ibid.
[253] Ibid.

tribunal's view unwarranted interference could not be said to follow the normal contractual course and cannot be said to have complied with the standard of fair and equitable treatment.[254] The approach in *Biwater* will inevitably be of persuasive value to future tribunals applying fair and equitable treatment within the Africa treaty setting because the majority of African BITs do not make reference to either the minimum standard of treatment or international law. The conclusion reached by the tribunal is laudable because the tribunal aptly acknowledged that the parties intended fair and equitable treatment to constitute an autonomous standard. This approach is in line with findings of similar cases discussed above and also conforms to the rules of interpretation stipulated in the Vienna Convention on the Law of Treaties.[255]

Further, with all the resistance mounted by developing countries towards the minimum standard, it is doubtful African states would refer to the minimum standard by using the expression fair and equitable treatment.[256] In addition, the fact that the majority of African states do not make reference to the minimum standard clearly shows the intention in African BITs is to make fair and equitable treatment an autonomous treaty standard. Manifestly, if African countries intended the minimum standard to be equivalent to fair and equitable treatment this would either have been plainly mentioned or implicitly stated in the wording of the BITs. Since this is not the case, one can reasonably state that majority of African countries do not consider the international minimum standard as equivalent to fair and equitable treatment. In other words, the standard of fair and equitable treatment as stipulated in African BITs squarely represents an autonomous treaty standard. Obviously, as arbitral tribunal have pointed out differences between the treaty standard of fair and equitable treatment and the minimum standard of treatment may be more apparent than real.[257] Notwithstanding this, it is important to stress that in contrast to the minimum standard, fair and equitable treatment is an elastic and flexible standard which

[254] Ibid.

[255] See above for the discussion dealing with fair and equitable treatment as an independent standard as well as the discussion of components of fair and equitable treatment.

[256] Rudolf Dolzer echoes a similar view. For a detailed discussion see Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 124.

[257] For instance see *Occidental v Ecuador*, para 190, *Azurix v Argentina*, para 361, *Saluka v Czech Republic*, para 291.

can be adjusted to cover several situations not envisioned by the minimum standard.[258]

4.5.4 Fair and Equitable Treatment in African BITs with Reference to International Law

As mentioned above, although majority of fair and equitable treatment provisions in African BITs do not make reference to international law, there are a few exceptions. The language of these provisions deserves scrutiny especially because the provisions suggest that the treatment is not restricted to the minimum standard. For instance article 2(4) of the United States-Congo BIT reads;

> Investments of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and security in the territory of the other Party. The treatment, protection and security of investment shall be in accordance with applicable national laws, and *may not be less than that recognized by international law* (emphasis added).[259]

Although article 2(4) of the United States-Congo BIT pairs fair and equitable treatment parallel to national law the clause incorporates international law as the threshold. Particularly, a proper reading of this clause suggests that foreign investors are to be accorded treatment conforming with national law but not below that recognised under international law. To my mind, this is a broad provision and equivalent to construing fair and equitable treatment as an autonomous standard. Specifically, this is chiefly because the scope of international law is broad and not restricted to the minimum standard. Coupled with this a breach of international law may not necessarily be decisive in determining whether investors have been denied fair and equitable treatment.[260] In essence, to achieve the objectives of article 2(4) of the United States-Congo BIT, a tribunal would have to examine whether there has been protection of legitimate expectation, protection against discrimination and

[258] Lluis Paradell, 'The BIT Experience of The Fair and Equitable Treatment Standard in law' in Federico Ortino and others, *Investment Treaty Law: Current Issues II: Nationality and Investment Treaty Claims and Fair and Equitable Treatment in Investment Treaty Law* (British Inst of Intl & Comparative 2007) 128.

[259] Article 2(4) of the United States-Congo BIT.

[260] *SD Myers v Canada*, para 264.

arbitrariness, transparency, denial of procedural due process and the failure to act in good faith.[261] The standard of fair and equitable treatment in article 4(2) of the United States-Congo BIT is closely similar to article 2(2) of the Finland-Tanzania BIT which stipulates that:

> Each Contracting state shall in its territory accord to investment and returns of investment of investors of the other contracting party fair and equitable treatment and full protection and security. In no case shall a party accord treatment less favourable *than that required by international law* (emphasis added).[262]

From the foregoing, it is evident that reference to international law under the mentioned African BITs clearly suggests that foreign investors should receive treatment beyond domestic law and the minimum standard. In essence, any treatment below national treatment breaches fair and equitable treatment and any treatment above national treatment but below international law also breaches fair and equitable treatment. Manifestly, reference to international law without qualification implies that fair and equitable treatment under the above African BITs cannot be equated to the minimum standard. Put differently, reference to international law as stipulated in the above African BITs simply means foreign investors are accorded treatment above that required by the minimum standard. More succinctly the tribunal in *Azurix v Argentina* interpreting a similar phrase noted that the purpose of a sentence providing for treatment no less than that required by international law ''sets a floor, not a ceiling, in order to avoid a possible interpretation of these standards below what is required by international law''.[263]

4.4.5 Fair and Equitable Treatment in African BITs with Reference to the Minimum Standard

The United States-Rwanda BIT supports the view that fair and equitable treatment and the minimum standard are functionally equivalent. This BIT is indeed rare among African BITs because of the explicit reference to the

[261] See discussion above under the heading of elements of fair and equitable treatment in arbitral practice.

[262] Article 2 (2) of the Finland-Tanzania BIT.

[263] *Azurix v Argentina*, para 361.

minimum standard. Article 5 of the United States-Rwanda BIT including its heading reads as follows;

> Article 5: Minimum Standard of Treatment
>
> Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.[264]

Article 5 further provides that fair and equitable treatment does not go beyond the minimum standard. In the words of article 5 (2);

> For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require *treatment in addition to or beyond that which is required by that standard*, and do not create additional substantive rights (emphasis added).[265]

To be sure, article 5 even goes further to articulate the substantive content of fair and equitable treatment. Specifically article 5 points out that fair and equitable treatment includes ‘‘the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world’’.[266] Through the use of an annex, the United States-Rwanda BIT also defines the scope of the minimum standard to include all customary international law principles that protect the economic rights and interests of aliens. Particularly, article 5 of the United States-Rwanda BIT clearly indicates that the parties intended fair and equitable treatment not to exceed the minimum standard. In essence, as compared to other African BITs which contain an autonomous standard, the United States-Rwanda BIT explicitly limits the interpretation of fair and equitable treatment to the minimum standard. Moreover, such limitation to the minimum standard is reflective in the heading titled the ‘minimum standard of treatment’ as well as deducible from the wording of the text itself. Essentially, the treaty explicitly makes it clear that

[264] Article 5 of the United States-Rwanda BIT.

[265] Ibid Article 5(2).

[266] Ibid.

fair and equitable treatment basically means the minimum standard removing any doubt about the scope of the standard. Unlike other African BITs, the United States-Rwanda BIT articulates the relationship between fair and equitable treatment and the minimum standard.

From the preceding discussion, considering that the United States-Rwanda BIT is unambiguously worded, it would be implausible especially since the intention of contracting states is clear to argue that the standard of fair and equitable treatment has an autonomous character. Comparatively, the wording is similar to that of NAFTA and the United States Model BIT. Interestingly, unlike other African BITs, the provision of fair and equitable treatment in the United States-Rwanda BIT mirrors the authoritative interpretation issued by the FTC. The obligation of fair and equitable treatment in the United States-Rwanda BIT may have followed this format for the following reasons; the United States on the basis of its experience in NAFTA may have wanted to limit the discretion of arbitral tribunals by imposing a strict interpretation of fair and equitable treatment so as to limit ambiguity.[267] At a policy level Rwanda may have envisioned that concluding a treaty with the United States may attract foreign capital into Rwanda and therefore easily subscribed to the United States Model BIT. Indeed, through restricting discretionary interpretation, the United States-Rwanda BIT ensures that arbitral tribunals limit the obligation of fair and equitable treatment to the minimum standard and constrains the expansive interpretation of customary norms. The unambiguous reference to the minimum standard is particularly important considering that it is ''often difficult in international practice to establish at what point obligations accepted in treaties, multilateral or bilateral, come to condition the content of a rule of customary international law binding on States not party to those treaties''.[268]

As a result of the striking similarities between the United States-Rwanda BIT, the jurisprudence developed within NAFTA arbitral practice has persuasive value in the interpretation of the United States-Rwanda BIT. Particularly, two issues are of fundamental importance, the content of the minimum standard and the

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[267] For insightful criticism of the United States Model BIT and its regressive contribution to international law see Stephen Schwebel, 'The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law' (2006) 2 *TDM*.

[268] *Mondev International* v *United States of America*, para 111.

threshold of fair and equitable treatment. Arbitral practice states that the threshold of violating fair and equitable treatment under NAFTA arbitral practice is high.[269] Also, it is generally accepted that for conduct to constitute treatment below the international minimum standard such treatment should ''include acts showing a wilful neglect of duty, an insufficiency of action falling below international standards, or even subjective bad faith''.[270] However, it should be stressed that both customary international law and the minimum standard of treatment it incorporates are constantly in the process of development.[271] Furthermore, it should be stated that when fair and equitable treatment is restricted to the minimum standard, investors cannot claim treatment above the minimum standard.[272]

For instance, in *Mondev International v United States*, Canada suggested the meaning of the minimum standard in customary international law is that laid down by the Neer case and other related cases.[273] This position was however rejected because according to the tribunal there is insufficient reason for assuming the provisions of BITs and NAFTA while incorporating *Neer* principles are confined to the Neer standard of outrageous treatment.[274] In the tribunal's view the minimum standard has an evolutionally character and the parties would not have frozen fair and equitable treatment to the Neer principles.[275] The tribunal then examined treatment accorded to the investor to assess whether there was denial of justice. In the tribunal's view for state conduct to constitute a violation of the standard, the question to ask ''is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable''.[276] The tribunal further noted that tribunals do not have an unfettered discretion to decide for themselves, on a subjective basis, what was fair or equitable in the

[269] *Waste Management v Mexico*, para 98, see also *Thunderbird v Mexico*, para 194.
[270] *LFH Neer v Mexico*, para 4, *Genin v Estonia*, para 367.
[271] *ADF Group v United States of America*, 179.
[272] *Mondev International* v *United States of America*, para 114.
[273] Ibid.
[274] Ibid.
[275] Ibid.
[276] Ibid para 127.

circumstances but they are bound by the minimum standard as established in State practice and in the jurisprudence of arbitral tribunals.[277]

Similarly, in *Waste Management v Mexico* following the lead in *SD Myers*, *Mondev, ADF* and *Loewen*, the tribunal acknowledged a general standard of fair and equitable treatment emerging under NAFTA. In the view of the tribunal, the general standard suggests that at a minimum fair and equitable treatment is infringed if the state conduct is arbitrary, grossly unfair, unjust or idiosyncratic and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety.[278] According to the tribunal a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process would breach the standard of fair and equitable treatment.[279] Taken as a whole, the jurisprudence supports the view that fair and equitable treatment is equivalent to the minimum standard but with an evolutionary character and not frozen to the Neer principles.

Unlike other African BITs, the provisions of fair and equitable treatment in the United States-Rwanda BIT are the most detailed and extensive. Although the meaning of fair and equitable treatment is not defined the standard to a large extent is clearer than most other African BITs. As mentioned above, restricting fair and equitable treatment to the minimum standard limits arbitral tribunals from second guessing the intention of state parties. The standard as articulated in the United States-Rwanda BIT could serve as a model for African countries interested in limiting the scope of fair and equitable treatment. Having said that, acceptance of the minimum standard in the United States-Rwanda BIT demonstrates changing attitudes towards the minimum standard and general international law by African countries. In addition, the fact that African states support the minimum standard both in arbitral practice and in treaties may be an indication that the minimum standard of treatment has attained the status of a customary norm.[280] At least the position in the United States-Rwanda BIT

[277] Ibid para 119.

[278] *Waste Management v Mexico*, para 98.

[279] Ibid.

[280] *Biwater v Tanzania*, para 587. Particularly the respondent reckoned that fair and equitable treatment was no more than the international minimum standard of treatment.

seems to support the conclusion that as far as Rwanda and the United States are concerned reservations about the existence of the minimum standard of treatment as part of customary international law are closed.[281] This view is also echoed in the *Biwater* case where Tanzania contended that fair and equitable treatment is no more than the customary international minimum standard.[282] Obviously, caution should be exercised when defining the content of the minimum standard in large measure because the standard is inherently controversial but also the substance of the standard remains difficult to articulate.

4.5.6 Fair and Equitable Treatment in African BITs Combined with Full Protection and Security

The majority of African BITs combine the standard of fair and equitable treatment with the obligation of full protection and security.[283] Generally, the assurance of full protection and security originates in the United States customary international law treaty practice developed in the early FCN treaties.[284] Originally, the obligation was understood as the exercise of regulatory power but has subsequently developed to encompass protecting stability of the investment.[285] For instance in *Biwater* the tribunal started that the content of full protection may extend to matters other than physical security.[286] According to the tribunal, the obligation includes a state's guarantee of conducting business in stable and secure environment covering both physical and commercial aspects.[287] Similarly, the arbitral tribunal in *Azurix v Argentina* supported the view that full protection and security goes beyond protection and

[281] For a similar opinion under NAFTA see JC Thomas, 'Reflections of Article 1105 of NAFTA' (2002) 17 *ICSID Rev. FILJ* 21.

[282] *Biwater v Tanzania*, para 587.

[283] See e.g. Article 2(2) of the Korea-Congo BIT; Article 2(2) of the Finland-Tanzania BIT; Article 2(4) of the United States-Congo BIT; Article 2 of the Korea-Congo BIT; Article 3 of the Denmark-Ghana BIT; Article 3(1) of the United Kingdom-Ghana BIT; Article 2(2) of the United Kingdom-Tanzania BIT; Article 4(2) of the United States-Cameroon BIT; Article 3(1) of the Ghana-Benin BIT; Article 3 (1) of the Ghana-Guinea BIT; Article 2(2) of the United Kingdom-Kenya BIT; Article 2(2) of the Ghana-Egypt BIT; Article 5(1) of the United States-Rwanda BIT and Article 3(1) of the United States-Congo BIT.

[284] Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration* (OUP 2007) 247.

[285] Ibid.

[286] *Biwater v Tanzania*, para 729.

