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**PROTECTION OF FOREIGN INVESTMENT IN SOUTH
SUDAN: MAKING A CASE FOR CONSOLIDATION OF
FRAGMENTED FOREIGN INVESTMENT RELATED LAWS**

By

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DECLARATION

I Gabriel Mading Apach Mading, declare that Protection of Foreign Investment in South Sudan: Making a case for consolidation of fragmented foreign investment related laws is my original work and it has not been plagiarized from any source or presented to any University or Institution for award of degree or diploma. I confirm that it is the result of my own effort except where acknowledgement has been rendered therein inform of footnotes.

Signed-----

Gabriel Mading Apach Mading, November 2017

Signed-----

Dr Olufemi Oluyeju, November 2017

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ACRONYMS

AFDB	African Development Bank
AGI	Acquisitions and Greenfield Investment
BITs	Bilateral Investment Treaties
BOSS	Bank of South Sudan
CPA	Comprehensive Peace Agreement
EAC	East African Community
EOI	Export-Oriented Investment
EU	European Union
FATF	Financial Action Task Force
FI	Foreign Investment
FDI	Foreign Direct Investment
FEC	Foreign Exchange Control
FPI	Foreign Portfolio Investment
FL	Foreign Loans
GII	Government Initiated Investment
GOSS	Government of South Sudan
ICSID	International Center for Settlement of Investment Disputes
IPA	Investment Promotion Act
IPRs	Intellectual Property Rights
ITA	Income Tax Act
JCA	Juba Center for Arbitration
JOSS	Judiciary of South Sudan
JVA	Joint Venture Agreement
LC	Labour Code

MDI	Market Development Investment
MNEs	Multi National Establishments
MoJCD	Ministry of Justice and Constitutional Development
MoFEP	Ministry of Finance & Economic Planning
OECD	Organization for Economic Co-operation and Development
OSSIC	One Stop Shop Investment Center
PSA	Production Sharing Agreement
SSIA	South Sudan Investment Authority
SSLC	South Sudan Land Commission
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
WIPO	World Intellectual Property Organization

ABSTRACT

Foreign investment (FI) is one of the important tools that developing countries use to foster economic growth. It involves capital flows from one country to another, granting extensive ownership stakes in domestic companies and assets. Governments in many developing countries are now giving new attention to the potential for foreign investment in their economies. The main reason being the desire for those countries to extend their market- price, grow their private sector and mitigate the external debt problem by attracting more private foreign investment. In this regard, South Sudan is not an exception. Despite efforts by the government of South Sudan to attract foreign investment in the country, foreign investors are still facing an extremely challenging investment climate because of fragmented foreign investment related laws which are scattered in different legislation passed by different law-making bodies. Some laws contradict others, and no reliable mechanisms exist to settle inconsistencies. In other words, the laws governing foreign investment in South Sudan are not consolidated making enforcement difficult and creating legal uncertainty. This legal uncertainty does not inspire investors' confidence. It is against this backdrop that this study is founded on the argument that foreign investment in South Sudan is regulated by a raft of fragmented foreign investment related laws which are scattered and inconsistent, posing a disincentive to inflow of foreign investible capital into the country for economic development. Therefore, the non-consolidation of these laws is detrimental to the future of foreign investment in South Sudan and addressing this uncertainty is important to boost the investors' confidence which is crucial to attraction of the needed capital, economic wellness of South Sudan and effective use of her economic resources. Thus, this research will seek to make a case for consolidation of fragmented foreign investment related laws in South Sudan.

CHAPTER ONE

INTRODUCTION

1.1 Background to the study

Foreign investment (FI) is one of the important tools that developing countries use to foster economic growth.¹ It involves capital flows from one country to another, granting extensive ownership stakes in domestic companies and assets.² FI denotes that foreigners have an active role in management as a part of their investment. A modern trend leans towards globalization, where multinational firms have investments in a variety of countries.³

According to Sornarajah, FI can be made by individuals, but most often it is an endeavor pursued by companies and corporations with substantial assets looking to expand their riches. As globalization increases, more and more companies have branches in countries around the world. For some companies, opening new manufacturing and production plants in a different country is attractive because of the opportunities for cheaper production, labor, legal protection and lower taxes. FI can be classified in one of two ways: Foreign Direct investment (FDI) and Portfolio investment (PI). FDI is the physical investment and purchases made by a company in a foreign country, typically by opening plants and buying buildings, machines, factories and other equipment in the foreign country. This type of investment finds a far greater deal of favor, as it is generally considered long-term investment and helps bolster the foreign country's economy.⁴

FDI comprises of not only the initial transactions establishing the relationship between the investor and enterprise but also all the subsequent transactions between them and among affiliated enterprises both incorporated and not incorporated.⁵ The second one is (PI) which involves corporations, financial institutions and private investors buying stakes or positions in foreign companies that trade on a foreign stock exchange.⁶ This type of investment is sometimes

¹<http://www.investopedia.com/terms/f/foreign-investment>.(accessed on the 9th March 2017) 1.

²M Sornarajah *the international law on foreign investment (Third Edition)* 8.

³Sornarajah (n 2above) 8.

⁴'The importance of Foreign Direct Investment' *the Sunday Times Economic Analysis 29 May 2011* available at <http://www.sundaytimes.lk/110529/Columns/eco.html> (accessed on 9th March 2017).

⁵B Sodersten & G Reed *international economics* (1994) 501.

⁶See (n 1 above) 1.

referred to as a foreign portfolio investment (FPI). PI investment includes not only equity instruments such as stocks, but also debt instruments such as bonds.

Governments in many developing countries are now giving new attention to the potential for foreign investment in their economies. The main reason being the desire for those countries to extend their market- price, grow their private sector and mitigate the external debt problem by attracting more private foreign investment.⁷

1.2 Problem statement

Despite efforts by the government of South Sudan to attract foreign investment in the country, foreign investors are still facing an extremely challenging investment climate because of fragmented investment related laws which are scattered in different legislation passed by different law-making bodies. Some laws contradict others, and no reliable mechanisms exist to settle inconsistencies. Some laws are out of date, leading to confusion about how they should be applied, if at all, to current circumstances. In other words, the laws governing foreign investment in South Sudan are not consolidated making enforcement difficult and creating legal uncertainty. The laws that regulate foreign investment in South Sudan are scattered in different Legislation. After the promulgation of a new Constitution in 2011, some laws became unconstitutional because of lack of conformity with the Constitution. This legal uncertainty does not encourage investors' confidence. It is against this backdrop that this study will seek to make a case for consolidation of fragmented foreign investment related laws in South Sudan.

1.3 Research question(s)

The overarching research question in this study is:

How can extant fragmented foreign investment related laws be consolidated to inspire investors' confidence in South Sudan?

In answering the broad research question, the following adjunct questions will also be answered:

- What is foreign investment and why is it important in South Sudan?

⁷MB Obwona 'Determinants of FDI and their impact on economic growth in Uganda' (2001) African Development Bank 47.

- What are the fragmented foreign investment related laws and regulations governing foreign investment in South Sudan?
- How do these fragmented foreign investment related laws impact on foreign investment inflows in South Sudan and its effects on economic development in general?
- How can these fragmented foreign investment related laws be consolidated in South Sudan?

1.4 Thesis statement

This research is founded on the argument that foreign investment in South Sudan is regulated by a raft of fragmented related laws which are scattered and inconsistent, posing a disincentive to inflow of foreign investible capital into the country for economic development. Therefore, the non-consolidation of these laws is detrimental to the future of foreign investment in South Sudan and addressing this uncertainty is important to boost the investors' confidence which is crucial to attraction of the needed capital, economic wellness of South Sudan and effective use of her economic resources. Thus, this study will argue that consolidation of the fragmented related laws that regulate foreign investment in South Sudan will engender legal certainty and stability in order to build investors' confidence.

1.5 Aims and objectives of the study

The main objective of this research is to appraise the current legal framework on foreign investment in South Sudan and to advise the authorities to consolidate these fragmented foreign investment related laws in order to eliminate the apparent overlaps and duplication that are found in different legislation. This will therefore, improve legal transparency and easier access to South Sudan investment laws. By eliminating these conflicts that exist as a result of fragmentation of foreign investment related laws, there will be clarity and legal certainty which will build investors' confidence to invest more in South Sudan. Hence, boosting its economy.

1.6 Literature review

Some empirical evidences reveal that FI is crucial to economic growth.⁸ Recently, some developing countries in Africa, realized that foreign investment is crucial to their economic growth. FI is viewed as an engine of growth as it provides the much needed capital for investment, increases competition in the host country's industries, and aids local firms to become more productive by adopting more efficient technology or by investing in human and or physical capital.⁹

Although there are various definitions on FI, the most suitable one is that it involves capital flows from one country to another, granting extensive ownership stakes in domestic companies and assets.¹⁰ FI denotes that foreigners have an active role in management as a part of their investment. A modern trend leans toward globalization, where multinational firms have investments in a variety of countries.¹¹

Laura Alfaro & Areendam Chanda stated that, there is a strong relationship between FI and economic growth. Larger inflows of FIs are needed for the country to achieve a sustainable high trajectory of economic growth.¹² Nimal Sanderatne pointed out the conditions that must be fulfilled to attract FI. He advised that it is important to ensure an attractive investment climate. Consistent macroeconomic policies, good governance, economic stability, guarantee of property rights, rule of law and absence of corruption are among the conditions required to attract foreign investment.¹³ FI comes in several forms. PI, foreign loans (FLs) and FDI are the three important types. Out of these, FDI in industry and services are the most useful and affective one. FLs are generally used for investment in infrastructures.¹⁴

⁸S Minota- Zekaria 'the impact of foreign direct investment on economic growth in Eastern Africa': Evidence from panel data analysis (2016) 147 *University of Addis Ababa Redfame Publishing* 3 available at <http://redfame.com/journal/index.php/aef/article/view/1317> (accessed on 9th March 2017).

