



**Foreign Direct Investment in Tanzania: Implications of Bilateral Investment Treaties in
Promoting Sustainable Development in Tanzania.**

**Dissertation Submitted in (partial) fulfilment of the requirements of the Master of Laws
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Pretoria**

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MAY 2010

DECLARATION

I, **Aisha Ally Sinda** declare that the work presented in this dissertation is original. It has never been presented to any other University or Institution. Where other people's works have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LL.M. Degree in International Trade and Investment Law in Africa.

Signed:

Date: Dar es Salaam, 31st May 2010.

DEDICATION

I dedicate this thesis to my mother who supported me throughout my LL.M. program. Also, it is dedicated to my sister Nacky and brothers Hassan and Hussein. It should be a motivation for you to work hard and reach your goals. Aim for the stars and maybe you will reach the sky.

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LIST OF ABBREVIATIONS

BITs	Bilateral Investment Treaties
BGT	Biwater Gauff (Tanzania) Limited
FCNT	Friendship Commerce and Navigation Treaties
FDIs	Foreign Direct Investments
GATS	General Agreement on Trade and Services
ICSID	International Center for Settlement of Investment Disputes
IAs	International Investment Agreements
IISD	International Institute for Sustainable Development
ILA	International Law Association
LIB OR	London Inter Bank Offered Rate
LTD	Limited
MFN	Most Favoured Nation
MW	Mega Watts
NAFTA	North America Free Trade Area
NGO	Non Governmental Organization
NT	National Treatment
RSA	Republic of South Africa
STM	Super Doll Trailer Manufacture Co. (T) Limited
TANU	Tanganyika African National Union
TIC	Tanzania Investment Centre

UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference for Trade and Development
URT	United Republic of Tanzania
USA	United States of America
US\$	United States Dollar
USD	United States Dollar
VAT	Value Added Tax
WSSD	World Summit on Sustainable Development
WTO	World Trade Organization

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FREFACE

Many governments in developing countries including Tanzania have embarked upon an ambitious effort to conclude bilateral investment treaties. Bilateral investment treaties (BITs) are currently used as a famous means for establishing the legal framework for foreign investment in the world. BITs have been entered to by Tanzania mostly to improve the foreign investment climate and hence attract more foreign investment.

Foreign investors are often worried about the quality of host countries institutions and enforceability of the law in developing countries. As a result, BITs guarantee them certain standards of treatments that can be enforced through investor state dispute settlement in international tribunals.

Developing countries conclude BITs and accept restrictions on their sovereignty in the hope that the protection from political and other risks lead to increase in FDI flows. BITs aspire to protect, promote and in some instances to remove obstacles to foreign investment flows without looking at their implications on sustainable development.

The purpose of this research is to examine the BITs framework in Tanzania, explores the increasing persuasiveness of these agreements in promoting FDIs and their impacts upon sustainable development. Sustainable development here refers to development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs.

The thesis tries to look at what BITs say and identifies a number of key emerging development linkages and their implications on sustainable development. The thesis demonstrates that some BITs provisions have been seen to have disturbing and potentially worrying legal and policy implications for host states. Most BITs offer an avenue for dispute settlement mechanism that

permits foreign investors to take host states to international arbitrations in cases where the investor alleges that the treaty's provisions have been violated. As will be seen in this paper, the number of treaty based arbitrations has enormously increased in recent years.

One of the main findings of the research is that, BITs are not mutually beneficial agreements and are one sided in favour of capital exporting countries. They are unbalance and can hardly provide the basis for a durable investment regime though they are reciprocal in appearance. Despite the fact that they establish equal rights and duties for both sides, capital flows from one side only. Thus, it is argued in this thesis that BITs lack clarity and consistency as benefits will accrue to the capital exporting countries.

The thesis further argues that Tanzania faces some challenges regarding the provisions of BITs already concluded. Foreign investors are increasingly aware of the protection available under BITs, and increasingly inclined to invoke those rights in the face of undesirable government initiatives or proposals.

The thesis concludes that BITs will harbour important consequences for Tanzania and may have significant adverse implications if not well negotiated. It further reveals that BITs are not efficient in promoting sustainable development and there is a need for investment agreement to be balanced in a development dimension. Most of the treaties compare unfavourably with the model investment agreement drafted by the International Institute for Sustainable Development (IISD), and that the latter agreement provides a more development friendly template for such agreements. For that reason, Tanzania has to review its BITs so as to ensure that they are in harmony with the country's broader social and economic principles for sustainable development.

CHAPTER ONE

Introduction

1.1 Introduction and Background to the Problem

United Republic of Tanzania (URT) attained her political independence from the British in 1961. Immediately the independence government of mainland Tanzania made various attempts to put in place the requisite policy and legal framework for growth of the economy. The early intention of the government was shown in 1963. Foreign Investment (Protection) Act¹ was passed in order to persuade Foreign Direct Investment (FDI) in the newly independent Tanganyika. Through the Act the government encouraged free enterprise as well as attracting foreign capital.² However such efforts were somewhat unsuccessful since the government opted for a socialist path of economic development through the Arusha Declaration on socialism and self reliance of 1967.³ This socialist policy decision had diverse effects as it aimed at taking control of the economy of the country.

It should however be noted at this juncture that the proclamation of the Arusha Declaration was a sharp turn in the policy and legal framework of the country from the general legal order at independence which essentially had traits of fostering private investment.⁴ With the coming of the declaration all major means of production were nationalised to the state. That is the privately owned investment were taken and under control of the state.⁵

This atmosphere drove foreign investors away from investing in Tanzania, fearing their properties being nationalized. As a result in this period the contribution of the FDI to the

¹ Act 40 of 1963.

² JL Kanywanyi 'Enabling Legal Framework for Operation of a Local Capital Markets in Tanzania' (1992)1 *Eastern Africa Law Review* 2.

³ Arusha Declaration was not a legal document but a political manifesto of Tanganyika African National Union (TANU) the ruling party by then of Tanzania mainland. The Arusha Declaration was adopted by the National Executive Committee of TANU in January 1967 and subsequently ratified by the Party's annual conference. Arusha Declaration declared socialism and self reliance as official policy of the country. It explained the meaning of Socialism and Self reliance, and their relevance to Tanzania sustainable development. TANU adopted the Arusha Resolution and instructed the Government and other public institutions of Tanzania Mainland to implement policies which would make Tanzania a Socialist and Self reliant Nation.

⁴ Kanywanyi (n 2 above) 12.

⁵ Private banks, foreign export trading companies and farms were nationalized to bring economy into the ownership and control of the people with compensation. The nationalization was effected with legal provisions providing full and fair compensation to the affected foreign and local investors under the Foreign Investments (Protection) Act and the State Trading Corporation (Establishment and Vesting of Interests) Act 2 of 1967.

economy went down drastically.⁶ There were very minimal FDI activities taking place in Tanzania between 1970 and 1985. The majority of the investments were made by the State directly or indirectly.

The revival of the foreign investment attraction came in 1985 when, among other things the pressure from the Bretton Woods Institutions over structural adjustment programme and the need for liberalisation. Tanzania found that it could not cope with the ailing and ill managed public enterprises and companies. As a matter of time Tanzania adopted tremendous reforms in its investment policy. It first enacted the National Investment (Promotion and Protection) Act 1990⁷ and subsequently the Tanzania Investment Act, 1997.⁸ The latter legislation came to cure the inadequacy of the former in terms of the increased inflow of investment volume in the country; this was due to the on going economic changes happening in various parts of the world. Each country was trying to compete to attract more foreign direct investment in their respective countries.

It was during the period from 1990s to 2000s that Tanzania embarked upon an ambitious effort to conclude Bilateral Investment Treaties (BITs) with other countries. Tanzania entered into these treaties in order to protect, promote and remove barriers to foreign investment flows. This is because the main underlying principle of the BITs is that flows of foreign investment leads to economic development, though there is no reference in the treaties nor do they contain any meaningful provisions as to the promotion of such economic development as a result of affecting these treaties. Further, as a former socialist state, Tanzania concluded these treaties to dispel perceptions that it is a high risk country. This was because of past ideological commitments that opposed the entry of foreign investment and the notion of private ownership of property.

As a result despite of Tanzania signing several BITs, it has not witnessed significant inward investment flows and under the BITs it is unable to push for inward flow of investment. Tanzania signed such treaties believing that they will lead to greater investor confidence by dispelling any impression of risk associated with the country in the past.

⁶ CP Maina & S Mwakaje, 'Investment in Tanzania: Some comments Some Issues', (2004) 9.

⁷ Act 10 of 1990.

⁸ Act 26 of 1997.

Ironically, the experience of Tanzania in the context of the signed BITs is legal battles between the investors and the government because of mismatch between the government's expectations on the BITs and the actual reality of the so called investors. It turned out that BITs were more economically detrimental to the government. This can be elucidated in cases brought at the World Bank administered International Center for Settlement of Investment Disputes (ICSID) by foreign investors against the government.

In the *Biwater Gauff* case,⁹ British water company Biwater Gauff (Tanzania) Ltd (BGT) used BIT between Tanzania and United Kingdom (UK) to make Tanzania pay \$ 20 millions (US) for an abrogated water privatization contract. After Tanzania cancelled its contract in 2005 on the grounds that BGT had failed to deliver promised services. BGT sued the country at ICSID where it sought to enforce the terms of a Tanzania-UK investment treaty. In July 2008, the ICSID panel ruled for BGT, but refused to grant any damages. The tribunal rejected in its entirety a bid by BGT for upwards of \$20 Million (US) in compensation, citing the state of the firm's water project by the time that the Tanzanian Government took a series of abusive and unnecessary actions which deviated from the treaty protections owed.¹⁰

Somewhat similar experience of a mismatch between the governments' expectations and the damaging realities of BITs are also found in other developing economies. For sometime now there has been an ongoing debate on the importance and relevance of the BITs arrangement in attracting inflow of foreign meaningful investment.

It should be noted in the outset that there has been an outcry from many developing countries that BITs are not effective in promoting sustainable development. Some Latin America countries have withdrawn from the Washington Convention on the Settlement of Investment Disputes. The list of the countries includes, Bolivia, while Ecuador has announced that consent to ICSID arbitration is no longer available for certain categories of disputes which are mining and oil contracts.¹¹ Countries such as Nicaragua and Venezuela are also considering such a move.¹² Other countries in Africa such as South Africa are reviewing their

⁹ *Biwater Gauff Ltd v. Tanzania*, ICSID Case No. ARB/05/22.

¹⁰ Investment Arbitration Reporter, Vol 1, No. 6, July 28 2008 available at www.iareporter.com accessed on 1st December 2009.

¹¹ UNCTAD 'Recent developments in international investments agreements (2007-June 2008)' *IIA MONITOR No. 2 (2008)*, United Nations, New York & Geneva 2008.

¹² UNCTAD 'Latest Developments in Investor-State Dispute Settlement' *IIA MONITOR 1/2008* United Nations New York & Geneva 2008.

BITs policy framework.¹³ Also, Canada and United States of America have sought to revise negotiating templates for BITs, so as to ensure that new agreements provide narrower protections for investors thus ensuring greater freedom for governments to regulate in certain contexts, without fear of investment treaty lawsuits. This, outwardly, appear to respond to the Latin America's approach.

This study attempts to contribute to the debate by analysing the implications of BITs in promoting sustainable development in Tanzania.

1.2 Statement of the Problem

Tanzania does not appear to take a comprehensively approach review its BITs frame work policy despite the experience of the Biwater case to sustainable development.¹⁴ Particular reference is being made in the absence of provisions in the BITs which foster sustainable development or pose quantifiable obligations to investors to promote flows of foreign investment in the treaties. Instead, the anticipated obligations are referred to in permissive language, and, in most cases in the preamble. This has raised a lot of discussions among academicians and the general public in these affected countries. As it was observed in Biwater case, Tanzania is facing serious challenges from BITs counterparts seeking to rely on the provisions of BITs in order to claim compensation from Tanzania for alleged failure to comply with its obligations under BITs with respective countries.

Essentially, there has been no comprehensive review, as such, to give legal analysis of the risk associated with the conclusion of BITs or legal implications of BITs provisions on sustainable development.

1.3 Objectives of the Study

¹³ Republic of South Africa 'Bilateral Investment Treaty Policy Framework Review' Government Position Paper, Pretoria June 2009 pg 5

¹⁴ As pointed out in chapter three below, Tanzania attempted its first review on BITs which was completed in July 2003 to give an update on the status of BITs signed and those which are still negotiated by Tanzania up to 2003.

Generally, this study attempts to explore the work of the Government of Tanzania negotiation team mandated to negotiate and review bilateral investment treaties entered into by the United Republic of Tanzania. In particular, this paper seeks to: -

- (a) Study various BITs entered between Tanzania and other countries.
- (b) Evaluate and examine the effectiveness and implications of BITs in attracting foreign direct investment and promoting sustainable development in Tanzania
- (c) Give recommendations on what Tanzania should do so that BITs can promote sustainable development.

1.4 Significance of the Study

This study will provide an in-depth analysis of the bilateral investment treaties in Tanzania. The study will further contribute to the broader understanding of the present bilateral investment treaties, and its implications on promoting sustainable development in Tanzania.

1.5 Hypothesis

The BITs are not efficient and have negative implications in promoting sustainable development in Tanzania.

1.6 Literature review

The paper seeks to study various BITs entered between Tanzania and other countries and examine the effectiveness and implications of BITs in attracting FDIs and promoting sustainable development in Tanzania.

Numerous works and studies have been published in the area of international investment agreement over the years. Academic institutions and international organizations including United Nations Conference for Trade and Development (UNCTAD) and International Institute for Sustainable Development (IISD) have undertaken extensive research on FDIs and BITs.

UNCTAD IIA Monitor of 2006¹⁵, 2007¹⁶, and 2009¹⁷ provides the latest development in international investments agreements on various issues such as a discussion on settlement of disputes between investors and states. UNCTAD reports further analyse the nature and development implications of international investment agreements to developing countries. The reports also look at the effective of arbitral decisions on the evolution of dispute settlement procedures under BITs.

Graham Mayeda¹⁸ examines how arbitration tribunals have negatively impacted Argentina through their interpretations of expropriation law, the fair and equitable treatment principle, and equitable defences such as necessity, as well as the tribunals' willingness to interpret Argentine law. The author proposes that future international investment tribunals apply a sustainable development analysis to avoid similar outcomes as that in Argentina. Such an analysis would consider promoting investment not as an end in itself but as part of a country's approach to important social issues, including promoting human rights, protecting the environment, and improving social welfare. In advancing this proposal, the author explores the legal and equitable basis for applying sustainable development law when interpreting international investment agreements. He further suggests that International investment agreements can have detrimental effects for developing countries: they can limit a government's ability to regulate in the public interest where this interest runs counter to that of foreign investors; they can severely restrict a country's ability to enact measures responding to financial, social, and economic crises; and they can impede legitimate democratic processes

¹⁵ UNCTAD 'Systemic issues in international Investment Agreements (IIAs)' *IIA MONITOR No.1 (2006)*, United Nations New York & Geneva, 2006. The 2006 report shows some important developments in investment agreements including BITs. There is a new variation of BITs emerging with significant variations in their content and that interactions between BITs provisions and state contracts may create new challenges for policy makers and undermine police coherence. Available at http://www.unctad.org/en/docs/webiteiia20062_en.pdf accessed on 11 December 2009.

¹⁶ UNCTAD 'Development Implications of international investment agreement' *IIA MONITOR No.2 United Nations* New York & Geneva 2007. The report shows the implications of BITs in promoting policy coherence, balancing private and public interest and issues of regulatory flexibilities. Available at http://www.unctad.org/en/docs/webiteiia20072_en.pdf accessed on 11 December 2009.

¹⁷ UNCTAD 'Latest Developments in investor-state dispute settlement' *IIA MONITOR No.1 (2009)* United Nations, New York and Geneva, 2009. This report shows new development and recent trends in investor-state dispute settlement and the increase in the number of cases under the BITs. http://www.unctad.org/en/docs/webdiaeia20096_en.pdf accessed on 11 December 2009. Also *IIA MONITOR No. 3 (2009)* which shows recent development in International Investment agreements from 2008 to June 2009. Available at http://www.unctad.org/en/docs/webdiaeia20098_en.pdf accessed on 15 January 2010

¹⁸ M Graham 'International Investment Agreements between Developed and Developing Countries: Dancing with the Devil? Case Comment on the *Vivendi, Sempra* and *Enron* Awards' (2008) 4 *McGill International Journal on Sustainable Devevelopment Law & Policy* 189

Peterson LE has written extensively about the implications of BITs on sustainable development. In one of his works¹⁹ he is of the view that, States sovereignty includes the right of the government to regulate economic activities for the public interest. Most BITs limit this right by limiting ways in which the government can pursue their economic development policies. Investment promotion and protection must not be done at the expenses of other key policy objectives. He analyses further that most notable features of these investment treaties is that they permit foreign investors to sue host governments under international law in the event of an alleged breach of the treaty obligations.

In another work²⁰, Peterson pointed clearly the implications of BITs to the Republic of South Africa. Peterson demonstrated that South Africa's BITs provide foreign investors with the power to by pass South Africa local court system and pursue international arbitration in case of alleged breach by the host state of treaty protection. The protections in the BITs include duty to pay market value compensation and in case of expropriation and to provide full protection and security to foreign investors and investment. The work only provides an assessment of South Africa BITs. IT does not address the subject matter of the present study which focuses on Tanzania.

In *Bilateral Investment Treaties and Development Policy-Making*²¹, discusses among other things the impact of BITs upon development policy making with particular focus on the treaty practice of Switzerland and the United Kingdom. The paper examines what BITs say and offer an analysis of what the treaties exactly do. Most importantly the study gives specific implications of BITs on development which could be useful to developing countries to look at before signing such BITs.

On his part Seifu Getahun²² examines foreign direct investment in Ethiopia and the emergence of bilateral investment treaties and regulatory space of the respective country. He is of the view that the fundamental rights to non discriminatory treatments that is national

¹⁹ LE Peterson 'Bilateral Investment Treaties-Implications for sustainable Development and Options for regulation' (2006) *Friedrich Ebert Stiftung SAIIA IISD*

²⁰ LE Peterson 'South Africa's Bilateral Investment Treaties Implications for Development and Human Rights' (2006) *Friedrich Ebert Stiftung SAIIA IISD*

²¹ LE Peterson 'Bilateral Investment Treaties and Development Policy Making' 2004 *IISD*

²² G. Seifu, "'Regulatory Space' in the Treatment of Foreign Investment in Ethiopian Laws' (2008) 5 *the Journal of world investment & trade* 405

treatment and most favoured nation treatment of foreign investments are relative rights. They are granted, limited or denied depending on treatments that a country gives to either its own nationals or investors of a third country. Thus, it is for the concerned country to appropriately regulate how much treatment it should give to its own nationals and to third country nationals. He further elaborates that if BITs provides for non discriminatory treatment and does not leave regulatory space for the parties, it becomes very difficult, if not possible, to advocate important and at times inevitable, national policies deviating from BITs, through domestic legislation.

Ranjan Prabhash²³, analyses the linkages between international investment agreements and regulatory description with respect to India. He examines certain features of the Indian international investment agreements (IIAs) and studies the interplay between IIAs provisions and regulatory discretion of India as a case study and the provisions of Indians IIAs. He further argues that BITs can be structured in a manner that gives country sufficient regulatory discretion.