[287] Ibid.

security safeguarded by the police and includes a secure investment environment which is critical for the investor's overall protection.[288] The combined use of full protection and security and fair and equitable treatment in African BITs, typically follows the approach in the Ghana-Benin BIT which read as follows;

> Investments of nationals and companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall *enjoy full and adequate protection and security* in the territory of the other Contracting Party.[289]

It should be stressed that for African treaties combining fair and equitable treatment with the obligation of full protection and security, the pattern is the same whether treaties are between African states themselves or between African states and other developing countries and also between African states and developed countries.[290] Usually, the provision is qualified with adjectives such as 'full protection',[291] 'full and adequate protection',[292] 'and adequate protection'.[293] However, it should be stressed that not all African BITs follow the obligation of protection and security with qualifying adjectives. For instance, the United States-Congo BIT reads as follows, ''investments of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and security in the territory of the other Party''.[294] A quick glance at the jurisprudence suggests that opinion remains divided whether substantively there is a difference in protection between treaties incorporating the adjective 'full protection' and those that do not

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[288] *Azurix v Argentina*, para 408.

[289] Article 3(1) of the Ghana-Benin BIT.

[290] For an overview see Article 2(2) of the Korea-Congo BIT; Article 2(2) of the Finland-Tanzania BIT; Article 2(4) of the United States-Congo BIT; Article 2 of the Korea-Congo BIT; Article 3 of the Denmark-Ghana BIT; Article 3(1) of the United Kingdom-Ghana BIT; Article 2(2) of the United Kingdom-Tanzania BIT; Article 3(1) of the Ghana-Benin BIT; Article 3 (1) of the Ghana-Guinea BIT; Article 2(2) of the United Kingdom-Kenya BIT; Article 2(2) of the Ghana-Egypt BIT; Article 5(1) of the United States-Rwanda BIT.

[291] See e.g. Article 3(1) of the United Kingdom-Ghana BIT; Article 5(1) of the United States-Rwanda BIT; Article 2 (1) of the Finland-Tanzania BIT; Article 2(4) of the United States-Cameroon BIT; Article 2(2) of the United Kingdom-Kenya BIT; Article 2(2) of the Korea-Congo BIT; Article 2(2) of the United Kingdom-Tanzania BIT and Article 3(1) of the Denmark-Ghana BIT.

[292] See Article 3(1) of the Ghana-Benin and Article 3(1) of the Ghana-Guinea BIT.

[293] For e.g. see Article 2(2) of the Ghana-Egypt BIT. It should be stressed that adding the adjective 'adequate protection' is rarely used in African treaty practice.

[294] Article 4(2) of the United States-Congo BIT.

contain the adjective. For instance, the tribunal in *Parkerings* reasoned that the variation in language between the formulation 'protection' and 'full protection' does not make a difference in the level of protection a state is required to provide.[295] However, other cases reaffirm the view that when qualifies are added, the scope of obligation extends beyond physical security. For example the tribunal in *Azurix v Argentina* was of the view that "when the terms 'protection and security' are qualified by 'full' and no other adjective or explanation is provided, they extend, in their ordinary meaning the content of this standard beyond physical security".[296] Conversely, if the adjective 'full' is not added, the protection is restricted to physical security and protection.[297]

This position is also supported in *Biwater* where the tribunal viewed full protection and security as extending to actions by organs and representatives of the State and not limited to a State's failure to prevent actions by third parties.[298] Another question that frequently arises is the relationship between 'full protection' and the obligation of fair and equitable treatment.[299] The practice in arbitral tribunals has often resulted in merging the two standards especially when the obligation is qualified with 'full protection and security'.[300] Most importantly, it would be difficult to find a violation of fair and equitable treatment that does not inevitably lead to a breach of 'full protection and security'. However, even though some tribunals have separated the two standards,[301] there is a growing trend towards equating full protection and security to the obligation of fair and equitable treatment.[302]

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[295] *Parkerings-Compagniet v Lithuania*, para 354.

[296] *Azurix v Argentina*, para 408.

[297] Ibid.

[298] *Biwater v Tanzania*, para 730.

[299] Ibid para 716. The Respondent argued that the claimant does not define the standard of full protection and security in any fashion that might distinguish it from the obligation to provide fair and equitable treatment.

[300] *Occidental v Ecuador*, para 187, *PSEG v Turkey*, para 257-259, *Wena Hotels v Egypt*, para 84-95.

[301] *Azurix v Argentina* para 407.

[302] *Occidental v Ecuador*, para 187, *PSEG v Turkey*, para 257-259, *Wena Hotels v Egypt*, para 84-95.

4.5.7 Fair and Equitable Treatment in African BITs Combined with Unreasonable and Discriminatory Measures

There are a few African BITs that link the standard of fair and equitable treatment to the prohibition of unreasonable and discriminatory measures.[303] In these African BITs, the threshold of unreasonable and discriminatory measures seems higher than the standard of fair and equitable treatment.[304] Furthermore, the language suggests there is a relationship between the two standards but one where unreasonable and discriminatory measures have an overarching character. Typically, provisions of African BITs following this formulation read as follows:

> Neither contracting party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party.[305]

The relationship between discriminatory measures and fair and equitable treatment has been the subject of considerable disagreements. For instance in *Biwater*, the claimant argued that apart from government measures breaching fair and equitable treatment, the measures also amounted to unreasonable and discriminatory treatment. The tribunal concurred with the claimant and held that the conduct of the respondent was unreasonable and also violated the standard of fair and equitable treatment.[306] Particularly, drawing parallels between the two standards, the tribunal adopted the reasoning enunciated in *CMS v Argentina* where the tribunal held that the standard of protection against discrimination is related to fair and equitable treatment.[307] Accordingly, the tribunal noted that any discriminatory measure simultaneously amounts to a breach of fair and equitable treatment.[308] Applying this reasoning to the facts at

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303 See for instance Article 3(1) of the Netherlands-Ghana BIT.

304 See generally the wording of Article 3(1) of the Netherlands-Ghana BIT that reads as follows 'Each Contracting Party shall ensure fair and equitable treatment to the investments of nationals of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals'.

305 Article 2(2) of the United Kingdom-Tanzania BIT. See also Article 3(2) United Kingdom-Ghana BIT, Article 2(2) of the Korea-Congo BIT, Article 2(4) of the United States-Congo BIT, Article 2(2) of the Egypt-Ghana BIT and Article 3(2) of the Denmark-Ghana BIT.

306 *Biwater v Tanzania*, para 694.

307 Ibid.

308 Ibid.

hand, the tribunal found the statements the Minister made at press conference impaired management of the claimant investment.[309] In addition, the address to the staff was unreasonable, politically motivated and undermined management of city water.[310] Lastly, withdrawing VAT exemption impaired city waters business; the deportation of senior management was abusive and unreasonable.[311]

Interestingly, although the tribunal viewed the government measures as unreasonable, the measures in and of themselves did not cumulatively amount to discrimination.[312] According to the tribunal, there was insufficient evidence to justify that the respondent accorded the competitor preferential treatment.[313] From the tribunal's analysis, it is important to stress that the threshold of discriminatory measures is relatively high as compared to fair and equitable treatment. Given this, it can be presumed that if a claimant successfully proves that the measures amounted to discrimination then breach of fair and equitable treatment is an automatic conclusion.[314] In essence, arbitral tribunals will be inclined to find measures amount to breach of fair and equitable treatment more often because such findings are based on objective criteria while assessment of discriminatory measures are purely based on subjective criterion.

4.5 Conclusion

The preceding analysis shows that the majority of African countries have concluded BITs offering foreign investors the right to fair and equitable treatment as well as full protection and security. In addition, the analysis has shown that African BITs do not define the meaning of fair and equitable treatment. As previously discussed, with the exception of the United States-Rwanda BIT, the obligation of fair and equitable treatment in the majority of

[309] Ibid para 696-709.

[310] Ibid.

[311] Ibid.

[312] Ibid.

[313] Ibid.

[314] Ioana Tudor, *Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP 2007) 180.

African BITs is overly broad and accords arbitral tribunals the discretion to determine the scope and substantive content of fair and equitable treatment. Specifically, within African treaty practice, majority of African BITs usually encapsulate fair and equitable treatment as an all or nothing right. Essentially, the practice of African states as demonstrated through the body text of African BITs is twofold; fair and equitable treatment is either entrenched as part of the substantive treaty protections offered to foreign investors or as seen in a few African BITs the standard is completely excluded. However, it should be stressed that the wording of African BITs incorporating fair and equitable treatment make it clear that the standard forms part of substantive treaty protection and creates binding legal obligation.

From the foregoing discussion, it should be noted that African treaty practice supports the view that fair and equitable treatment is an autonomous treaty standard and is not tied to customary international law. The analysis of arbitral jurisprudence also showed that when interpreting the ordinary meaning of fair and equitable treatment, arbitral tribunals have developed components such as protection of legitimate expectations, good faith, transparency, consistency and discrimination. These components are particularly relevant to the interpretation of BITs concluded by African countries because fair and equitable treatment as articulated in most African BITs is either a stand-alone or linked to international law. This essentially means that the interpretation of fair and equitable treatment as developed through arbitral practice will influence and inform decisions of investor-state disputes involving African BITs.

As stressed earlier, given that the content of customary international law remains controversial and the traditional resistance of African states towards the minimum standard, it is doubtful African states intended equating fair and equitable treatment to the minimum standard. Taken as a whole therefore, it can be stated that fair and equitable treatment as expressed in African treaty practice goes beyond the minimum standard. The rationale of this reasoning is additionally reinforced with the fact that in most African BITs international law is rarely mentioned suggesting a further detachment to the minimum standard.[315] In light of these considerations, by leaving fair and equitable treatment as a stand-alone standard and in some instances making reference to international law without mentioning the minimum standard this underscores the autonomous character of fair and equitable treatment within African treaty practice. Further, as noted above construing fair and equitable treatment as part of the minimum standard would be conflicting with the intention of African states that have not linked fair and equitable treatment to the minimum standard. Having said that, although linking fair and equitable treatment as equivalent to the minimum standard is not supported by African treaty practice, African countries are considerably better positioned clarifying that fair and equitable treatment simply means no more than the minimum standard. As noted above, although the content of the minimum standard is controversial when fair and equitable treatment is linked to the minimum standard the discretion of arbitral tribunals is fundamentally restricted to generally accepted principles of customary international law. More importantly, explicitly linking fair and equitable treatment to the international minimum standard would minimize the possibility of arbitral tribunals second guessing the intention of African states.

[315] See above discussion on fair and equitable treatment without the mentioning of international law.

Chapter 5

Analysis of Dispute Settlement Clauses of African Bilateral Investment Treaties

Introduction

The procedural protection offered to foreign investors to directly bring investment disputes under the scrutiny of international investment tribunals is probably the most important protection included within the broad spectrum of modern investment treaties.[1] Indeed, commentators have approvingly described dispute resolution provisions appearing in virtually all modern investment treaties as the ''ultimate investor protection''.[2] Moreover, as previously noted in Chapter 1, the introduction of modern dispute settlement provisions through restricting diplomatic protection have to some extent depoliticized the settlement of investment disputes.[3] In essence, through offering ''arbitration without privity'' foreign investors are protected from undergoing complicated political nuances involved with espousing claims to home countries.[4] Furthermore, modern dispute settlement provisions have radically diminished the international law standard requiring the exhaustion of local remedies.[5] As a practical matter therefore, the significance of modern dispute settlement provisions cannot be taken lightly considering the traditional ideological differences between developed and developing countries.[6] For example, within the African context, early investment treaty practice of African states embodied reluctance towards international arbitration and the insistence that foreign

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[1] Stephan W Schill, *The Multilateralization of International Investment Law* (Cambridge University Press 2009) 87.

[2] Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policies and Practices* (OUP 2009) 299.See also Stephan Schill who notes that dispute settlement provisions have ''accurately been described as a change in paradigm in international investment law''. Stephan W Schill, *The Multilateralization of International Investment Law* (Cambridge University Press 2009) 87.

[3] See Chapter 1 for in-depth analysis.

[4] See generally, Jan Paulsson, 'Arbitration without Privity' (1995) 10 *ICSID Review-Foreign Investment Law Journal* 232.

[5] Christoph Schreuer, 'Calvo's Grand Children: The Return of Local Remedies in Investment Arbitration' (2005) 1 *LPICT* 1, 3. See further discussion Ian Brownlie, Principles of Public International Law (6th edn, OUP 2003) 472.

[6] M Sornarajah, *The International Law on Foreign Investment* (2nd edn, Cambridge University Press 2004) 1-4.

investment disputes should primarily be resolved through national courts.[7] Notably, during this period, African states incorporating aspects of international arbitration required the exhaustion of local remedies and emphasised the centrality of national courts in settling foreign investment disputes.[8]Moreover, many African countries argued that with respect to certain aspects of investment claims only their domestic courts could resolve such investment disputes.[9]

From a historical perspective, the change in tone and content of modern African investment treaty practice demonstrates remarkable evolution in the attitude of African states towards international investment arbitration-from periods of resistance to acquiescence. In the view of the present author, the fundamental shift in attitude especially for African states can possibly be attributed to the underlying premise on which BITs are negotiated. The uneven power disparity notwithstanding, investment treaties and indeed as will shortly be seen through deliberations of the ICSID Convention, African states negotiate investment treaties with the perception that upon concluding such treaties the flow of foreign investment will increase. On this basis, African states in search of foreign investment flows inevitably conclude treaties containing liberal international investment arbitration clauses irrespective of whether African states have any outstanding concerns. It is against this background that virtually all BITs concluded by African countries contain clauses providing not only for state to state arbitration but also direct investor-state arbitration. Clauses providing for direct investor state arbitration are particularly tempting to many multinational corporations that view African legal and political systems as traditionally hostile towards foreign investors.[10]

In some quarters, opinion holds that foreign investors will not be accorded sufficient protection on the basis that African courts are generally perceived as unsuitable to settle investment disputes because of rampant levels of corruption, biased judiciary and the lack of separation of power between the

[7] Augustus A Agyemang, 'African Courts, the Settlement of Investment Disputes and Enforcement of Awards' (1989) 33 *Journal of African Law* 31, 31.

[8] Ibid.

[9] Ibid.

[10] Ibid 33-35.

executive and judiciary.[11] Moreover, even with an independent judiciary, a number of African states through nationalistic driven legislatures overrule court decisions especially when the executive believes that the amount of compensation awarded for the expropriation claims is unreasonable.[12]

On this basis, the apparent conclusion is that African states through consenting to alternative dispute resolution forums this minimizes the limitations of African domestic courts. Although such a conclusion is plausible on both legal and equity grounds, presently however, the interpretation accorded to arbitration clauses as features encapsulated in virtually all modern BITs has produced divergent reactions especially with respect to issues such as the scope of dispute settlement clause and its interrelationship with other substantive provisions. Against this backdrop, this chapter thoroughly examines the dispute resolution provisions commonly articulated in African BITs. Given that the majority of African states consent to ICSID as the choice of arbitration, the chapter starts by briefly exploring the participation of African states in the design and formulation of the ICSID framework. The chapter then moves on to examine the nature and scope of jurisdiction conferring clauses as well as the consent to arbitration clauses contained in the national legislation of African states. By so doing, the chapter situates not only the scope of dispute settlement clauses contained in African treaty practice but also situates whether African treaty practice conforms or differs from general treaty practice. Lastly, the chapter explores the policy implications resulting from dispute settlement clauses of African BITs.