⁹E Ghee-Lim 'determinants of and relationship between growth and foreign direct investment'(2001) 4 *International Monetary Fund* 175 available at <https://www.imf.org/external/pubs/ft/wp/2001/wp01175> (accessed on 9th March 2017).

¹⁰R Dolzer & C Schreuer *principles of international investment law* (2008) 46.

¹¹WTO reports (1996) 'Foreign direct investment seen as primary motor for globalization'1 available at https://www.wto.org/english/news_e/pres96_e/pr042_e.htm (accessed on 9th March 2017).

¹²L Alfaro et al; 'how does foreign direct investment promote economic growth'? Exploring the effects of financial markets on linkages (2006) 1 available at <http://www.tandfonline.com/doi/full/10.1080/23322039.2016.1277860> (accessed on 9th March 2017).

¹³See (n 1 above) 1.

¹⁴See (n 1 above) 1.

In order for developing countries to enjoy the continuous inflows of FI, policies have been put in place to attract such inflows.¹⁵

Carlos M Correa and Nagesh Kumar stated that, expansion of foreign investment inflows would help in filling up the resource, technology and foreign exchange gaps that constrain the process of development of poorer countries. This is the reason why most developed and developing countries compete among themselves to attract more foreign investment inflows through policies liberalizations and incentives.¹⁶

Estrin points out that, poverty reduction resulting from economic growth arising from FDI may not necessarily benefit the poor directly; however, because FDI contributes to export growth, productivity growth and finance for balance of payments, it supports increases in national income that offer the potential to benefit the poor indirectly.¹⁷ In addition to that, FDI does not reduce poverty directly, but it helps in creating enabling environment for economic growth which increases employment opportunities to the local population, hence, leading to poverty reduction.¹⁸ The beneficial effects of FDI on poverty reduction are potentially stronger when FDI is employed as a tool to develop labour-intensive industries and where it is anchored in the adherence to Multi Nations Establishments' (MNEs) national labour law and internationally accepted labour standards.¹⁹ Hausmann outlines three, advantages of FI in contributing to economic growth and development:²⁰

Firstly, some developing countries have domestic savings that are too low to finance an optimal rate of capital building.²¹ If, at the same time, they have problems tapping into international financial markets, FDI may be their best chance of alleviating financing constraints.²² A similar effect occurs where domestic savings may be ample, but a deficient banking system is unable to funnel the available funds to domestic investors. Secondly, FDI is a more stable source of

¹⁵Sodersten & Reed (n 5 above) 2.

¹⁶C Maria & K Nagesh *protecting foreign investment. Implications on a WTO regime and policy options* (2003)1.

¹⁷E Saul *Economic transition and privatization: The issues in Estrin Saul (ed). Privatization in Central and Eastern Europe. Key issues in realignment of Central and Eastern Europe* (1994) 6. Longman, Essex, UK, 3-30. ISBN 9780582227651 available at www.Ise.ac.uk (accessed on 9 March 2017).

¹⁸Maria et al;(n 16 above) 5.

¹⁹Saul (n 17 above) 7.

²⁰Ricardo-Hausmann & A Eduardo-Fernandez 'foreign direct investment: Good Cholesterol?. Prepared for the seminar. The new wave of capital inflows: Sea change or just another tide?' Working paper (2000) 9.

²¹Ricardo-Hausmann & Eduardo-Fernandez (n 20 above) 6.

²²Ricardo-Hausmann & Eduardo-Fernandez (n 20 above) 6.

external finance than PI and borrowed funds.²³ For example, in the case of a financial crisis, loans and short-term securities investments are easily pulled out of the host country quickly.²⁴

Investors with a direct stake in enterprises are less likely to disinvest due to short-term considerations.²⁵ Hausmann and Fernandez-Arias further explain that perhaps, and most importantly, countries at all levels of development may benefit from a foreign corporate presence in their business sector in that FDI has direct effects on the performance of the host country business sector.²⁶ The benefit of foreign enterprises entering into host country are productivity growth and enterprises development.

Lipsey argues in a similar way to Hausmann and Fernandez-Arias in that, FDI has become an important source of private external finance for developing and developed nations.²⁷ It is different from other major types of external private capital flows as it is motivated largely by the investors' long-term prospects for making profits in production activities that they directly control.²⁸ Foreign bank lending and portfolio investment in contrast are often motivated by short-term profit considerations that can be influenced by a variety of factors and are prone to herd behavior.²⁹

Sun on the point advises that, a sound policy and regulatory framework and efficient supporting institutions to enforce the relevant laws and regulations are imperative for FDI to enter and thrive.³⁰ He argues that in a globalized competitive market, the difference between countries in how conducive their investment climate may be, including how an investor is received, how many administrative and regulatory obstacles an investor has to overcome to enter and operate, and how commercial disputes are handled through the judicial system have a huge impact on

²³Ricardo-Hausmann & Eduardo-Fernandez (n 20 above) 6.

²⁴Ricardo-Hausmann & Eduardo-Fernandez (n 20 above) 6.

²⁵ Ricardo-Hausmann & Eduardo-Fernandez (n 20 above) 6.

²⁶Ricardo-Hausmann & Eduardo-Fernandez (n 20 above) 6.

²⁷ER Lipsey 'foreign direct investment and the operations of multinational firms: concept, history and data'. Working paper (2001) 12 available at www.nber.org/papers/w8665 (accessed on 9th March 2017).

²⁸ER Lipsey (n 27 above)13.

²⁹ER Lipsey (n 27 above)13.

³⁰X Sun 'how to promote FDI? the regulatory and institutional environment for attracting FDI' (2002)2 available at <http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN006349> (accessed on 10th March 2017).

where the investor will go and how much contribution the investment will make to the host economy.³¹

Parker adds that the aim of regulation is to establish a policy environment that sustains market incentives and investors' confidence.³² For this to be achieved, the regulator needs to be shielded from political interference, and the government needs to support a regulatory environment that is transparent, consistent and accountable.³³

South Sudan is the most foreign investment-dependent country in the world, with 97% of its revenue coming from oil which is under production by foreign investment companies. In light of these, FI is important vehicle for economic growth specially in the natural resources-riched country like South Sudan.

In respect of arguments shown above by different Authors, it is important for a country like South Sudan to have a consolidated legal framework by bringing together the fragmented laws that regulate foreign investment in the country. This will encourage investors' confidence in expanding investment in South Sudan which will increase economic growth.

1.7 Research methodology

This is a desk and library based research. It involves descriptive and analytical exploration of primary and secondary sources. As such, it relies on both published and unpublished material. The materials used include foreign investment legal texts dealing with the subject, policies, agreements, decided cases and general literature on the foreign investment, relevant Journal, articles, newspaper, conferences and seminaries reports. The research also relies greatly on internet public sources; South Sudan issues and world at large are considered.

1.8 Limitation to the study

This research covers the twelve years duration, a period of Comprehensive Peace Agreement (CPA) signed in 2005 in Naivasha Kenya between Sudan Government and Sudan People's

³¹ER Lipsey (n 27 above) 2.

³²D Parker; C Kirkpatrick & Y Zhang, 'foreign direct investment in infrastructure in developing countries: does regulation make a difference?'(2006) 1 Transnational Corporations 15.

³³ER Lipsey (n 27 above) 7.

Liberation Movement/Army (SPLM/A) and the period of independent of Republic of South Sudan from 2011 to 2017.

The research does not attempt to answer all investment issues. As such, it is limited to regulation of foreign investment in South Sudan through consolidation of fragmented investment related laws. It will also analyze the regulations passed by the government of South Sudan to regulate foreign investment.

1.9 Structure of chapters

The work is divided into five chapters as follows:

Chapter one. This chapter provides a general introduction: The problem statement, research questions, thesis statement, aims and objectives of the study, literature review, research methodology, limitation to the study and overview of chapters. Chapter two. This chapter will discuss the concept of FI and its relevance to South Sudan economy. Various definitions and types of FI and FDI by various disciplines will be examined as well as the theories of FI. It will explore the importance of FI to developing countries and less developed countries like South Sudan. The chapter will also explore the attempts that have been made by the government of South Sudan to protect FI. Chapter three. This chapter will examine the current laws and regulations governing FI in South Sudan. It will appraise the points through which these fragmented foreign investment related laws conflict. Chapter four. This chapter will explore how the fragmentation of foreign investment related laws impacts negatively on foreign investment inflows and economic development in South Sudan. Chapter five. This chapter summarizes the discussions in prior chapters. It concludes the discussion and recommends the method of consolidating these fragmented foreign investment related laws in South Sudan to provide legal certainty.