Newcombe Andrew²⁴ evaluates sustainable development and investment treaty law. He argues that IIAs are not impediment to sustainable development. He is of the view that the focus should be on promoting to a greater degree the integration of sustainable development principles into bilateral and regional agreements.

The study by Hamilton CA and Rochwerger PI²⁵ focuses on foreign direct investment through bilateral and multilateral treaties. They touch on whether investors need to choose between treaty rights and contracts rights or pursue both simultaneously, either in the same forum or in separate forums. They further elaborate the disadvantages and advantages of BITs.

²³ P Ranjan, 'International Investment Agreements and Regulatory Discretion: Case study of India', (2008) 5 *the Journal of world investment and trade* 211

²⁴ A Newcombe 'Sustainable Development and Investment Treaty Law' (2007) 5 *the Journal of World Investment and Trade* 357

²⁵ CA Hamilton & PI Rochwerger 'Trade and Investment: Foreign Direct Investment through bilateral and multilateral treaties' (2005)18 *New York International Law Review* 1

The study of Chalamish Ephraim²⁶ discusses on the establishment of investor state arbitration jurisprudence and the rise on international investment dispute between states and investors. Furthermore, the author is of the view that the new era of bilateralism brings alarming challenges for shaping economic relationships between foreign investors and developing countries, as most developing countries seek foreign investments that support sustainable development values.

Huiping Chen²⁷ explores that the forum for investment disputes is not limited to ICSID but extends to other forums like the UNCITRAL arbitration rules. And that the principle of exhaustion of local remedies in the host state has disappeared. The author gives the historical background of investor-state dispute mechanism. He shows the position of developing countries in 1960s when investor-states disputes were resolved through local courts to the present situation were almost all developing countries have full accepted highly protective investor-state dispute settlement mechanism.

The study conducted by Gaffney JP and Loftis JL²⁸ shows the effect of forum selection clauses in investment contracts on a treaty claim and contract claim. It is the authors view that some umbrella clauses permits a treaty tribunal to accept jurisdiction over a claim based on a breach of contract when that breach might not otherwise give rise to direct responsibility in international law on the part of the state or at the very least confer a right to submit contractual claims directly to a treaty based arbitration.²⁹

It is noteworthy that the above studies have attempted to demonstrate the linkages between international investment agreements and regulatory spaces and investor state dispute mechanism. However none of these studies thought to demonstrate the implications of BITs on sustainable development particularly to Tanzania. The paper focuses on Tanzania because not much work has been done to analyse the Tanzania BITs and their interplay in promoting sustainable development. Most of the work on foreign investment in Tanzania context has focused on the economic dimensions of foreign investment.

²⁶ E Chalamish 'The future of bilateral investment treaties: a de facto multilateral agreement'(2009) 2 *Brook journal of international law* 303

²⁷ C Huiping 'the Investor-state dispute settlement mechanism: where to go in the 21st century' (2008) 6 *the Journal of World Investment & Trade* 467

²⁸ JP Gaffney & JL Loftis 'The "Effective Ordinary Meaning" of BITs and the Jurisdiction of Treaty-Based Tribunals to Hear Contract Claims' (2007) 1 *the Journal of World Investment & Trade* 5

²⁹ *Aguas del Tunari, S.A. v Republic of Bolivia* ICSID Case No. ARB/02/3.

1.7 Research Methodology

From the statement of the problem above, the thesis examines the extent to which the bilateral investment treaties have implications on sustainable development in Tanzania. The thesis used both primary and secondary sources of data. The primary sources included basic documents such as international instruments and agreements, statutes, declarations, treaties, official circulars and publications by relevant government departments.³⁰

The substance of the thesis is based on research conducted from secondary sources. This included library research, books, the internet, journal articles, magazines, conference and seminar proceedings and reports. The research further draws from best practices from other countries as well as various materials and documentations from UNCTAD and IISD.

In addition, research was done through conducting interviews with the relevant government departments on negotiating BITs. In the course of this study both structured and unstructured interviews were used. Further, a comparative analysis is done with other countries. This comparative analysis helped to assess the implications of bilateral investment treaties on promoting sustainable development in Tanzania. All interview subjects remain anonymous and are referenced according to the name of their organization and date of interview.

1.8 Limitations of the Study

There is a small body of literature on the implications of bilateral investment treaties in promoting sustainable development in Tanzania. For more empirically based policy and legal work, there is a significant lack of concrete and verifiable material. Most critically, for local communities and stakeholders and for broader policy development purposes, there appear to be virtually no actual materials available in the public domain in Tanzania, and there is a dearth of information to the public. The dominant source of information is the IISD and UNCTAD which are available through the internet. Their publications are useful, and provide many details on investment treaties and sustainable development.

1.9 Chapter Overview

³⁰ For example the Government of South Africa position paper on bilateral investment treaties.

This paper comprises of five chapters. The first chapter gives an introduction and general statement of the problem, context of the research question and methodology used in exploring the research questions. It also covers an overview of the existing relevant literature and sets out the limitation of the study. The second chapter covers the description of the concept of FDI, BITs and sustainable development. The third chapter gives an overview of the bilateral investment agreement that Tanzania entered to with other countries. The fourth chapter gives the evaluation of the implications of BITs in promoting sustainable development followed by summaries of the findings of the study, conclusion and recommendation in the fifth chapter.

CHAPTER TWO

The Conceptual Framework of FDIs, BITs and Sustainable Development

2.1 Introduction

Most countries have recognized the importance of FDI inflows for their economic growth, poverty alleviation and development in general. FDIs are widely acknowledged to be crucial engines of growth especially in the developing countries. It is recognized that FDIs are capable of creating employment, transferring technology, increasing government revenues and contribute positively to the capital formation process of host economies.³¹ As a result of these and other potentially positive roles that FDIs can play in host economies many countries wish to attract more FDIs.

It is on this basis that countries have taken specific steps to conclude BITs aimed at promoting FDI by ensuring protection to foreign investors and at the same time promoting sustainable development. This chapter attempts to provide a background on the definition of terms, rationale of BITs for FDIs promotion and sustainable development.

2.2 The concept of foreign investment

While the term investment could be defined in various ways, it could generally be understood to mean the expenditure of capital for the production of goods and services with the purpose of making a profit.³² The Tanzanian Investment Act³³ defines the term investment to mean the creation or acquisition of new business assets and includes the expansion, restructuring or rehabilitation of an existing business enterprise. The Act goes further to define the term foreign investor to mean in the case of a natural person means a person who is not a citizen of Tanzania, and in the case of a company, a company incorporated under the laws of any country other than Tanzania in which more than fifty percent of the shares are held by a person who is not it citizen of Tanzania, and in the case of partnerships, means a partnership

³¹ HP Ngowi ‘Ten Essays on Foreign Direct Investments (FDIs): A Focus on Tanzania’ unpublished PhD thesis, Commonwealth Open University, 2002.

³² Seifu (n 20 above).

³³ Act 26 of 1997.

in which the partnership controlling interest is owned by a person who is not a citizen of Tanzania.

On the other hand, Sornarajah³⁴ defines the term foreign investment to mean the transfer of tangible or intangible assets from one country into another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets. It follows therefore that the above definition entails that, the transfer of physical property such as equipment or physical property that is bought or construed such as plantation or manufacturing plants constitute foreign direct investment.

A typical definition of foreign investment in most BITs concluded between Tanzania and other countries follows what is known as the broad asset definition.³⁵ The broad asset based definition means that all assets in the host country, whether tangible or intangible, owned by the other country's investors fall under the definition of investment.

Article 1 of the Tanzania- Italy agreement³⁶ defines investment as any kind of asset invested by a natural or legal person of a contracting party in the territory of the other contracting party in conformity with the laws and regulations of that party, irrespective of the legal form chosen, as well as of the legal framework. Without limiting the generality of the foregoing, the term investment comprises in particular, but not exclusively, includes:

- a) Movable and immovable and any ownership right in rem, including real guarantee rights of a third party, to the extent that it can be invested;
- b) Shares, debentures, equity holdings, or any other instruments of credit, as well as Government and public securities in general;
- c) Credits for some of money or any service right having an economic value connected with an investment, as well as reinvested incomes and capital gains
- d) Copyrights, commercial trademarks, patents, industrial design and other intellectual and industrial property rights, know how, trade secrets, trade names and goodwill;

³⁴ M Sornarajah *the International Law on Foreign Investment* (2004)7.

³⁵ World Investment Report (2002) 99-100.

³⁶ Article 1 of the agreement between the government of the united republic of Tanzania and the government of Italian Republic on the promotion and protection of investments, signed at Dar es Salaam on 27 September 2002.

- e) Any economic rights accruing by law or by contract and any license and franchise granted in accordance with the provisions in force on economic activities, including the right to prospect for, extract and exploit natural resources;
- f) Any increase in value of the original investment.³⁷

Consequently it is not hard to observe the broadness or extension of the definition of investment in the bilateral investment treaties. Lately the concept of foreign investment is expanding to include even pre-establishment rights, which are expenditures of an investor prior to acquiring admission to invest in a particular jurisdiction and being established. Further, it should be noted that foreign investment could be classified as foreign direct investment and portfolio investment.³⁸

2.3 The concept of bilateral investment treaties and their rationale

2.3.1 The concept of bilateral investment treaties

BITs are said to be useful tool in creating a welcoming environment for companies seeking to invest in foreign countries.³⁹ Since the late 1980s, BITs have come to be universally accepted instruments for the promotion and legal protection of foreign investments.⁴⁰

UNCTAD⁴¹ defines bilateral investment treaties (BITs) as agreements between two countries for the reciprocal encouragement, promotion and protection of investments in each other's territories by companies based in either country.

Salacuse also defines BITs as agreements signed at bilateral, regional or multilateral level by two or more countries to protect investments made by one country's investors in the other country.⁴²

³⁷ Article 1 of Tanzania-Italy, Article 1(a) of Tanzania-UK, Article 1 (1) of Tanzania-Sweden BITs. All Tanzanian BITs surveyed contain a broad definition of foreign investment.

³⁸ FDI refers to an investment carried out by a foreign investor by being physically present in the country where the investment takes place and she is in control of the management aspects of the investment; whereas portfolio investment refers to an indirect investment which participates the foreign investor only indirectly such as through buying shares, debentures and bonds.

³⁹ Interview with an official from Tanzania Investment Centre conducted on 13 April 2010

⁴⁰ Hamilton CA & Rochwerger PI (n 25 above) 1.

⁴¹ UNCTAD website <http://www.unctadxi.org> accessed on 15 November 2009.

⁴² Salacuse (1990) 503 as quoted by Rajan (n 23above) 209.

Aside from protection of investment, BITs also aim to create good conditions for greater investment flow.⁴³ BITs also restrict the regulatory discretion of the parties by imposing conditions that prohibit certain types of conduct such as breaking agreements, discrimination among foreign investors or favouring domestic investors over foreign investors, revoking essential licenses or confiscating property. For this reason, BITs require parties to exercise regulatory discretion in accordance with the provisions of the treaties and this varies from treaty to treaty.⁴⁴

The most significant recent development in the international FDI regulatory framework has been the massive increase of bilateral investment treaties due to failure of reaching a comprehensive multilateral agreement on investment and they are also the flavour of the day.⁴⁵ UNCTAD Report (2008-June 2009) shows by the end of 2008 the total number of BITs rose to 2,676 with remarkably similar provisions suggesting that many of them now express the international law standard or foreign investment.⁴⁶ This makes BITs the main source of international law on foreign investment. As far as the legal instruments used in international arbitration are concerned, bilateral investment treaties (BITs) remain by far the most common type of treaty used by foreign investors to file claims against host States.

Most of these agreements have been concluded between a developed and a developing country, owing to their origins as instruments governing investment into the developing world. An increasingly sizable number, however, are concluded between two developing countries, and even between least developed countries.

BITs serve to attract foreign investment by granting broad investment rights to investors and creating flexibility in the resolution of investment disputes. This flexibility typically includes allowing for any investment dispute to be resolved by international arbitration, most often

⁴³ Preamble of Tanzania-UK BIT, which provides desiring to create favourable conditions for greater investment by nationals and companies of one state in the territory of another.

⁴⁴ Ranjan (n 23 above) 209.

⁴⁵ Sornarajah (n 34 above) 204.

⁴⁶ UNCTAD 'Recent Developments in International Investment Agreements (2008-June 2009)' IIA MONITOR No. 3 (2009) United Nations New York and Geneva pg 2. According to UNCTAD This number of BITs accounts for new BITs (adding to the total), terminated and denounced BITs (subtracting from the total) and renegotiated BITs (replacing old BITs), as well as data adjustments in line with country reporting. The report is available at http://www.unctad.org/en/docs/webdiaeia20098_en.pdf accessed on 15 January 2010

under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID).

Although the BITs contemplates a reciprocal flow of investments between the state parties to the treaty; it is usually practically a one way flow that is contemplated and feasible in reality in the context of the disparities of wealth and technology between the two parties. Tanzania concluded BITs so as to encourage and attract FDIs in order to promote development in the country and encourage transfer of technology, better services delivery, provide employment and increase the living standard of the community at large.⁴⁷

2.3.2 Origins of bilateral investment treaties

The most remarkable development in international investment law has been the increase in the number of BITs concluded relating to the protection and promotion of foreign investment. Even though, the number of agreements has amazingly increased in recent years, BITs have been in existence from early times.⁴⁸ Understanding the origin and development of the current BITs system is critical to evaluating the challenges for countries, in particular developing countries, posed by such BITs as well as the prospects for effectively addressing them.⁴⁹

The modern BITs are said to originate from the United States of America (USA) known as the treaties of friendship, commerce and navigation Treaties (FCNT). These treaties were concluded between the USA and other nations as early as 18th Century and after the Second World War onwards.⁵⁰ Prior that, the protection of foreign direct investment was not often a concern in international agreement.⁵¹ These treaties were the cornerstone of how the United States sought to rebuild its commercial relations with other counties after the Second World War and to tie many states of the world to alliance with the United States.⁵²

⁴⁷ Sornarajah (n 34 above) 207

⁴⁸ KJ Vandeveldel 'A Brief History of International Investment Agreements' (2005)12 *U.C Davis Journal of International law and policy* 157

⁴⁹ UNCTAD 'International Investment Rulemaking: Stocktaking, Challenges and the Way Forward' 2008 United Nations New York & Geneva pg 9

⁵⁰ Hamilton & Rochwerger (n 25 above) and UNCTAD (n 49 above) 11

⁵¹ Vandeveldel (n 48 above) 158

⁵² Hamilton & Rochwerger (n 25 above)

However FCNT contrary to BITs contained clauses that were not commercial in nature such as provisions that regulated human rights practices or touched upon the personal or religious rights and practices of a country and military matters.⁵³ However USA could not sign FCNT with many developing countries and 1960 the FCNT completely diminished.

Nonetheless, at about the same period European nations discovered BITs and entered into treaty agreements with many developing countries.⁵⁴ Germany was the first to conclude BITs in 1959 with Pakistan and continued to conclude more BITs with other countries.⁵⁵ Other European countries quickly followed Germany's lead. France concluded its first BIT in 1960, Switzerland in 1961, the Netherlands in 1968, United Kingdom in 1975, Italy and the Belgium-Luxembourg union in 1964, Sweden and Denmark in 1965 and Norway in 1966.⁵⁶

This was because the European BIT model dealt only with investment issues alone and did not venture into additional controversial matters as did the American agreements. The European countries were therefore more successful in obtaining agreements in developing countries than the Americans were.⁵⁷ Subsequently, in 1977 the United States decided to rework its model agreement and pattern it after the European BIT although it did not successfully complete a negotiation until the 1980s.⁵⁸

Later in 1965, the World Bank opened for signature the Convention for the Settlement of Investment Disputes between States and Nationals of other States. The Convention created the International Centre for the Settlement of Investment Disputes (ICSID) to administer the arbitration of disputes between investors and States, a mechanism that soon became common in BITs.⁵⁹ Since then the pace of negotiating BITs has increased with more participation of developing countries.

2.3.3 The changing nature of bilateral investment treaties

⁵³ Hamilton & Rochwerger (n 25 above)2 and Sornarajah (n 34 above) 209

⁵⁴ UNCTAD provides a complete list of parties to BITs for 178 economies concluded as of 1 June 2009 available at <http://www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1> accessed on 30 March 2010 and Hamilton CA & Rochwerger (n 25 above) also see AT Guzman 'Why LDCs sign treaties that hurt them: Explaining the popularity of Bilateral Investment treaties' (1998)38 *Virginia Journal of International Law* 653

⁵⁵ UNCTAD (n 49 above) 11

⁵⁶ (n 55 above) & Vandavelde (n 48 above) 169

⁵⁷ (n 53 above)

⁵⁸ Hamilton & Rochwerger (n 25 above) also see Vandavelde (n 48 above) 178

⁵⁹ UNCTAD (n 49 above) 12

Of late, BITs are no longer concluded exclusively between developed and developing countries an increasing number of BITs are concluded between developing countries themselves.⁶⁰ For instance Tanzania concluded BITs with Mauritius and South Africa and is still negotiating with Zambia. BITs are more crucial now in maintaining international investment relations worldwide, including South-South cooperation.⁶¹ The number of BITs and the number of countries involved has been growing.

2.3.4 Salient features of bilateral investment treaties

The fundamental elements of BITs, including their objectives, format and broad underlying principles have changed little over the years. Their main provisions typically cover the following areas of the regulation of foreign investment scope and definition of investment, admission and establishment, national treatment, most-favoured-nation treatment, fair and equitable treatment, compensation in the event of expropriation or damage to the investment, guarantees of free transfers of funds, and dispute settlement mechanisms, both state-state and investor-state.