5.1 The ICSID Dispute Settlement System: Design, Structure and Participation of African States

The Convention establishing the international centre for the settlement of investment disputes is an initiative of the World Bank aimed at facilitating the peaceful resolution of investment disputes between contracting states and nationals of other contracting state.[13] The ICSID framework as is commonly known facilities the settlement of investment disputes either through

[11] Ibid.

[12] Ibid 34.

[13] Christoph Schreuer and others, *The ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (2nd edn, Cambridge University Press 2009) 1-10.

conciliation or arbitration.[14] The centre itself does not engage in arbitration or conciliation, instead the task is carried out by conciliation commissions and arbitral tribunals established by the parties in accordance with the rules of the Convention.[15]

The ICSID institutional arrangement gives parties to the dispute considerable autonomy in deciding the panels of conciliators or arbitrators as well as the venue of the dispute.[16] Theoretically therefore the institutional arrangement presumes that through parties to the dispute selecting members of the tribunal the outcome of such arbitral tribunals should convincingly be fair to both foreign investors and state parties. Since the inception of the ICSID Convention on October 14, 1967 with initial membership of 20 countries, the Convention presently includes nearly all nations and has a growing membership of 147 countries.[17] Over the years, the Centre has become the preferred destination for settling foreign investment disputes and as of December 31, 2010 nearly 331 cases have been arbitrated under the rules of the ICSID Convention and Additional Facility Rules.[18] More broadly, considering the historical resistance towards international arbitration, the rapidly expanding number of cases and the emerging body of jurisprudence demonstrates considerable advance in the progressive development of international law.[19]

Before discussing arbitration options articulated in African BITs, preliminary remarks about the participation of African states in the drafting of the ICSID Convention are worth making. In particular because this supports the opinion of the present author that African states participate in investment treaties and include consent to dispute settlement provisions based on assumptions made by architects of such treaties. For instance with respect to the innovative ICSID Convention, it is stated that one of the primary objectives of the Convention is to ‘‘encourage and accelerate economic development in the poorer

[14] Ibid.

[15] Ibid 10-11. See also Aron Broches ‘The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction’ (1966) 5 *Colum. J. Transnent’l L* 263, 264.

[16] Aron Broches ‘The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction’ (1966) 5 *Colum. J. Transnent’l L* 263, 264.

[17] ICSID, *The ICSID Case Load-Statistics Issue 2012-1* (ICSID Secretariat 2012) 7.

[18] Ibid.

[19] PF Sutherland, ‘The World Bank Convention on the Settlement of Investment Disputes’ (1979) 28 *International and Comparative Law Quarterly* 367, 367.

countries''.[20] The drafting of the ICSID Convention occurred at a time when foreign investors inhibited general reservations about investing in developing countries because of mounted hostilities towards foreign investors inspired by forces of nationalism.[21] At the time of the Convention's inception, it was believed that the assurance of a dispute settlement system with proximity to the World Bank would ''assuage the anxieties of foreign investors and encourage them to invest, while at the same time cooling the enthusiasm of host governments against expropriatory actions''.[22] Indeed, the Report of the Executive Directors on the ICSID Convention puts the intention of the Convention in the following words:

> In submitting the attached convention to governments, the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development. The creation of an institution designed to facilitate the settlement of disputes between states and foreign investors can be a major step towards promoting at atmosphere of mutual confidence and thus stimulating a larger flow of private international investment capital into those countries which wish to attract it.[23]

Indeed, the avowed emphasis of the World Bank on the positive contribution of the Convention towards directing the flow of foreign investment to poorer nations probably explains the enthusiasm expressed by African states during the drafting of the Convention.[24] Preparatory documents of the ICSID Convention highlight the fact that during regional consultations discussing the draft ICSID Convention, African states perceived the Convention as a vehicle for social

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[20] Michael W Reisman, *System of Control in International Adjudication and Arbitration: Breakdown and Repair* (Duke University Press 1992) 46. See also Michael W Reisman, 'The Breakdown of Control Mechanism in ICSID Arbitration' (1989) 4 *Duke L.J* 739, 750.

[21] Michael W Reisman, 'The Breakdown of Control Mechanism in ICSID Arbitration' (1989) 4 *Duke L.J* 739, 750, see also, Christoph Schreuer and others, *The ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (2nd edn, Cambridge University Press 2009) 4.

[22] Ibid.

[23] Christoph Schreuer and others, *The ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (2nd edn, Cambridge University Press 2009) 4.

[24] As Professor Schreuer notes, the reason for the World Bank's initiative can be found in the fact that the Bank is an international development agency and as spelled out in the bank's Articles of Agreement list the promotion of private foreign investment is among the Bank's purpose. Ibid 8. See also Amazu A Asouzu, *International Commercial Arbitration and African States: Practice and Institutional Development* (Cambridge University Press 2001) 230.

economic development.[25] As such the attitude of African states throughout the drafting of the ICSID Convention was positive thus enabling the Convention to enter into force soon after it was opened for signature.[26] Asouzu notes that during regional meetings made up of high level delegations of African states discussing the details of the draft Convention ''remarks of participants on the preliminary draft of the Convention were generally positive''.[27] At numerous regional meetings, African states supported the principles embodied in the Convention and the purpose it was meant to achieve''.[28] For instance, some representatives at the African consultative meeting optimistically believed that through concluding the convention ''it would be easier for developing countries to obtain the investments they needed if all agreements contained a clause to the effect that disputes could be referred to the centre''.[29] Evidently, the optimism of the majority of African states in the ICSID Convention, explains why Tunisia, an African state was the first state to sign the Convention and Nigeria, an African state was the first state to ratify the Convention.[30] Indeed, positive expectation in the ICSID convention justifies the attachment many poorer countries attach to the Convention through ratification and also this explains why presently nearly all African states are signatory to the ICSID Convention.[31]

As noted above, participation in the ICSID Convention alone without any further action does not create any obligation to foreign investors that contracting states will consent to arbitration under ICSID arbitral rules.[32] To be sure, during the

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[25] Amazu A Asouzu, *International Commercial Arbitration and African States: Practice and Institutional Development* (Cambridge University Press 2001) 230.

[26] Ibid 221.

[27] Ibid 222.

[28] Ibid.

[29] Ibid 228.

[30] Ibid 221.

[31] Almost all African states are signatory to the ICSID Convention and majority of African states have ratified the Convention. Particularly, 47 out of the 51 African states have signed the ICSID Convention. For a detailed list see ICSID, List of Contracting States and Other Signatories of the Convention (as of April 18, 2012) <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English> accessed 20 May 2012.

[32] UNCTAD, *Course on Dispute Settlement* (UNCTAD/EDM/Misc.232 2003) 16. See also Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Article 25 provides as follows 'while consent of the parties is essential prerequisites for the jurisdiction of the centre, consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the

drafting of the ICSID Convention and for purposes of respecting state autonomy, Mr. Broches the then General Council of the World Bank and inventor of the Convention stressed that ''the use of the Centre's facilities would be voluntary and that participation in the Convention would not compel any state to submit disputes to the Centre''.[33] Indeed, the Report of the Executive Directors to the Convention ardently describes consent of both parties and especially consent of contracting states as the cornerstone of the centre's jurisdiction.[34] In the same breath and along the lines of searching for foreign investment earnings, African states have subsequently perfected the ratification of the ICSID Convention through including consent clauses in treaties consenting to arbitration under the Convention.[35]

Indeed, presently the majority of African countries have not only ratified the ICSID Convention but also expressed consent to ICSID arbitration through BITs, national legislation and contractual undertakings. Particularly with regard to BITs, as part of the treatment accorded to foreign investors, virtually all African BITs contain arbitration clauses offering consent to conciliation and arbitration

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dispute and the parties thereto' <http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partB.htm>accessed 20 May 2012.

[33] Christoph Schreuer and others, *The ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (2nd edn, Cambridge University Press 2009) 190.

[34] Ibid.

[35] Virtually all BITs concluded by majority of African BITs consent to arbitration under the ICSID Convention. For e.g. see Article 10 of the Belgium-Rwanda BIT; Article 8 of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the United Republic of Tanzania for the Promotion and Protection of Investments (Treaty Series No. 90, 1996) [Hereafter United Kingdom-Tanzania BIT] ; Article 9 Netherlands-Tanzania BIT; Article 8 of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the Promotion and Protection of Investments (Treaty Series No. 8, 2000) [Hereafter United Kingdom-Kenya BIT; Article 9 of the Agreement between the Government of the Republic of Finland and the Government of the Republic of Tanzania for the Promotion and Protection of Investments (19 June 2001) [Hereafter Finland-Tanzania BIT]; Article 8(3) of the Agreement between the Government of the Republic of Korea and the Government of the Democratic Republic of Congo for the Promotion and Protection of Investments (March 17, 2005); Article 25 of the Treaty between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment [Hereafter United States-Rwanda BIT]; Article 8(3) of the Ghana-Mauritius BIT; Article 9(2) of the Agreement between the Government of the Republic of Ghana and the Government of the Republic of Benin for the Promotion and Protection of Investments [Hereafter Ghana-Benin BIT]; Article 8(2) of the Agreement between United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Promotion and Protection of Investments (Treaty Series No. 8, 1992) [Hereafter United Kingdom-Ghana BIT]. For detailed list of all African BITs see UNCTAD database < http://www.unctadxi.org/templates/DocSearch.aspx?id=779>accessed 20 May 2012.

under ICSID arbitral rules.[36] Predominately, African BITs express consent to the resolution of foreign investment disputes either through the ICSID framework or under UNCITRAL rules.[37] In essence, when pressed with disputes depending on the treaty language foreign investors have the discretion to choose between any of the dispute resolution option that best suits them. The scope of discretion varies among different African BITs, some African BITs consent fully to the discretion of foreign investor in selecting the arbitration option while other African BITs explicitly require agreement between the host state and the investor in selecting the arbitration option.[38] With respect to the range of arbitration options, typically African BITs follow the approach articulated in article 7(2) of the Malaysia-Ghana BIT that reads as follows:

> Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to: (a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention of the Settlement of Investment Disputes between states and nationals of other states, opened for signature at Washington DC on 18th march, 1965 and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or (b) an international arbitrator of ad hoc arbitration tribunal to be appointed by a special agreement between the parties to the dispute or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

The majority of African BITs explicitly consent to several arbitration options as in the above BIT. However, there are a number of African BITs that consent to arbitration only under the ICSID framework. Particularly, such BITs include the Belgium-Rwanda BIT, United Kingdom-Tanzania BIT and the Belgium-Cameroon BIT. However, it should be stressed that African BITs expressing consent only through the ICSID arbitration option without providing for alternative arbitration options are few. Generally, the majority of African states broadly consent to

[36] Ibid.

[37] For e.g. Article 10 of the Belgium-Rwanda BIT; Article 8 of the Korea-Congo BIT; Article 8(3) of the Ghana-Mauritius BIT; Article 8(2) of the United Kingdom-Ghana BIT; Article 9(2) of the Ghana-Benin BIT; Article of the Finland-Tanzania BIT; Article 25(3) of the United States-Rwanda BIT and Article 9 of the Netherlands-Tanzania BIT.

[38] Article 8 of the Agreement for the Protection and Promotion of Investments between the Republic of Ghana and the Arab Republic of Egypt (11 March 1998) [Hereafter Ghana-Egypt]; Article 9 (2) of the Ghana-Benin BIT, 10(2) of the Cameroon-Belgium BIT, 9(1) Ghana-Guinea BIT, Article 7 (3) of the United States-Cameroon BIT and Article 7 (1) of the Malaysia-Ghana BIT. See for instance the article 9(2) of the Netherlands-Ghana BIT and article 9(2) of the India-Ghana BIT that require mutual consent and agreement between both parties to the dispute.

several dispute resolution options. Specifically, of the various arbitration alternatives, the most common arbitration option consented to by nearly all African BITs is arbitration through the ICSID framework. It should also be noted that some African BITs envisage the use of additional facility rules where one of the contracting state part to the same BIT has not ratified the ICSID Convention.[39] In addition, African dispute resolution clauses emphasize the fact that once consent to submit disputes to the centre has been given such consent is irrevocable.[40]

The choice of arbitration aside, it is important to note that the wording of consent clauses of nearly all African BITs unequivocally consent to the resolution of investment disputes through international arbitration.[41] Generally, African BITs contain dispute resolution clauses affirming binding consent to arbitration using five different mechanisms but substantively similar in scope. Typically, offers to binding arbitration included in African BITs follow the approach provided for under Article 8 of the United Kingdom-Cameroon BIT which reads as follows ''each contracting state hereby consents to submit to the international Centre for the settlement of investment disputes''.[42] On the other hand, article 10 (2) of the Germany-Burundi BIT stipulates that ''if a divergence cannot thus be settled it shall upon request by either contracting party be submitted to arbitration tribunals''.[43] While article 8 of the Ghana-Mauritius BIT states that disputes ''may be submitted to an international arbitral tribunal established by both parties''.[44] The subsequent article of the Ghana-Guinea BIT provides that ''disputes shall be submitted at the first instance to the competent court of the

[39] For e.g. see Article 24(3) of the United States-Rwanda BIT and Article 10(2) of the United Kingdom-Ghana BIT.

[40] Specifically see Article 10 (3) of the Belgium-Rwanda BIT; Article 8 (3) of the United Kingdom-Tanzania BIT; Article 10 (2) of the Belgium-Cameroon BIT; Article 8 (3) of the United Kingdom-Kenya BIT; Article 9 (2) of the Finland-Tanzania BIT; Article 8 (3) of the Mauritius-Ghana BIT; Article 9 (4) of the Ghana-Benin BIT and Article 10 (2) of the United Kingdom-Ghana BIT.

[41] Ibid.

[42] See also Article 9 (1) of the Netherlands-Tanzania BIT, Article 8 (1) of the United Kingdom-Tanzania BIT, Article 7 (3) of the United States-Cameroon BIT and Article 9 (3) of the Belgium-Rwanda BIT.

[43] See also Article 10 (2) of the Germany-Kenya BIT. See a slight variation contained in Article 8 (2) of the Malaysia-Ghana BIT that provides as follows 'If a dispute between the Contracting Parties cannot thus be settled, it shall upon the request of either Contracting Party be submitted to an arbitral tribunal'.

[44] See also Article 10 (2) of the Belgium-Cameroon BIT, Article 10 (2) of the India-Ghana BIT and Article 10 (2) of the Belgium Rwanda BIT.