CHAPTER TWO

CONCEPT AND THEORIES OF FOREIGN INVESTMENT AND ITS RELEVANCE TO SOUTH SUDAN ECONOMY

2.1 Introduction

Foreign investment (FI) has developed at a remarkable rate ever since early 1980s, and the global market for it has become more viable. Therefore, this chapter will discuss a range of definitions of FI by different writers and an attempt will be made to define it in a broader sense. In addition, a general concept as well as global trends of distinction of FIs will be discussed including types of foreign direct investment. Recent development on FI has come up with the new forms of foreign investment which will be investigated too in this chapter. The chapter will also examine the conflicting economic theories of FI. The importance of FI investment to economic development and in particular, South Sudan's economy will be discussed in this chapter. Although the research covers FI in general, the main focus will be on FDI because of its dominance and importance to South Sudan.

2.2 Concept of FI, its trends and definitions

The phrase "foreign investment" usually brings to mind the significant contribution of foreign investment to domestic economy. Different authorities and writers have defined it broadly. Sornarajah defined it as "transfer of tangible or intangible assets from one country to 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."³⁴ There can be no doubt that the transfer of physical property such as equipment, or physical property that is bought or constructed such as plantations or manufacturing plants, constitute foreign direct investment. Such investment may be contrasted with portfolio investment".³⁵

PI is normally represented by a movement of money for the purpose of buying shares in a company formed or functioning in another country.³⁶ It could also include other security

³⁴Sornarajah (n 2 above) 8.

³⁵Dolzer & Schreuer (n 10 above) 60.

³⁶Sornarajah (see n 1 above) 8.

instruments through which capital is raised for commercial ventures.³⁷ The distinguishing element is that, in PI, there is a separation between, on the one hand, management and control of the company and, on the other, the share of ownership in it.³⁸ In investment treaties, the nature of the foreign investment that is protected through their provisions is also defined. All the definitions provided herein differ according to the purpose for which they are used. It is emphasized that this work is not confined solely to the law created by treaties, but also definitions contained in legislation like Investment Promotion Act, 2009 for South Sudan.

A recent study by UNCTAD of investment treaties has shown that many countries include specific language in the preamble to their treaties, the aim is to clarify the objective of investment promotion and protection.³⁹ The definitions contained in investment treaties contribute to the understanding of the usage of the term foreign investment. They usually define investment broadly as possible in order to clear doubts that exist from early idea that intangible property is not protected by international law, because the creation of intangible property is dependent on the laws of the host state.⁴⁰

Bilateral investment treaties (BITs) leave no room for doubt that they include intangible assets within the definition of property and often spell out the types of intangible assets protected by the treaty. Article 1 of the United Kingdom treaty with Singapore may be taken as representative of the types of property listed as protected by such treaties in some early treaties. The term investment is defined as including: (1) "movable and immovable property and property rights such as mortgages, liens and pledges; (2) shares, stocks and debentures in companies and other interests in companies; (3) claims to money or to any performance under contracts having a financial value; (4) Intellectual Property Rights and goodwill; and (5) business concessions including concessions relating to natural resources". However, as BITs advances, the definition

³⁷D Bowett 'the Encyclopedia of public international law' (vol.8) 246 available at <https://doi.org/10.1093/bybil/57.1.376> (accessed on 29th August 2017).

³⁸E Graham and P Krugman, foreign direct investment in the United States (1991) 7: 'Foreign direct investment is formally defined as ownership of assets by foreign residents for purposes of controlling the use of those assets.'

³⁹UNCTAD Bilateral investment treaties 1995-2006: Trends in investment rules making (2007) 3 available at <http://unctad.org/en/docs/iteija20065> (accessed on 29th August 2017).

⁴⁰UNCTAD (n 39 above) 3.

becomes more refined in order to capture new instruments that are associated with the making of investments within the definition of investment.⁴¹

The US Model Bilateral Investment Treaty contains a longer list which includes, in addition to the five categories listed above, licenses and permits issued pursuant to law, including those issued for manufacture and sale of products' and 'any right conferred by law or contract, including rights to search for or utilize natural resources, and rights to manufacture, use and sell products. These additions are the recognition of the fact that many of the rights which the foreign investor obtains in host states are administrative law rights based on permission to conduct certain activities in the host state. The investment will cease to be of much value if rights such as the right to export or repatriate profits initially granted are later withdrawn by the administrative agency which grants them.⁴²

The protection of the rights and privileges acquired by an investor in the host state are the primary task of BITs, and this is what US model seeks to achieve by including the public rights acquired under the host state's law in the definition of property.

2.3 Distinction between foreign direct investment (FDI) and portfolio investment (PI)

The distinction between FDI and PI is that, "FDI involves (a) the transfer of funds, (b) a long-term project, (c) the purpose of regular income, (d) the participation of the person transferring the funds, at least to some extent, in the management of the project, and (e) a business risk".⁴³

In the case of PI, the investor takes upon himself the risks involved in the making of such investment. The investor cannot sue the domestic stock exchange or the public entity which runs it if the investor suffers loss. Likewise, if the investor suffers loss by buying foreign shares, bonds or other instruments, the investor will have no basis of seeking remedy because there is no such protection accorded under customary international law.⁴⁴ The protection of foreign investment

⁴¹OECD 'indirect expropriation and the right to regulate in international investment Law' (2004) 9 OECD working papers on international investment. Available at <http://dx.doi.org/10.1787/780155872321> (accessed on 29th August 2017).

⁴²Some of the issues in *Amco v. Indonesia* concerned such administrative controls. The fact that the rights of the foreign investor are dependent on administrative decisions has been pointed out in this case.

⁴³R Dolzer the notion of investment in recent practice in S Charnovitz, DP Steger and P van den Bosche (eds), *Law in the service of human dignity : Essay in honor of Florentino Feliciano* (2005) 261.

⁴⁴In *Fedax v. Venezuela* (1998) 37 ILM 1378, would have it, an investment treaty could be interpreted as extending to portfolio investments.

under customary international law is limited to physical property of the foreign investor and other assets directly invested through principle of diplomatic protection and state responsibility.

Another distinction is premised in Investment Promotion Act, 2009 which defines FDI as an investment where the investor is not a national as defined in the Act and has majority shares, financing, managerial, administrative and technical personnel in an enterprise.⁴⁵ PI is termed in the Act as indirect investment (II) and is defined as any act or contract whereby an investor makes a contribution whether tangible or intangible, to an enterprise in South Sudan without obtaining an equity interest in the enterprise but is entitled to returns based on profits generated by the enterprise.⁴⁶ This legislation was passed before the independence of South Sudan, it was during the interim period when South Sudan was a semi- autonomous known as Southern Sudan, to mean a region within the territory of the Sudan.

In spite of the above distinctions, one view maintains that there should be no distinction between PIs and FDIs as to the protection given to either by international law. This view is based on the assumption that there is no distinction between risks taken by either type of investor, both being voluntarily assumed.⁴⁷ However, this view is not accepted generally in international law, where it is clear that FDI alone is subject to the protection of customary international law.⁴⁸ While PIs, on the other hand, can be made on stock exchanges virtually anywhere in the world. Since the host state cannot know to whom linkages are created through the sale of shares through these stock exchanges, there can be no concrete relationship creating a responsibility.⁴⁹ This is not so in the case of FDI where the foreigner enters the host state with the express consent of the host state. Nevertheless, different opinions are found in the publications that, PIs are now to be included in the FDIs. Such opinions are influenced by the fact that treaties defining investments include shares in the definition of FDI. The better view is that PIs are not protected unless specifically included in the definition of FI in the relevant treaty.⁵⁰

2.4 Types of FDI

⁴⁵Investment promotion Act of 2009 section 5.

⁴⁶Act of 2009 (n 46 above) section 5.

⁴⁷W Flume, H Hain, G Kegel & K Simmond 'international law and economic order': Essay in honor of FA Mann (1997) 311. Also see I Brownlie treatment of aliens:Assumption of risks and international law (1997) 309.

⁴⁸Flume (n 48 above) 309.

⁴⁹Sornarajah (n 2 above) 9.

⁵⁰K Vandavelde United States investment treaties (1992) 261.

There five broad categories through which FDI flows into an economy: They are export-oriented investment, market-development investment, government-initiated investment, acquisition investment and greenfield investment.

2.4.1 Export-oriented investment (EOI)

EOI is described by Reuber as an investment that reflects a wide range of considerations such as the desire to develop secondary and more diversified sources of supply by way of obtaining lower-cost products to be used either as inputs or for sale elsewhere.⁵¹ Firms serving established markets at home or internationally frequently seek new sources of inputs, including raw materials, components and parts, as well as finished products. This reflects a wide range of considerations, such as the desire to develop secondary and more diversified sources of supply and the possibility of obtaining lower-cost products. This type of investment is commonly found in the raw materials sector. Their main interested is to extract products from the host country and sell them abroad through established market channels. Such investment brings about infrastructures development such as housing, hospitals and schools.⁵²

The global investment's report advocates that, EOI is made with the intention of the investor to improve its competitive position at home or internationally by taking advantage of the lower cost of production that host countries offer, where lower cost is indicated by some of the following, amongst others; incentives from the host country, abundance of skilled and semi-skilled labour with concurrent relatively lower wages, and political and monetary stability.⁵³ The costs and reliability of production are the major factors which determine the location of investments.⁵⁴ As soon as good are produced, the components are normally exported to a central location or to a country apart from host country to assemble into finished goods, confirming the fact that this investment is made with the object of taking advantage of the lower-cost environment in a host country.⁵⁵ Export-oriented investment tends to be very much lucrative even in the short period.⁵⁶

⁵¹O Anthony-Gyapong & A John-Karikari 'direct foreign investment strategies and economic performance in Ghana and Ivory Coast (1999) 134.