2.3.5 The content of treaty rights in bilateral investment treaties

An investor can always claim the rights provided under the BITs if the host country breaches them. However, the investor must identify the treaty rights relied upon in support of the treaty claim.⁶²

The content and definition of treaty rights depend on the terms of the specific BIT that creates these rights. As BITs are intended to facilitate investment, they address issues of laws, policies or actions that could impede or endanger investment flows. There is a core of generic treaty rights that are well established and defined in international law. These have in practice formed the basis of treaty claims by investors against host states. The hub of treaty rights is the following⁶³:

(a) The right to national treatment:

⁶⁰ Hamilton & Rochwerger (n 25 above) 2

⁶¹ United Nations Conference on Trade and Development, *Bilateral Investment Treaties 1959-1999* pg iii

⁶² Hamilton & Rochwerger (n 25 above) 4

⁶³ Hamilton & Rochwerger (n 25 above) 4-5

Most BITs impose an obligation to the host state to accord the foreign investor the same treatment as that enjoyed by its own nationals. This right protects foreign investors from special requirements that would result in a competitive disadvantage in comparison with national investors.⁶⁴

(b) The right to most favoured nation treatment:

This right guarantees investors of the home state treatment no less favourable than that which the host state accords to nationals of any other country. This right protects an investor from special requirements and competitive disadvantage against foreign investors from other countries.⁶⁵

(c) The right to non-discriminatory treatment:

BITs often contain a provision which prohibit measures which generally discriminate against the foreign investor.⁶⁶

(d) The right to fair and equitable treatment:

Most BITs provides investors with the right to fair and equitable standard. However, the content of the right to fair and equitable treatment is a controversial issue in investor-state arbitration at present. Often fair and equitable treatment is related with the minimum standard of protection for aliens provided customary international law.⁶⁷

(e) The right to compensation for expropriation:

BITs consistently include the right to compensation if the host state expropriates the investment of the foreign investors. The meaning of expropriation and scope of this right to compensation is another contentious issue in investor state arbitrations today.⁶⁸

⁶⁴ (n 63 above) and Republic of South Africa Government Position Paper pg 36

⁶⁵ (n 63 above) South Africa Government Position Paper pg 38

⁶⁶ (n 63 above)

⁶⁷ (n 63 above)

⁶⁸ The Republic of South Africa Government Position Paper pg 40-41

2.3.6 Treaty rights against contract rights

The issue of whether the investor needs to choose between treaty rights and contract rights, or whether the investor may pursue both types of rights simultaneously, either in the same forum or in separate forums, is of strategic importance and much debate. The answer requires consideration of the nature of treaty claims in contrast with contract claims. The fundamental criterion that always distinguishes a treaty claim from a contract claim is the source of the right.⁶⁹

2.3.7 The rationale for bilateral investment treaties

The main reason for the failure to reach a comprehensive multilateral agreement is that the developed countries seek progressive liberalization of foreign investment while developing countries, which host the investment, oppose to the establishment of multilaterally binding international agreement and want to maintain broad rights of regulatory freedom. As a result, foreign investment regulated by BITs, a few regional investment treaties and national investment laws.⁷⁰

This approach of shifting towards bilateral arrangements has several reasons for both developed and developing countries.⁷¹ BITs tend to serve a middle ground for both the interests of developing countries and developed countries. In that they enable developed countries to get back what they have lost at the multilateral level and enable developing countries to conclude the agreement, at least to some extent, balancing to their interests better than multilateral arrangements. As such, the advantages of BITs include, inter alia, that they:

- a) are concluded on ad hoc basis usually with review provisions every five or ten years;

⁶⁹ C Schreuer 'Investment Treaty Arbitration and Jurisdiction over Contract claims the Vivendi I Case considered available at http://www.univie.ac.at/intlaw/pdf/cschapter_76pdf. accessed on 30 March 2010.

⁷⁰ Committee on Legal Aspects of Sustainable Development, International Law Association, London Conference Report (2000), 4 available at <http://www.ila-hq.org/en/committees/index.cfm/cid/25> accessed on 20 January 2010 . As expressed above, currently there are more than 2,392 BITs in the world.

⁷¹ There are evidences that show that some developed countries are not willing to enter into a multilateral obligation for fear of loss of sovereignty in making their own policies on certain issues. For instance, the French had to withdraw from the OECD negotiation on MAI in autumn of 1998 due to lack of willingness to open investment areas such as the cultural industry. They feared that the sector will be overwhelmed by US multinational companies. See Committee on Legal Aspects of Sustainable Development, 4; See also Sornarajah (n 34 above) 292-293 and 297.

- b) give the parties greater freedom, as opposed to multilateral treaties, to negotiate on the content of each and every obligation in accordance with particular needs involved as they entail mutual obligation;
- c) would enable the parties to limit the specific areas of foreign investment they would like to protect and to control the extent of protection;
- d) protect host countries from an instantaneous development of an all encompassing international standard on foreign investment, to which they were objecting since the inception of the idea of international legal protection of foreign investment; and
- e) It is further argued that bilateral solutions become necessary simply because of an absence of a consensus to create multilaterally accepted norms.⁷²

Another recent development is that developing countries are taking foreign investment as a policy towards fighting against poverty as well as their development mechanism on the argument that international investors, particularly multinational companies bring in large amount of foreign capital or assets. Such benefits include, among others, transfer of technology, management skills, and international marketing channels for marketing products, product design, quality characteristics, and brand names, which are intangible in nature.⁷³ These intangible assets will then be capitalized or converted in capital by applying them on products and services of the developing countries.

In exchange for such benefits, countries started giving non-discriminatory protection through BITs to the foreign investors on same level with their national investors and other foreign investors. This is based on the argument that protection of foreign investment on bilateral basis guarantees and encourages investors of the other party to invest in the partner country and stimulates the flow of capital and technology and in the end brings economic development to the parties. Note that Tanzania has concluded dozens of such BITs with countries in Africa, Europe and Asia with the view of promoting foreign investment and giving it legal protection.⁷⁴

⁷² Sornarajah (n 34 above) 212.

⁷³ UNCTAD, MR Agosin & R Mayer, 'Foreign Investment in Developing Countries: Does it Crowd in Domestic investment?' Discussion Paper No 146, February 2000 available at <http://www.unctad.org/en/docs/dp-146.en.pdf> accessed on 20 January 2010

⁷⁴ Tanzania is also a party to the World Bank Conventions mentioned above and the WTO agreements.

As regards the purpose of concluding such BITs, most BITs concluded by Tanzania shows that the purpose is to stimulate the flow of capital, technology and economic development of the contracting parties.⁷⁵

It should be noted that, however, that despite expectations about the impact of BITs on FDI, there is no evidence indicating that the adoption of BITs has actually encouraged FDI flows to signing developing countries.⁷⁶

The Tanzania Investment Centre reports that the number of foreign investment has increased in the country from 1999 to 2008. FDI stock increased from USD 1993.8 million in 1999 to USD 6,686.0 million in 2008.⁷⁷ FDI flows increased from USD 496.6 million in 1999 to USD 744.0 million in 2008.⁷⁸ Moreover, between 1999 and 2008 FDI inflows grew by 8.8 percent to USD 744.0 million per annum.⁷⁹ This does not indicate whether this foreign investment is the result of increase of in the number of BITs concluded by the country. It also does not show whether or not the investments originate from countries that have concluded BITs with Tanzania. This makes it difficult to determine whether foreign investment is achieving the target for which it is required in the country.

Such shortcomings aside, the scope and content of BITs have been very standardized over the years. Nonetheless, the exact wordings of individual provisions still vary from BIT to BIT, while differences are most significant between BITs signed some decades ago and those signed more recently.

2.4 The concept of sustainable development

There is a well-known consensus in the international community that foreign direct investment is necessary for sustainable development Agenda 21,⁸⁰ the comprehensive plan developed in the 1992 United Nations Conference on Environment and Development (the Rio

⁷⁵ Agreement between Tanzania and Italy.

⁷⁶ UNCTAD 'Economic Development in Africa: Rethinking the Role of Foreign Direct Investment, UNCTAD, Geneva (2005) 64-81 available at http://www.unctad.org/en/docs/gdsafrica20051_en.pdf accessed on 20 January 2010.

⁷⁷ See Tanzania Investment Report 2006 (data for 1999) and World Investment Report 2009 (data for 2008).

⁷⁸ See Tanzania Investment Report 2006 (data for 1999) and World Investment Report 2009 (data for 2008).

⁷⁹ See Tanzania Investment Report 2006 (data for 1999-2005) and World Investment Report 2009 (data for 2008).

⁸⁰ Agenda 21, Report of the United Nations Conference on Environment and Development, UN Doc. A/CONF.151/26/Rev.1, (1992) 31 I.L.M. 874, para. 2.23.

“Earth Summit”), highlighted the critical role investment plays in the ability of developing states to meet basic needs in sustainable manner. Also the Monterrey Consensus in 2002⁸¹ identified mobilizing FDI as one of the leading actions to achieve the goals of eradicating poverty, achieving sustained economic growth and promoting sustainable development.⁸² The Johannesburg Plan of Implementation adopted a few months later at 2002 World Summit on Sustainable Development (WSSD) identified an enabling environment for investment⁸³ as one of the bases for sustainable development.

The concept of sustainable development calls different understanding in different disciplines. Newcombe Andrew⁸⁴ is of the view that the meaning of sustainable development remains highly contested. However the working definition adopted by this paper is the one suggested by Brundtland Report of 1987:

*“...development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs”.*⁸⁵

The above definition of sustainable development is the most successful, widely accepted and influential.⁸⁶ Sustainable development contains two key concepts, the concepts of needs in particular the essential needs of the world’s poor, to which overriding priority should be given and the idea of limitations imposed by the state of technology and social organizations on the environmental ability to meet present and future needs.⁸⁷

⁸¹ United Nations, Monterrey Consensus of the International Conference on Financing for Development: The final text of agreements and commitments adopted at the International Conference on Financing for Development, Monterrey, Mexico 18-22 March 2002[Monterrey Consensus]. Available at <http://www.un.org/esa/ffd/Monterrey%20Consensus.pdf> accessed on 18 January 2010.

⁸² Monterrey Consensus, *ibid.* Para. 1. Para. 20 states: Private international capital flows, particularly foreign direct investment, along with international financial stability, are vital complements to national and international development efforts. Foreign direct investment contributes towards financing sustained economic growth over the long term.

⁸³ Plan of Implementation of the World Summit on Sustainable Development, U.N. Doc. A/CONF.199/20 (2002), Para. 4 [Plan of Implementation] available at www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm. Accessed on 20 January 2010

⁸⁴ Newcombe (n 24 above) 361

⁸⁵ The World Commission on Environment and Development, “Our Common Future”, Oxford, Oxford University Press, 1987, p.43. The chairperson was Gro Harlem Brundtland, the former Prime Minister of Norway.

⁸⁶ TM Walde ‘Natural Resources and Sustainable Development: ‘From Good Intentions’ To ‘Good Consequences’ in N Schrijver & F Weiss *International Law and Sustainable Development Principles and Practice* (2004)

⁸⁷ The World Commission on Environment and Development (n 58 above).

Moreover, the International Law Association's 2002 New Delhi Declaration of principles of International Law Relating to Sustainable Development (the Declaration) defines sustainable development as: a comprehensive and integrated approach to economic, social, and political processes, which aims at the sustainable use of natural resources of the earth and protection of the environment on which nature and human life as well as social and economic development depend and which seeks to realize the right of all human beings to an adequate living standard on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting there from, with due regard to the needs and interests of future generations.⁸⁸

The Declaration identifies seven principles of international law relating to sustainable development:

1. The duty of states to ensure sustainable use of natural resources,
2. The principle of equity and eradication of poverty,
3. The principle of common but differentiated responsibilities,
4. The principle of the precautionary approach to human health, natural resources and ecosystems,
5. The principle of good governance and
6. The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives⁸⁹.

Sustainable development is concerned with equity in the allocation of the benefits of development. As a concept of international law, it has evolved in a way that defines the competence of states to direct their own development.

The 69th conference of International Law Association (ILA) emphasised that “sustainable development is a matter of concern both to developing and industrialised countries and should be integrated into all relevant fields of policy in order to ensure the goals of

⁸⁸ ILA New Delhi Declaration on Principles of International Law relating to Sustainable Development, ILA Resolution 3/2002, Annex, published as UN Doc. A/57/329. The Declaration is available online at http://www.cisd.org/pdf/new_delhi_declaration.pdf accessed on 20 January 2010

⁸⁹ N Schrijver & F Weiss p xii. This ILA Declaration was brought, by the governments of Bangladesh and the Netherlands, to the attention of the Johannesburg summit as UN Doc.A/CONF 199/8 and later the United Nations General Assembly in New York as UN Doc. A/57/329. The declaration appeared, with an introduction, also NILR (2002), p.299. The final report of the ILA Commission and the New Delhi Declaration were published in ILA, Report of the 70th Conference New Delhi, London, 2002, p.22 and p.380 and can also be found on www.ila-hq.org.

environmental protection, development and human rights recognising the critical relevance of the gender dimension in all these area with the aim of practical and effective implementation”.⁹⁰

Therefore it is not difficult to observe the broadness of this definition. Nowadays, the concept of sustainable development is expanding beyond the now classic formulation of sustainable development focused on reconciliation between economic development and environmental protection to include the concept of social development that incorporates concerns regarding public participation, good governance and human rights.

2.4.1 The concept’s relevance to foreign investment regulation

The foundation on which investment treaties are made is that foreign investment lead to sustainable development and greater flows of foreign investment. Many states particularly the least developed state, have liberalised their foreign investment laws and made a large number of investment treaties without witnessing the expected flows of foreign investment.⁹¹

International investment treaties are occasionally alleged to have set out sustainable development as a central objective. This is a view which had been expressed by governments at the (World Trade Organization)WTO’s Working Group on Trade and Investment, and is attributed, in turn, to UNCTAD’s work in this area.⁹² Without a doubt, any expression of the development intentions of the parties entering into such a treaty would be appropriate for purposes of guiding the legal interpretation of the treaty.

However, examples of treaties which set out sustainable development as an objective tend not to come from BITs and, more often, from a handful of regional or multilateral agreements, such as the WTO’s General Agreement on Trade in Services (GATS) or the Lomé Convention, rather than the overwhelming number of bilateral investment treaties.⁹³

⁹⁰ Resolution No 15/2000 of the 69th ILA Conference held on July 25th -29th, 2000, London.

⁹¹ South Africa which is reviewing their Bilateral Investment Treaties is a classic example.

⁹² See for e.g., “Investment Rules For Developing Policies,” Communication from Japan, June 12, 2001, WT/WGTI/W/104, at para 13 and “Multilateral Framework for Investment; an Approach to Development Provisions,” Communication from Switzerland, May 16, 2002, WT/WGTI/W, at paras 19–20.

⁹³ LE Peterson, ‘Bilateral Investment Treaties and Development Policy Making’ 2004 IISD pg 4

Because treaty practice differs from country to country and even within countries over time generalizations must be made cautiously. However, the author's experience of examining Tanzania BITs suggests that references to sustainable development are exceedingly rare in treaties entered between western governments and Tanzania. For example, investment treaties signed by the Tanzania with the U.K, Italy, Denmark and Switzerland typically do not refer to development in any context either in the preamble to the treaty or in the treaty's substantive provisions.

Moreover, Schrijver N. and Weiss F. made emphasis on the role of sustainable development to be recognized in regulations including foreign investment regulation. The state should be in the fore front to recognize sustainable development in variety of legal instruments as it is the one who is setting the standards and provide for instruments to supervise and enforce the law.⁹⁴ Therefore recognising sustainable development in the BITs for FDI is very crucial for the recipient country.

Therefore, as investment treaties seem to have little to say about sustainable development apart from a generalized faith that the treaties will yield investment, which will, in turn, lead inevitably to development references to an actual right to development which some commentators consider to be part of customary international law, international development law, or a right to regulate for development are even less common.⁹⁵ This widespread failure to identify development as an important objective of investment treaties will have important policy repercussions and implication on sustainable development, as will be seen in chapter four.

2.5 Conclusion

In summary, the foregoing chapter attempted to define the concepts of foreign investment, BITs and sustainable development. The chapter also show the rationale of countries signing BITs to attract FDI. As a result, in most BITs the concept of sustainable development is not recognised hence fail to reach the purpose of economic development.

⁹⁴ Schrijver & Weiss(n 77 above) xiii.

⁹⁵ UNCTAD's survey of a broader range of BITs yields no examples which reference the right to development, which many commentators hold to be a tenet of customary international law. See UNCTAD, *International Investment Agreements: Flexibility for Development*, UNCTAD Series on Issues in International Investment Agreements, (Geneva and New York 2000), pg 25

CHAPTER THREE

Analysis of the Bilateral Investment Treaties Regime Concluded By Tanzania

3.1 Introduction

Tanzania has bilateral treaties for promotion and protection of FDI with the United Kingdom, Switzerland, Germany, Denmark, Finland, Italy, Republic of Korea, Netherlands, South Africa, Sweden and Mauritius.⁹⁶ The chapter analyse the standard clauses found in all the BITs concluded by the United Republic of Tanzania and further study the application of the BITs protections by investors and see whether the BITs concluded by Tanzania assist the country in promoting FDI's flow.

Tanzania is becoming an important destination of foreign investment.⁹⁷ Until 1991 Tanzania investment policy was restrictive to foreign investment. However at the beginning of economic reforms in the early 1990s brought a change in Tanzania's perception towards foreign investment with changes in policy to boost liberalisation.

Tanzania received a billion dollars of investment inflows in 1995-2000 compared with only \$90 million during the preceding six years⁹⁸, in its overall strategy of liberalisation, has been signing BITs to attract foreign investment although there is no study to show how BITs has been successful in attracting foreign investment.

Tanzania signed its first BIT in 1965 with Germany since then; Tanzania has signed BITs with several countries. Before 2003 Tanzania has signed BITs with Denmark, Finland, Germany, Italy, Republic of Korea, Netherlands, Sweden, Switzerland and United Kingdom. In October 2005 Tanzania signed BITs with the Republic of South Africa and in May 2009 with Mauritius. Tanzania has reached a complete agreement waiting for signature with Zimbabwe and Oman. The Government of Tanzania is still negotiating with Canada, India,

⁹⁶ Ministry of Finance and Economic Affairs, Tanzania as of April 2010. This paper surveyed 7 Tanzanian BITs with Denmark, Finland, Germany, Italy, Netherlands, Sweden, Switzerland and United Kingdom because the text of other Tanzanian BITs is not available on the UNCTAD BIT database and the Author couldn't get text of the other BITs signed by Tanzania from the Ministry of Finance and Economic Affairs, Government of Tanzania.

⁹⁷ UNCTAD, Investment Policy Review, the United Republic of Tanzania, UNCTAD/ITE/IPC/Misc. 9 2002.

⁹⁸ See UNCTAD (n 85 above)

Iran, Jordan, Malawi and Opec Fund. Moreover, Tanzania has received drafts from France, Turkey, United Arab Emirates, Slovak, China, Belgo-Luxemborg, Libya, Russia and Zambia.⁹⁹

These numbers point towards the vigour with which Tanzania is pursuing its BITs regime and importance it is attracting to foreign investment for economic development. By signing BITs, Tanzania is taking treaty obligations and binding itself on the growing body of international norms on international foreign investment law. Surprisingly, despite a massive BIT programme resulting in international obligation, Tanzanian BITs as such, have hardly been an issue in academic and policy debates within Tanzania, although foreign investment policies have certainly attracted attention.

Despite that BITs have hardly been an issue in policy debates, Tanzania attempted to review its BITs. The first review on BITs was completed in July 2003 to give an update on the status of BITs signed and those which are still negotiated by Tanzania up to 2003. The review came up with the standard format template which is being used to date in negotiating BITs between Tanzania and partner countries. This review was only about identifying a list of already effected BITs and a list of the ongoing negotiations of potential BITs. The Government planned to do another review which was to include the BITs which Tanzania has signed with other countries, countries which are still negotiating with Tanzania and potential countries for negotiations in the future. This Second review was to go further to review the signed agreement with the view of analysing if there is a need of amending specific provisions and was to be completed in 2009. Unfortunately this review could not be done and the reasons for the failure were not given.¹⁰⁰

Further, the use of BITs is not well documented. The government provides no public records of claims brought against Tanzania. Moreover Tanzanian investors investing abroad are not well versed on how to use such BITs against other countries. To date, there are no cases of Tanzanian investors invoking their treaty rights against other countries.¹⁰¹

⁹⁹ Ministry of Finance and Economic Affairs, Tanzania.

¹⁰⁰ Interview with the officials at Ministry of Finance and Economic Affairs on 30th March 2010

¹⁰¹ Ministry of Justice and Ministry of Finance and Economic Affairs are not aware of any cases that Tanzania investors have invoked their treaty rights. There is no information on the number of Tanzanian investors who invest abroad. Tanzanian investors can ask for permission from The Bank of Tanzania to invest abroad as that right is restricted.