Contracting Party for decision, or to international arbitration if either party to the dispute so wishes''.[45] Lastly, article 9 of the Netherlands-Ghana BIT provides that ''…disputes…shall by mutual consent be submitted to international arbitration or conciliation''.[46]

Although the Netherlands-Ghana BIT requires ''mutual consent'', it is doubtful that Ghana would withhold consent to international arbitration if faced with foreign investment claims because withholding consent would be in breach of the spirit and purpose of article 9 of the same BIT which provides that ''Each Contracting Party hereby consents to the submission of an investment dispute to international arbitration or conciliation''.[47] It should be stressed that exceptionally some African BITs such as the Netherlands-Kenya BIT do not unequivocally consent to arbitration. Specifically, article 11 of the Netherlands-Kenya BIT reads as follows, ''The Contracting Party in the territory of which a national of the other Contracting Party makes or intends to make an investment, shall give *sympathetic consideration* to a request on the part of such national to submit for conciliation or arbitration, to the Centre established by the Convention of Washington of 18 March 1965, any dispute that may arise in connection with the investment'' (emphasis added).[48] Although, Kenya may decline consenting to the investor's request for arbitration, the Netherlands may exercise diplomatic protection on behalf of the affected investors.[49]

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[45] Similarly see Article 9 (1) of the Ghana-Benin BIT providing for disputes to '...be submitted at the first instance to the competent court of the Contracting party for decision or to international arbitration if either party to the dispute so wishes'.

[46] It should be stressed that throughout African practice the submission of dispute after mutual consent is rarely included as a requirement for the commencing of arbitral proceedings.

[47] Article 9 (4) of the Netherlands-Ghana BIT.

[48] Article 11 of the Netherlands-Kenya BIT.

[49] For instance in *Italian Republic v Republic of Cuba*, the tribunal was of the view that Italy could invoke diplomatic protection within the BIT's interstate arbitration framework provided that other jurisdictional requirements setforth in the treaty were met. Although Cuba did not object that Italy could bring claims in its own name, it rejected the resort to interstate dispute settlement clause for the purposes of diplomatic claims. The tribunal postulated that ''as long as the investor had not consented to international arbitration with the host state or submitted the dispute to arbitration, it could request diplomatic protection from its home state''. For detailed discussion see, *Republic of Italy v Republic of Cuba*, Michele Potesta (ed) (2012) 2, Vol 106, *AM. J. Int'l. L*, 341-347. Based on this case, it is plausible to argue that if the host state declines consenting to arbitration then the home state can pursue diplomatic protection on behalf of the affected investors.

It should also be stressed that despite the passionate endorsement of the ICSID Convention this has not resulted in massive flows of foreign investment within African states otherwise how one would explain the fact that African states with the largest regional membership of the ICSID Convention still receive the lowest flows of new investments.[50] Broadly, however, the enthusiastic support of the ICSID Convention by African states as evidenced throughout the drafting process demonstrates remarkable evolution in the attitude of African states towards international law. Particularly, it should be stressed that, unlike other rules of international law that developed and consolidated during the colonial era, a period when African states were not regarded as members of the international community, the drafting and adoption of the ICSID Convention happened at a time when most African states had acquired independence.[51] This means that at least theoretically, consent to arbitration by African states suggests that African states are no longer opposed to the settlement of investment disputes outside domestic settings.

In practice though, it is prudent to stress that positions taken by African states in cases such as *Holiday Inns v Government of Morocco*, *Societe Ltd Benvevuti et Bonfant Sri* v *the Government of Congo* suggest that African states remain reluctant to submit to ICSID arbitration especially when disputes arise requiring them to fulfil their undertaking.[52] Agyemang postulates that Congo and Morocco participated in these two cases only because the two countries could not afford to renegade from ICSID commitments because this would send wrong signals to investors that they do not honour agreements to arbitrate and are not prepared to guarantee investor security in their jurisdiction.[53] From the positions of these two states, it would be unsurprising to discover that many other African states still harbour similar reservations questioning the settling of investment policy decisions through international tribunals outside the scrutiny of domestic actors.[54]

[50] Amazu A Asouzu, *International Commercial Arbitration and African States: Practice and Institutional Development* (Cambridge University Press 2001) 230-231.

[51] Ibid 221.

[52] Agyemang AA ‘African States and ICSID Arbitration’ (1988) 21 *Comp. & Int’l L.J. Southern Afr* 177, 181.

[53] Ibid.

[54] Ibid.

5.2 Jurisdictional Conferring Clauses in African BITs

5.2.1 The Scope of Consent Clauses

As noted above, ratification of the ICSID Convention alone without any further action does not automatically imply consent to jurisdiction under the ICSID framework.[55] According to ICSID arbitral rules, ICSID jurisdiction is only enforceable through written consent by both parties.[56] Specifically, for contracting states consent to arbitration under the Convention can either be expressed through treaties such as BITs or any other instrument while foreign investors can duly express consent through instituting proceedings.[57]

As expressed in article 25(1) of the ICSID Convention, the Convention does not impose conditions on the form that consent should take except that when consent to arbitration is given, it must be expressed in writing.[58] In essence therefore, contracting states have the discretion to limit the scope of consent through for instance imposing conditions on the types of disputes that can be arbitrated under the Convention as well as the duration such disputes should take before proceeding to arbitration. Practically, this means that as long as the dispute satisfies other objective requirements set forth in Article 25 of the Convention, arbitral tribunals have the jurisdiction to hear all disputes that fall within the scope of the contracting parties consent.[59] Substantively therefore, consent to arbitration clauses articulated in African BITs form an integral part when determining jurisdiction of arbitral tribunals over disputes between foreign investors and African states.

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[55] Christoph Schreuer and others, *The ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (2nd edn, Cambridge University Press 2009) 190.

[56] Article 25(1) of the ICSID Convention provides as follows 'The Jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

[57] Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Article 24 of the Report reads as follows 'Consent may be given, for example, in a clause included in an investment agreement, providing for the submission to the Centre for future disputes arising out of that agreement, or in a *compromis* regarding a dispute which has already arisen.

[58] Article 25 (1) of the ICSID Convention.

[59] *Tokio Tokeles v Ukraine*, ICSID Case No. ARB/02/18 Decision on Jurisdiction 29 April 2004, para 19 [Hereafter *Tokio Tokeles v Ukraine*].

The vast majority of African BITs expansively consent to arbitration covering virtually all disputes. There are however, some significant variations with respect to the different formulas used when expressing consent to arbitration.[60] For instance the consent to arbitration clause in the United Kingdom-Tanzania BIT covers 'any disputes' while the Germany-Burundi BIT covers ''divergences between the Contracting Parties concerning the interpretation or application of the Treaty''. The precise meaning of divergence is unclear but as persuasively stressed by Paul Peters, the scope of 'divergence' is much broader than 'dispute' because it covers not only legal disputes but could also encompasses any questions where a gap in an agreement has to be filled by a third party (binding advice) or where facts have to be ascertained by an outsider (fact-finding commission).[61] Accordingly, Paul Peters opines that ''when arbitration is called for by such a BIT, it must of course have a correspondingly wide scope beyond that expressed by the phrase dispute''.[62] Apart from this wording, as demonstrated in the Korea-Congo BIT, some African BITs include consent to expropriation claims in the dispute resolution clause. Specifically, article of the Korea-Congo BIT provides that;

> Any dispute between a Contracting Party and an investor of the other Contracting Party derived from an alleged breach of an obligation under this Agreement, including disputes related to the expropriation or nationalization of investments, shall, as far as possible, be settled by the parties to the dispute in an amicable way.

Evidently, from the wording of the Korea-Congo BIT the unambiguous consent to expropriation disputes removes any doubts about the jurisdiction of arbitral tribunals in cases involving expropriation claims. In the same breath, article 8 of the Italy-Tanzania BIT uses wording similar to the United Kingdom-Congo BIT. Particularly, article 8 of the Italy-Tanzania BIT provides as follows; ''any dispute which may arise between one of the Contracting parties and the investor of the other contracting party on investments, including disputes related to the amount of compensation shall be settled through consultations and negotiations as far as

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[60] For different variation see Article 9 of the Ghana-Guinea BIT, Article 9 of the Netherlands-Ghana BIT, Article 11 of the Netherlands-Kenya BIT, Article 10 of the India-Ghana BIT , Article 7(3) of the United States-Cameroon BIT, Article 10 of the Belgium-Rwanda BIT, Article 10 of the Belgium-Cameroon BIT and Article 8 of the Egypt-Ghana BIT.

[61] Paul Peters, 'Dispute Settlement Arrangements in Investment Treaties' (1991) 22 *NYIL* 91, 111.

[62] Ibid.

possible''.[63] Aside from the Korea-Congo BIT and the Italy-Tanzania BIT, predominately consent to arbitration clauses of most African BITs follow three distinct but interrelated formulas. For example, many African BITs contain the phrasing expressed in article 9 of the Denmark-Tanzania BIT which provides as follows ''any dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute''.[64]

The Denmark-Tanzania formulae aside, other African BITs follow the wording similar to article 10 of the Belgium-Rwanda BIT which provides as follows; ''Any investment dispute between one Contracting Party and an investor from the other Contracting Party shall, to the extent possible be resolved amicably between the parties to the dispute''.[65] Finally, a number of African BITs extensively consent to dispute resolution but with limited scope to the substantive standards of the BIT. Typically, African BITs encapsulating this line of reasoning contain a clause similar to article 9(1) of the Ghana-Guinea BIT which provides as follows; ''disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this agreement in relation to an investment of the former which have not been amicably settled shall, after a period of six months from written notification of a claim, be submitted at the first instance to the competent court of the Contracting Party for decision, or to international arbitration if either party to the dispute so wishes''.[66]

The wording of consent clauses articulated in African BITs explicitly demonstrate that African states have broadly consented to the arbitration of foreign investment disputes under the ICSID convention. As noted above, apart from the ICSID Convention African states have also included in their respective BITs consent to other alternative arbitration options. However, although consent clauses encapsulated in African BITs are broadly worded, it remains unclear

[63] Article 8 of the Italy-Tanzania BIT.

[64] Article 9 of the Denmark-Tanzania BIT; see also Article 8 of the Mauritius-Ghana BIT.

[65] Article 10 of the Belgium-Rwanda BIT.

[66] Article 9(1) of the Mauritius-Ghana BIT; see also article 10 of the United Kingdom-Ghana BIT.

whether the consent to arbitration clause includes not only disputes from BIT obligation but also other disputes arising out of contractual undertakings. In practice, the approaches of different tribunals dealing with consent clauses similar to those stipulated in African BITs remains divided. For instance, in *Salini v Morocco*, the tribunal in interpreting article 8 of the Morocco-Italy BIT consenting to ''all disputes or differences'' reasoned that the scope of the consent clause was generally construed to include both BIT claims as well as contractual claims.[67] According to the tribunal the wording of article 8 ''compels the state to respect the jurisdiction offer in relation to violations of the bilateral investment treaty and any breach of contract that binds the state directly''.[68] In sum, the tribunal accepted jurisdiction over contractual claims provided such claims directly correspond to violations of the BIT.[69]

On the other hand, faced with similar consent clauses but contained in two different BITs, arbitral tribunals in the SGS cases arrived at conflicting conclusions. Specifically, in the first case, *SGS v Pakistan* the tribunal was of the view that article 9 of the Pakistan-Swiss BIT providing for consent to 'disputes with respect to investments' was merely descriptive of the 'factual subject matter of the disputes and does not relate to the legal basis of the claims, or the cause of action asserted in the claims''.[70] The tribunal further held that from the description of article 9 alone without any further explanation ''no implication necessarily arises that both BIT and purely contractual claims are intended to be covered by the Contracting Parties in Article 9''.[71] Furthermore, the tribunal postulated that the wording of Article 9 or any other provision of the BIT did not justify a reading vesting the tribunal 'with jurisdiction over claims resting ex hypothesis exclusively on contracts''.[72]

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[67] *Salini Construttori SpA v Morocco*, ICSID Case No. ARB/00/4 Decision on Jurisdiction July 23 2001, para 59 [Hereafter *Salini v Morocco*].

[68] Ibid para 61.

[69] Ibid para 63.

[70] *SGS Societe Generale de Surveillance S.A v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 Decision on Jurisdiction, para 161[Hereafter *SGS Societe Generale de Surveillance v Pakistan*].

[71] Ibid.

[72] Ibid.

On this basis the tribunal declined jurisdiction with respect to contractual claims submitted by the claimant that did not constitute or amount to breaches of the substantive standards of the treaty.[73] However, subsequently, the approach adopted by the tribunal in *SGS v Pakistan* was rejected in the *SGS v Philippines* tribunal. In *SGS v Philippines* while interpreting the clause ‘‘dispute with respect to investments’ the tribunal stated that the consent clause was ‘‘entirely general allowing for submission of all disputes by the investor against the host state’’.[74] According to the tribunal, it was implausible to suggest that the ‘‘general language in BITs dealing with all investment disputes should be limited because in some investment contracts the parties stipulate exclusively for different dispute settlement arrangements’’.[75]

From the approach of the tribunal in *SGS v Philippines*, it is plausible to state that since most African BITs have expansive consent clauses this implies that the jurisdiction of arbitral tribunals involving African states would extend not only to breach of BIT substantive standards but also to contractual claims. On the other hand, the few African BITs with expansive consent clauses but with limited consent to substantive treaty claims contain umbrella clauses extending treaty protection to contractual claims. For instance, although the Ghana-Benin BIT has wide consent clauses but limited to substantive treaty claims, it does contain an umbrella clause that suggests consent to disputes arising out of contractual claims. Specifically, Article 3(3) provides as follows; ‘‘each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party’’.[76]

A similar provision is stipulated in article 13 of the Netherlands-Ghana BIT which reads as follows ‘‘each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals of the other contracting Party’’.[77] It is generally accepted that the inclusion of umbrella clauses in BITs elevates contractual obligations between host states and

[73] Ibid para 162.

[74] Ibid para 131.

[75] Ibid para 134.

[76] Article 3(3) of the Ghana-Benin BIT.

[77] Article 13 of the Netherlands-Ghana BIT.

investors to the level of treaty violations.[78] Conclusively, the wording of the vast majority of consent to arbitration clauses stipulated in African BITs offer arbitral tribunals jurisdiction over both substantive treaty obligations as well as contractual violations related to investments. Moreover, even African BITs with broad but narrow consent to jurisdiction clauses contain umbrella clauses that extend the jurisdiction of arbitral tribunals to contractual claims. This suggests therefore that consent clauses in African investment treaty practice cover both substantive treaty obligations as well as contractual claims.