⁵²Anthony Gyapong & John Karikari (n 52 above) 73.

⁵³Project appraisal document on a proposed loan in the amount of US\$35 million to the Republic of Tunisia for an export development project April 30, 1999 Document of The World Bank Report No: 18778 TUN 3.

⁵⁴World Bank (n 54 above) 4.

⁵⁵L Jose-Gonzalez 'export-oriented entrepreneurship and regional economic growth' (2000) *Pernía Basque Institute of Competitiveness* 4.

⁵⁶Jose Gonzalez(n 57 above) 4.

The investing company's control over the market and the rapid depreciation of its investment is made possible by high cash throw-off and is sometimes enhanced by technological obsolescence.⁵⁷ If environment for competition becomes less favorable in the host country relative to somewhere else, the firm can relocate its investment quite quickly.⁵⁸ Because of high mobility involved in this form of investment, most countries around the globe become competitive with each other in making concessions to such investors in order to make their investment platforms more attractive, which in turns reduces the risk and hence an advantage to both the host country and the investor.⁵⁹

Reuber states that, this type of investment is less commonly found producing final products for sale directly to consumers abroad.⁶⁰ In his explanation, he states that, "one may speculate on a variety of reasons for this, such as the difference in comparative advantage associated with different parts of the production process, handling and transportation costs, the reluctance of investors to assume the risk of relying entirely on any country for the production of a full product line, and the advantages from the standpoint of sale and the service of having final assembly take place in the major markets where the product is sold, as in most cases, the host country's markets are more oriented to raw materials".⁶¹ There are several ways by which export-oriented FDI can facilitate to improve a host country's manufacturing and sell abroad competitiveness. In order to attract this type of investment and to ensure that the investment translates into development gains, a host country needs to find the most effective ways of making the choice of location as well as the target segments conducive to the kind of export activities the host country aims to foster.⁶² In today's rapidly globalizing world, prosperous exporting needs to produce products that are competitive in the global market, marketing expertise and right of entry to global markets. The literature views that, this type of investment can also be an effective means of providing resources such as skills, training, technology, capital goods and intermediate inputs needed to exploit a country's existing comparative advantages.⁶³ The most prominent role played

⁵⁷Jose Gonzalez(n 57 above) 5.

⁵⁸Jose Gonzalez(n 57 above) 5.

⁵⁹Jose Gonzalez(n 57 above) 7.

⁶⁰Anthony Gyapong & John Karikari (n 52 above) 73.

⁶¹E Ghee Lim 'determinants, and relationship between foreign direct investment and growth' (2001) 3.

⁶²Ghee Lim (n 62 above) 4.

⁶³G Lutz Arnold 'Economic theory': Existence of equilibrium in the Helpman–Krugman model of international trade with imperfect competition(2013) 52 available at <https://doi.org/10.1007/s00199-011-0624-8>(accessed on 12 August 2017).

by EOI in the exports of developing countries is in the manufacturing sector.⁶⁴ This area of economy is mostly dominated by foreign affiliates that tend to be leaders in export-oriented investment and in marketing.⁶⁵

Some of the impact of foreign affiliates on the domestic entities' export activities can be both direct and indirect.⁶⁶ Direct effects occur when exporting foreign affiliates establish backward linkages with local firms which then become indirect exporters. Indirect effects of the presence of export-oriented foreign affiliates occur when local firms manage to copy the operations of foreign affiliates, employ staff of foreign affiliates, and benefit from improvements in infrastructure and reduction in trade barriers undertaken in response to demand by the host country for foreign operations/investors.⁶⁷

Khan and Afia have a similar view to that of Helpman and Kruman. However, they point out that, "expanding exports is a means to an end of a country's economic development, thus promotion of export-oriented FDI should be an integral part of the overall development strategy."⁶⁸ Moreover, FDI can help a host country in its efforts to raise exports in all kinds of industries by providing the missing elements that they need in order to compete or by improving locally based skills and capabilities".⁶⁹ Export-oriented FDI is deemed as a tool for economic growth and development especially for developing countries.⁷⁰

UNCTAD report views that, developing countries should actively seek to attract the right type of FDI to tap into the new international production system and that although FDI projects might not be export oriented at first, such an orientation can emerge as countries learn more about the performance of their initial investments and possibilities for expanding production in particular markets.⁷¹

⁶⁴Lutz Arnold (n 64 above) 52.

⁶⁵E Helpman &P Kruman 'Market Structure and Foreign Trade' (1995) 134 Cambridge MIT press.

⁶⁶J Timothy Kehoe & Raphael Bergoeing 'Trade theory and trade facts' March(2001) 4.

⁶⁷Timothy Kehoe & Raphael Bergoeing (see n 34 above) 4.

⁶⁸A Khan & C Afia 'export growth and causality'(1995): An application of Co-integration and ECM Model Pakistan Development Review 33.

⁶⁹Khan & Afia (n 69 above) 33.

⁷⁰S Lall 'Foreign Direct Investment, Technology Development and Competitiveness': Issues and Evidence (2001) 4 Oxfordshire Oxford University Press.

⁷¹United Nations Conference on Trade and Development (UNCTAD 2001) 13. Investment Country Profiles: South Africa, Geneva.

Even if the possible paybacks of EOI are extensively recognized, this does not automatically lend support for policies aimed at targeting and promoting it.⁷² The reason being that, most countries tend to take an incremental approach to foreign markets, especially new ones, and that their commitment to this over time will be conditioned to a significant extent by observed performance policies that aim to attract export-oriented FDI may neglect or even discourage FDI that might initially be oriented towards the domestic market but which might become more export-oriented over time.⁷³

2.4.2 Market-development investment (MDI)

Distinct from EOI, the aims of MDI is to put up for sale the final output in the host country's market.⁷⁴ However, a common feature of both types is that they thrive on feasibility of reduction in production cost. Another key consideration by the investor is the potential growth in the size of the host country's market in the long term. Although in the short to medium term the investment may not yield the expected return, if the long-term view is that the host country's market will grow in size and hence become profitable, the investment may then be undertaken.⁷⁵

The development in the host country's market is, however, dependant on the general economic viewpoint of the host country and hence the macroeconomic variables and the efficiency of the financial reform policies. The investors' decision to invest in host country is determined by policies directives related to taxation, tariffs rate, trade control and subsidies, as well as other regulations imposed on foreign investors by the host government.

This policies do apply to foreign investment generally or to broad sectors of the economy rather than to particular projects or industries. Moreover, many of these policies confer the same advantage on domestic industries. The initiative to undertake such investment is taken by the investor and although the incentives provided by the host country frequently have some influence on the decisions made, investors may view many of these incentives as uncertain over time and marginal in importance by comparison with long-term market considerations.⁷⁶

⁷²UNCTAD (n 72 above) 13.

⁷³UNCTAD (n 72 above) 14.

⁷⁴E Helpman &P Kruman (n 66 above) 6.

⁷⁵E Helpman &P Kruman (n 66 above) 7.

⁷⁶D Nguyen 'exports, growth and causality in developing countries' (2001)12 *Journal of Development Economics* Vol. 18.

MDI is manifested by numerous doubts of the most central kind from a business angle: How quickly will a market develop? Can the firm speed up the market-development process? What share of the market can the firm capture? Owing to these and other uncertainties regarding product acceptance and market development, many manufacturing firms are likely to prefer to explore the market initially by exporting.⁷⁷ In the process of market development, while investment become more familiar with the market risk and build confidence, the market expands progressively into assembly activities.⁷⁸

Example, a "major manufacturer of tractors approached the Brazilian market by exporting initially and working directly with Brazil to establish a strong local distribution network. This required extensive training of Brazilian distributors, not only in how to sell tractors but also in how to use, service and repair them. In many cases certain business practices were also transferred, such as inventory control for parts and record keeping for internal control purposes. The Brazilian distributors were allowed to make attractive margins in return for their inputs.⁷⁹ The distribution system added more value to the host country than did the company's eventual manufacturing activities. Furthermore, after the firm had developed a large market to begin the integrated manufacture of tractors in Brazil, the distribution network proved effective in handling imported combines and other farm equipment as well".⁸⁰

Reuber gave second example which, relates to a major US chemical company which bought out the only local plastics manufacturer in a small Latin American country and operated on a reasonably profitable basis. The American firm was not very interested in the modest return available from the existing firm, but was interested in the potential returns after market development and the related infusion of technology.⁸¹ Their long-term objective was to create a technologically advanced self-contained plastics industry in the host country as they knew that

⁷⁷L Rangasamy 'Exports and economic growth' (2009) 21 *The case of South Africa. Journal of International Development*.

⁷⁸F Abul Shamsuddin 'Economic determinants of foreign direct investment in less developed countries'(1994) 44 *Pakistan development review*.

⁷⁹Reuber & Crookell (n 82 above) 633.