The reasons for this are; first, lack of adequate information and awareness about BITs. Second, since many of these agreements are signed at a bilateral level do not receive the kind of media attention that multilateral agreements such as the WTO do. Third since BITs have not been subjected to rigorous analysis, their full implications are yet to be understood.

Lastly, Tanzanian firms are not major outward investors and moreover full swing capital account liberalization is yet to be achieved in the country. There are restrictions on capital account and outward portfolio and direct investments by residents is not allowed. This makes the use of such BITs by Tanzanian impossible.¹⁰²

3.2 Features of Tanzania bilateral investment treaties

3.2.1 Standard of treatment of investment

Bilateral Investment Treaties usually contain obligations specifying the treatment that the parties to the treaties are required to provide to the investment once it has been established. In many instances it has been contended that an international minimum standard exists.¹⁰³

There are varieties of standards of treatment provided in bilateral investment treaties. First there are absolute standards of treatment, so called because they are non contingent. They establish the treatment to be accorded to investment without referring the manner in which other investments are treated. These include provisions on fair and equitable treatment, full protection and security, expropriation and transfer of funds.¹⁰⁴

Secondly, there is relative standard of treatment. This includes national treatment and most favoured nation treatment. National Treatment (NT) and Most Favoured Treatment (MFN) Treatment are the relative standard. National Treatment refers to treatment of nationals of the host country and MFN standard refers to treatment granted to investments from the most favoured nation. These standards of investment protection require that tribunals undertake a comparative analysis to determine whether they have been breached by host state. That is

¹⁰² The United Republic of Tanzania, Ministry of Finance, Tanzania: One of Africa's Fastest Growing Economy Come and grow with us.

¹⁰³ Government Position Paper, 'Bilateral Investment Treaty Policy Framework Review', Republic of South Africa June, Pretoria, 2009 pg. 34

¹⁰⁴ Sornarajah (n 34 above) 233

treatment accorded by the state receiving the investment to a given investor or investment must be assessed in light of that accorded to other investors or investment.¹⁰⁵

3.2.1.1 National standard of treatment

This clause relates to treatments to be accorded to investment by reference to treatment to other investment. National Treatment requires that the host state provide foreign investors and investments with treatment no less favourable than that provided to its own investors and investments.¹⁰⁶

The national treatment provision is included in most investment treaties. Some treaties combine both national treatment and most favoured nation treatment. Ghana and United Kingdom treaty Article 4(1) provides as follows:

neither contracting parties shall in its territory subject investments or returns of nationals or companies of the other contracting party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third state.

Article 4(2) further provides:

*neither contracting party shall in its territory subjects nationals or companies of the other contracting party, as regards there management, maintenances, 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.*¹⁰⁷

Moreover, the treaty between United State of America and The Argentine Republic for provides that:

Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favourable than that accorded in like situations to investment or associated activities of its own nationals or companies or of nationals or companies of any third country, whichever is the more favourable, subject to the right of each

¹⁰⁵ S Jagusch & N Duclos 'Compensation for Breach of Relative Standards of Treaty Protection'(2009) 4 *the Journal of World Investment & Trade* 521

¹⁰⁶ R Dolzer & M Stevens, 'Bilateral Investment Treaties' (1995) 63 *Kluwer Law International* ("Many BITs impose on hosts state the obligation to accord the foreign investor the same treatment as that enjoyed by its own nationals.

¹⁰⁷ Ghana-UK BIT entered into force on 25 October 1991.

*Party to make or maintain exceptions falling within one of the sectors or matters listed in the Protocol to this Treaty.*¹⁰⁸

The Tanzania-UK BIT and Tanzania-Italy BIT provide an exception for national treatment for temporary special incentives in order to stimulate local industries provided they do not significantly affect the investment and activities of nationals and companies of the other party.¹⁰⁹ These agreements were entered before 2003.

The Tanzania-Republic of South Africa (RSA) BIT of 2005 provides for national treatment in Article 3(2), while Article 4(c) contains the exception to the above-mentioned treatment clause. Article 4 (c) reads as follows:

*“The provisions of sub-Articles (2) and (3) shall not be construed so as to oblige one Party to extend to the investors of the other Party the benefit of any treatment, preference or privilege resulting from... any law or other measure the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination in its territory.”*¹¹⁰

This provision gives rights to the state of both countries to provide preferential treatment to locals.

3.2.1.2 Most favoured nation treatment (MFN)

The basis for comparison under MFN standard differs from national treatment standard because one contracting state is obliged to give investors or investments from the other contracting state no less favourable treatment than it grants to investors or investment from third countries. This levels the playing field for all foreign investors protected by BITs.

The primary aim of MFN principle is to establish equality of competitive opportunities between investors from different foreign countries. It prevents competition between investors from being distorted by discrimination based on nationality.¹¹¹

¹⁰⁸ Article II of USA-Argentina BIT entered into Force October 20, 1994.

¹⁰⁹ The Tanzania-UK BIT entered into force on 2 August 1996 and Tanzania-Italy BIT.

¹¹⁰ Government Position Paper, ‘Bilateral Investment Treaty Policy Framework Review’, Republic of South Africa, June 2009 pg 37

¹¹¹ Jagusch & Duclos Nicole (n above) as quoted from Doak Bishop, James Crawford and W. Michael Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary* 1010, 1133, (Kluwer Law International 2005)

All of Tanzania BITs have the MFN provision. In 2003 Tanzania did a review of its BIT and came up with a standard format to be used in all negotiations of BITs which provide an exception to MFN. This exception permits the contracting parties to deny investors of the other contracting party more favourable treatment resulting from membership of regional economic integration organizations.

The rationale for this exception stems from the nature of regional economic integration, which purports to grant privileges to the member countries in exchange for a reciprocal preferential treatment. The exception prevents these privileges from being extended to those contracting parties of BITs with which such a reciprocal integration relationship does not exist.¹¹²

Article 3(2) of the standard format provides that:

*a contracting party which has concluded or may conclude, a customs union, a common market or a free trade area shall be free to grant more favourable treatment by investors of the state or states which are also parties to the aforesaid agreements, or by investors of some of these states.*¹¹³

3.2.1.3 Fair and equitable standard

Tanzania BITs also refer to the notion of fair and equitable treatment to foreign investors. This phrase somehow seems to be vague and open to different interpretations. According to UNCTAD the contents of this standard has caused much concern.¹¹⁴ It is said that the standard offered under fair and equitable treatment seems to be higher than the international minimum standard.

In the *Biwater Gauff* case the tribunal held that the same actions that constituted an expropriation also breached the Fair and Equitable Treatment standard. These included a May 13th public announcement by the Minister; comments made to City Water employees at a subsequent political rally; withdrawal of certain tax exemptions; and the seizing of City Water's offices and deportation of senior management.

¹¹² Republic of South Africa Government position paper pg 39

¹¹³ Tanzania BIT standard format available at Ministry of Finance and Economic Affairs. The text of the BIT between Tanzania-South Africa and Tanzania and Mauritius couldn't be found in order to see if this exception is included for BITs signed after 2003.

¹¹⁴ UNCTAD, Fair and Equitable Treatment (1999)

3.2.1.4 Full protection and security

Tanzania BITs also provides for the provisions on full protection and security to the foreign investment. According to Sornarajah M¹¹⁵, this provision in the treaties requires that government's forces should not harm foreign investor's property. Further more, the state should provide protection from violence against the interests of foreign investor.

In the *Biwater Gauff* case, Tanzania was also held liable for a breach of the treaty's Full Protection and Security obligation with respect to one set of incidents: the removal of City Water management from its offices, the take-over of the facilities and the hasty deportation of the managers. Indeed, the tribunal takes a broad reading of this particular treaty standard, noting that it concurs with those earlier tribunals which have read the clause so as to provide not only for the physical security of investments, but also their broader commercial and legal stability.¹¹⁶

3.2.2 Expropriation and compensation

Most BITs always protect investors against the fear of being expropriated unlawfully. State are allowed to expropriate foreign investments if it is done on a non discriminatory basis, for public purpose, under due process of law, and based upon payment of prompt, adequate and effective compensation (Hull formula). Yet, the Hull formula has been contested by developing countries who maintain that the applicable criterion for payment of compensation is that of appropriate compensation.

BITs that Tanzania has signed also guard against fear of investor being expropriated or nationalised unlawfully. Tanzania is allowed to expropriate foreign investment only if it is for a public purpose and is done on non discriminatory bases and upon payment of prompt, adequate and effective compensation.

But the language differs from one BIT to another like the Italy-Tanzania BIT states compensation shall be made without delay, be effectively realizable and be freely transferable

¹¹⁵ Sornarajah M p 237

¹¹⁶ *Biwater Gauff Ltd v. Tanzania*, ICSID Case No. ARB/05/22

within 6 month at a convertible currency at the prevailing interest rate applicable when the expropriation was announced to the public and shall include interest calculated on the bases of London Inter Banking Offered Rate (LIBOR) from the date of expropriation to the date of payment.¹¹⁷

A comparison between Tanzania BITs as compared to domestic law has demonstrated that standards with relation to expropriation differ from standards under domestic Tanzania law.

Article 24(1) of the Constitution of United Republic of Tanzania states that:

*every person is entitled to own property, and has a right to the protection of his property held accordance with the law and sub article two further states subject to the provisions of sub article one, it shall be unlawful for any person to be deprived of his property for the purposes of nationalization or any other purposes without the authority of law which makes provision for fair and adequate compensation.*¹¹⁸

Several potential problems have been identified with investment treaties. First, it remains unclear how to draw the line between indirect or creeping forms of expropriation, where the state gradually encroaches upon a foreign investment so as to confiscate or destroy it, and the exercise of legitimate government regulation, which might have some negative impact upon foreign (and domestic) business activity.

Many foreign investors have argued for a generous interpretation of expropriation, so that many of the latter type of regulations would trigger the treaty requirement to compensate foreign investors. Meanwhile, governments have feared that their legitimate functions might be jeopardized by an overly-broad reading of these treaties. One solution has been for governments to bring greater clarity to the drafting of these treaties, or to amend existing treaties. For the time being, arbitration tribunals have adopted diverging approaches to this important question of where to draw the line between expropriation and legitimate regulation, creating greater uncertainty on the part of investors and governments alike.

3.2.3 Compensation for destruction during wars and national emergencies

¹¹⁷ See Article 5 of Tanzania-Italy BIT signed in Dar es Salaam 21st August 2001 and Article 5 of Tanzania-Finland BIT entered into force on 30 October 2002

¹¹⁸ Article 24 of the constitution of the united republic of Tanzania

Investment treaties contain provisions for compensation in the event of damage to the foreign investor's property as a result of war, civil unrest or other national emergencies also provide for liability where the armed forces requisition the foreign investor's property or where such property is destroyed by the armed forces.¹¹⁹

BIT signed between Tanzania and other countries also guarantees that if a national or companies of the other contracting states suffer losses due to war or other armed conflict or revolution, or a state of national emergence, Tanzania shall accord the other party compensation, restitution, or indemnification or other settlement not less favourable than that which Tanzania accord its own nationals companies or companies of any third states.¹²⁰

3.2.4 Transfer of funds

The aim of foreign investment is to make profit and to send that profit to the home state. If the transfer of such profit is barred by the host state, this purpose of the foreign investor will be frustrated. In cases of extreme balance of payments or financial crisis the application of the treaty obligation to permit repatriation can be suspended until this situation improves.¹²¹

This clause is included in Tanzanian BIT and assures investors that they will move their funds from Tanzania to the home states without any restriction, delay and to use a particular currency at a specified exchange rate. Tanzania does not impose any restrictions to this. Most of the BITs with UK, Germany, Switzerland, and South Africa have this provisions and it has included it to attract investment.¹²²

3.2.5 Dispute settlement

3.2.5.1 Development of investor state dispute settlement mechanism

Generally speaking before 1960s, there was no investor state dispute settlement in Tanzania as during that period Tanzania was a British colony. Tanzania got independence in 1961 and in 1963 Foreign Investment (Protection) Act was introduced to attract foreign investment and

¹¹⁹ Sonarajah (n 34 above) 246

¹²⁰ See Article 7 of Tanzania-Netherlands BIT of 31 July 2001

¹²¹ Sornarajah (n 34 above) 238-239

¹²² Article 5 of Tanzania-German BIT

the Act was silent on investor state disputes. Moreover, in 1965 Tanzania signed its first BITs with German however there was no provision on investor state disputes. It is said that settlement of investor state dispute provision was not contained in the German Style BITs before the creation of ICSID. This was because the newly independent countries cherished their hard won state sovereignty and insisted disputes be solved by domestic Courts.¹²³

Therefore it is important to note that, this imply that any investor state disputes which arised from 1960s to early 1990s was resolved in Tanzania courts. This trend changed in 1990s when Tanzania started ambitiously to conclude BITs and accepted ICSID jurisdiction and other arbitrations.

However in other developing countries such as Latin America the position regarding dispute settlement mechanism has been changing over the years. Huiping Chen¹²⁴ described it in four main parts.

The first period is before 1960s and the attitude was that investor state disputes were resolved in host countries courts. During this period basically after the Second World War investment issues were included in the treaty of Friendship, Commerce and Navigation Treaty (FCNT) between USA and developing countries without mentioning the resolution of investor state disputes. This was because investment issues were not a key issue in the treaty and Latin American countries, which were the main body of developing countries at that time, insisted on the Calvo Doctrine.¹²⁵

The second period is from 1960s to 1980s here many Latin America countries insisted on four 'safety valves'¹²⁶ in ICISD arbitration. During this period ICSID was establishment by the World Bank to handle investment disputes between host country and foreign investor and

¹²³ Huiping (n 27 above) 469

¹²⁴ Huiping (n 27 above) 468

¹²⁵ Calvo doctrinehas its origin in South America and emphasizes that the responsibility of governments towards foreigners cannot be greater than that which such governments have towards their own citizens. It rejects the notion of international minimum standard as a standard applicable to the treatment of foreigners including foreign investors. See Huiping (n 27 above) 469 & The Republic of South Africa Government Position Paper pg 8

¹²⁶ safety valves includes the exhaustion of local remedies, use of domestic law of the host country as one of the governing laws, consent for arbitration on a case by case basis and respect for national sovereignty national security. See Huiping (n 27 above) 470

the ICSID Convention was concluded in 1965.¹²⁷ Therefore when negotiating the ICSID Convention, developing countries agreed to a limited transfer of their sovereignty by submitting investor state investment disputes to ICSID for resolution. However they maintained the four safety valves.¹²⁸

The four safety valves protected developing countries from being easily sued by foreign investors in an international arbitral tribunal. It is important to note that there were only 24 cases submitted to ICSID for the first 25 years of ICSID from 1966 to 1991 because of the four safety valves principle.¹²⁹ Nevertheless, during the beginning years of ICSID many developing countries and Latin American countries in particular, still had serious concerns about submitting disputes to ICSID, they did not sign or accede to the ICSID Convention.

During the third phase in the 1980s to 1990s, many developing countries including Tanzania and the Latin American Countries wholly accepted ICSID jurisdictions and other arbitration. Towards the end of 1980s, many developing countries changed their attitudes towards investor state dispute settlement.

Developing countries considered signing high standard BITs with developed countries as an important means to improve the domestic legal environment for foreign investment. In order to attract more foreign investment to develop domestic economies, many developing countries began competing to sign high standard BITs containing highly protective investor state dispute settlement mechanism with developed countries without considering the consequences.¹³⁰

As a result, during this period more and more developing countries acceded to ICSID as a gesture of protecting foreign investors and their investments. From the late 1990s Tanzania accepting ICSID jurisdiction, all BITs signed by Tanzania from 1990s to present accept ICSID jurisdiction by providing that investors may refer any investment disputes to ICSID. Moreover, the majority of Latin America countries also changed their attitudes from the Calvo Doctrine to accepting international arbitration by ICSID or other arbitration institutions

¹²⁷ Huiping (n 27 above) 469

¹²⁸ Huiping (n 27 above) 470

¹²⁹ (n 119 above)

¹³⁰ Huiping (n 27 above) 472

in their BITs. The first to do was Mexico, which signed North America Free Trade Area (NAFTA) in 1992.¹³¹

Thus developing countries accepted increased international protection for foreign investors and their investments, gave up the four safety valves, and loosed protection of national security and state sovereignty. This resulted in numerous challenges and claim from foreign investors. Developing countries accepted investor state dispute settlement mechanism from the late 1980s, and from the middle of 1990s they started to be frequently challenged by investors hence leading to an increase in ICSID cases.

An investment dispute case was filed against Tanzania by a foreign Investor in 2005, Biwater Gauff (Tanzania) Ltd. The case was filled at ICSID as *Biwater Gauff (Tanzania) Ltd vs. United Republic of Tanzania*. In the case, the foreign investor took the government to court to challenge the treatment of foreign investments in water and sewage provision which is very crucial for Tanzania sustainable development using Tanzania-UK BIT.

Thus more developing countries than developed countries are confronted by claims from foreign investors, even if they have the same BITs with the same dispute settlement mechanism. The reason is that most investment treaties typically pair a developed country that is an exporter of capital with a developing country that imports capital but exports very little capital or not at all. In such circumstances, even though the treaty provisions are reciprocal, the litigation risk is not, there is little likelihood that the developed country will face a claim by an investor of the developing country.

Lastly recently, there is a new trend whereby many developing countries are now reverting back to the early conservative attitudes and many developing countries are withdrawing and criticizing the ICSID arbitration system.¹³²

3.2.5.2 Dispute settlement provisions in Tanzania bilateral investment treaties

The settlement of disputes between investors and states in which they operate is one of the important aspects of investment protection established in BITs. Tanzania BITs provide ways

¹³¹ Huiping (n 27 above) 475

¹³² (n 114 above)

of settling investment disputes between foreign investors and the government as a result of accepting highly protective investor-state dispute settlement.¹³³ This provision allows foreign investors to take their dispute directly to international arbitration and foregoing domestic legal system which was designed to protect the public interest.¹³⁴ The investor state dispute settlement provisions in the Tanzania BITs provides for state to state dispute resolution mechanism and investor state dispute settlement mechanism to which investors can sue governments direct to international arbitration tribunal.¹³⁵

It is argued by academicians and most countries agree that an independent dispute body can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it. Although several different bodies exist, most are subject to similar criticisms.

The most commonly used dispute settlement body is ICSID, a World Bank body set up in 1966 to solve investment disputes between corporations and sovereign states. As of April 2010, 155 states had signed the ICSID Convention.¹³⁶ Of these, 144 States have also deposited their instruments of ratification, acceptance or approval of the Convention and have become ICSID Contracting States.

Other investor states disputes settlement bodies includes the International Chamber of Commerce (ICC), the International Court of Arbitration in Paris (ICP), the Stockholm Chamber of Commerce (SCC), the United Nations Commission for International Trade Law (UNCITRAL) and the Permanent Court of Arbitration (PCA). The handling of disputes is characterized by non transparency and only the ICSID rules provides for public disclosure of disputes proceeding under their auspices.

3.2.5.3 Data on investment treaties arbitration

¹³³ See Article 8 Tanzania-UK BIT of

¹³⁴ D Bishop et al; *Foreign Investment Dispute Cases, Materials and Commentary* (2005)

¹³⁵ Article 8 of Tanzania-UK BITs

¹³⁶ http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates_Home

The number of investor state treaty based cases had risen to 357 by the end of 2009 from 325 in 2008.¹³⁷ A total number of 225 disputes were brought before ICSID including ICSID's Additional Facility.¹³⁸ There were 91 cases under UNCITRAL, 19 under SCC, five with the ICC and four were *ad hoc*.¹³⁹ Eight were administered by the PCA and 1 under Cairo Centre for International Commercial Arbitration. However in four cases, the applicable rules are unknown so far by UNCTAD.¹⁴⁰ The Table below shows the number of cases registered by different international arbitration tribunal. The table shows that ICSID is still the most popular.