5.2.2 Procedural Restrictions

Although all dispute settlement provisions contained in African BITs consent to international arbitration, this is not without conditions that must be followed before commencing arbitration. The practice among most African states requires that foreign investors before resorting to arbitration must initially attempt to resolve the dispute amicably through negotiations.[79] This is illustrated for example in article 7 of the Sweden-Tanzania BIT which provides as follows 'any dispute concerning an investment between an investor of one contracting party and the other contracting party shall, if, possible be settled amicably.'[80] African BITs generally incorporate a minimum time frame providing for duration of time negotiations must take before aggrieved foreign investors can resort to international arbitration.[81] The required time frame varies but typically the time ranges between three to six months.[82] However, predominately the vast majority of African BITs require the lapse of 6 months before resorting to international

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[78] Peter Muchlinski, Federico Ortino and Christoph Schreuer, *The Oxford Handbook of International Investment Law* (OUP 2008) 839. A detailed discussion of umbrella clauses is beyond the scope of this work.

[79] See for example Article 8 of the United Kingdom-Tanzania BIT, Article 9 of the Mauritius-Ghana BIT, Article 10 of the India-Ghana BIT, Article 7 of the United States-Congo BIT, Article 10 of the Belgium Rwanda BIT, Article 10 of the Denmark-Ghana BIT, Article 24 of the United States-Rwanda BIT, Article 9 of the Finland-Tanzania BIT and Article 8 of the United Kingdom-Tanzania BIT.

[80] Article 7 of the Sweden-Tanzania BIT; see also Article 9 Ghana-Mauritius BIT, Article 8 of the United Kingdom-Tanzania BIT, Article 9 of the India-Ghana BIT, Article 10 of the Denmark BIT, Article 9 of the Finland-Tanzania BIT and Article 8 of the United Kingdom-Kenya BIT.

[81] Ibid

[82] Specifically for African BIT providing three months period see Article 7 of the Malaysia-Ghana BIT, Article 8(3) of the United Kingdom-Kenya BIT, Article 9(2) of the Denmark-Tanzania, Article 10(1) of the United Kingdom-Ghana BIT, Article 8(3) of the United Kingdom-Congo BIT, Article 9(2) of the Finland-Tanzania BIT and Article 10(1) of the Denmark-Ghana BIT.

arbitration.[83] A good example of such provisions and this basically appears in most African BITs is article 8 of the Ghana-Mauritius BIT that reads as follows:

> If the dispute cannot be settled through negotiations within *six months*, either party to the dispute shall be entitled to initiate judicial action before the competent court of the Contracting Party in whose territory of investment was made or it may be submitted to an international arbitral tribunal established by both parties (emphasis added).

It should also be stressed that a number of African BITs do not contain any time limitations as illustrated in article 9 of the Netherlands-Tanzania BIT which provides that, ''Each Contracting Party hereby consents to submit any legal dispute arising between that Contracting Party and an investor of the other contacting Party concerning an investment of that investor in the territory of the former Contracting Party to the International Centre for the Settlement of Investment Disputes by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States....''.[84] It is prudent to stress that for African BITs containing no cooling off periods, aggrieved foreign investors have the discretion to directly institute international arbitration without necessarily having to wait for any waiting period. Furthermore, some African BITs as illustrated under article 10 of the Belgium-Cameroon BIT do not only require the lapse of 6 months but also require written notification accompanied by sufficiently detailed memorandum before commencing disputes.[85] Lastly, the majority of African BITs offer aggrieved foreign investors the option of either pursuing claims through local courts or international tribunals upon the lapse of the cooling off period.[86]

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[83] African BITs providing for 6 month waiting period include the following Article 7 (4) of the United States-Congo BIT, Article 7(3) of the United States-Cameroon BIT, Article 9(1) of the Ghana-Benin BIT, Article 10 (2) of the Belgium-Cameroon BIT, Article 8 (2) of the Egypt-Ghana BIT, Article 8 (4) of the Mauritius-Ghana BIT, Article 24(3) of the United States-Rwanda BIT, Article 8(3) of the Korea-Congo BIT, Article 9(1) of the Ghana-Guinea BIT, Article 9 (2) of the Netherlands-Ghana BIT, Article 10 (2) of the Belgium-Cameroon BIT, Article 9 (2) of the India-Ghana BIT and Article 7(2) of the Sweden-Tanzania BIT.

[84] Article 9 (1) of the Netherlands-Tanzania BIT.

[85] See also Article 10(4) of the Belgium-Rwanda BIT.

[86] For instance see inter alia Article 9(2) of the India-Ghana BIT, Article 9 (2) of the Finland-Tanzania BIT, Article 9(1) of the Ghana-Benin BIT, Article 8 (2) of the Ghana-Egypt BIT, Article 24(3) of the United States-Rwanda BIT and Article 8 (3) of the Mauritius-Ghana BIT.

However, the formulation of African BITs varies with respect to the choice of arbitration for instance; some African BITs stipulate that at first instance the investor should seek to resolve the dispute through domestic courts while other African BITs only mention the option of international arbitration.[87] This is illustrated for example in the Ghana-Mauritius BIT which provides under article 8 that 'if the dispute cannot be settled through negotiations within six months, either party to the dispute shall be entitled to initiate judicial action before the competent court of the Contracting Party in whose territory of investment was made or it may be submitted to an international arbitral tribunal established by both parties.'[88] While article 9(2) of the Netherlands-Ghana BIT simply provides that ''if such disputes cannot be settled…within a period of six months from the date either party to the dispute requested amicable settlement, the dispute shall, by mutual consent, be submitted to international arbitration or conciliation''.[89]

Substantively, the wording of article 8 of the Ghana-Mauritius BIT and that of article 9(2) of the Netherlands-Ghana BIT are not any different because even though the option of domestic courts is not mentioned in the Ghana-Netherlands BIT, nothing compels aggrieved foreign investors from pursuing claims only through international arbitration. However, the most pressing issue in both BITs is not whether aggrieved foreign investors can directly institute international arbitration but whether foreign investors can pursue arbitration without complying with the six month cooling off-period. The answer to this question is not peculiar to African states and indeed the jurisprudence of arbitral tribunals with respect to waiting periods remains conflicting.

For instance the tribunal in *Ronald Lauder v Czech Republic* concluded that the ''requirement of a six-month waiting period in Article VI (3) (a) of the United States-Czech Republic Treaty is not a jurisdictional provision, i.e. a limit set to the authority of the Arbitral Tribunal to decide on the merits of the dispute, but

[87] See for example Article 9(1) of the Ghana-Guinea BIT, Article 7 of the United States-Congo BIT and Article 8 (2) of the Mauritius-Ghana BIT.

[88] Article 8(2) of the Mauritius-Ghana BIT, see also 9 (2) of the Finland-Tanzania BIT, Article 9 (1) of the Ghana-Benin BIT, Article 8 (2) of Egypt-Ghana BIT, Article 24 (3) of the United States-Rwanda BIT and Article 9(2) of India-Ghana BIT.

[89] Article 9(2) of the Ghana-Netherlands BIT.

a procedural rule that must be satisfied by the Claimant''.[90] According to the tribunal even though only 17 days had passed between the time when the letter had been delivered to the Media Committee of the Czech Parliament and the filing of the Notice to Arbitration, evidence presented suggested that the respondent would not have accepted entering into negotiations.[91] In the tribunal's view insisting that the claimant cannot commence proceedings until after 6 months would amount to an unnecessary and overly formalistic approach that does not protect any legitimate interests of the parties.[92] Similarly, the tribunal in *SGS v Pakistan* supported the opinion expressed in *Ethyl Corporation v Government of Canada* where the tribunal concluded that the consultation period should be treated as directory and procedural rather than mandatory and jurisdictional.[93] Particularly, the tribunal rejected the notion that a twelve month consultation period before commencing arbitration is a condition precedent for the vesting of jurisdiction.[94]

However, the tribunal in *Murphy v Ecuador* rejected this line of reasoning and found that ''the requirement that the parties should seek to resolve their dispute through consultation and negotiation for a six-month period does not constitute, as claimant and some arbitral tribunals have stated, "a procedural rule" or a "directory and procedural rule'' which can or cannot be satisfied by the concerned party''.[95] The tribunal reasoned that the six month period is a compulsory requirement and forms a fundamental basis before submitting requests for arbitration under the ICSID arbitral rules.[96] According to the tribunal;

> The purpose of such requirement is that during this ''cooling-off period,'' the parties should attempt to resolve their disputes amicably, without resorting to arbitration or litigation, which generally makes future business relationships difficult. It is not an

[90] *Ronald Lauder v Czech Republic*, UNICTRAL Tribunal Final Award 3 September 2001, para 187[Hereafter *Ronald Lauder v Czech Republic*].

[91] Ibid 188.

[92] Ibid para 190.

[93] *SGS Societe Generale de Surveillance v Pakistan*, para 184.

[94] Ibid.

[95] *Murphy Exploration and Production Company International v Republic of Ecuador*, ICSID Case No. ARB/08/4 Award December 15 2010, para 149 [Hereafter *Murphy Exploration v Ecuador*].

[96] Ibid.

> inconsequential procedural requirement but rather a key component of the legal framework established in the BIT and in many other similar treaties, which aims for the parties to attempt to amicably settle the disputes that might arise resulting of the investment made by a person or company of the Contracting Party in the territory of the another State.[97]

The tribunal in *Burlington v Ecuador* arrived at a similar conclusion. It noted that the six month waiting period starts to run only once an allegation of Treaty breach has been made to the host state.[98] The tribunal found that the claimant had made no allegations of Treaty breach in connection with the indigenous opposition blocks prior to filling its request for arbitration.[99] On this basis the tribunal held that the claims submitted by the claimant were inadmissible because the claimant failed to comply with the six month waiting period, as it should have, before filing the request.[100] The tribunal stressed that the six month waiting period does not impose a formal requirement but rather requires that evidence of some form or another alleging treaty breach must be made.[101] In essence, according to the tribunal, the six month waiting period requires investors to ‘‘inform the host State that it faces allegations of Treaty breach which could eventually engage the host State's international responsibility before an international tribunal’’.[102] The six month waiting period therefore offers the host state the opportunity to be informed of the likely negative consequences that will follow if negotiations fail to produce an amicable settlement.[103]

5.3 Overcoming Consent Restrictions Enunciated in African BITs through Invoking the MFN Clause

The majority of African BITs contain the most-favoured-nation (MFN) provisions similar to article 4 of the Ghana-Benin BIT which provides that ‘‘neither Contracting Party shall in its territory subject investments or returns of nationals

[97] Ibid para 151.

[98] *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No. ARB/08/5 Jurisdiction June 02 2010, para 336.

[99] Ibid.

[100] Ibid.

[101] Ibid para 337.

[102] Ibid para 338.

[103] Ibid.

or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of nationals or companies of any third state''.[104] The MFN clause when incorporated into BITs ensures that investors receive treatment similar to or better than like investors from third party states.[105] In essence therefore, the MFN clause removes discriminatory treatment based on nationality and creates ''a level playing field for investors or investments protected by the treaty''.[106] The applicability of the MFN clause to substantive treaty obligations is unquestionable however whether the MFN clause extends to jurisdictional issues remains debatable.

At the core of this discussion as aptly summarized by Professor Christoph Schreuer concerns the question about whether the MFN clause can be used to bypass consent limitations through relying on another BIT the respondent state has entered into with a third party state that contains favourable dispute settlement procedures.[107] The scope of the MFN clause is not merely of theoretical significance but one with practical consequences which is indeed demonstrated through the growing number of cases and the unsettled jurisprudence. Evidently over the last decade, the scope of the MFN clause has been undeniably one of the most divisive issues in investor-state dispute settlement and indeed this has placed the applicability of the MFN clause at the forefront of controversial issues in investment arbitration.

Historically, prior to the *Maffezini* case, the scope of the MFN clause was not contentious and numerous cases as well as commentators argued against the extension of the MFN clause to jurisdictional matters.[108] Moreover, as noted by Zachary Douglas ''across the hundreds of years of activity of international courts and tribunals leading up to *Maffezini*, there had only been judicial pronouncements against such a device, including the International Court of

[104] Similarly see inter alia Article 11 of the Belgium-Rwanda BIT, Article 3 of the United Kingdom-Congo BIT, Article 3(1) of the Ghana-Egypt BIT, Article 4 (2) of the Ghana-Mauritius BIT, Article 4(4) of the Germany-Burundi BIT, Article 3 (1) of the Finland-Tanzania BIT, Article 4(1) of the India-Ghana BIT and Article 2(7) of the United States-Cameroon BIT.

[105] Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policies and Practices* (OUP 2009) 340.

[106] Ibid.

[107] Peter Muchlinski, Federico Ortino and Christoph Schreuer, *The Oxford Handbook of International Investment Law* (OUP 2008) 852.

[108] Zachary Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails' (2010) 2 *Jnl of Int. Dispute Settlement* 97, 101.

Justice's judgment in the *Anglo-Iranian Oil Company Case* and the British-Venezuelan Mixed Claims Commission's decision in *Aroa Mines*''.[109] The *Maffezini* tribunal dramatically changed settled practice and at the time of writing this thesis opinion remains difficult to reconcile and in some cases misleading. Specifically, the structural differences underpinning the MFN jurisprudence are mainly twofold; on one hand some cases and commentators alike favour a presumption incorporating dispute settlement within the scope of the MFN clause while another line of cases proceed from the presumption that dispute settlement cannot be extended through the backdoor of the MFN clause unless the intention of contracting parties is manifestly clear.[110]

The question about whether the MFN clause extends to dispute settlement mechanism is equally relevant to African states considering the generality of MFN clauses contained in African BITs. Specifically, with respect to African treaties virtually all MFN clauses contained in African BITs are generic in nature and commonly make reference to 'treatment' without providing further clarification about whether 'treatment' extends to dispute settlement.[111] Typically, the MFN clause in African BITs except for wording variations usually follow the formulation of article 4 of the Mauritius-Ghana BIT which reads as follows; ''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''.[112]

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[109] Ibid.

[110] For the growing body of jurisprudence and varying opinions see *Emilio Augustin Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7 January 25 2000, [Hereafter *Maffezini v The Kingdom of Spain*]; *Gas Natural v Argentina*, ICSID Case No. ARB/03/10 June 17 2005 [Hereafter Gas *Natural v Argentina*]; *National Grid v Argentina*, UNCITRAL June 20 2006, [Hereafter *National Grid v Argentina*], *Siemens v Argentine*, ICSID Case No. ARB/02/8) August 2004 [Hereafter *Siemens v Argentina*], *Salini v Jordan*, *Plama v Bulgaria*.

[111] See for instance Article 2 United States-Cameroon BIT; Article 3(2) of the Netherlands-Ghana BIT; Article 3 of the Egypt-Ghana BIT; Article 4(2) of the Mauritius-Ghana BIT; Article 11 of the United States-Congo BIT; Article 4 of the Denmark-Ghana BIT; Article 3 of the Ghana-Malaysia BIT; Article 3(4) of the Germany-Tanzania BIT; Article 4 of the Ghana-Benin BIT; Article 3(2) of the Bulgaria-Ghana BIT and Article 11 of the Cameroon-Belgium BIT.