⁸⁰Abul Shamsuddin (n 81 above) 44.

⁸¹D Sethi & S Guisinger trends in foreign direct investment flows: A theoretical and empirical analysis (2003) 80 *Journal of international business studies*.

the existing manufacturer was operating with old technology and that the inferior quality of the output limited the number of possible end users.

In addition to that, "the size of the market as it stood was less than half that required to justify building the new facilities using new technology needed to bring about market growth."⁸² The American firm's strategy in the light of these conditions was three-fold: (i) to develop the country's market potential; (ii) to export more sophisticated products from other countries to the host country; and (iii) to build a new plant with advanced modern technology in the host country after the market had developed to a sufficient level".⁸³ This policy also looks more inspiring and beneficial to both the host country and investor.⁸⁴

There are many forms of market-development FDI. For example, a major aluminium company began its operations in India by selling aluminium pans and utensils door to door.⁸⁵ The key feature to be noted in this process is that the building of production facilities followed the development of demand, and that the development of demand was a risky and time-consuming activity requiring extensive transfers of managerial and technological skills.⁸⁶ With this type of investment, host countries have upper hand bargaining power more than investors seeking to set up a foothold in their home markets.⁸⁷ In the process of economic expansion, new investors are attracted, creating some competition among investors for available market opportunities.

2.4.3 Government-initiated investment (GII)

comparing export-oriented with market-development types of FDI, government-initiated type of FDI occurs through the provision of substantial incentive structures to investors by a host country's government.⁸⁸ These are accepted by investors whereas market as well as cost conditions may have precluded them from investing in the host country under normal or no incentive circumstances.⁸⁹ For example, in South Sudan, the incentive takes the following forms: relaxed foreign exchange controls, tax concessions to investors who partake in national

⁸²Sethi & Guisinger (n 85 above) 19.

⁸³Nguyen (n 79 above) 12.

⁸⁴Nguyen (n 79 above) 12.

⁸⁵Abul Shamsuddin (n 81 above) 46.

⁸⁶N Hermes & R Lensink *Foreign direct investment, financial development and economic growth* (2003) 142 *The Journal of Development Studies* 40.

⁸⁷Hermes & Lensink (n 90 above) 142.

⁸⁸Rangasamy (n 80 above) 46.

⁸⁹Mahya Nobakht & Seyedashkan Madani. Is FDI Spillover Conditioned on Financial Development and Trade Liberalization: Evidence from UMCs. *Journal of Business and Management Sciences* (2014) 26.

development projects, indirect subsidies through the provision of specific infrastructural requirements by investors, ease of repatriation of investments and many other kinds of government support services.⁹⁰

To shield the host-country and to make the option of providing incentives to foreign investors efficiently, such incentives are aimed at explicit projects industries.⁹¹ Furthermore, "incentives are given by host-country's government in order to attract foreign investors to either less-developed regions or regions which require improvement in certain sectors. For example in South Sudan, it is understood that the South Sudan investment authority has prioritized specific areas for investment".⁹² Some of the selected examples are as follows; a country decides that the time had come to displace imports of synthetic rubber with those produced locally.⁹³ The country falls short of hard currency and lacks the technological skills to produce competitive products.⁹⁴ To overcome these problems, it seeks a joint venture arrangement with another country which holds only a small share of the host country's market as an exporter to the country.⁹⁵ This country considered it worthwhile to supply funds and technology in order to obtain a substantial minority interest in the venture and thereby increase its market share.⁹⁶

The participating country continues to uphold its own self-regulating distributors, though later the host country decides to put up its own distributor to handle a portion of the output under a market sharing arrangement⁹⁷. Import-displacement investment of this kind accelerates the shift of manufacturing and technical know-how but at the cost noticeably higher for the home economy.⁹⁸ This cost was justified by the government on the grounds that it yielded a variety of intangible non-quantifiable external effects, such as the development of local management and technical skills, improved technology and series of beneficial spill-over effects on the local

⁹⁰Basic information on tax system in South Sudan Directorate of taxation (2015) 3 available at www.grss-mof.org (accessed on 13 August 2017).

⁹¹Alfred Strolla *South Sudan investment basic highlights* (2015) 4 available at www.gurtong.org (accessed on 13 August 2017).

⁹²(See n 94 above) 4.

⁹³G Reuber *Private Foreign Investment in Development* (1973) 40 Clarendon Press Oxford available at www.academia.edu/12562532/Review_of_Grant_Reuber_et_al (accessed on 13th August 2017).

⁹⁴Reuber (n 97 above) 40.

⁹⁵Reuber (n 97 above) 41.

⁹⁶Reuber (n 97 above) 41.

⁹⁷D Salvatore *International Economics* (7th edition) 8 2001.

⁹⁸Salvatore (n 101 above) 9.

industries. Host-country governments have historically played an important role in attracting or excluding FDI through subsidies, which is one of the most effective ways of stimulating the flow of FDI.⁹⁹ Subsidies of different kinds help in reducing the risks of payment to locate out of the country, as such, they influence directly a firm's cost structure.

An example of a subsidy which affects the firm's risk premium would be the provision of public education to increase literacy within the country. All firms benefit from a more educated populace. In contrast, a subsidy could be aimed at reducing a particular firm's or industry's costs of providing on-the-job training.¹⁰⁰ A risk-reducing subsidy, such as the provision of social overhead capital, has direct economy-wide benefits while a cost reducing subsidy benefits a select firm or group of firms.¹⁰¹ Based on the framework of analysis presented above, a subsidy granted by government would have the unequivocal effect of increasing the probability of a firm's move to an investment location.¹⁰² This argument does not mean that a subsidy does itself reduce or compensate firms for location risk, but does increase the risk premium for investors, that means, a subsidy is not seen as a positive factor in a firm's cost structure or the riskiness of a foreign location decision making.¹⁰³ As an incentive to FDI, a host government can tailor subsidies to reflect the relative importance of the cost or risk factor in a firm's decision to locate in the host country.¹⁰⁴

Krueger points out that the objective of this type of investment is generally rooted in the desire of a country to increase employment and output, to encourage certain kinds of activities, to promote regional development within the host country, to improve the balance of payments and to alleviate the scarcity of hard currency.¹⁰⁵ Tyler argues that although such policies do not necessarily imply investment in import-displacing industries, this in fact has been the most common practice in the past. Government-initiated investment, despite its benefits, inevitably creates a high degree of interdependence between the investor and the host-country government,

⁹⁹Reuber (n 97 above) 46.

¹⁰⁰Reuber (n 97 above) 46.

¹⁰¹H William Davidson *The location of foreign direct activity: country characteristics and experience effects(1980)9*.

¹⁰²William Davidson (n 105 above) 10.

¹⁰³William Davidson (n 105 above) 10.

¹⁰⁴R Vernon *International Investment and International Trade in the Product Cycle Quarterly Journal of Economics* (1966) 190 vol. 80.

¹⁰⁵M Thomas Krueger *Institutional investment across market anoma* (1994) 1 *Journal of financial and strategic division* vol. 1.

and an uncertain environment for both parties. Home-country government may also be drawn into the arrangements directly or indirectly.¹⁰⁶

undoubtedly, the success of motivation is dependent largely on the continuation of the host country's subsidies in various forms. The investor loses much of his bargaining power once the investment is committed. The investor is therefore likely to demand excessively favorable terms at the outset as a condition for making the investment to compensate for the possible erosion of these terms once a commitment is made.¹⁰⁷

The host government for its part tends to be excessively generous in the first instance in the hope of being able to change the terms of its support once investments have been committed. On this basis, the stage is set for relatively difficult relationships to develop between investors and governments. Owing to their interdependence and in order to minimize conflict, investment of this kind tends to give greater emphasis to joint ventures, minority interests for foreign investors and other conditional forms of FDI.¹⁰⁸

2.4.4 Acquisitions and greenfield investments (AGI)

FDI flows to developing countries surged in the 1990s to become the leading source of external finance.¹⁰⁹ This rise in FDI level was accompanied by a marked change in its composition.¹¹⁰ Investment taking the form of acquisition of existing assets (Mergers & Acquisitions) grew much more rapidly than investment in mainly new assets (greenfield FDI), particularly in countries undertaking extensive privatization of public enterprises.¹¹¹ Are greenfield investments better than M&As? The UNCTAD report asks to what extent FDI entry through the acquisition of domestic firms is different in terms of its developmental impact from entry through the establishment of a new facility.¹¹² There is a perception that M&As do not necessarily add productive assets or new jobs to a country. At the heart of the concern in this regard is the notion

¹⁰⁶Thomas Krueger (n 110 above) 190.

¹⁰⁷Thomas Krueger (n 110 above) 190.

¹⁰⁸Reuber (n 97 above) 50.

¹⁰⁹M Carkovik & R Levine *Does Foreign Direct Investment Accelerate Economic Growth?* (2002) 2 *University of Minnesota Working Paper June*.

¹¹⁰Carkovik & Levine (n 114 above) 50.

¹¹¹J H Dunning *Location and the Multinational Enterprise: A neglected Factor* (1998) 45 *Journal of International Business Studies vol. 29*.