Fig 1: Number of cases registered at various international tribunals at the end of 2009

Further according to UNCTAD at least 77 governments have faced investment treaty arbitration by 2008.¹⁴¹ In 2009, the number of countries that have faced investment treaty arbitrations increased to 81, with four countries having to respond to a dispute for the first time.¹⁴² Among which 49 are developing countries, 17 developed countries and 15 countries with economies in transition. Most claims were initiated by investors from developed countries.¹⁴³ At the end of 2009, only 23 cases were filed by investors from developing countries, and nine cases originated from investors headquartered in transition economies.¹⁴⁴

By 2008 Argentina topped the list with 48 claims lodged against it. Second in the list was Mexico which has 18 cases. The Czech Republic follows with 15 cases and Ecuador with 14

¹³⁷ UNCTAD 'Latest Development in Investor-State Dispute Settlement' (2010) IIA ISSUES No. 1 pg 2

¹³⁸ (n 128 above)

¹³⁹ (n 128 above)

¹⁴⁰ (n 128 above)

¹⁴¹ UNCTAD's 2009 IIA Monitor No. 1

¹⁴² Belize, Cambodia, the former Yugoslav Republic of Macedonia (with two cases) and Turkmenistan see (n 128 above)

¹⁴³ (n 128 above)

¹⁴⁴ (n 128 above)

cases. Canada and the United States of America have 13 and 12 cases, respectively.¹⁴⁵ The information above from UNCTAD shows that majority of claims were lodged by investors from developed countries.

3.2.5.4 Tanzania experience with investment treaty arbitration

Biwater Gauff Ltd v. Tanzania ICSID Case No. ARB/05/22

Tanzania faced so far one investment treaty arbitration at ICISD. The case was filed in 2005 by a foreign investor using a Tanzania-UK BIT and on 24 July 2008 the award was rendered.¹⁴⁶ The discussion on the case is as follows below.

In this case Tanzania was held to have violated treaty protections owed to foreign water services company Biwater Gauff (Tanzania) Ltd (BGT), but no damages flow from these breaches. ICSID tribunal holds that firm's ill-managed operation of Dar es Salaam water supply had brought company to brink of collapse by the time Tanzanian Government actions served to breach Tanzania-UK investment treaty.

An arbitral tribunal at ICSID held the Republic of Tanzania in breach of several provisions of the Tanzania-UK BIT in relation to Tanzania's treatment of the UK based water services firm BGT.

Notwithstanding a finding of multiple treaty breaches, the tribunal rejected in its entirety a bid by BGT for upwards of \$20 Million (US) in compensation, citing the state of the firm's water project by the time that the Tanzanian Government took a series of abusive and unnecessary actions which deviated from the treaty protections owed. From a purely financial perspective, these actions by Tanzania that included the seizure of BGT assets and the deportation of local executives merely served to accelerate a process of winding up an investment which was teetering on the brink of collapse. The discussions on the case are as follows below.

¹⁴⁵ UNCTAD 2009 IIA MONITOR No. 1

¹⁴⁶ A panel of distinguished arbitrators (Gary Born, Toby Landau and Bernard Hanotiau) rendered an award. The case is available at [The case can be at ICSID.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal](https://www.icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal)

3.2.5.5 Factual background of the case

In 2003 several multilateral lending institutions, including the World Bank, the African Development Bank, and the European Investment Bank, granted Tanzania US\$ 140 million to upgrade and expand the water and sewerage infrastructure of its capital city, Dar es Salaam. In 2002, to fulfil some of the conditions imposed by the multilateral lenders, Tanzania had launched a bidding process for a private operator of water and sewerage services, who would also serve as a contractor for some of the required upgrade and expansion works.

Tanzania awarded the concession, set to last for ten years, to a joint venture of Biwater International Limited (Biwater) a British corporation and HP Gauff Ingenieure GmbH and C. KG-JBG (Gauff). In January 2003, Biwater and Gauff incorporated jointly Biwater Gauff (Tanzania) Limited (BGT) a British corporation that would become the Claimant in this case. In turn, as required by the terms of the bid, BGT partnered with a Tanzanian company, Super Doll Trailer Manufacture Co. (T) Limited (STM), and incorporated the operating company, City Water Services Limited (City Water), under the laws of Tanzania. To implement the project, City Water entered into three key contracts (jointly, 'Project Contracts') with the Dar es Salaam Water and Sewerage Authority (DAWASA).

Under the terms of the Project Contracts, City Water would lease DAWASA's existing pipeline network, which City Water would use to provide water and sewerage services to customers. Customers would pay a tariff that would remain fixed under a contractual indexation formula for the first five years of operation. City Water's portion of that tariff was subject to three levels of review: annual, interim, and major. The main reason the parties agreed to elaborate tariff-review provisions was that neither City Water nor DAWASA had extensive or sufficiently reliable data on customer demand and revenue projections. In addition to providing services previously rendered by DAWASA, City Water would undertake, on a priority basis, the performance of upgrades to the water supply system, and would install water meters in all customer locations, to attain accurate data on water consumption. City Water would also act as the main contractor for the expansion of Dar es Salaam's water supply network and for other improvements necessary for the implementation of the project.

Eleven months after the commencement of City Water's operations, however, it was apparent that the project was facing significant financial difficulties and was in danger of shutting down. City Water concluded that it would need to call for an interim review of the tariff it was receiving under the Project Contracts. Critically for Claimant's claims against Tanzania, although the water and sewer systems were in bad condition before City Water took over, shifting part of the blame for increased operating costs to prior acts of DAWASA, the main source of City Water's problems was the Claimant's (BGT's) gross overestimation of projected tariff revenues at the bidding stage, combined with the failure of the BGT appointed management of City Water to successfully handle the project's numerous challenges. The operating company's failures were borne out in Claimant's own internal evaluation of the project, in reports by independent auditors employed to evaluate whether a tariff renegotiation was warranted (it was not) and the decision of a mediator employed by the parties in the course of subsequent negotiations on how to revive the moribund project.

Despite good faith negotiations during the first months of 2005, Claimant and the Government of Tanzania failed to reach agreement on how to salvage the project. Contemporaneous documentation cited by the Tribunal provides further evidence that the project was in dire straits, since solutions that were considered potentially viable during the negotiations were simultaneously characterized as radical or last resort by the parties themselves.

While the contractual relationship was headed inevitably towards dissolution, Tanzanian Government officials, motivated by electoral concerns, among others, took a series of drastic measures that went far beyond the contractually mandated process for termination of the Project Contracts. In May 2005 Tanzanian Government officials, causing public furor, repudiated unilaterally and rather publicly the lease agreement with City Water while calling on the performance bond posted by BGT, reinstated the previously waived Value Added Tax (VAT) on purchases by City Water, repossessed forcibly the assets previously leased to City Water, and deported City Water's BGT management.

These series of actions by Tanzanian Government officials were ultimately deemed by the ICSID arbitration tribunal to be excessive and abusive, and in breach of the Tanzania-UK investment treaty. Among the actions which were held to have breached Tanzania's treaty obligations were a series of public announcements by a Government Minister to the effect

that the Government was terminating the City Water contract; a unilateral withdrawal of a tax exemption earlier granted to City Water; and the occupation of City Water's facilities and the unceremonious deportation of key company executives.

3.3 The use of bilateral investment treaty protections by investors in Tanzania

As discussed above, we have seen the provisions available in Tanzania BITs and the treaty rights offered to foreign investors. Without a doubt Tanzania BITs were drafted to protect foreign investors and their investment and not to promote foreign investment in the country. Although the aim of the BITs is to produce a double effect it is well understood that, capital flow is one sided always from developed countries to developing countries.

So far there is only one case in which the investor used the treaty protection. Therefore, only through actual arbitration between investors and states as observed in the *Biwater* case above will the meaning of standard treaty obligations offered to foreign investors and their implications for Tanzania be elucidated.¹⁴⁷ The case showed that such investment treaties place no restrictions upon government policy making by the host state. As we have seen above, the number of treaty based arbitrations has grown significantly in recent years. So too has the variety of ways in which the treaties may narrow the policy space available to governments playing host to foreign investment.

3.4 Bilateral investment treaties and promotion of foreign direct investment in Tanzania

For a long time, the justification for the conclusion of BITs has been that countries sign these treaties to help increase, promote and encourage new investment flows between the parties to the BITs thereby increasing the amount of capital and associated technology that flows to their territories.¹⁴⁸ In actual fact, there is a hope that the treaties will encourage new investment, which will, in turn, bring a wide range of benefits to the host state.¹⁴⁹ Lets

¹⁴⁷ I Shihata & Antonio Parra 'The Experience of ICSID' (1999) 2 *ICSID Review*, pp. 319, 336 as quoted from Peterson (n 21 above) 11

¹⁴⁸ DL Swenson 'Why do Developing Countries Sign BITS?' (2005) 12 *U.C. Davis Journal of International Law and Policy* 131 and JW Salacuse & NP Sullivan 'Do BITS Really Work?: An Evaluation of Bilateral Investment Treaties and their Grand Bargain' (2005) 46 *Harvard International Law Journal* 67

¹⁴⁹ Peterson (n 21 above) 9

suppose that FDI can contribute to economic development, it remains uncertain whether BITs enable countries to attract a higher level of foreign investment.¹⁵⁰

According to one of the Bank of Tanzania official is of the view that the treaties were not intended to promote new flows, but rather to protect existing investments. He further suggests that capital exporting states may have given priority in BITs negotiations to states that already were hosts to large amounts of its investment, so that BITs may be used to protect their investments.¹⁵¹ Salacuse also is of the view that the movement behind the rapid expansion of BITs rests in the desire of foreign investors to invest safely and securely in developing countries, as well as the consequent need to create a stable international legal framework to facilitate and protect those investments.¹⁵²

Some investment lawyers have highlighted the lack of tangible evidence to demonstrate investment flows and a link to investment treaties.¹⁵³ in reality, two self described proponents of the investor protections contained in such agreements, concede that the agreements may be negatively linked to investment flows with countries like Brazil and Nigeria seeing large investment flows despite not concluding such treaties, many Central African or Latin American nations have seen little investment despite having entered into many of BITs.¹⁵⁴

Moreover, countries such as China and Cuba are said to have seen sizable flows of investment from countries with which they have not concluded BITs.¹⁵⁵ Astonishingly, many analyses examining the economic effects of signing BITs have generally come to the rather disappointing conclusion that BITs are not linked with large increases in foreign investment.¹⁵⁶ For instance, The World Bank's 2003 Report on the Global Economic Prospects of the Developing Countries concluded that, even the relatively strong protections in BITs do not seem to have increased flows of investment to signatory developing

¹⁵⁰ (n 148 above) and (n 149 above)

¹⁵¹ Interview conducted at Bank of Tanzania Headquarters on 30th March 2010

¹⁵² Salacuse & Sullivan (n 148 above) 75

¹⁵³ Thomas Walde, with Stephen Dow, "Treaties and Regulatory Risk in Infrastructure Investment: The Effectiveness of International Law Disciplines versus Sanctions by Global Markets in Reducing the Political and Regulatory Risk for Private Infrastructure Investment," 34 *Journal of World Trade*, 2000, No. 2, p. 12. As quoted by LE Peterson BITs and Development-Policy Making p.9

¹⁵⁴ (n 153 above)

¹⁵⁵ The China-US relationship is the most notable; On Cuba see: "The Contribution of BITs to Cuba's Foreign Investment Program," Jorge F. Perez-Lopez and Matias F. Travieso-Diaz, 32 *Law and Policy in International Business*, 529 as quoted from Peterson (n 21 above) 10

¹⁵⁶ Swenson (n 148 above) 134

countries.¹⁵⁷ The Bank relies upon a 2002 study by Mary Hallward-Driemeier of 20 years of data, which indicates that Countries that had concluded a BIT were no more likely to receive additional FDI's than were countries without such a pact.¹⁵⁸

Likewise in Tanzania, looking at the flow of FDI by top ten source countries for 2001 to 2005,¹⁵⁹ it shows that, Tanzania received considerable flows of investment from countries which had not signed BITs with for instance Canada, USA, Bermuda, Cayman Islands, China, South Africa and Kenya. It is only two countries in the top ten by then which had BITs with Tanzania which are Switzerland and UK. However, South Africa later signed a BIT with Tanzania in October 2005. Further, Tanzania is now negotiating BIT with Canada and received drafts from China. Though, Kenya is also a developing country: the closeness with Tanzania through state boundaries, culture and the regional integration are said to make Kenyan investors confident to invest in Tanzania. Therefore it is observed here that many investments projects in Tanzania are from countries which have no BITs with Tanzania.

Notwithstanding these irritating doubts about the impact of BITs upon investment flows, developing countries have continued to champion the agreements despite lack of evidence to show their efficacy in increasing FDI flows to developing countries.¹⁶⁰

More mystifying, however, is the eagerness of many developing countries including Tanzania to continue to enter into these treaties with developed states and increasingly with their counterparts in the developing world. Even if investment treaties play a relatively marginal role in the promotion of new investment, it needs to be asked to what extent the protective function of the treaties will impact upon the ability of governments to regulate investments in the public interest, including for the furtherance of development goals.

3.5 Conclusion

In summing up, this chapter aimed at analyzing Tanzania BITs by looking at specific provisions in the treaties such as expropriation, transfer of funds and dispute settlement. The

¹⁵⁷ 'Global Economic Prospects and the Developing Countries 2003' World Bank, p. xvii. As quoted from Peterson (n 21 above) 10

¹⁵⁸ (n 157 above)

¹⁵⁹ Tanzania Investment Report 2006 p. 19

¹⁶⁰ See LE Peterson BITs and Development Policy-Making pg 10

chapter also looked at whether BITs attract the flows of FDIs in the country and how foreign investors use such BITs. The author concludes that BITs do not necessary promote FDIs flow as there are a range of issues that investors look at. Some of them matter less and some matter more for foreign investors. As observed in this chapter, in 2001-2005 Tanzania had many investment projects from countries which had not sign BITs with.

Foreign investors have a checklist and will go somewhere they meet their checklist which includes BITs, FDI policy framework and political stability among others which cements confidence of a new investor in a new environment. Apart from political stability and BITs which guarantee against expropriation, expatriation of profits and access to fair justice through international tribunals, foreign investors look at FDI policy frameworks in host countries. This gives them an idea of the broad range of policy issues that matter for foreign investors. Thus, these issues may cover foreign exchange regulations, taxation, employment, including employment of non-citizens, land issues, competition policy, rule of law and respect for property rights, intellectual property protection, corporate governance and accounting standards, licensing and administration of regulations and investment promotion including incentives.

CHAPTER FOUR

Evaluating the implications of Bilateral Investment Treaties in Promoting Sustainable Development

4.1 Introduction

This chapter evaluate the implications of BITs in promoting sustainable development. Trade and Investment are essential for sustainable development. The World Commission on Environment and Development Agenda 21 shows that there is a widespread consensus in the international community that FDI is necessary for sustainable development.¹⁶¹ Nonetheless, at the June 1992 “Earth Summit” in Rio de Janeiro, the comprehensive plan developed by UNCTAD highlighted the critical role investment plays in the ability of developing states to meet basic needs in a sustainable manner.¹⁶²

Many developing countries including Tanzania in order to increase FDI flows and promote sustainable development have significantly liberalized their investment regime to create an enabling FDI regulatory framework. FDI flows occur within a complex of national and international laws. The most significant recent development in the international FDI regulatory framework has been the creation of BITs to promote and protect foreign investment.¹⁶³ This chapter analyses the implications of BITs on sustainable development.

The criticism of BITs in promoting sustainable development in host countries is often expressed. For example academicians argue that unequal and exploitative investment agreements, which prohibit the very policies developing countries, need to fight poverty, is no way to put trade and investment at the service of sustainable development.¹⁶⁴

Peterson¹⁶⁵ is of the view that bilateral investment treaties were designed by Western capital exporting governments to protect investors when they make investments abroad, typically in developing countries. They were conceived as a supplement to domestic legal systems, so as

¹⁶¹ Agenda 21, Report of UNCTAD, UN Doc. A/CONF.151/26/Rev.1, (1992) 31I.L.M. 874, para. 2.23.

¹⁶² Newcombe (n 24 above) 357

¹⁶³ Newcombe (n above) 358

¹⁶⁴ Republic of South Africa Government Position paper pg 46

¹⁶⁵ Peterson L.E “Bilateral Investment Treaties-Implications for sustainable Development and Options for regulation” Friedrich Ebert Stiftung, SAIIA, IISD, Berlin (2006)

to provide higher levels of protection against property interferences, including nationalization without compensation, guarantees for the free repatriation of capital, and prohibition of discrimination against foreign investors and investments. In the absence of clear rules of international law governing the treatment of foreign investment, these bilateral treaties would clarify those rules at least between the two signatory countries.

Moreover, The Public Citizen, a prominent USA based non-governmental organization (NGO), views BITs not as providing an enabling FDI regulatory framework, but as an extraordinary attack on government's ability to regulate in the public interest.¹⁶⁶ Further, Investment Treaty News reports that many BITs are based on a 50 year old model that is in favour of investors from developed countries. Issues of concern to developing countries are not addressed or negotiated in most BITs.¹⁶⁷

The following part evaluates the implications of BITs in promoting sustainable development in Tanzania.

4.2 Implications of BITs in promoting Sustainable Development

4.3 Object and purpose of the treaty

It is important for Tanzania to note that, in many BITs concluded by the government the preamble is drafted in narrow terms with lack of broader policy objectives. This may have implications on sustainable development. Generally in the Preamble parties state their intentions and objectives when concluding the agreements. For instance in Tanzania-UK BIT the preamble provides that;

parties to the agreement desire to create favourable conditions for greater investments by nationals and companies of one state in the territory of the other state.

¹⁶⁶ Public Citizen. Online: <http://www.citizen.org/trade/nafta/CH_11/>

¹⁶⁷ 50th Anniversary of the first bilateral investment treaty: An occasion for celebration or reflection? Published on 3 December 2009 by Investment Treaty News, Accessed on 20 February 2010 at <http://www.iisd.or/media/press.aspx?id=13>

The Tanzania-UK BIT suggests that there is absence of references to development objectives or public interest goals in the preamble. It only shows the need for creating a favourable investment climate and little else is stated.

Parties to a BIT must ensure that preamble take note of broader policy objectives such as sustainable development, environmental protection or raising the standards of living. The Preambles play an important role in guiding the interpretation of the treaties where there is ambiguity in the language. Lack of references to development objectives goal strengthens the case for investors to argue that the primary objectives of BITs is to protect interests of investors.