[112] See also Article 4 of the Ghana-Benin BIT; Article 2 of the United States-Cameroon BIT; Article 3 of the Egypt-Ghana BIT; Article 3(2) of the Bulgaria-Ghana BIT; Article 2 of the United States-Congo BIT; Article 3(2) of the Netherlands-Ghana BIT; Article 3(2) of the Netherlands-Tanzania BIT and Article 4 of the India-Ghana BIT.

Aside from this wording, other African BITs follow the MFN formulation stipulated in article 3(2) of the United Kingdom-Tanzania BIT which 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''.[113]

Although the wording of the two common MFN formulations articulated in African treaty practice are theoretically different, substantively both provisions make little headway in clarifying whether dispute settlement falls within the scope of the MFN clause. Quite apart from these two common MFN clauses, the third and seldom used MFN formulation is article 3 of the United Kingdom-Kenya BIT which provides as follows:

> Nether contracting Party shall in its territory subject nationals of 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. For the *avoidance of doubt it is confirmed that the treatment* provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement (emphasis added).

Unlike the two common MFN clauses found in African BITs, the wording of article 3 of the United Kingdom-Kenya BIT is exceptional because it removes any doubts about the intention of contracting states to include dispute settlement within the scope of the MFN clause. Furthermore, because the intention of contracting states is manifestly clear i.e. dispute settlement falls within the scope of the MFN clause, arbitral tribunals do not have the discretion to second-guess the intention of contracting states. Having said that, since majority of MFN clauses included in African BITs fall within the two formulas mentioned above, the MFN clause stipulated in most African BITs can potentially although questionably be interpreted as extending to dispute settlement mechanisms.

[113] For instance see also Article 3 of the United Kingdom-Cong BIT, Article 3 of the Germany-Burundi BIT, Article 4 of the United Kingdom-Ghana BIT, Article 4 of the Ghana-Benin BIT, Article 3 of the Germany-Kenya BIT and Article 4 of the Denmark-Ghana BIT.

In addition, as noted above, consent to arbitration provisions in African BITs usually contain different consent restrictions depending on the asymmetrical relationship of contracting parties during the negotiation process of the BIT. To this end therefore, an expansively interpreted MFN clause can further upset the delicate balance in the relationship between foreign investors and African states through negatively interfering with previously agreed consent restrictions.[114] For instance, the Netherlands-Tanzania BIT does not contain any waiting period while the Sweden-Tanzania BIT contains a waiting period of six before instituting arbitral proceedings. Equally important, the MFN clause contained in both BITs is generally worded to cover any treatment accorded to investments. It is unclear from the wording of this MFN clause and indeed many other African BITs whether treatment extends both to the jurisdictional provisions as well as to substantive provisions. On the basis of this example, it would not be unsurprising for a Swedish foreign investor to invoke the Sweden-Tanzania MFN clause so as to benefit from more favourable dispute settlement conditions contained in the Netherlands-Tanzania BIT which essentially permits direct arbitration without requiring any waiting period. In essence, through invoking the Netherlands-Tanzania MFN clause, the Swedish foreign investor would be seeking to bypass the six months waiting period contained in the Sweden-Tanzania BIT.

The scope and complexities thereof of the MFN clause was extensively dealt with in *Maffezini v Spain* where the claimant sought to bypass restrictions contained in the Argentine-Spain BIT which provided domestic courts with the opportunity to deal with disputes for a period of eighteen months before disputes can be submitted to arbitration.[115] To succeed with the jurisdictional question, the claimant invoked article 10(2) of the Chile-Spain BIT which accorded foreign investors the right to pursue arbitration upon the lapse of six month waiting period. During the proceedings, the claimant argued that investment claims of Chilean investors in Spain are treated more favourable than those of Argentinean investors which according to the claimant breached the spirit and purpose of the MFN clause

[114] Apart from Article 3(3) of the United Kingdom-Kenya BIT, none of the reviewed MFN clauses contained in African BITs explicitly mention the applicability of the MFN clause to dispute resolution.

[115] *Maffezini v Spain*, para 39.

In the claimant's view, the MFN clause contained in the Argentine-Spain BIT offered investors the option of submitting disputes without prior reference to domestic courts provided such provision is contained in third party investment treaties.[116] The respondent rejected these claims arguing that the MFN clause serves the purpose of avoiding discrimination and such discrimination is only related to material economic treatment and not procedural matters.[117] In essence, the respondent was of the view that the scope of the MFN clause is limited to substantive aspects of treatment accorded to investors and does not extend to procedural or jurisdictional matters.[118] The tribunal concurred with the claimant and opined that 'dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce.'[119] In the tribunals view, ''if a third party treaty contains provisions for the settlement of disputes that are more favourable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favoured nation clause as they are fully compatible with the *ejusdem generis* principle''.[120] In conclusion the tribunal held that;

> …the requirement for the prior resort to domestic courts spelled out in the Argentine-Spain BIT does not reflect a fundamental question of public policy considered in the context of the treaty, the negotiations relating to it, the other legal arrangements or the subsequent practice of the parties. Accordingly, the Tribunal affirms the jurisdiction of the Centre and its own competence in this case in respect of this aspect of the challenge made by the Kingdom of Spain.[121]

Although the *Maffezini* tribunal ruled in favour of the claimant, in *obiter* the tribunal stresses the limited application of MFN clauses to dispute settlement procedures. The tribunal particularly detailed a number of scenarios where public policy concerns demand that the application of the MFN clause to dispute settlement procedures should be restrained. For instance the tribunal noted that ''if one contracting party has conditioned its consent to arbitration on the exhaustion of local remedies, which the ICSID Convention allows, this

[116] Ibid para 40.
[117] Ibid para 42.
[118] Ibid para 41.
[119] Ibid para 54.
[120] Ibid para 56.
[121] Ibid para 64.

requirement could not be bypassed by invoking the most favoured nation clause in relation to a third-party agreement that does not contain this element since the stipulated condition reflects a fundamental rule of international law''.[122]

Furthermore, the tribunal noted that if a BIT provides for a particular arbitration forum such as ICSID, this option could not be changed merely through invoking the MFN clause so as to refer the dispute to another arbitration system.[123] In addition, the tribunal emphasized that ''if the contracting parties have agreed to a highly institutionalized system of arbitration that incorporates precise rules of procedure…it is clear that neither of these mechanisms could be altered by the operation of the clause because these very specific provisions reflect the precise will of the contracting parties''.[124] Against this backdrop, the reasonable inference that can be drawn from the *Maffezini* decision is that the tribunal did not entirely support the applicability of the MFN clause to dispute settlement procedures. In essence, although the tribunal left room for the MFN clause to apply to dispute settlement procedures, the tribunal was conscious of the inherent limitations placed upon the MFN clause. Additionally, the tribunal's approach suggests that the MFN clause applies in narrowly circumscribed circumstances and should not be construed to be of general applicability to dispute settlement procedures.

Subsequently, the *Siemens v Argentina* tribunal did not only concur with the *Maffezini* decision but went even further and expansively interpreted the applicability of MFN clause to dispute settlement procedures. In rejecting the respondent's argument that the MFN clause does not apply to jurisdictional matters such as dispute settlement, the tribunal stressed that access to dispute settlement is part of the protection offered under treaties.[125] This according to the tribunal means that treatment of foreign investors and investment is part of the advantage accessible through the MFN clause.[126] The respondent argued unsuccessfully of the difference between the MFN clause in the Spain-Argentina

[122] Ibid para 63.
[123] Ibid.
[124] Ibid.
[125] *Siemens v Argentina*, para 102.
[126] Ibid.

BIT which refers to ‘‘all matters subject to this agreement’ and the Argentina-Germany BIT which refers only to ‘treatment’’.[127]

On this basis the respondent postulated that the *Maffezini* decision should be interpreted within its specific context because the Argentina-Germany MFN clause was different from the Spain-Argentina MFN clause.[128] However, the tribunal was not persuaded and reached the conclusion that the phrase ‘all matters subject to this agreement’ and ‘treatment’ are sufficiently wide enough to include settlement of disputes.[129] In essence, the tribunal was of the view that provided the MFN clause does not explicitly exclude dispute settlement procedures then undoubtedly dispute settlement falls within the scope of the MFN clause.

Departing from this line of reasoning, the tribunal in *Plama v Bulgaria* reached a different conclusion and rejected the *Maffezini* approach. According to the tribunal, dispute settlement provisions are negotiated and included into specific treaties to achieve specific objectives.[130] This therefore means that incorporating dispute resolution provisions from other treaties negotiated in an entirely different context would defeat the intention of contracting states.[131] In the tribunal’s view the self-adaptation of an MFN clause to dispute settlement provisions creates the impression that investors have the option of picking and choosing provisions from various BITs.[132] The tribunal was of the opinion that ‘‘if that were true, a host state which has not specifically agreed thereto can be confronted with a large number of permutations of dispute settlement provisions from the various BITs which it has concluded’’.[133]

In the tribunal’s opinion this could create a chaotic situation that is ‘‘actually counterproductive to harmonization and cannot be the presumed intent of Contracting Parties’’.[134] Unlike the *Siemens* tribunal, the *Plama* tribunal

[127] Ibid para 103.
[128] Ibid.
[129] Ibid.
[130] *Plama v Bulgaria*, para 207.
[131] Ibid.
[132] Ibid para 219.
[133] Ibid.
[134] Ibid.

favoured a presumption against the incorporation of dispute settlement procedures into the MFN clause unless the treaty explicitly includes dispute settlement. According to the tribunal, ‘‘an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them’’.[135] Against this background, the tribunal concluded that there was no basis on which the MFN clause contained in the Bulgaria-Cyprus BIT could be interpreted as providing consent to submit disputes under other BITs Bulgaria has concluded other than the Bulgaria-Cyprus treaty.

Similarly, the tribunal in *Salini v Jordan* dealt with the question of whether the scope of the MFN clause extends to dispute settlement. The tribunal observed that the MFN restriction expressed in *Maffezini* may in practice be difficult to apply thereby contributing more uncertainties to the risk of treaty shopping.[136] According to the tribunal, treaties address this issue differently, for example some treaties expressly provide that the MFN obligation extends to provisions of dispute settlement while others limit the scope of the MFN clause to substantive matters.[137] The tribunal noted there was no evidence from either the practice of Jordan or the intention of state parties to the effect that the parties intended to have the MFN clause apply to dispute settlement.[138] On the contrary according to the tribunal the intention of the state parties was to ‘‘exclude from ICSID jurisdiction contractual disputes between an investor and an entity of a State Party in order that such disputes might be settled in accordance with the procedures set forth in the investment agreements’’.[139] On the basis of the evidence submitted, the tribunal concluded that the dispute should be settled through the Jordan-Italy BIT and further held that the MFN clause does not apply to dispute settlement procedures.

Lastly, in a more recent case supporting this line of reasoning, *Wintershall v Argentina*, the claimant sought to invoke the MFN clause contained in Article 3

[135] Ibid para 223.

[136] *Salini v Jordan*, para 115.

[137] Ibid para 116.

[138] Ibid para 118.

[139] Ibid.

of the Argentina-Germany BIT in order to bypass the requirements of article 10(2) of the BIT. Article 10(2) provided *inter alia* that international arbitration may be resorted to if ‘‘(i) the court has not rendered a final decision within eighteen months as from the initiation of the court proceeding or (ii) even upon a final decision rendered by a court, if the parties are still under dispute…’’.[140] The tribunal noted that dispute resolution clauses are specific provisions reflecting the will of contracting parties and cannot be altered by the MFN clause unless such an intention is explicitly stated by the contracting parties.[141] The tribunals further stressed that the requirements of article 10(2) are fundamentally jurisdictional and not simply procedural and as such can only be dispensed with by ‘‘some legitimate extension of rights by means of the operation of the MFN clause’’.[142]

Even then, according to the tribunal, the MFN clause must permit the interpreter of the treaty to conclude that ‘‘this was the clear and unambiguous intention of the Contracting Parties’’.[143] The tribunal further rejected the assertion that contracting states included the term ‘treatment of investment’ with the intention of covering both dispute resolution as well as any other treatment accorded to investors.[144] In the tribunal’s view such an interpretation would be erroneous because the intention of contracting states is unclear and cannot easily be adduced from the wording of the MFN clause.[145] In sum the tribunal concluded that ‘‘it is difficult to say that when the Contracting Parties used the word “treatment” in Article 3 they “had in mind” the dispute resolution clause in Article 10’’.[146]

Comparatively, between the two approaches discussed above, the present author concurs with the line of cases that reject the presumption against incorporating dispute settlement into the scope of the MFN clause. Moreover,

[140] Article 10(2) of the Argentina-Germany BIT cited in *Wintershall Aktiengellschaft v Argentina Republic*, ICSID Case No. ARB/04/14 Award December 8 2008, para 6 [Hereafter *Wintershall Aktiengellschaft v Argentina Republic*].

[141] Ibid para173.

[142] Ibid para 172.

[143] Ibid.

[144] Ibid para 192.

[145] Ibid para 193.

[146] Ibid.

effective treaty interpretation that reasonably takes into account the object and purpose of BITs and fundamentally the differences between the two competing interests would bear credence to the conclusion that consent to investment arbitration should be squarely within the state's discretionary powers as expressed in the treaty language. Practically, this means that unless the MFN clause clearly includes dispute settlement, arbitral tribunals should refrain from drawing any inference that would interfere with prior consent restrictions imposed by contracting parties. Besides, usurping a state's consent powers through incorporating dispute settlement into the scope of the MFN clause would not only be contrary to the intention of contracting states especially where consent to dispute settlement is not unequivocally stated but also this type of interpretation would be inadmissible under international law.[147] Equally important, the general framework of BITs suggests that when contracting states consent to arbitration such consent is intrinsically limited to the agreement of state parties arrived at during the negotiation process of the treaty.

Evidently, it is during the negotiation process that contracting states agree conditions *ratione personae, ratione materiae, ratione temporis* and *ratione voluntatis* of the treaty.[148] In turn these conditions detail the prerequisites for ''enjoyment of the rights under the treaty, the conditions for the application of the treaty depending on the rules of general international law concerning the consent of the states''.[149] To this end, Professor Bridget Stern in her vigorously dissenting opinion in *Impregilo S.p.A v Argentine Republic* correctly argues that if factors shaping contracting parties previously agreed consent restrictions can be waived through invoking the MFN clause then consent restrictions included in treaties are essentially meaningless.[150] In other words, changing previously agreed consent restrictions between contracting states basically makes contracting parties dependent on the vagaries of other possible treaties entered

[147] Article 31(1) read with article 31(2) of the VCLT provides that '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 light of its object and purpose. The context of the purpose of the interpretation of a treaty shall compromise, in addition to the text including its preamble and annexes.