¹¹²Report by the secretariat of the United Nations Conference on Trade and Development No.17 (2001) 22.

that M&As are generally perceived as resulting mainly in a change of ownership and a shift in control from domestic to foreign hands, thereby increasing the risk of foreign domination of segments of the economy.¹¹³ furthermore, M&As often lead to employment loss and can be used to reduce competition and strengthen market power. They may also lead to the breaking up of the acquired firm and divestment of its individual parts. Such concerns exist in all countries. The World Bank suggests that especially at the time of entry and in the short term, M&As (as compared to greenfield investments) may involve, in some respects, smaller benefits or larger negative impacts from the perspective of host-country development.¹¹⁴

The UNCTAD report summarizes the impact as follows: The financial resources provided through M&As do not always add to the capital stock. Hence, a given amount of FDI through M&As may correspond to a smaller productive investment than the same amount of Greenfield FDI, or to none at all. However, when the only realistic alternative for a local firm is closure, cross-border merger or acquisition can serve as a life preserver.¹¹⁵

FDI all the way through M&As is less likely to transfer new or better technologies or skills than Greenfield FDI, at least at the time of entry. M&As may lead directly to the downgrading or closure of local production, or functional activities in line with the acquirer's corporate strategy.¹¹⁶ FDI through M&As does not usually generate employment when it enters a country. It may even lead to layoffs, although in the case of a firm which would have gone bankrupt had it not been acquired, it can also maintain employment. Greenfield FDI, by contrast, necessarily creates new employment at entry.¹¹⁷

FDI through M&As can increase concentration and lead to anti-competitive results. However, it may prevent concentration from increasing when takeovers help preserve local firms that might otherwise have gone under. Greenfield FDI, by definition, increases the number of firms in existence and does not increase market concentration upon entry.¹¹⁸

¹¹³(see n 117 above) 24.

¹¹⁴The World Bank report on Greenfield investment (2000) 8.

¹¹⁵(see n 119 above) 24.

¹¹⁶(see n 120 above) 24.

¹¹⁷Guide to mergers and acquisition *Protiviti risk & business consulting*24.

¹¹⁸(See n 122 above) 24.

The UNCTAD report notes that, most of the shortcomings of FDI through M&As, as opposed to Greenfield FDI, relate to effects at entry or soon thereafter. In the longer term, when both direct and indirect effects are taken into account, many differences between the impacts of the two modes diminish or disappear.¹¹⁹ For instance, cross-border M&As are often followed by subsequent investments by the foreign acquirers, in this case, FDI through M&As can lead to enhanced investment in production just as greenfield FDI does.¹²⁰ Similarly, M&As in form of cross-border can transfer new better technology, especially when acquired firms are rationalized to enlarge the competence of their operations.¹²¹

2.5 New forms of foreign investment

Having looked at various types of investment contracts above in comparison with these new forms of foreign investment, the picture has changed. Unlike earlier forms of contract which favored the foreign investor, modern forms of foreign investment contract ensure that the contractual balance favors the host state.¹²² They are based on recognition that foreign investment is beneficial to the host economy provided there is careful regulation of such investment.

The principal forms of foreign investment are the joint venture and the production-sharing agreement, they are supported by agreements such as the management agreement whereby the manager controls a project in return for a fixed sum, whereas the profits of the project go to the state, and the transfer of technology agreement where the technology required for the project is supplied by the foreigner and the state controls the project and has a larger share of the profits. These new forms of foreign investment contract have been described in the literature.

2.5.1 The joint venture agreement

The joint venture agreement is a collaborative contract enters into between two or more business entities to achieve a particular objective or to participate in another fresh project which may be more successfully pursued as a result of their pooling of resources or technology.¹²³ The risk of

¹¹⁹(See n 122 above) 24.

¹²⁰(See n 122 above) 24.

¹²¹(see n 122 above) 26.

¹²²Sornarajah (n2 above) 116.

¹²³Sornarajah (n 2 above) 117.

failure is shared by parties to the project. There are two main principal forms of joint venture: The partnership joint venture which bears no different from partnership agreement in common law, except that it is formed with a precise and a particular project in mind. The second form is corporate joint venture, where parties incorporate a company through which they carry out their business objectives.¹²⁴ This type of agreement has become popular for the reason that the "penetration of new market through local business partners is easier, because the risks are diversified and market information is accurate through local partners. In South Sudan, there are compelling reasons that foreign investment entry can be usually made to collaborate with local" partners, as shall be discussed in the next chapter.

In developing countries, if the industry into which entry is sought is a state monopoly, this will mean that the joint venture will have to be made with state corporation.¹²⁵ This form of contract has advantages and disadvantages from foreign investor's point of view. One advantage is that foreign investor will be able to share in monopoly profits in a monopoly market. Another advantage is that the investor will have a link with the state so that matter such as customs clearance, export permits and other administrative matters related to entry and joint venture functioning. The disadvantage is that the state seeks to represent its objective through state corporation and ensures that its policies are implemented in the joint venture agreement. The presence of the directors of state entity in a board meeting of a joint venture corporation will give that state upper hand in enforcing its policies. In this situation, there will be a conflict between investor and state over a profit motive.

2.5.2 The production-sharing agreement

There has been a change to the dominant form of contract has in the oil industry. Previously, the prevailing form of contract was the concession agreement through which the oil industry functioned in the oil-exporting countries.¹²⁶ The concession agreement is no longer used, as oil-

¹²⁴Sornarajah (n 2 above) 117.

¹²⁵In manufacturing sectors, this appears to be the trend, but, in mining sectors, the requirement that there should be state participation still persists. Likewise, some sectors, such as civil aviation, continue to be subject to entry with local participation. Laws requiring local participation have not been dismantled, despite liberalization.

¹²⁶Dr Irina Paliashvili Concept of production-sharing (1998) 1 *outlines of the presentation Russian-Ukrainian legal groups at the seminar on the legislation on production sharing agreements, September 14,1998 available at http://www.rulg.com/documents/The_Concept_of_Production_Sharing.htm (accessed on 13th August 2017).*

producing countries have sought greater control over the industry. The new agreement, which replaced the concession agreement, reflects the fact that there has been a shift of power away from the oil companies to the oil-producing states.¹²⁷ The production-sharing agreement is based on the concept that the ownership of oil is always in the state, and that the state alone has the right to its disposal, a reflection of the principle of permanent sovereignty over natural resources.¹²⁸

In South Sudan the risk of oil exploration is borne by the foreign corporation, which is given a license for the exploration of parcels of land where there is a prospect of finding oil. When oil is found, the foreign corporation extracts the oil and is given a certain percentage of it, so that it recovers the expenses of the exploration and secure a reasonable profit. The state retains ownership of the oil, subject to the right of the foreign corporation to its share of production. There is a term for joint administration of the project with the state oil company known as Nile petroleum, the only state owned oil company in South Sudan. Both the joint-venture agreement and the production-sharing agreement are legal techniques which demonstrate that host states are asserting their power over incoming investments.¹²⁹ The amount of power that can be asserted will depend on the relative bargaining strengths of the parties.

A state which is desperate for investment is not going to be too assertive in case it scares away such investment, this is the situation of South Sudan since it depends on oil largely, whereas a state which is perceived as a safe state from which profits can be made will seek to maximize the benefits from the foreign investment for itself while ensuring that the foreign investor still has adequate incentives to do business in that state. The joint-venture agreement and the production-sharing agreement illustrate the manner in which the older types of agreement such as the concession agreement have been replaced to ensure that there is greater state control over foreign investment even at the contractual stage which is indispensable to the entry of the foreign investment.¹³⁰

2.6 Conflicting economic theories on foreign investment

¹²⁷Irina Paliashvili (n 131 above) 3.

¹²⁸Sornarajah (n 2 above) 118.

¹²⁹Irina Paliashvili (n 131 above) 6.

¹³⁰Irina Paliashvili (n 131 above) 6.

hypothetical conflicts have had an impact on shaping legal attitudes to foreign investment. Apart from Marxist theories, there are two main conflicting theories, one of which maintains that foreign investment is wholly beneficial to the host state while the other maintains that, unless a state veers away from dependence on foreign investment, it cannot achieve development. There are theories which seek to adopt a middle course between these extreme views. All theories focus attention on the economic development of the host state, particularly the host developing state. The literature views the three theories which are: The classical theory, the dependency theory and the middle path.

2.6.1 The classical theory

The classical economic theory on foreign investment takes the view that foreign investment is wholly beneficial to the host economy.¹³¹ This position is supported by several reasons. One of the reasons is the fact that foreign capital is brought into the host state which ensures that the domestic capital available for use can be diverted to other uses for the public benefit.¹³² The fact that foreign investor brings with him technology to the host state, leads to the diffusion of technology within the host economy. There is new employment created, whereas, without foreign investment, such opportunities for employment would be lost. The labour that is so employed will acquire new skills associated with the technology introduced by the foreign investor. Skills in the management of large projects will also be transferred to local personnel. road and rail network amenities will be built either by the foreign investor or by the state, and these facilities will be to the general benefit of the economy.

The improvement of services such as transportation, health or education for the benefit of the foreign investor will also benefit the host society as a whole.¹³³ A focal point for these beneficial aspects of the foreign investment flows enables the making of the policy-oriented argument that foreign investment must be protected by international law.¹³⁴ Such protection will facilitate the flow of foreign investment and lead to the economic development of less developed countries.¹³⁵ It provides a strong, seemingly unselfish policy justification for the protection of foreign

¹³¹Sornarajah (n 2 above) 48.