What is apparent is that, in case of disputes between foreign investors and Tanzania, a narrow preamble language will have an important impact upon interpretation of the treaty provisions, and the treaty's application. According to Peterson, several treaty arbitrations have seen tribunals look to these narrow preambles, and, in the absence of any broader treaty objectives, adopt interpretations which are on the side of foreign investors and investments. For example, in a claim against Chile, the tribunal noted that it would interpret a treaty provision in the manner most conducive to fulfill the objective of the BIT to protect investments and create conditions favourable to investments.¹⁶⁸

Peterson explains further that in another treaty based arbitration *Siemens v. Argentine Republic*, a tribunal observed that it was obliged to interpret key treaty rules through the lens of the treaty's object and purpose, which was to create favourable conditions for investments and to stimulate private initiative.¹⁶⁹ And in *SGS v. Philippines*, the tribunal held that a similarly narrow treaty preamble dictated that, it is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.¹⁷⁰

Therefore Tanzania should be carefully in negotiating treaties with narrow and brief preambular language as investment treaty disputes may arise out of investments in sensitive sectors such as electricity, environmental regulation, water, health and safety measures. Given the nature of the disputes which are arising between governments and foreign investors

¹⁶⁸ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, Decision on Jurisdiction, at para 104. As quoted from Peterson (n above 21) 23

¹⁶⁹ *Siemens v. Argentine Republic*, Decision on Jurisdiction, at para 81. As quoted from Peterson (n 21 above) 23

¹⁷⁰ *SGS v. Philippines*, Decision on Jurisdiction, January 29, 2004, at para 116. As quoted from Peterson (n 21 above) 23

under investment treaties, it will be important for Tanzania to ensure that investment treaties recognize not only the importance of a favourable investment climate, but also the prerogative of states to regulate in the public interest and the importance of other policy goals, such as poverty alleviation, environmental protection and sustainable development. More balanced preambles might help to ensure that tribunals do not view it as legitimate to resolve uncertainties in treaty interpretation so as to always favour investor interests.¹⁷¹

4.4 Conflicts of Jurisdiction

In accordance with the principle of national sovereignty over activities occurring on the territory of a State, most countries have traditionally maintained that investor-state disputes should be resolved in their national courts. In its strict formulation, this position means that foreign investors ought not, in principle, to have the option to pursue investor-State disputes through internationalized methods of dispute settlement.¹⁷²

Moreover, The United Nations Charter on Economic Rights and Duties of States, which was adopted by the General Assembly on 12 December 1974, emphasises that each State has the right 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. In addition states that, in the case of disputes concerning compensation as a result of nationalization or expropriation, such disputes should 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.¹⁷³

Nonetheless, it should also be noted that States are given the freedom to use other means of resolving compensation disputes. Thus, the Charter certainly cannot be interpreted as prohibiting the use of internationalized measures, merely not advocating them.

¹⁷¹ Peterson (n 21 above) 24

¹⁷²United Nations Conference on Trade and Development Dispute Settlement: Investor-State UNCTAD Series on issues in international investment agreements United Nations, 2003. Pg 26

¹⁷³The United Nations Charter on Economic Rights and Duties of States, 1974 Art 2.2 (a) (c)

However, BITs provide foreign investors with the ability to bypass local and national legal systems, and to pursue claims before international arbitration tribunals.¹⁷⁴ This major innovation is not found in most other international treaties. International human rights treaties, for example, will not always provide victims with international forms of dispute settlement, and when they do, these avenues are only accessible after the claimant has exhausted all domestic legal remedies.¹⁷⁵

This rule on exhaustion of local remedies is a method of permitting states to solve their own internal problems in accordance with their own constitution procedures in the first instance before accepted international mechanism can be invoked, and is well established in general international law.¹⁷⁶ By contrast, the arbitration process provided under Tanzania's investment treaties offers foreign nationals and companies the ability to dispense with the Tanzania legal system in many circumstances, and set up international tribunal to arbitrate claims.¹⁷⁷

ICSID cases have further demonstrated that even in situations where contracts between an investor and a state expressly limit investment disputes to local courts, this may not restrict foreign investors from opting for international arbitration in situations where a bilateral investment treaty has also been concluded by the investor's home state and host state. A number of ICSID cases have underscored this point by upholding jurisdiction to hear treaty claims, notwithstanding the fact that the foreign investor was party to a contract which specified that contract claims would be the exclusive province of a given domestic court.¹⁷⁸

While access to international arbitration is clearly advantageous for foreign investors, this process has certain disadvantages from the perspective of the public interest of host states.¹⁷⁹ First, there are no uniform requirements for the parties to the dispute to publicly disclose the existence of their claim.¹⁸⁰ The effect of this is that governments often confront arbitration

¹⁷⁴ Peterson (n 20 above) 19

¹⁷⁵ Peterson L.E Bilateral Investment Treaties – Implications for Sustainable Development and Options for Regulation, Conference Report 2007, Friedrich-Ebert-Stiftung.

¹⁷⁶ M N Shaw *International Law*(1997) 202

¹⁷⁷ Article 8 of Tanzania-UK treaty

¹⁷⁸ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3) Annulment Decision of July 3, 2002, 41 ILM 1135 (2002); *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Jurisdiction of July 17, 2003, 42 ILM 788 (2003)

¹⁷⁹ See UNCTAD Latest Development in Investor-State Dispute Settlement (2006) IIA Monitor No 4 at UNCTAD online http://www.unctad.org/sections/ditepcbb/docs/webiteiaa200611_en.pdf

¹⁸⁰ United Nations Commission on International Trade Law (UNCITRAL) UNCITRAL Notes on Organizing Arbitral Proceedings part 6 notes 31 and 32 talks of Confidentiality of information relating to the arbitration. An

claims and demands for compensation which are not a matter of public record, and which may be adjudicated with little or no public disclosure. Indeed, as is discussed in more detail in chapter three, Tanzania has faced one investment treaty arbitrations already; a claim, brought by British water company Biwater Gauff used an investment treaty between UK and Tanzania to make Tanzania pay millions for an abrogated water privatization contract, this case was arbitrated without any publicity despite the fact that many NGO's participated as amicus curiae in the case.¹⁸¹

Further in Tanzania context, the BITs place foreign investors in Tanzania in a better position than local investors. The BITs gives foreign investors opportunity to sue government in international courts while local investors are not given such avenue to avoid local courts. As Peterson explained the failure of most modern investment treaties to require exhaustion of local remedies ensures that foreign investors will rarely need to dip even a toe into the local court system provided a treaty is at their disposal.¹⁸²

BITs internationalize disputes which arise between regulators and foreign investors in sensitive sector including electricity and water as the experience in the Biwater Gauff case. In doing so ensure that foreign investors may detour around domestic legal system and laws applicable in Tanzanian system.

For instance, South Africa has similar experience in 2004 the South African government had been served with notice that several foreign owned mining corporations might bring claims under domestic law for expropriation.¹⁸³ The firms object to mining legislation inspired by a desire to redress historical economic marginalization of Blacks and South African minorities, and which imposes various constraints and obligations upon mining firms including to

agreement on confidentiality might cover, for example, one or more of the following matters: the material or information that is to be kept confidential (e.g. pieces of evidence, written and oral arguments, the fact that the arbitration is taking place, identity of the arbitrators, content of the award) downloaded at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf> on 30 April, 2010.

¹⁸¹Petition for Amicus Curiae Status in Case No. ARB/05/22 before the International Centre for Settlement of Investment Disputes Between Biwater Gauff (Tanzania) Limited and United Republic of Tanzania. Petitioners were The Lawyers' Environmental Action Team (LEAT), The Legal and Human Rights Centre (LHRC), The Tanzania Gender Networking Programme (TGNP), The Center for International Environmental Law (CIEL) and The International Institute for Sustainable Development (IISD).

¹⁸² Peterson (n 21 above) 22

¹⁸³ Nicol Degli Innocenti and John Reed, "Foreign mining groups set to sue S Africa for expropriation," *Financial Times*, Oct.30, 2004 as quoted from Peterson (n 21 above) 23

surrender ownership over mineral rights, in favour of licences to exploit minerals.¹⁸⁴ For several of the firms which notified claims in October 2004, this domestic recourse was their only Option as their home government did not have an effective international investment treaty with South Africa.¹⁸⁵

Therefore some foreign owned mining firms will enjoy a separate international avenue because of investment treaties which are in force between their countries and South Africa. These foreign parties may appeal to an international arbitral tribunal which would operate according to different applicable laws and standards rather than subjecting South Africa's minerals legislation to review by South African courts.

Peterson also observed that foreign investors with access to international investment treaty arbitration may be able to obtain higher levels of compensation for losses due to their ability to skirt South African legal rules which would take into account historical prejudice against Blacks and minorities when assessing the level of compensation owed to individuals who have had their property dispossessed by government action.¹⁸⁶

Moreover the provisions of the treaty may override domestic law where the two are in conflict. Therefore, it can be said that BITs place improvements of international tribunal while local courts don't improve. Enhancing the development of legal institution within host states that can benefit both national and foreign investors is crucial.

Viewed with observation, it is clear that the investment treaties entered into by Tanzania during the past decade may harbour profound implications in terms of the process by which disputes with foreign investors are to be adjudicated. Indeed, the Biwater case challenged measures taken by Tanzania to look after its own citizens in a highly sensitive sector. Water and sanitation services are vitally important, and the Republic has more than a right to protect such services in case of crisis. While the Government tends to protect its citizen, and water situations deteriorate at home on the other hand investors take the government to international tribunals and bypass domestic courts hence the disputes are litigated far away from the place where conflicts originated and decided by people who are not fully aware of

¹⁸⁴ Peterson (n 21 above) 23

¹⁸⁵ (n 184 above)

¹⁸⁶ (n 184 above)

the local situation. Therefore our own legal order is marginalized which could best solve the situation.

4.4.1 Efficacy of Local Courts in investments disputes

4.4.2 Commercial Dispute resolution in Tanzania: Tanzania Commercial Court

The Commercial Division of the High Court of Tanzania (Commercial Court) was established in 1999 with the express purpose of improving the efficiency and fairness of commercial dispute resolution in the country. Tanzania established the Commercial Court to address perceived deficiencies in the judicial resolution of business disputes in the country. The government believed that a speedy and reliable vehicle for commercial dispute resolution would facilitate private sector development and improve investor confidence.¹⁸⁷

A number of factors combined to create a perception among the domestic and international business communities of significant delays in the administration of justice and unfairness within the Tanzanian judicial system, even at the High Court level where high value disputes are litigated. As one Tanzanian jurist observed, alarming delays and accumulation of cases in existence in the general registries of the High Court were and are not a secret. The Commercial Court was designed to address these deficiencies in the limited context of business dispute resolution in Tanzania. Several domestic and international factors combined to make the establishment of the Court politically and financially viable.

The Commercial Court received its first case on September 16, 1999. The number of cases filed with the Court increased steadily in its first several years of operation. In 1999-2000, 116 cases were filed and the Court decided or otherwise resolved 66 cases; in 2001, 301 cases were filed and 227 were resolved; in 2002, 351 cases were filed and 234 were resolved; and in the first 11 months of 2003, 158 cases were filed and 242 were resolved.¹⁸⁸

From the start, the Commercial Court has demonstrated a high degree of efficiency in handling and resolving cases, particularly as compared to the general division of the High

¹⁸⁷David Louis Finnegan 'Judicial Reform and Commercial Justice: The Experience of Tanzania's Commercial Court (2005) Background Paper Prepared for the World Development Report pg 1

¹⁸⁸ (n 187 above) pg 5

Court. Recall that even the most routine commercial cases take on average four to five years to be resolved in the general division. By contrast, in its first four years of operation, commercial cases filed with the Commercial Court took an average of 4.1 months to be resolved, either through some form of pre-trial settlement (e.g., negotiation, mediation) or by judgment following trial. In 2003, the Court had on average 247 pending cases each month. Of these pending cases, an average of 74% remained pending six months from the date of filing. Only an average of 46% remained pending after 12 months from the date of filing. 68% of Tanzanian lawyers surveyed recognize that it takes less time to resolve a case in the Commercial Court compared to the general division of the High Court.¹⁸⁹

The Commercial Court has demonstrated a high degree of efficiency in handling and resolving cases. Therefore, it is observed the commercial court is sufficient and has the ability to solve investment disputes between foreign investors and the Government and can be resolved on time as shown in this part.

4.5 Multiple Cases

The multi-faceted nature of the legal framework governing international investment projects involving contractual rights and treaty rights creates conditions for multiple proceedings. This is because the multiplicity of applicable legal standards might introduce incompatible dispute settlement provisions which direct legal disputes to different judicial forums including international courts or arbitral tribunals. This part looks at the interplay between treaty claims and contract claims.

Tanzania for instance sued Biwater Gauff (Tanzania) Ltd sued twice. First, in a case filed in the UK under UNCITRAL rules and alleged Tanzania violated the terms of the contract and in January 2008, the tribunal deciding the case ruled that Biwater should actually pay \$8 million USD to Tanzania.¹⁹⁰ Biwater filed another suit at ISCID, under the bilateral investment treaty (BIT) of 1994 between the United Kingdom and the Republic of Tanzania, alleging expropriation of its property and unreasonable or discriminatory treatment.

¹⁸⁹ (n187 above) 5-6

¹⁹⁰ Tanzania declares victory in contractual dispute with water services company, Investment Treaty News 11 January 2008.

The company also claimed that Tanzania had violated its obligation to provide fair and equitable treatment, full protection and security to permit the repatriation of investment funds. Biwater Gauff requested damages in the range of US\$19 – 20 million.¹⁹¹

In July 2008, the ICSID panel ruled for Biwater, but refused to grant any damages. The tribunal rejected in its entirety a bid by Biwater Gauff for upwards of \$20 Million (US) in compensation, citing the state of the firm's water project by the time that the Tanzanian Government took a series of abusive and unnecessary actions which deviated from the treaty protections owed.

Although Tanzania won the case, Tanzania is left with heavy legal bills funds that could have otherwise be channelled to further sustainable development. Moreover, Biwater has rejected to pay USD 8 million awarded to Tanzania by United Nations Commission on International Trade Law (UNCITRAL) because City Water no longer exists. The amount would have sufficiently connected 50,000 people in Dar es Salaam to water system.¹⁹²

Therefore as observed above, there are multiple cases for one set of facts as investor's claims under BITs which referred to ICSID were crucially connected with their claims under the contract referred to UNCITRAL. It can therefore be noted that same facts and circumstances were litigated by the same investor in different tribunals as the claims underlying the two proceedings are sufficiently connected to one another as a factual matter.

There is therefore a risk of lack of finality and the possibility that host countries could be sued several times and be subject to multiple awards. While this is a risk for all host countries, the burden of such an outcome could fall more heavily upon developing countries. In addition, any cases leading to significant awards against a developing host country may require the diversion of much-needed financial resources from other areas.

4.6 Costs of investment treaty arbitration

¹⁹¹ Fiona Marshall, 'The Precarious State of Sunshine Case Comment on procedural orders in the Biwater Gauff (Tanzania) Ltd. V. Tanzania Investor-State Arbitration'

¹⁹² See Maj Fiil Tanzania: Thirst for Justice by at http://www.bilateral.org/article.php?id_article=13849 24 Nov 2008

As investor claims against governments increases day after day, the cost of defending against such claims is coming into the limelight. Investment treaty arbitrations have been costly, especially for developing country governments. Information about the level of damages being sought by investors tends to be sporadic and unreliable. However, some claims certainly involve large sums.¹⁹³

Developing countries and mainly the least developed countries such as Tanzania ought to be aware of the financial implications of investor state disputes when giving consent to arbitration under a given investment treaty. These costs can be extensively large. The costs estimates vary a lot from case to case but the average cost of hiring three arbitrators for ICSID arbitration is said to be close to US\$500,000.¹⁹⁴

Arbitrations under other rules such as UNICITRAL or NAFTA tend to be even more expensive.¹⁹⁵ Astonishingly legal fees for lawyers may run much higher for example; the Metalclad Corporation is reported to have spent some US\$4 million on lawyers and arbitrator's fees in arbitration under NAFTA, and a subsequent court challenge to the arbitral award.¹⁹⁶ The Czech Republic is known to have spent some US\$10 million to defend against two major arbitrations brought in relation to a large broadcasting enterprise.¹⁹⁷ In 2004, the Czech Republic spent about US\$3.3 million and US\$13.8 million in 2005, to defend against more than half-a-dozen foreign investment arbitrations.¹⁹⁸ Although it is unclear what proportion of these claims are contract based or treaty based.¹⁹⁹

In another treaty arbitration, a state owned Latvian electricity company conceded that it had to reappropriate funds earmarked for future investments in order to cover mounting legal costs in an investment treaty arbitration brought by a Swedish firm against the Republic of Latvia.

¹⁹³ Peterson (n 21 above) 24

¹⁹⁴ Gustavo Carvajal, presentation to workshop on investment, Americas Trade and Sustainable Development Forum, November 18, 2003, Miami; Shihata and Parra 1999, put the average figure at US\$220,000 in 1999 (excluding lawyer's fees). In 2002, ICSID's daily fee payable to ICSID arbitrators was increased from \$1,100 to \$2,000. On this schedule, the average cost would appear to rise to some \$400,000. See Schedule of Fees at <http://www.worldbank.org/icsid/schedule/schedule.htm> as quoted from Peterson (n 21 above) 25

¹⁹⁵ See note 156 above

¹⁹⁶ See J.C. Thomas, "A Reply to Professor Brower," *Columbia Journal of Transnational Law*, Vol. 40, No. 3, 2002.

¹⁹⁷ Luke Eric Peterson, "Croatian firm invokes investment treaty to challenge Czech eviction notice," *INVEST-SD News Bulletin*, Oct. 1, 2004, http://www.iisd.org/pdf/2004/investment_investsd_oct1_2004.pdf accessed on 10 January 2010

¹⁹⁸ (n 197 above)

¹⁹⁹ (n 197 above)

Developing countries should also note that some arbitration lawyers advise investors to open up multiple legal fronts (arbitration, home and host state court proceedings) so as to add to the “cost and uncertainty” of disputes “thereby creating an *in terrorem* effect that may spur a quicker or more favourable settlement.”²⁰⁰

In addition to the costs involved in mounting a legal defence to treaty claims, the potential damages owing to investors can be substantial depending upon the nature of the investment in dispute and the alleged damage. Earlier this year, the Czech Republic found itself on the losing end of a mammoth award amounting to more than a third of a billion dollars (US) which effectively doubled the country’s public sector deficit and necessitated an urgent debate over the appropriate fiscal policy response (i.e., an increase in taxes, increased borrowing or serious cuts to public spending).²⁰¹

To date the largest sum paid to date was US\$877 million which the Slovak Republic paid to the Czech bank CSOB. Under several arbitration systems the existence of a dispute, its documents and pleadings, and often its decisions, are not made public; indeed according to UNCTAD, most investor-to-state proceedings have not been conducted in public.²⁰²

Unfortunately, the author could not get the costs that the Government of Tanzania incurred for payment of legal fees in the Biwater Gauff case. The author made several attempts to obtain the costs at DAWASA and Ministry of Justice but the relevant officials refused to give the author the incurred costs. However it is obvious that after the case Tanzania was left with heavy legal bills funds that could have otherwise be channelled to further sustainable development.

Moreover, despite the large numbers of investment treaty arbitrations which are being launched as foreign investors use their legal rights under these treaties; it is clear that these disputes may implicate investments in almost every economic sector or industry. Arbitrations have arisen in relation to mining, oil and gas exploration, production and

²⁰⁰ RD Bishop et al, ‘Strategic Options Available When Catastrophe Strikes the Major International Energy Project’ 36 *Texas International Law Journal*, No. 4, Summer 2001, p. 668.