[148] *Impregilo S.p.A v Argentina Republic*, ICSID Case No. ARB/07/17 Award June 21 2011, Concurring and Dissenting Opinion of Professor Brigitte Stern, para 60.

[149] Ibid.

[150] Ibid para 98.

into by the state.[151] This according to Professor Stern would be unclear consent and tantamount to not including any consent restrictions at all.[152]

In light of the foregoing discussion, it is imperative to note that unless the MFN clause unambiguously includes dispute settlement, incorporating dispute settlement through the operation of the MFN clause would be contrary to the intention of contracting parties. Put differently, foreign investors should only be permitted to import the MFN clause to acquire more favourable dispute settlement provisions of BITs with third states when the circumstances indicate that the state parties to the basic treaty envisaged the MFN clause to apply to dispute settlement.[153] From an equity standpoint and more especially from the perspective of African states, including dispute settlement within the scope of the MFN clause would unfairly imbalance the relationship between African states and foreign investors in particular because during BITs negotiations African states are at the receiving end. As seen from the sections of African BITs above, African treaties contain broadly worded MFN clauses suggesting that African states are perilously predisposed to the danger of disruptive treaty shopping.

In addition, the wording of African MFN clauses interpreted without purposively balancing the interests of African states *vis-à-vis* the interests of foreign investors could potentially result in foreign investors disregarding consent restrictions imposed by African states which would inevitably lead to disruptive treaty shopping. Given the fact that African states are capital recipients, it is reasonable to assume that during the negotiation process of the treaty, the dispute settlement and MFN clause were negotiated to favour foreign investors. Clearly, adding further technicalities through a catch all MFN clause would dispense the minimum consent restrictions African states successfully negotiated and included into the dispute settlement clause. Finally, for all practical purposes, the MFN clause like other treaty provisions such as expropriation and fair and equitable treatment evidence an apparent pattern that African states have undertaken expansively worded BITs which have a direct impact on the ability of African states to make legitimate policy.

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[151] Ibid.

[152] Ibid.

[153] Stephen Fietta, 'Most Favoured Nation Treatment and Dispute Resolution under Bilateral Investment Treaties: A Turning Point?'(2005) 8 *Int'l Arb.L.Rev* 131, 138.

5.4 Alternative Forms of Consent in African Treaty Practice

Aside from consent to dispute settlement clauses contained in African BITs, the majority of African states have also consented and incorporated dispute settlement clauses into their domestic laws and procedures regulating foreign investors.[154] Typically, the vast majority of African states include in their foreign investment protection laws or codes explicit consent to the resolution of foreign investment disputes either through the ICSID framework or under UNCITRAL arbitration rules. In addition, African states also normally include national courts as an alternative forum to settle investment claims. Given this, foreign investors have the discretion to choose from any of the three available dispute resolution forums; however the majority of African investment laws further make provision for national courts to play a vital role when foreign investors and the respondent state do not mutually agree the arbitration forum within which the dispute should be arbitrated.[155]

Generally, African foreign investment protection laws usually include a clause similar to article 34 of the Rwanda Investment Code which reads as follows ''in case parties to a dispute do not agree on the mode or forum for arbitration, the party aggrieved by the possession or acquisition of his or her property, or the amount and compensation payable, or in respect of any other matter relating to the investment enterprise, may sue to a competent Rwandan court for the decision to be rendered''.[156] In addition, some foreign investment legislation of African states include a provision offering foreign investors at the time of registering the business enterprise the possibility of acquiring special arbitration

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[154] See for instance Article 32 of the Rwanda Law Relating to Investment and Export Promotion and Facilitation (Law No. 26/2005 of 17/12/2005) [Hereafter Rwanda Investment Act]; Article 23(2) of the Tanzania Investment Act (2 No.26, 1997) [Hereafter Tanzania Investment Ac]; Article 38 of the Democratic Republic of Congo Investment Code (Law No. 00/4/2000 of 21 February 2002) [Hereafter Democratic of Congo Investment Act]; Article 29 of the Ghana Investment Promotion Centre Act (1994, Act 478) [Hereafter Ghana Investment Act]; Article 17 of the Burundi Investment Code (Law No. 1/24, 10 September 2008) [Hereafter Burundi Investment Act]; Article 11 of the Republic of Cameroon Investment Charter (Law No. 2002/004 of April 19, 2002) [Hereafter Cameroon Investment Act].

[155] See particularly Article 32 of the Rwanda Investment Act and Article 23 of the Tanzania Investment Act.

[156] Article 34 of the Rwanda Investment Act. See also article 29 (3) of the Ghana Investment Act which makes special provision for the investor's choice of arbitration to prevail in case parties to the dispute do not reach an amicable resolution on the choice of arbitration.

procedures.[157] The undertakings included in special arbitration procedures acquired by foreign investors as part of incentives for acquisition and establishment of business enterprises are contentious especially when the certificate of incentives contains unrestricted rights to international arbitration beyond the consent restrictions contained in national legislation and other international treaties.[158]

Similarly, just like in African BITs, foreign investment laws of African states place a high premium on other alternative dispute resolution methods that can resolve investment disputes amicably through negotiations.[159] However, dispute resolution clauses contained in African national investment laws are vaguely drafted and do not provide any specificities with respect to the waiting period required before commencing international arbitration.[160] In essence, the envisaged negotiations are of little substantive value because foreign investors can directly institute arbitration without waiting for the lapse of any cooling off period. Also, in some African countries there are substantive difference between the procedures for initiating investment claims contained in BITs and procedures envisaged in national investment laws. Indeed, sometimes reconciling the consent restrictions stipulated in national investment laws and related but different consent conditions contained in BITs has resulted in arbitral disagreements.[161]

The lack of harmonization between national investment laws and BITs has sometimes resulted in creative foreign investors taking advantage of such weakness so as to benefit from the most favourable treatment which is usually at the detriment of African states.[162] For example in *Biwater*, the claimant with the intention of benefiting from the most favourable treatment provided for under the Tanzania National Investment Act, the United Kingdom-Tanzania BIT

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[157] Article 33 of Rwanda Investment Act; see also Article 23(2) of the Tanzania Investment Act and Article 38 of the Democratic Republic of Congo Investment Act.

[158] See for instance *Biwater v Tanzania*, para 329-337.

[159] See article 23 (2) of the Tanzania Investment Act; Article 38 of the Democratic Republic of Congo Investment Act; Article 29(1) of the Ghana Investment Act; Article 17 of the Burundi Investment Act and Article 32 of the Rwanda Investment Act.

[160] Ibid.

[161] See particularly, *Biwater v Tanzania*, para 329-337.

[162] See for instance *Biwater v Tanzania*, para 241-277 and also see *Gustav F W Hamester v Republic of Ghana*, ICSID Case No. ARB/07/24 Award 18 June 2010, para 62-79.

as well as the Certificate of Incentive invoked all the three consent to arbitration clauses contained therein. Although the respondent successfully demonstrated that the consent to arbitration clause under the Tanzania National Investment Act and the certificate of incentives did not offer foreign investors the right to refer investment disputes directly to ICSID, this illustrates the dubious ways through which foreign investors can take advantage of weakness in African national investment laws.

Undoubtedly such differences in the arbitration requirements between BITs and national investment laws epitomizes the thinking of an African contracting party at the time of concluding the BIT and supports the argument that African states indeed undertake BITs expecting increased foreign investment flows. A case in point for instance is section 23.2 of the Tanzania Investment Act and article 8(1) of the United Kingdom-Tanzania BIT which contains different procedures for initiating investment claims. Section 23.2 of the Tanzania Investment Act (TIA) provides as follows;

> A dispute between a foreign investor and the Centre or the Government in respect of a business enterprise which is not settled through negotiations may be submitted to arbitration in accordance with any of the following methods as may be *mutually agreed by the parties*, that is to say-(a) in accordance with arbitration laws of Tanzania for investors; (b) in accordance with the rules of procedure for arbitration of the International Centre for the Settlement of Investment Disputes; (c) within the framework of any bilateral or multilateral agreement on investment protection agreed to by the Government of the United Republic and the Government of the Country the Investor originates (emphasis added).

In stark contrast to section 23.2 described above, article 8 (1) of the United Kingdom-Tanzania BIT reads as follows;

> Each Contracting Party *hereby consents to submit* to the International Centre for the Settlement of Investment Disputes (the "Centre") for settlement by conciliation or arbitration under the [ICSID Convention] any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former (emphasis added).

The interpretation of these two provisions came under scrutiny in *Biwater* where the respondent argued that the tribunal lacked jurisdiction because section 23.2

was not a unilateral standing offer to submit disputes before ICSID tribunals. In the respondent's view an accurate interpretation of section 23.2 required a mutually agreed arbitral forum between investors and the government before the submission of investment disputes.[163] The tribunal concurred with this line of reasoning postulating that the natural reading of this section indeed suggested that although disputes may be referred to ICSID tribunals this required subsequent agreement between the parties.[164]

Practically, according to the tribunal section 23.2 was different from the provision of article 8(1) of the BIT which contained a unilateral standing offer that simply required the investor to provide written consent to conciliation or arbitration.[165] In essence, according to the tribunal the consent clause in section 23.2 required the investor not only to consent to the arbitration forum but also to mutually agree with the government the chosen arbitration forum.[166] Equally, important the tribunal noted that unlike article 8, section 23.2 affords the state the possibility of concluding specific types of dispute resolution agreements with foreign investors without the raise of internal issues such as *ultra vires*.[167] On the basis of the facts, the tribunal found that it lacked jurisdiction on claims based on the TIA because the claimant and respondent did not mutually agree about the arbitration forum before submitting investment claims to the ICSID tribunal. Regarding the BIT, the tribunal contended that it had jurisdiction over investment claims submitted with respect to alleged violations of the BIT.[168]

The differences in consent restrictions between the Tanzania Investment Act and the United Kingdom-Tanzania BIT are not peculiar to Tanzania. Similar provisions are included in the Rwanda Investment Code and BITs undertaken by Rwanda as well as in the Ghana Investment Code Act and BITs concluded by Ghana. For instance, the Rwanda Investment Code despite approvingly consenting to arbitration, foreign investors and the government must agree on the arbitration forum before instituting arbitral proceedings. This provision

[163] *Biwater v Tanzania*, para 300-301.
[164] Ibid para 329.
[165] Ibid.
[166] Ibid para 330.
[167] Ibid para 331.
[168] Ibid para 351.

differs with Rwanda BITs that express consent to arbitration without requiring subsequent consent from the government about the arbitration forum. Moreover, just like the Tanzania Investment Act, the Rwanda Investment Code also mandates the use of domestic courts in the event that there is no consensus between the government and foreign investor about the arbitration forum. However, it remains doubtful that foreign investors faced with disagreement about the arbitration forum would refer the investment disputes to domestic courts. More so, recourse to domestic courts seems superfluous considering that more favourable treatment consent conditions are provided for in BITs. Finally, the requirement of 'mutually agreed arbitral forum' is not a uniform standard across Africa. Indeed, other African countries such as Congo and Burundi in their national investment codes explicitly consent to foreign investors determining the arbitration forum without seeking consent from the state parties.[169]

5.5 Conclusion

As previously noted, the treaty practice of modern African treaties to acquiesce to investment arbitration demonstrates remarkable evolution in the attitude of African states towards rules of international investment law. Obviously in principle consent to investment arbitration as embedded within African investment treaty practice is a positive step towards creating dependable dispute resolution systems through which foreign investment disputes are neutrally settled. However, like all legal provisions, the devil is in the details and as the foregoing discussion has shown the majority of African consent clauses are manifestly problematic. In part this is because the scope of African consent clauses is expansive and as a result the wording has the propensity of extending not only to breach of substantive treaty standards but also to purely contractual undertakings. Evidently, it is doubtful that African states during treaty negotiations intended this to be the desired consequence. Although this was not the desired consequence, the reality is African consent clauses textually interpreted undoubtedly cover not only breach of substantive treaty standards but also contractual claims.

[169] Article 38 of the Democratic Republic of Congo Investment Act and Article 17 of the Burundi Investment Act.

Moreover, even in instances where some African BITs contain circumscribed consent clauses the breadth of other treaty provisions contained therein such as the umbrella clause unambiguously extend the jurisdiction of arbitral tribunals to both substantive treaty claims and contractual claims. The wording of consent clauses aside, MFN clauses contained in majority of African BITs are equally expansive and this has the danger of undermining legitimate policy making. Moreover, it should further be stressed that the MFN clause of virtually all African states do not clearly delimit the scope of the MFN clause which inherently makes it possible for foreign investors to bypass previously agreed consent restrictions. In light of these considerations, arbitral tribunals should take caution not to overtly extend the scope of the MFN clause to cover dispute settlement mechanisms especially when the intention of African states is not manifestly clear.

Chapter 6

Conclusion

This thesis set out to situate the investment treaty practice of African states and examine whether African treaty practice conforms or differs from general investment treaty practice. The analysis was inspired by the fact that African states have traditionally resisted the internationalisation of foreign investment rules but have subsequently concluded BITs containing far-reaching treaty provisions. With this in mind, the thesis attempted reviewing the investment treaty practice of African states which by and large is missing from general discourse on investment law. Through reviewing the treaty practice of African states, the thesis also sought to explore the extent to which the emerging investment treaty practice interferes or restrains legitimate policy making of African states. In so doing, the thesis raises awareness to African specific concerns with respect to the international law of foreign investment; the controversy entrenched in substantive treaty standards and the suitability of treaties concluded by African states.

The thesis observes that there has been a paradigm shift in the investment treaty practice of African states. Specifically, the present treaty practice of African states suggests that African states have retreated from previously held positions augmenting for state sovereignty to a more peculiar position of acquiescence. The current state of African investment treaty practice is all surprising when contrasted with the fierce resistance of African states towards the internationalisation of foreign investment rules in the last century. Moreover, the attitude of African states is astonishing considering that African states have historically been active and relevant players in shaping foreign investment rules. As demonstrated in the thesis, Africa's contribution to the evolution of international investment law dates back even before colonialism but was more evident in the period immediately after colonialism. In essence, the thesis shows that historically apart from the colonial era which substituted African sovereignty with that of European colonial masters, African states have been relevant contributors to the formulation of foreign investment rules.