¹³²Vintila Denisia 'foreign direct investment theories: An overview of the main FDI theories (2010) 5 Vol. 2. available at <https://www.researchgate.net/publication/228259720> (accessed of 17 August 2017).

¹³³Vintila Denisia (n 137 above) 7.

¹³⁴F. Fukuyama '*the end of history and the last man*'(1992) 20.

¹³⁵Fukuyama (n 139 above) 20.

investment through the principles of international law. Although there is strong support to this theory, there is failure to explain why, despite all these benefits, there is still state interference with foreign investment and a long period of foreign investment flows, but no economic development has taken place and resource-rich countries still remain poor.¹³⁶ What should not be forgotten here is that classical theory has a strong hold in capital-exporting states and international institutions that are controlled by them.¹³⁷ The 1990s were the glory days of economic liberalism, embodying the classical view on foreign investment.¹³⁸

Economic open-mindedness swept the world, and was encouraged by international economic institutions like the World Bank and the International Monetary Fund. The conditions attached to loans granted by such institutions were an effective means of the dispersal of these views.¹³⁹ Privatization, liberalization and macro-stability were the prescriptions given by these institutions to attract foreign investment which would contribute to economic development.¹⁴⁰

The "preambles to bilateral investment treaties (BITs) state the belief that the foreign investment flows between the parties will benefit the development of the host parties"¹⁴¹. They commonly assert that such investment will 'stimulate the flow of capital and technology and economic development of the Contracting Parties'. Since virtually every developing country has made such treaties, this is evidence of a widespread belief in the tenets of the classical theory".¹⁴²

Literature produced by the World Bank is plainly based on the classical theory. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) begins with the statement of the belief that provision for the settlement of disputes arising from foreign investments will increase the flow of foreign investment. Such flows are stated to be beneficial to the economic development of developing countries. The preamble states that the contracting states agreed on the Convention after considering the need for international cooperation for economic development and the role of private international

¹³⁶J. Stiglitz *globalization and Its discontents* (2002) 16.

¹³⁷Stiglitz (n 141 above) 17.

¹³⁸Stiglitz (n 141 above) 17.

¹³⁹Fukuyama (n 139 above) 26.

¹⁴⁰Fukuyama (n 139 above) 26.

¹⁴¹The basis of such belief has been seriously dented by reports which indicate that there is no evidence at all for such a claim. UNCTAD, *World Investment Report* (2003) 89. An aggregate statistical analysis does not reveal a significant independent impact by bilateral investment treaties in determining investment flows.

¹⁴²J M Rothger 'investment dependence and political conflict' (1990) 27 *Journal of Peace Research* 255.

investment therein.¹⁴³ The "Multilateral Investment Guarantee Agreement (MIGA), which provides for the insurance of foreign investment against political risks, was promoted on the basis that it would have considerable potential to remove barriers to international investment and give new vigour to the development process".¹⁴⁴

The World Bank's Guidelines on the "Treatment of Foreign Direct Investment issued in 1992 encapsulate the philosophy of the classical theory when it recognizes, that a greater flow of foreign direct investment brings substantial benefits to bear on the world economy and on the economies of developing countries in particular, in terms of improving the long term efficiency of the host country through greater competition, transfer of capital, technology and managerial skills and enhancement of market access and in terms of the expansion of international trade. Recent literature emanating from the World Bank and other studies takes the view that there is no hard proof to the claim that these instruments do promote foreign investment".¹⁴⁵ The theory has also influenced the thinking of arbitral tribunals. Thus, for example, in *Amco v. Indonesia*, an arbitral tribunal asserted that to protect investments is to protect the general interests of development and developing countries.¹⁴⁶

2.6.2 The dependency theory

The dependency theory opposes the classical theory, and takes the view that foreign investment will not bring about meaningful economic development.¹⁴⁷ This theory was popularized by Latin American economists and political philosophers. The theory focuses on the fact that most investment is made by multinational corporations which have their headquarters in developed states and operate through subsidiaries in developing states.¹⁴⁸ The proposition is that the subsidiary devises its policies in the interests of its parent company and its shareholders in the

¹⁴³The Convention on the Settlement of Investment Disputes between States and Nationals of other states (ICSID) 1965.

¹⁴⁴I Shihata *The MIGA and foreign investment*(1988).

¹⁴⁵C Brower and S Schill 'Is arbitration a threat or a Boon to the legitimacy of international investment law?' (2009)9

¹⁴⁶*Amco v. Indonesia* (1984) 23 ILM 351 at 369 (para. 23).

¹⁴⁷R Peet *global capitalism: Theories of social development* (1991) 43–51 *Hettne*, also see (1987) the prominence of the theory resulted from the work of Raul Prebisch, whose work with the Economic Commission for Latin America suggested a link between the decrease in the wealth of the poorer states coinciding with an increase in the wealth of the rich states. There are various strands of the dependency theory.

¹⁴⁸P Evans *dependent theory and the three worlds* (1988) 30.

home state¹⁴⁹. As a result, multinational corporations come to serve the interests of the developed states in which they have their headquarters.¹⁵⁰

The home states become the central economies of the world, and the states of the developing world become submissive or marginal economies serving the interests of the home states.¹⁵¹ Development becomes impossible in the peripheral economies unless they can break out of the situation in which they are tied to the central economies through foreign investment.¹⁵² The resources which flow into the state as a result of foreign investment are seen as benefiting only the elite classes in the developing state, who readily form alliances with foreign capital. The foreign investor is able to defeat these attempts at control through his alliance with the elite classes.¹⁵³ This theory comes to the diametrically opposite conclusion to that of the classical theory, in that it holds that foreign investment is uniformly injurious.¹⁵⁴ It holds that, rather than promoting development, foreign investment keeps developing countries in a state of permanent dependency on the central economies of developed states. Unless a developing state can break out of the situation of dependency, economic development becomes impossible in that state. The view is to reject foreign investment rather than attract it.¹⁵⁵

Dependency theorists see economic development not in terms of flow of resources to the host state but as involving the meaningful distribution of wealth to the people of the state.¹⁵⁶ On this view, there cannot be development unless the people as a whole are freed from poverty and exploitation. Development becomes a right of the people rather than of the state.¹⁵⁷

2.6.3 The middle path theory

The middle path argues in support and against the two conflicting theories depending on the situation of the host state. The studies of United Nations Commission on Transitional corporation

¹⁴⁹The Alliance of Multinational State and Local Capital in Brazil (1979) 26 and T J Biersteker *Multinationals, the State and the Control of the Nigerian Economy*.

¹⁵⁰S Amin *Unequal Development: An Essay on the Social Formation of Peripheral Capitalism* (1976) 17.

¹⁵¹S Amin *Obsolescent Capitalism: Contemporary Politics and global disorder* (2003) 14.

¹⁵²A factor to take into account is that shareholdings are now very diffuse, as shares are traded on exchanges around the world.

¹⁵³D Bennet & K. Sharpe *Transnational corporations versus the state* (1985) 21.

¹⁵⁴Bennet & Sharpe (n 158 above) 21.

¹⁵⁵Bennet & Sharpe (n 158 above) 21.

¹⁵⁶Sornarajah (n 2 above) 54.

¹⁵⁷J Crawford *A major strand within international law denies the rights of peoples* (ed 2001).

on the role of foreign investment helped to identify the beneficial as well as the harmful effects of foreign investment. The beneficial effects identified were very similar to those already identified by supporters of the classical theory of foreign investment. There was definite support for the view that foreign investments made by multinational corporations benefit the local economy through the flow of capital and technology, the generation of new employment and the creation of new opportunities for export income.¹⁵⁸

While pointing out the benefits brought by foreign investment, these studies also identified the deleterious effects of foreign investment. For the first time, serious efforts were made to identify the precise types of activity of multinational corporations which could harm the host economy.¹⁵⁹ This enabled the host countries to take regulatory measures to counter harmful practices. They also resulted in efforts to fashion codes of conduct for multinational corporations, thus generating principles which, though not international law, will have an influence in shaping the course of the development of the law for the future.

The fundamental idea of the summary codes of conduct was that multinational corporations should avoid certain identifiable conduct which was seen as harmful to the economic development of the poorer states. Some of the harmful effects these studies identified may be briefly stated. The studies pointed out that multinational corporations defeated the tax laws of states by engaging in transfer pricing. This practice involved fixing an artificially high price for an item permitted to be imported at concessionary rates bought from the parent company. Tax credits were later claimed on the basis of this artificial price.¹⁶⁰ There were practices associated with transfers of technology, widely touted as one of the benefits brought by foreign investment, which deprived the host economy of the benefits of the transfer. There were many restrictive clauses introduced into the transfer agreement which prevented the transferee from obtaining the full benefits of the transfer. They were intended to maximize the benefit to the transferor, but their indirect effect was to hurt the host economy.¹⁶¹ Thus, there were restrictions on the export

¹⁵⁸The views expressed by the Commission received support from an influential group of American and European scholars. See, for example, Fred Bergsten, *American Multinationals and American Interests* (1978) 6.

¹⁵⁹(n 163 above) 6.

¹⁶⁰S Picciotto *International Business Taxation* (1992) 171.