²⁰¹ See Luke Eric Peterson, “BIT award against Russia being challenged in Swedish appeal court,” *INVEST-SD News Bulletin*, Oct. 27, 2004, at <http://www.iisd.org/investment/invest-sd/archive.asp>

²⁰² See ITUC Briefing note on Bilateral Investment Treaties available at <http://gurn.info/en/topics/bilateral-and-regional-trade-agreements/bilateral-investment-treaties/background/tils-briefing-note-on-bilateral-investment-treaties> accessed on 20 January 2010

transportation, agriculture, food processing, financial services, public utilities (electricity, water, telecommunications), information services, broadcasting and media, construction and transportation concessions (train, airport, ports). Tanzania had two arbitrations in public utilities.²⁰³

These claims have challenged the actions of media regulators, public utility regulators, gambling and gaming regulators, financial services supervisory agencies, or tax authorities. In some of the more well-publicized cases in the North American context, foreign investors have challenged bans on particular substances (gasoline additives) or on the cross-border trade of such substances, with these disputes attracting the wider scrutiny of the media and environmental groups.

There is thus complete non-transparency even though cases can affect whole economies. While some degree of confidentiality might be justified, greater transparency of investor-to-state proceedings would help to ensure that public interests would be respected. There are no penalties for claimants filing claims on the basis of unreliable information.

To sum up, there is a need for more detailed analysis of the degree of impartiality of dispute bodies such as ICSID. Furthermore, the dimension of the losses of domestic investors as a direct or indirect result of ICSID activities in the host countries requires greater consideration. Most of the Tanzanian BITs with UK, Sweden, Denmark, and Italy have this provisions and it has included it to attract investment except for the BITs with German and Switzerland which have no provisions on dispute settlement.²⁰⁴

4.7 Right to regulate for Public interest

State sovereignty requires governments to act for the public interests and regulate economic activities for its citizens. This right arises out of the constitutional, administrative and legislative mandate. So basically no one can challenge the right of the states to regulate for economic purposes. Almost all BITs limit the rate at which Tanzania can regulate their

²⁰³ Marshall F. Case Comment: 'The Precarious State of Sunshine: Case comment on procedural Orders in *Biwater Gauff (Tanzania) Limited v Tanzania Investor State Arbitration*' (2007) 3 *McGill International Journal on Sustainable Development Law and Policy* 181

²⁰⁴ See Article 8(1) of Tanzania-UK BIT, Article 7(2) of Tanzania-Sweden BIT, Article 8 of Tanzania-Italy BIT and Article 9 of Tanzania-Denmark BIT.

economic development policies. BITs include variety of discipline that affect wider areas of Tanzania activities.

Foremost, there is ongoing debate over whether it is proper to use international arbitration as a means of dispute settlement that may rule on public policy issues without having the same levels of safeguards for accountability and transparency as are typically required for domestic juridical systems. Second, the investor state dispute settlement system is usually exclusively available to foreign investors, and, to the extent that the relief available under this method may not exist under domestic procedures, this may be said to put domestic firms at a disadvantage. Much here depends on the existence of analogous domestic remedies. Third, there is a risk that tribunals will not decide like cases in a like manner, since there is no obligation for them to do so.²⁰⁵

Hence, not only developing countries such as Tanzania but also developed countries may view the process of international dispute settlement in this field with some concern, especially when it comes to deciding on matters of national and international public policy .

Tanzanian will continue to be mainly capital importing country. It is therefore likely to bear the burden of a potential increase in investor state dispute settlement cases. This creates a financial concern for Tanzania as the costs of the cases can be significant when the tribunal's costs, arbitrator fees, fees and disbursements by lawyers, as well as the time involved in preparing the cases, are all accounted for. Developed countries have a greater capacity in most cases to afford and manage increases in international proceedings, although, here too, the costs may be considerable.

In addition, Argentina was recently affected by financial crisis and dozens of arbitration brought against it as a result of the crisis. This shows the existence of a risk that Tanzania may be subject to extensive use of investor state arbitrations as the result of a major economic crisis. Tanzania may have fewer options available to respond to financial or political crises

²⁰⁵ This was explicitly recognized by the ICSID tribunal in a recent case: the tribunal stated that “although different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each respondent State” (*SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Decision on Jurisdiction paragraph 97).

than many developed countries. If each such event can trigger dozens of international arbitrations, this could create a major problem for Tanzania.

It has become increasingly clear that investors can use BIT entitlements to interfere significantly in the regulatory systems of host states. A significant number of states as noted earlier, in addition to South Africa, are at least in part for this reason reconsidering the terms of BITs in light of this experience. Ecuador and Bolivia have each removed natural resource disputes from the jurisdiction of the arbitration facility at the World Bank, the International Centre for the Settlement of Investment Disputes (ICSID). The United States, and in similar respects Canada, altered their 2004 model BITs so that foreign investors would receive rights, in circumstances of expropriation and nationalization, no greater than those available to USA citizens under their Bill of Rights.

4.8 Expropriation and amount of compensation

4.8.1 Expropriation

A main concern of investment treaties is to guarantee compensation to foreign investors in the event of nationalization or expropriation.²⁰⁶ On the other hand, what constitutes an expropriation remains a deeply contentious issue.²⁰⁷ It is said that the interpretation of the doctrine of expropriation is far too broad: it unduly limits the ability of developing countries to legislate or implement policies promoting their development goals.²⁰⁸

In the cases of *Sempra* and *Enron ICSID* distinguished between direct and indirect expropriation. Direct expropriation involves transferring an essential component of a property right to a different beneficiary. In contrast, to establish a claim of indirect expropriation a party must demonstrate a substantial deprivation of control over an investment.²⁰⁹

²⁰⁶ Peterson L.E “South Africa’s Bilateral Investment Treaties Implications for Development and Human Rights. Friedrich Ebert Stiftung, SAIIA, IISD, Berlin (2006) pg 21

²⁰⁷ L. Yves Fortier, ‘Caveat Investor: The Meaning of ‘Expropriation; and the Protection afforded Investors Under NAFTA’, *News From ICSID*, Vol.20, No.1, Summer 2003, at pg.1 as quoted from Peterson L.E

²⁰⁸ G Mayeda, ‘International Investment Agreements between Developed and Developing Countries: Dancing with the Devil? Case Comment on the *Vivendi, Sempra* and *Enron Awards*’ (2008) 4 *McGill International Journal on Sustainable Development Law & Policy* 189

²⁰⁹ (n 208 above)

Moreover in *Pope & Talbot v. Canada*,²¹⁰ other measures capable of indirect expropriation were listed including 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 and managers, or depriving the company of its property or control in whole or in part.²¹¹

Thus, as observed treaties leave open the prospect that legitimate government actions or regulations will be deemed to constitute a form of indirect” expropriation, therefore triggering the treaty requirements for compensation.

The concern is not hypothetical, it is supported by a NAFTA Chapter 11 investment arbitration, *Metalclad v. Mexico*, where an arbitral tribunal ruled that expropriation could be defined broadly, so as to include not only literal seizure or destruction of property, but also “covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or significant part, of the use or reasonably to be expected economic benefit t of property...”²¹²

In the ruling, the tribunal gave short reasons to the purpose underlying the government interference, instead setting forth a test which focused upon the degree of interference suffered by the investor. A deprivation in whole or significant part, would constitute an expropriation contrary to the treaty, no matter the purpose underlying that deprivation. While this reasoning was seized on by foreign investors, and used in subsequent arbitrations under investment treaties, the reasoning was not supported by governments, as well as those non-governmental organizations, concerned that investment treaty claims might stifle efforts by government to regulate the activities of foreign investors in the public interest.²¹³

Further, these standards were also applied in the Biwater case, the tribunal found that certain actions by Tanzania amounted to an indirect expropriation. That a series of steps which were

²¹⁰ *Pope & Talbot* (2000), 40 I.L.M. 258 (UNCITRAL)

²¹¹ MAYEDA

²¹² *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award of the Tribunal, Aug.30, 2000, at para 103

²¹³ See for example, Aaron Cosbey, Howard Mann, Luke Eric Peterson and Konrad von Moltke, *Investment and Sustainable Development: A Guide to the Use and Potential of International Investment Agreements*, IISD, 2004, at page 14, available on-line at: <http://www.iisd.org/publications/pub.aspx?id=627>

taken by the Republic which could not be characterised as the ordinary behaviour of a contractual counterparty, and which adversely impacted upon City Water's rights were seen to fall under the category of expropriation. In essence, the arbitrators held that Tanzanian officials inflamed and exacerbated tensions leading to the ultimate expropriation finding by virtue of a series of political statements, as well as the subsequent take-over of City Water's offices and deportation of its managers.

4.8.2 Amount of Compensation

It is further observed that treaty standards on compensation may differ from standards under domestic law. The Constitution of United Republic of Tanzania²¹⁴, the Supreme law in Tanzania recognises and gives protection to private property. Article 24 of the Constitution of Tanzania guarantees the right to own property.²¹⁵

Article 24 of the constitution suggests that deprivations of property may occur only pursuant to laws of general application; thus, arbitrary deprivations are prohibited. Second, property may be expropriated only in accordance to the law; in furtherance of a public purpose or in the public interest; and subject to the payment of compensation to the affected owner. This shows the aim of the Government to regulate property rights without having to compensate owners whose property rights are limited by regulations, while still guaranteeing a right to compensation in cases where expropriation rather than mere deprivation has occurred.

By contrast, most international investment treaties, including all of those which have been concluded by Tanzania, with dozens of Governments, may have extended even greater protection for foreign owned property against government interference and incursion, and without benefit of any meaningful public debate or scrutiny of such a move. In other words, by invoking their rights to international arbitration found in Tanzania BITs, foreign shareholders or investors could circumvent the Tanzanian courts, and seek to avoid the compensation standards prescribed under Tanzania law. Hence BITs provide for greater property protection than the Tanzania Constitution.

²¹⁴ The constitution of the United Republic of Tanzania 1977 as amended from time to time

²¹⁵ Art 24 The said provision stipulates that every person has the right to own or hold property lawfully acquired and shall not be arbitrarily deprived of his property without fair and adequate compensation according to the law.

Tanzania should be cautious of signing BITs containing expropriation provisions which give the Government less power than they would have in domestic law to enact statutes expropriating the property of foreign investors for public interest without providing compensation. It is only by assessing whether legitimate public interest exists that tribunals can properly weigh investor's interests against those of the Tanzanian citizens. The lessons to be learned is that Tanzania should negotiate BITs that require tribunals to evaluate whether there is a valid purpose to motivate the government's actions. Such BIT is more inline with principles of sustainable development, since it promotes investment that is consistent with the goals of Tanzanian citizens.

Biwater Gauff case raises broader questions about the proper boundaries of expropriation. For instance, to what degree should the law of expropriation in the context of investment treaties exclude the state from liability for expropriations in the public interest. For instance the international legal standard for expropriation differs from the law of expropriation in countries such as Canada and the United States.²¹⁶ In Canadian law, for instance, where the state causes property to lose its value, a taking will not arise unless the government acquires the property or enhances the value of its own property by devaluing another's property.²¹⁷

In American jurisprudence, which places greater limits on the state's ability to regulate and is generally more protective of property rights, courts have refused to find expropriation where an owner has been only partially deprived of enjoying her property.²¹⁸ In *Andrus v. Allard*,²⁰⁰ the United States Supreme Court held that "where an owner possesses a full bundle of property rights, the destruction of one strand of the bundle is not a taking, because the aggregate must be viewed in its entirety."²¹⁹

This is in part because the law of expropriation serves different purposes in the national and international contexts. In the national context, limits on expropriation are set by balancing the property interests of citizens as a group against the interests of the individual(s) alleging an

²¹⁶ Mayeda (n 208 above) 219

²¹⁷ *Haddock v. Ontario (A.G.)* (1990), 73 O.R. (2d) 545, 70 D.L.R. (4th) 644 (Ont. H.C.); *A & L Investments Ltd. v. Ontario* (1997), 36 O.R. (3d) 127, 152 D.L.R. (4th) 692 (Ont. C.A.) as quoted from (Mayeda n 208 above) 219

²¹⁸ (n 208 above)

²¹⁹ See also *Keystone Bituminous Coal Association v. Pennsylvania (Department of Environmental Resources)*, 480 U.S. 470 at 497 (1987) [*Keystone*], as quoted by Mayeda (n 208) 219

expropriation. In international law, however, the purpose of expropriation law is to protect foreign investors' interests against the state's supposedly greater power.

For this reason, some scholars argue that BITs should provide minimum standards of treatment but leave the balancing of individual and group interests to the state.²²⁰ Of course, what international law fails to take into account is the power imbalance between states. BITs benefit foreign investors, but they are negotiated between states-usually developed and developing countries-that have unequal bargaining power. Furthermore, the current approach to expropriation in BITs overlooks governments' understandable need to address the legitimate perceptions of their citizens, who may well perceive that BITs unfairly permits foreign investors to profit at their expense. As Franck argues, the solution is to ensure that the compact between the state and the foreign investor guaranteeing a stable investment environment has the "elasticity needed to accommodate the inevitable tension between the political pull to change and the economic rationale for stability. The current BIT expropriation regime lacks a mechanism for resolving this tension.

4.9 National Treatment and Discrimination

A standard guarantee offered in Tanzania's BITs is to provide foreign investments treatment which is as favourable as that enjoyed by local businesses that is Tanzania owned. The promise of National Treatment for foreign investors and/or their investments will minimize the likelihood that foreigners will suffer from discrimination on the basis of their nationality.

Beyond this, however, there are concerns that the concept of National Treatment might entitle foreigners to special incentives, treatment or perquisites which have been earmarked exclusively for local business actors. Similarly, there is a possibility that foreign investors might argue that certain obligations such as those prescribed under the Mining Charter discriminate against foreigners. One particular concern is that affirmative action measures reserved for Tanzanians, and which are in accord with the Tanzania Constitution, might be construed by foreign investors as breaching the treaty guarantee of National Treatment for foreign investors.

²²⁰ See Newcombe and Franc as quoted by Mayeda (n 208 above) 221

4.9.1 Affirmative Action measures

Affirmative Actions are economic empowerment measures undertaken by the Government for the purpose of promoting and enhancing knowledge, skills, economic process and financial prudence of Tanzanians to enable them to meaningfully participate in economic activities and include all plans, strategies, policies and measures taken to achieve that goal, be it by public or private sector.²²¹

Various Economic Empowerment obligations have been introduced through the National Economic Empowerment Act²²² and other written laws. These efforts are encouraged by a desire to bring about so called broad based Tanzanians economic empowerment, through substantial increases in Tanzanians participation and ownership in the economy. This is for the reasons that majority of Tanzanians who due to historical reasons were denied opportunities to participate fully in economic activities of their country. The denial of opportunities was a feature that was deeply ingrained in colonialism.²²³

The Constitution of the United Republic of Tanzania²²⁴ provides that the United Republic of Tanzania is a state which espouses principles of democracy and social justice and accordingly the primary objective of the Government shall be the welfare of the people.

Through the National Economic Empowerment Act 2004, the Government of Tanzania has resolved to take measures designed to promote and facilitate economic initiatives aimed at empowering Tanzanians. The Government further has agreed in terms of the National Economic Empowerment Policy that natural resources, trade, agriculture industry and other economic opportunities must generate wealth, boost the small and medium enterprise sector, in order to bring about a sustainable affirmative action and facilitate genuine and positive economic empowerment to the population of Tanzania.

²²¹ Article 3 of Act No 16 of 2004

²²² Act No 16 of 2004

²²³ Ministry of Planning, Economy and Empowerment, Empowerment of Economic Actors in Tanzania, A Paper Presented By Mr. Eliseta Isaac Kwayu, the Executive Secretary of the National Economic Empowerment Council in a Policy Dialogue Seminar Organized by ESRF 7TH SEPTEMBER, 2006 available at http://www.povertymonitoring.go.tz/documents/empowerment_of_economic_actors_kwayu.pdf accessed on 30 April.

²²⁴ Article 8(1) OF THE Constitution of the United Republic of Tanzania

With a view to promoting rapid economic growth that facilitate broader economic ownership by Tanzanians deliberate measures are taken to establish structures and mechanism to redress the existing economic inequalities among various section of the population.

A variety of policy tools are contemplated as part of this effort, including targets for national ownership, employment equity and human resources development, as well as the use of preferential governmental policies in the areas of procurement, granting of licenses, and public-private partnerships.

Investment laws on share capitals introduces capital requirement for grant of incentives. Tanzania Investment Centre (TIC) grant certificates of incentives, investment guarantees and register technology agreement for all investments, which are over and above US\$ 300,000 and US\$100,000 for foreign and local investments respectively.²²⁵

Moreover, in the mining sector, The Tanzanian Government requires foreign investors in the gemstone mining sector to form joint ventures/partnerships with Tanzanian nationals' in order to obtain licenses. Such initiatives appear in harmony with the Tanzania Constitution and National Economic Empowerment Act which expressly provides that so called affirmative action measures designed to protect or advance Tanzanians may be taken so as to meet the needs of Tanzania people and particularly socio-economic ones.

Moreover in the Tourism Sector, foreign investors are only allowed to operate a travel agent business in a joint venture with local investors. The Hotel Act of 1963 and the Tourist Agency Licensing Act of 1969 are the major laws regulating the tourism sector in Tanzania, and the tourism agency licensing board is the regulatory body.

In addition to restrictions applied to non-Tanzanians, quantity restrictions exist with regard to tour operators in the country. The Tanzanian government requires foreign investors to own at least ten new vehicles valued at \$300,000. All vehicles must be registered under the company's name. The requirement adds unnecessary costs to foreign tour operations, ties up a significant amount of capital, and discriminates against foreign investment. Foreign investors

²²⁵ Tanzania Investment Act [CAP 38 R.E. 2002], Section 2(2)

might argue that the requirement for a joint venture, and the requirement that foreign investors own at least ten new vehicles valued at 300,000 is discriminatory.

Lastly, Public procurement is cited as another important area that can be used to promote economic empowerment of Tanzanians, particularly local business men, local contractors and local consultants and at the same time discriminate foreign investors. However, participation of these firms in public tenders has been very limited due to lack of capacity in terms of capital, equipment, experience and skilled human resources. In other cases this problem is exacerbated by the packaging of contracts in sizes which are above the capacity of most of local firms. These measures contained in the Public Procurement Act 2004 aiming to increase participation of local firms in the tender process.

Exclusive preference to local firms is contained in Section 50 of the Act and means setting aside contracts not exceeding a certain value to local firms only where financial resources are exclusively provided by a Tanzanian public body. The Act allows the procuring entity to proceed through open tendering with inclusion of foreign firms where it fails to obtain acceptable offers from local firms.

The following limits were accepted by the Government and are included in the Regulations made under the Public Procurement Act of 2004: Works up to Tanzania shillings. 1,000,000,000; Goods up to Tanzanian Shillings 200,000,000; Non- Consultant Services up to Tanzania Shillings 250,000,000; Consulting Services (firms) up to Tanzania Shillings 500,000,000 and Consulting Services (Individuals) up to Tanzania Shillings 50,000,000. The exclusive preference is applicable for local firms and association of local and foreign firms in which the contribution of the local firm to the association is more than 75%. This provision has been included to allow local firms that lack capacity to associate with foreign firms to increase their capacity.

Indeed, the preamble to the National Economic Empowerment Act (2004) stipulates that one of the two objectives of the Act is to “promote the achievement of the constitutional right to equality”. However, these economic empowerment actions and associated regulations have not been the subject of a Constitutional challenge in Tanzania, so their compliance with the Tanzania Constitution has yet to be determined.