Africa's contribution is evidently illustrated in the deliberations of the Non-Aligned Movement, Africa's role in the creation of specialised institutions such as UNCTAD and Africa's strategic use of her numerical strength to sponsor numerous United Nations Resolutions and Declarations. From the historical evolution, the thesis concludes that without the active participation of African leadership within the NAM, the numerous United Nations Declarations and Resolutions of the 60's and 70's would not have successfully been adopted in the United Nations General Assembly. The overarching importance of Africa's numerical strength and influence in the passage of the numerous declarations and resolutions is more evident considering the resistance developed countries mounted against these resolutions. The thesis also demonstrated that Africa's support for the rhetoric of favourable foreign investment rules and principles of sovereignty did not end at the United Nations General Assembly. As the United Nations General Assembly discussed the numerous resolutions, many African states imported this rhetoric at the national level leading to the implementation of nationalisation and forced confiscation of foreign property. Also, at the national level, African states introduced sweeping changes to national investment laws that emphasised principles of national ownership. In fact, as noted in the thesis throughout decolonised African states, of all existing post-colonial law, investment laws were the first set of laws to undergo changes.

Based on the foregoing, one would have expected African states to remain active and relevant players. However, this has not been the case and indeed this is surprising. Given the present state of African treaty practice, it is unclear whether the previously active participation of African states in demanding for a new international economic order was out of naivety. However, what is remarkably apparent about the present state of African investment law is that African states have regressed from two contradictory extremes. Presently, African states have not only conformed to general investment treaty practice but also retreated to the position of passive observers. The discussion in chapters 2-5 clearly shows that African treaty standards are similar to general treaty provisions elsewhere. In essence, African BITs do not offer any nuance and generally follow existing BITs. Moreover, as the investment regime witnesses increased resistance from Latin American countries, the African continent with the exception of South Africa has remained relatively silent. Under normal circumstances, given the previous practice of African states, one would have expected the African continent to be at the forefront of debates questioning the present status quo.

The analysis in chapters 2-5 demonstrates that there really are not many differences between BITs concluded by African states and other existing BITs. Similarly, within the African continent majority of BITs concluded by African states have more similarities than differences. In essence, although some African BITs contain slight variations such differences are substantively insignificant. Particularly, the following can be stressed about the treaty standards of African BITs reviewed in this thesis; chapter 2 demonstrated that the majority of African BITs define the concept 'investment' broadly to include every kind of asset. This is usually followed with a broad based asset definition containing a non-exhaustive list of examples of assets African states consider as investments. However, it should be stressed that through concluding BITs with a broad based asset definition, African states have basically extended treaty protection to virtually all assets which could include insignificant assets that have little impact on the economic development of the respective African state.

Similarly, although there variations and wording differences in expropriation clauses contained in African BITs such differences are inconsequential. As the review in chapter 3 illustrated, some African countries have expropriation provisions that do not explicitly capture indirect expropriation but contain phrases such as measures tantamount to expropriation which are functionally equivalent to indirect expropriation. Perhaps more striking is the fact that majority of African expropriation clauses are generic and do not delimit the contours of indirect expropriation. The resulting consequences for African states is that predominantly arbitral tribunals apply the sole effect test which has the propensity to constrain African countries from pursuing regulatory measures even in the public interest.[1] Also, since African BITs do not precisely articulate the meaning of expropriation, the discretion to decide whether measures amount to indirect expropriation rests entirely within the discretion of arbitral tribunals. As chapter 3 demonstrated, this ambiguity has significant consequences for African states because some tribunals disregard the intention

[1] See chapter 3 for discussion on the different arbitral approaches.

and purpose of government measures and instead place a premium on the effect of the measure towards the investors' property rights.

Aside from the expropriation clause, majority of African countries have concluded BITs offering foreign investors the right to fair and equitable treatment. However, as discussed in chapter 4, the majority of African BITs do not define the meaning of fair and equitable treatment. With the exception of the United States-Rwanda BIT, the obligation of fair and equitable treatment in the majority of African BITs is overly broad and accords arbitral tribunals the discretion to determine the scope and substantive content of the standard. Lastly, African states have concluded BITs with problematic dispute settlement clauses. As the discussion in chapter 5 showed, the wording of the consent to arbitration clause contained in majority of African BITs has the propensity of extending not only to breach of substantive treaty standards but also to purely contractual undertakings. Similarly, the scope of the MFN clause encapsulated in majority of African BITs is expansive and vaguely worded. As chapter 5 illustrated, the failure of African states to unambiguously limit the scope of the MFN clause has the danger of empowering foreign investors to bypass previously agreed consent restrictions.

The discussion in chapters 2-5 showed that when interpreting treaty standards arbitral tribunals have in some instances taken contradictory and expansive approaches. Given the array of inconsistent decisions and the vagueness of African treaty standards, it is imperative that African states should reconsider changing from the present attitude of passive observers to more relevant and active players. African states need to reassert themselves and join the group of countries pushing for a more balanced investment regime. However, it should be stressed that reasserting does not mean a return to the ideological differences of the last century. Put succinctly, the active participation of African states through a return to the ideological differences of the 60's and 70's would be naïve and counterproductive. On the basis of the existing investment regime, African states can pursue a number of policy options which include, withdrawing from BITs, renegotiate existing BITs, not simply consent to foreign model drafts, prepare more favourable model drafts and finally reinvigorate support for a multilateral investment treaty framework. However, for African states to successfully pursue any of these practical policy options this would require African states to actively participate in the evolving investment treaty practice.

Having said that, although withdrawing from BITs and renegotiating existing BITs are attractive policy options this is not without high risks. Essentially, this can create the perception that African states are renouncing BIT treaty commitments which in turn may discourage reluctant foreign investors from investing in African states. Given the high risks, the most plausible option would be for African states to prepare their own model text which in turn would enable African states avoid the practice of simply consenting to foreign model drafts. In essence, through this approach African states would be using legal tools to advance more balanced treaty provisions that do not expansively constrain the ability of African states to implement regulatory measures. There are many model texts African states can borrow from when drafting or negotiating future treaty provisions that balance the interests of foreign investors and government regulatory competence. With respect to existing models, the United States-Rwanda BIT is an ideal starting point because it addresses many of the ambiguities existing in majority of African BITs.

Specifically, an African model text addressing the four most contentious provisions reviewed in this thesis should articulate unambiguous treaty provisions to minimize the discretion of arbitral tribunals. This would in essence ensure that arbitral tribunals do not second guess the intention of African states when interpreting treaty provisions. For instance, as the discussion in chapter 2 demonstrated, majority of African BITs broadly define the concept 'investment' and do not precisely indicate what constitutes an investment. To this end, arbitral tribunals have unfettered discretion to determine whether assets qualify for treaty protection. For purposes of clarity and to avoid protecting worthless investments, a model African BIT should explicitly indicate unambiguous characteristics that assets must meet before such assets qualify for treaty protection.

In particular, a model African BIT should specify that before assets qualify for treaty protection such assets must contribute to economic development, the investor must make commitment of capital or other resources, the investor must have an expectation of gaining or profiting from invested assets, the investor must demonstrate evidence of assumption of risk.[2] For purposes of clarity, the African model BIT should explicitly stipulate that assets falling below this threshold will not qualify for treaty protection. Similarly, the African model BIT should draw a distinction between direct and indirect expropriation. Also, since African states rarely pursue direct expropriation, the model text should attempt to demystify the meaning of indirect expropriation.

For purposes of regulatory autonomy, the African model BIT should stress that legally implemented regulatory measures aimed at serving legitimate public objectives such the environment, public health, safety do not constitute indirect expropriation.[3] Even more, for purposes of guiding the discretion of arbitral tribunals, the model text should provide approaches arbitral tribunals can use when examining allegations of indirect expropriation. To this end, the African model text should follow the wording of Annex B of Article 4 (a) of the United States-Rwanda BIT. It reads as follows;

> The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by case, fact-based inquiry that considers, among other factors: (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action.

By including the above provisions the African model text would ensure that not all government regulatory measures amount to indirect expropriation. Also, the suggested provisions require arbitral tribunals to consider the character of government measures and more importantly economic considerations do not outweigh the purpose of government measures. Obviously, arbitral tribunals must make a value judgment but such an analysis cannot entirely be influenced by economic considerations but rather a thorough consideration of the government regulatory measures *vis-à-vis* the extent to which such measures

[2] The following characteristics are listed in the United States-Rwanda BIT and would be ideal for an African model text. The developmental characteristic is included in the Denmark-Ghana BIT.

[3] The expropriation clause in the United States-Rwanda BIT is a balanced clause and ideal for an African model BIT.

interfere with duly acquired property rights. Similarly, as noted in chapter 4, the standard of fair and equitable treatment in majority of African BITs is autonomous and not linked to the minimum standard. Given the expansive wording of the standard, arbitral tribunals have the discretion to interpret the meaning of fair and equitable treatment broadly. Obviously, although the content of the minimum standard remains controversial but for the purposes of avoiding an overly expansive interpretation of fair and equitable treatment, the model African text should stipulate that fair and equitable treatment is no more than the minimum standard.

This would minimise the possibility of arbitral tribunals second guessing the intention of African states. For further clarity and to guide arbitral tribunals, the model African text should stipulate that fair and equitable treatment is functionally equivalent to the minimum standard and not an independent treaty standard. The benefit of this approach ensures that arbitral tribunals do not impose an idiosyncratic standard of what is fair or equitable without reference to established sources of law.[4] Even more, as the NAFTA Free Trade Commission explained the minimum standard simply refers to a standard under customary international law and not to standards established by other treaties.[5] According to the tribunal in *Mondev International v United States of America*, the phase ‘‘minimum standard of treatment has historically been understood as reference to a minimum standard under customary international law, whatever controversies there may have been over the content of that standard’’.[6] However, it should be stressed that, there risks in equating fair and equitable treatment to the minimum standard because the minimum standard has an evolving character and is not tied to the Neer principles.[7] In essence, this means that arbitral tribunals may broadly construe the minimum standard to cover circumstance equivalent to fair and equitable treatment.

In addition, the model text should stress that African states understand customary international law to result from general and consistent state

[4] *Mondev International Limited v United States of America*, ICSID Case No. ARB (AF)/99/2, October, 11 2000, pata 119.

[5] Ibid para 121.

[6] Ibid para 121.

[7] Ibid para 114.

practice.[8] The benefit of including such explicit reference to the minimum standards simply means that arbitral tribunals would have to justify any principle that has not yet reached the threshold of customary international law. Also, the model African text should stipulate that based on the minimum standard, fair and equitable treatment simply means ''the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world''.[9]

Lastly, the African model text should explicitly stipulate that the MFN clause does not extend to dispute settlement. As the discussion in chapter 5 illustrated, the MFN clause contained in virtually all African BITs does not clearly delimit the scope of the MFN clause. In majority of African BITs, the MFN clause is generic in nature and commonly makes reference to 'treatment' without providing further clarification about whether 'treatment' extends to dispute settlement. As a result of this ambiguity, arbitral tribunals have the discretion to incorporate dispute settlement within the scope of the MFN clause. Given the array of inconsistent decisions, the African model text should unambiguously stipulate that dispute settlement does not fall within the scope of the MFN clause.[10] The wording of such a clause could read as follows; ''the interpretation and applicability of favourable treatment does not extend to dispute settlement provisions included in third part treaties''.[11] The inclusion of such unambiguous limitation in the African model will ensure that arbitral tribunals do not second guess the intention of contracting states following the African model BIT.

Alternatively, African states should galvanise support for a multilateral investment treaty framework. The pursuit of changes to the present investment regime through galvanising support for a multilateral investment treaty framework would undoubtedly be ambitious but possible especially if such a model multilateral treaty framework is initiated and supported by the broad spectrum of developing countries. In the view of the present author, support for an African initiated multilateral treaty framework would not be surprising given

[8] See Annex A of the United States-Rwanda BIT for the full wording of this provision.

[9] See Article 5 of the United States-Rwanda BIT for full wording.

[10] For detailed discussion, see Chapter 5.

[11] Clause suggested by present author.

that the once initiators of overly expansive treaty standards have started experiencing constraints to legitimate policy making even when such government regulatory measures serve a public purpose. Particularly, if one goes by the experience of NAFTA arbitral jurisprudence, it is interesting that the usual public policy arguments normally advanced by developing countries against expansive treaty standards are now surprisingly asserted by developed countries. The opposition to treaty standards is understandable considering that NAFTA treaty provisions just like the patchwork of existing BITs have been expansively interpreted and in some NAFTA tribunals the interpretation has been overly in the direction of foreign investors.[12] Furthermore, foreign investors have demonstrated that they will challenge virtually any government action that interferes with duly acquired property rights.[13]

The concerns of regulatory chill have never been more obvious and as numerous studies have shown, there is a real danger that NAFTA and the patchwork of BITs frustrate the ability of governments to exercise regulatory powers even when such measures serve a legitimate public purpose such as protecting health and the environment, preserving natural resources and delivery of government services.[14] It seems history is repeating itself though from different perspectives and different avenues. In the past, the investment regime was shaped by divisive ideological differences between developed and developing countries. Lately, the area is witnessing gradual but steady resistance of treaty standards not only from developing countries but also some developed states. The scaling down of overly expansive treaty provisions is properly captured in latest model texts initiated by some developed countries such as the United States, Norway and Canada.[15]

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[12] Gus Van Harten, 'Reforming the NAFTA Investment Regime' in Kevin P Gallagher, Enrique Dussel Peters, and Timothy A Wise (eds), *The Future of North American Trade Policy: Lessons from NAFTA* (Pardee Center Task Force Report, Boston University, November 2009) 43.

[13] Ibid 44.

[14] Ibid 45.

[15] The 2004 Canada Model BIT does not only include a general exception clause but also specifically stresses that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. For detailed wording see Article 10 and Article 11 of the 2004 Canada Model BIT <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/2004-fipa-model-en.pdf>accessed 3 June 2012.

The scaling down of overly expansive treaty standards was clearly unimaginable in the last century. For example, the 2012 United States Model BIT, 2004 Canada Model BIT and the 2007 Norway draft Model BIT offer foreign investors sufficient treaty protection but also include safeguards and articulate clearer treaty standards that preserve regulatory autonomy.[16] The gradual change in the attitude of developed countries is obviously influenced by the array of inconsistent arbitral decisions but more importantly developed countries through arbitral practice may have realised the danger of expansive treaty standards over legitimate policy making. Given the evolving changes in investment treaty practice, it is imperative for African states to change from the present practice of passive observers and resist the attitude of simply consenting to foreign model texts. More broadly, whether African states pursue changes to the present system either through model texts or galvanise support for a multilateral investment treaty framework, the most immediate and pressing action is for African states to shift from the position of mere observers to active and relevant participants. To conclude the thesis on a more positive note, given the historical contribution of African states in the formulation of foreign investment rules, it is still within the capacity of African states to influence the adoption of more favourable treaty standards.

[16] See <http://www.state.gov/documents/organization/188371.pdf>accessed 3 June 2012. See also the 2007 Norway Draft Model BIT <http://www.asil.org/ilib080421.cfm>accessed 3 June 2012.

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