Meanwhile, the implementation of such economic empowerment action could implicate Tanzania's international investment treaty commitments, particularly where such obligations place foreign-owned businesses operating in Tanzania at a perceived disadvantage to locals.

For example, foreign investors in the gemstone mining sector might argue that obligations to acquire local partners, serve to discriminate against foreign owned businesses, on a de-facto basis, because local Tanzanian owned would have met such obligations already.

Such concerns for Tanzania are not hypothetical. Experience from South Africa shows that Black Economic Empowerment obligations such as targets for black ownership, employment equity and human resources development, as well as the use of preferential governmental policies in the areas of procurement, granting of licenses and concessions, sale of state enterprises, and public-private partnerships have received complains from foreign investors. Republic of South Africa in August 2004 received a "position paper" from the Italian Embassy which raised concerns about the "expropriation of mineral rights" and the Minerals and Petroleum Resources Development Act (2004) (MPRDA) which vests all mineral and petroleum rights with the SA Government. In this memo, the Italian Government warns that South Africa may be in breach of various BIT obligations.²²⁶

To date, international investment arbitration tribunals are not known to have grappled with the thorny question of how the National Treatment obligation is to be interpreted in circumstances such as those outlined above. Nevertheless, it appears likely that tribunals could be asked to resolve such delicate issues, should foreign investors follow through on threats to take Tanzanian Government to arbitration over economic empowerment measures. Any tribunal reviewing a claim for breach of National Treatment would assess the challenged government measures in light of the provisions of the governing treaty, and the law applicable to investor-state disputes.

4.10 Fair and Equitable Treatment and Full Protection and Security

Most Tanzania BITs include the principle of fair and equitable treatment which is one of the so called absolute standards of treatment. Fair and equitable treatment obligation holds the

²²⁶ Peterson (n 20 above) 27

host state to standards of fairness and equity that is protecting investors' expectations. This interpretation is far too broad and can severely limit the host state's ability to take legislative action promoting its sustainable development goals.

This is found for instance in Tanzania- UK BIT. That article sets forth certain minimum obligations to provide fair and equitable treatment as well as full physical security and protection. In addition, the Tanzania-UK treaty prohibits governments from impairing the operation or enjoyment of investments through unreasonable or discriminatory measures.

In the Biwater case, the tribunal, referring to the previous analysis under the expropriation section of the award, held that the same actions that constituted an expropriation also breached the Fair and Equitable Treatment standard. These included a May 13th public announcement by the Minister; comments made to City Water employees at a subsequent political rally; withdrawal of certain tax exemptions; and the seizing of city Water's offices and deportation of senior management.²²⁷

Tanzania was also held liable for a breach of the treaty's Full Protection and Security obligation with respect to one set of incidents: the removal of City Water management from its offices, the take over of the facilities and the hasty deportation of the managers. Indeed, the tribunal takes a broad reading of this particular treaty standard, noting that it concurs with those earlier tribunals which have read the clause so as to provide not only for the physical security of investments, but also their broader commercial and legal stability.

While it is important to recognize the role of equitable principles in international justice, the principle of fair and equitable treatment's development through international investment arbitration is failing to take into account all of the factors relevant to an equitable solution. In particular, principles of sustainable development and the interests of citizens of the host country that the latter is trying to protect and promote should also feature in applying principles of fairness. To date, the latter factors have never been taken into account, and so the principle of fair and equitable treatment has on balance favoured the protection of investors' rights to the detriment of those in the host country affected by the investment.

²²⁷ See Biwater Gauff case

4.11 Performance Requirements

Performance requirements are obligations imposed upon an investor by host state's public authorities.²²⁸ Developing countries may screen foreign investors in an endeavor to select investments which best serve the host state's broader economic development strategy. Performance requirements include export performance, joint venture and equity ownership, research and development, technology transfer, employment and training, and other requirements such as local content requirements or the provision of surety in the form of bonds.²²⁹

However, performance requirements are seen as obstacles to foreign investors as they decrease economic efficiency while at the same time Tanzania need them for insuring that foreign investors have some obligations to do. Moreover, states may have important public policy reasons for imposing conditions and responsibilities upon investors operating in their territory.

Performance requirements are addressed in some BITs while others do not. Its worth noting that Canadian BITs often prescribe domestic content rules, mandatory technology transfers, and mandatory sourcing from local suppliers.²³⁰ Some Japanese BITs also prohibit rules which dictate that individuals of a given nationality be appointed to executive, managerial or directorial roles; duties to achieve a given level of research and development in a given territory; and requirements that a regional or world headquarters be located in the host state's territory.²³¹ While close attention has been paid by researchers to the economic impacts of performance requirements and to the possibility that requirements may be inefficient in economic terms less attention has been paid to other social policy objectives which might be advanced through the use of performance requirements and benefits developing countries.²³²

²²⁸ Republic of South Africa Government position paper pg 48

²²⁹ (n 228 above)

²³⁰ See for example, "Agreement Between the Government of Canada and The Government of The Republic of Trinidad and Tobago For the Reciprocal Promotion and Protection of Investments," Art. V (2).

²³¹ See for e.g., "Agreement Between Japan and the Socialist Republic of Viet Nam for the Liberalization, Promotion and Protection of Investment," Article 4.

²³² Peterson (n 21 above) 34

It is possible that treaty prohibitions against select performance requirements may hinder government efforts to pursue certain types of social policies. For example, affirmative action programs by the Government of Tanzania, such as discussed in this paper, which are designed to encourage the economic opportunities of disadvantaged individuals or groups, may run afoul of performance requirements bans. Tanzania affirmative action program is an effort to boost the prospects of its citizens.

4.12 Ambiguity surrounding the meaning of key treaty provisions

Bilateral investment treaties have been drafted intentionally in a vague language, often to cover the broadest range of investment situations and circumstances and thus become to ambiguous. Only with the recent surge in interest in these treaties, and their invocation in legal disputes, have tribunals begun to put flesh upon treaty provisions. Although dozens of tribunals are now grappling with cases arising out of BITs, the full policy implications of most treaty provisions still remains unclear.²³³

Governments can take various steps during treaty drafting to make sure that they minimize some of these problems. For example, rules for the consolidation of related claims can ensure that similar claims are consolidated under the jurisdiction of a single tribunal so as to reduce the risk that parallel proceedings will lead to divergent rulings. Likewise, governments may look to joint interpretive statements or amendments as tools for clarifying the reach and implications of certain investment treaty provisions which have been subject to controversy.²³⁴

4.13 Practical effects of the bilateral investment treaties

A study of BITs raises a number of questions to which it is not easy to answer. There is the question of the practical effect of the investment treaties which is to produce a double effect. This means to encourage the flow of foreign direct investment and to secure the protection of investment. It is well understood despite the formal reciprocity of bilateral investment treaties, they are always one sided capital always flow from developed countries to

²³³ Peterson (n 21 above) 27

²³⁴ Peterson (n 21 above) 27

developing countries and therefore essentially protecting developed countries investment in developing countries.²³⁵

In spite of their growing popularity, BITs seems to have implications on sustainable development in developing countries largely because they have failed to attract more foreign investment. There are no express provisions in the treaty which pose an obligation to investors to promote FDIs. However, most of the provisions in BITs aim to protect investors in²³⁶ instances governments breach those provisions.²³⁷

Further as pointed earlier most treaties are reciprocal in form that they establish identical rights and duties for both sides nonetheless capital flows only from one direction only. Therefore it is hard to understand why Tanzania signs such treaties which its own citizen can not use as Tanzania is a capital importing country. It is shocking that, we sign these agreement knowing that the benefit accrue exclusively to capital exporting countries.

In additional, BITs are one sided in that they oblige the host state to accord a certain standard of treatment to the investor , as an incentive to invest whereas they do not normally mention any obligations of the home state to provide special incentives for investments in developing countries.²³⁸

It could be argued therefore, these poses a challenge for sustainable development of developing countries as their main objectives of signing such treaties are not met and they are basically defeated because they can not use such rights. This is because developing countries don't have the capital to invest in developed countries. Even if they had the capital it is hard to see whether they could be allowed to invest in public sectors such as health, water, electricity, and environment.

Therefore, it is hard very difficult to ascertain whether developing countries including Tanzania with such outcomes in general, they are satisfied with the results of bilateral investment treaties, but they continue to conclude them and have even started doing so between themselves.

²³⁵ <http://unctc.unctad.org/data/stctc65d.pdf> accessed on 15 March

²³⁶ (n 235 above)

²³⁷ (n 235 above)

²³⁸ (n 235 above)

4.14 Conclusion

BITs have been seen to have doubtful impacts upon the stimulation of new foreign direct investment, at the same time they enshrine far reaching rights and protections for those investments which do flow between home and host country. Dispute settlement is often closed to the public and not subject to clear rules of precedence. Given the current ambiguity of many key treaty provisions, foreign investors with deep pockets may be well advised to launch creative damage claims when they come into friction with regulators or government agencies in the host state. In the absence of full information about how earlier disputes may have been resolved, and in the absence of any procedural rules which would oblige subsequent disputes to be decided in a similar fashion, developing countries may be confronted with considerable uncertainty about the concrete policy implications of the international treaties to which they have acceded. Tanzania would be advised to undertake significant “due diligence” before agreeing to be bound by further such investment treaties as they have massive implications on sustainable development of Tanzania.

CHAPTER FIVE

Conclusions and Recommendations

This study set out to examine the negative implications of BITs in promoting sustainable development in Tanzania. This chapter sets out what emerges as a summary of the conclusions drawn from the entire study together with recommendations that will assist the government of Tanzania in reviewing its BITs policy framework.

5.1 Summary and Conclusions

This study has examined the implications of BITs in promoting sustainable development in Tanzania. The study has attempted to demonstrate how BITs affect sustainable development. It concluded that the BITs are not efficient in promoting sustainable development as there is no direct link between signing BITs and promotion of FDI thus promotion of FDI is totally dependent on other factors.

Chapter two of the study described in details the concepts of FDI, BITs and sustainable development and why the concept of sustainable development is linked with BITs and FDI. It is argued in this chapter that sustainable development is essential for FDI and BITs and there is a need to include the concept of sustainable development in host country legislation framework.

In chapter three, the study examines the features of Tanzania BITs and examines in details some of the provisions included in Tanzania BITs. The study went further to look whether BITs promote FDI and the use of such treaty protection by foreign investors. It has been demonstrated in this chapter that foreign investors use their treaty protection by invoking cases at international tribunals. Moreover, there have been a number of cases increasing over the years with many developing countries taken to international tribunals. The chapter further explains that BITs not necessarily stimulate FDI there is no direct link between signing BITs and promoting FDI. The main aim of BITs is to protect and not promote foreign investment.

Chapter Four examined the implications of BITs in promoting sustainable development. This chapter has demonstrated that BITs has serious implications to Tanzania especially on dispute settlement mechanism, the right of government to regulate for economic purposes, costs of

investment treaty arbitration are extremely high especially for developing countries such as Tanzania. Further the chapter looked on treaty rights such as expropriation and compensation, national treatment, fair and equitable treatment and full protection implications on sustainable development.

It is argued in this study that, the current BITs policy framework in Tanzania extend far into the country policy space, imposing damaging binding investment rules with far reaching consequences for development. New investment rules in BITs prevent developing country governments from requiring foreign companies to transfer technology, train local workers, or source inputs locally. Under such conditions, investment fails to encourage or enhance development. BITs allow foreign investors to sue governments for lost profits, including anticipated future profits, if governments change regulations, even when such reforms are in the public interest.

It is noted further that, Tanzania faces some challenges regarding the provisions of BITs already concluded. Foreign investors are increasingly aware of the protection available under BITs, and increasingly inclined to invoke those rights in the face of undesirable government initiatives or proposals. Tanzania has to review its BITs so as to ensure that they are in harmony with the country's broader social and economic principles.

The thesis tries to look at what BITs say and identifies a number of key emerging development linkages and their implications on sustainable development. The thesis demonstrates that some BITs provisions have been seen to have disturbing and potentially worrying legal and policy implications for host states. Most BITs offer an avenue for dispute settlement mechanism that permits foreign investors to take host states to international arbitrations in cases where the investor alleges that the treaty's provisions have been violated. As will be seen in this paper, the number of treaty based arbitrations has enormously increased in recent years.

The thesis observes that, when developing countries sign international investment agreements with developed countries, they run many risks. Some of these risks arise from the negotiation process. Developing countries generally have fewer resources than developed countries to evaluate an agreement's appropriateness or to assess its impact on their economy. Even if a developing country has the resources necessary to evaluate the advantages of signing BITs as

the case of Tanzania, many developed countries employ draft templates that leave little room for change during negotiations

It is further noted that, dangers also arise from the manner in which investment tribunals interpret common BITs provisions. Recent decisions of tribunals of the International Centre for the Settlement of Investment Disputes and tribunals using the United Nations Commission on International Trade Law Rules are quickly establishing authoritative interpretations of key BITs provisions without any consideration of sustainable development principles.

This raises a number of important issues that Tanzania must consider when signing international investment agreements. As many scholars have noted, BITs can potentially limit a government's ability to regulate in the public interest where this interest runs counter to that of foreign investors.

International investment agreements can have detrimental effects for developing countries: they can limit a government's ability to regulate in the public interest where this interest runs counter to that of foreign investors; they can severely restrict a country's ability to enact measures responding to financial, social, and economic crises; and they can impede legitimate democratic processes. The *Biwater* case poses as an example.

For instance, prior to *Biwater Case* , the government had voiced their opposition to the privatization of water utilities, an action that had resulted in an overnight doubling of the cost of water and which made the government to break the contract. The investment panel used these government statements and actions as evidence of the political intent of Tanzanian authorities to damage *Biwater Gauff Tanzania Ltd* without considering whether the government was giving voice to the legitimate concerns of the citizens they represented.

One of the main findings of the research is that, BITs are not mutually beneficial agreements and are one sided in favour of capital exporting countries. They are unbalance and can hardly provide the basis for a durable investment regime though they are reciprocal in appearance. Despite the fact that they establish equal rights and duties for both sides, capital flows from one side only. Thus, it is argued in this thesis that BITs lack clarity and consistency as benefits will accrue to the capital exporting countries.

The thesis further argues that Tanzania faces some challenges regarding the provisions of BITs already concluded. Foreign investors are increasingly aware of the protection available under BITs, and increasingly inclined to invoke those rights in the face of undesirable government initiatives or proposals.

From the above analysis the thesis draws the following conclusions, that BITs will harbour important consequences for Tanzania and may have significant adverse implications if not well negotiated. It further reveals that BITs are not efficient in promoting sustainable development and there is a need for investment agreement to be balanced in a development dimension. Most of the treaties compare unfavourably with the model investment agreement drafted by the International Institute for Sustainable Development (IISD), and that the latter agreement provides a more development friendly template for such agreements. For that reason, Tanzania has to review its BITs so as to ensure that they are in harmony with the country's broader social and economic principles for sustainable development.

5.2 Recommendations

First the government for Tanzania should note that, meaningful foreign direct investment is of crucial importance to Tanzania sustainable development. Without the right kind of investment policies including the BITs framework Tanzania will not be able to replace current unsustainable economic structures and the government will not manage to lift the mass of its citizen out of the poverty in which it now exists. Therefore there is need to focus on quality investment regulatory framework that does not unduly restrict the ability of states to act and regulate in the public interest.

The author proposes that future international investment tribunals apply a sustainable development analysis to avoid similar outcomes. Such an analysis would consider promoting investment not as an end in itself but as part of a country's approach to important social issues, including promoting human rights, protecting the environment, and improving social welfare. In advancing this proposal, the author explores the legal and equitable basis for applying sustainable development law when interpreting international investment agreements.

Further, it is recommended that there is a clear need for Tanzania to review its BIT framework as existing BITs are based on 50 year old model that mainly focus on interest of foreign investors from developed countries. Tanzania should learn from other countries which have already undertaken a review of their own BIT commitments. After losing a \$350 million (US) law suit, the Czech Republic set up a parliamentary commission to examine its investment treaty program.²³⁹

The study shows that thousands of existing BITs for the most part share certain problems of process and substance that, taken together, threaten to limit the valuable policy space for actions in the interest of development of Tanzania. Fixing these problems may be difficult given the complexities involved in amending any given treaty, particularly politically but Tanzania still have a chance to negotiate meaningful BITs from now onward. In the end, it comes down to this if we hope to have investment serve sustainable development we need a new breed of BITs, one that focuses on this objective as a starting point.

Tanzania faces many serious capacity problems when it comes to negotiating investment agreements, and to analyze the legal and policy consequences of negotiating such agreements. There is a need for investment agreements to be balanced, and to factor in a development dimension. There fore, it suggested that there is a need to train more government officials and lawyers to negotiate these agreements. More often, when countries sign international investment agreements with developed countries, they run many risks. Some of these risks arise from the negotiation process. Developing countries generally have fewer resources than developed countries to evaluate an agreement's correctness or to assess its impact on their economy.

The research recommends that there is room for improvement and urges ongoing monitoring of the BITs. Changes could involve improving the provisions of new BITs to include development provisions. In addition changes should be done to the currently negotiating template especially changes to the treaty preamble and treaty language.

Further, the research recommends building the capacity of arbitrators from Tanzania is important. These arbitrators can be used in investment disputes to build capacity instead of

²³⁹ Republic of South Africa Government Position Paper pg 55

using arbitrators from developed world who are always not well familiar with circumstances on the grounds.

Some Tanzanian companies are also investing abroad, increasingly looking internationally for business and investment opportunities. Despite of these Tanzanian companies investing abroad, Tanzanian investors have not yet taken advantage of the international agreements that are ready and available to protect their investments. International investment arbitrations have resulted in awards to investors from other regions in the hundreds of millions of dollars. It is time that Tanzania investors also take a closer look at the international agreements at their disposal to protect their investments.

The author lastly, concludes that there is a necessity for further research. This study is one of the first steps in assessing the implications of BITs in Tanzania. This initial work makes several contributions and it serves as the basis for future research that involves a larger data. For instance there are new areas in BITs which are not discussed in this paper such as human rights issues, environmental protection, social and health protection which need room for improvements in BITs.

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Annexure – one

Research Interview Questions

1. Are you satisfied with the BITs?

Yes..... No.....

If no give reasons

.....
.....

2. Is there a policy documentation/framework informing the rationale for conclusion of such BITs? Yes.....No.....Not applicable.....

3. Is there any legal analysis of the risk associated with the conclusion of BITs?

Yes.....No.....

4. What are your comments on the competence of our negotiations for such agreements?

.....
.....

5. Do you think Tanzania has benefited with such BITs?

Yes.....No.....

If no give reasons

.....
.....

6. Is there a public record for cases brought against Tanzania under BITs and other arbitration proceedings?

Yes..... No.....



7. What is the procedure for initiating such proceedings? Do investors inform the government that they want to sue them?

.....
.....
.....

8. Is there any requirement for Tanzania investors to publicize the fact that they are bringing arbitration against another country?

Yes.....No.....

9. What are your comments on the fact that Biwater Gauff had two avenues of suing our Government, first at UNICTRAL under the contract between the investor and the government of Tanzania and, secondly at ICSID under the Tanzania-UK treaty.

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.....
.....

10. Do you think our Courts are not efficient in international investment dispute settlement?

Yes.....No.....

If yes give reasons

.....
.....