¹⁶¹UNCTAD also worked on a code on restrictive business practices which did not progress beyond the draft stage. There is a difference in the strategy of UNCTAD and that of the contemporary discussions on how to grant competence to the WTO over competition.

of the goods manufactured with the technology, grant-back provisions which required that new inventions or adaptations made by the transferee be given over to the transferor, tie-in clauses which required associated products to be purchased only from the transferor, and similar restrictions controlling the use of technology.¹⁶²

The studies also indicated that the nature of the technology which was exported was often obsolete and hazardous. The extent of the harm to the environment caused by the export of such technology was identified in these studies, and there have been dramatic examples of the potential harm to both life and the environment that such obsolete technology could cause. The disaster caused by a gas leak in a plant set up by a multinational corporation, damages the property. Such instances indicate that multinational corporations often use technology in developing states which they are not permitted to use in their own home states, because it is cheaper to do so and there are no regulations or effective supervision to prevent the use of such harmful technology.¹⁶³ The need for the control of such export of hazardous activity has been demonstrated often as a result of environmental and other harm caused by multinational corporations.

2.7 Importance of foreign investment to South Sudan economy

South Sudan is the most oil-dependent country in the world, with 97% of its revenue coming from oil. The oil reserves lay along the North-South border, and 75% of the reserves of the former country are located in South Sudan. The government is now working hard to increase investment in non-oil sectors, such as agriculture, mining, and teak wood exports because it has recognized that the benefits of FD is significant to its economy. Some of the benefits include economic growth, knowledge and technology transfers to domestic firms and the labour force, productivity spill-over, enhanced competition and improved access for exports abroad, notably in source countries.

2.7.1 FI leads to macroeconomic growth

¹⁶²An effort within UNCTAD to introduce a code of conduct on the transfer of technology proved unsuccessful due to developed country opposition.

¹⁶³The issue has been raised as to whether a home state has responsibility in international law for permitting multinational corporations to set up in other states with defective technology the use of which would not have been permitted in the home state. M. Sornarajah, 'State Responsibility for Harms Caused by Corporate Nationals Abroad' in C Scott (ed.), *Torture as Tort* (2000) 491.

FI, given the level of inward investment, is good for productivity growth, technological progress as explained under classical theory above. South Sudan is a landlocked country that makes it difficult to access international market, therefore, FI is the only backbone for country' economy now. Once the economy grows, it usually leads to poverty reduction through distribution of income.

Bevan & Estrin, maintains that poverty reduction resulting from economic growth arising from FDI may not necessary benefit the poor directly; however, because FDI contributes to export growth, productivity growth and finance for balance of payments, it supports increases in national income that offer the potential to benefit the poor indirectly.¹⁶⁴ Also, even though FDI may not reduce poverty directly, it helps to create an enabling economic environment and increases employment, which may help many to move out of poverty. The beneficial effects of FDI on poverty reduction are potentially stronger when FDI is employed as a tool to develop labour-intensive industries and where it is anchored in the adherence to MNEs' national labour law and internationally accepted labour standards.

In the year of 2011, South Sudan had an estimated GDP of \$19.17 billion (\$1859 per capita). The government of South Sudan (GOSS) determined the most recent GNI figure of eight billion dollars (\$984 per capita) in 2010. Oil exports accounted for 71% of the total GDP in 2010.¹⁶⁵

The literature put forwards by Hausmann and Fernandez-Arias maintains that, the advantages of FDI in contributing to economic growth are threefold: First, some developing countries have domestic savings that are too low to finance an optimal rate of capital building. If, at the same time, they have problems tapping into international financial markets, FDI may be their best chance of alleviating financing constraints.

A related consequence happens wherever domestic reserves may be plenty, but a poor banking system is incapable to channel the available funds to domestic investors. Secondly, FDI is a more stable source of external finance than portfolio investment and borrowed funds. For example, in the case of a financial crisis, loans and short-term securities investment are usually withdrawn

¹⁶⁴Estrin (1994) 90 available at www.coursehero.com/file/pq93ap/Estrin-199490 (accessed on 16 August 2017).

¹⁶⁵The World Bank document on South Sudan, 2011 available at <http://data.worldbank.org/country/south-sudan> (accessed on 16 August 2017).

very swiftly. Investors with a direct stake in enterprises are less likely to disinvest due to short-term considerations.

Finally, Hausmann and Fernandez-Arias further explain that perhaps, and most importantly, countries at all levels of development may benefit from a foreign corporate presence in their business sector in that FDI has direct effects on the performance of the host country business sector. The entry of foreign enterprises generally leads to productivity growth and enterprise development. This in turn can lead to enhanced competition, particularly in previously shielded market segments.¹⁶⁶

Lipsey argues in a similar way to Hausmann and Fernandez-Arias in that, FDI has become an important source of private external finance for developing and developed nations. According to the World Bank Report, there is empirical evidence to suggest that a dollar of FDI raises the sum of domestic and foreign investment by more than a dollar, thus FDI complements rather than substitutes for domestic investment. In addition, especially in less-developed countries, FDI has been shown to be a more efficient, stable and worthwhile type of investment to attract than domestic investment only.

2.7.2 FDI leads to trade integration

In the process of industrialization by developing countries, FDI contributes to their further integration into the global economy by stimulating foreign trade flows. Several factors are considered, including the development of international networks of related enterprises and an increasing importance of foreign subsidiaries in MNE's, strategies for distribution, sales and marketing. In both cases, this leads to an important policy conclusion, namely that a country's ability to attract FDI depends on investors' subsequent access to importing and exporting. South Sudan has made an attempts to use FDI in a more "targeted manner to boost exports and imports that had been financially constrained.

2.7.3 Technology transfer

¹⁶⁶Ricardo Hausmann and Eduardo Fernandez-Arias Foreign Direct Investment (2000) 6: Good Cholesterol? available at <http://econpapers.repec.org/RePEc:idb:wpaper:4203> (accessed on 16 August 2017).

"FDI allows the transfer of technology, particularly in the form of new varieties of capital inputs that cannot be achieved through financial investments or trade in goods and services. Baldwin and Portes report that the spill-over (or positive externalities) generated by FDI fall into two categories: technology diffusion and human capital building.¹⁶⁷ FDI brings new technologies into host countries, which are eventually diffused to the broader domestic business sector. The channels through which this may take place are many but the report concludes that the most important source of technology spillovers is vertical linkages between MNEs and local suppliers. Foreign-owned enterprises usually provide their suppliers with technical assistance, training and other information to improve the quality of their products. Also, through FDI, many MNEs assist local suppliers in purchasing raw materials and intermediate goods, and in modernizing or upgrading production facilities. The above notion is supported by Meyer, who explains that FDI can lead to beneficial technology and management skills transfer to local firms. Owing to the fact that MNEs typically have greater technological and management expertise than local firms, such expertise can be transferred to other parts of the economy".¹⁶⁸

South Sudan is one of mineral resources-richest nation in Africa with less than 27% literacy rate, it is important to rely on foreign technology to develop its human capital. The researcher is aware of technical training provided by foreign investors.

In other countries, it appears clearly that, the MNE has close ties with local partners, suppliers and customers, but even in cases where the MNE is not tightly integrated with local firms, there is evidence that technology and skills transfer takes place most likely through labour mobility, professional contacts or a general rise in competitive pressure. Information and communication technology is a very important ingredient for growth. It helps in developing a country's productive capacity in all sectors of an economy, and provides a link between economies, thereby leading to competition. It stimulates invention, innovation and wealth creation. It is comprised of indicators such as Internet hosts and the number of computers, telephone mainlines, creation of bandwidths, fax machines, TV sets, radios, users of mobile phones and subscribers to newspapers.¹⁶⁹

¹⁶⁷21 Printed in Great Britain.

¹⁶⁸E Richard Baldwin, F Joseph Francois & Richard Portes: EU enlargement economic Policy April (1997).

¹⁶⁹Estrin (n 168 above) 96.

2.7.4 FDI leads to human capital enhancement

Countries that attract FDI always receive employee training in the course of operating the new business, which assists in human capital development in the host country. Investment in general education is of the utmost importance in creating an environment in which foreign enterprises wish to invest. Achieving a certain minimum level is paramount to a country's ability, not only to attract FDI but also to maximize the human capital spill-over that may arise from foreign enterprise presence, since the magnitude of MNE-sponsored training is necessarily smaller than that of general education. The direct impact on human capital from FDI derives mainly from the fact that MNEs tend to provide more training and other upgrading of human capital than domestic enterprises.¹⁷⁰

Grabbe argues that, FDI can improve the skills and wages of the labour force in that, MNEs provide training and better employment opportunities for development of labour. South Sudan has evidenced a strong payment to its citizens and better training to employees more thoroughly than domestic firms do.¹⁷¹ Most good examples are Dar petroleum company, which has employed more than 700 workers with good payment in hard currency. The researcher is aware of this important benefit to South Sudan.

2.7.5 FDI leads to competition

FDI is a tool which can be used to promote competition in the domestic market. The two main categories of efficiency gains from FDI which were identified by European Commission report include, effects on competition and the effect on enterprises.¹⁷² Furthermore, the report suggests that the effect of FDI on host country concentration is stronger in developing countries than in more mature economies. However, foreign entry also has the potential to increase competitive pressures in a previously national market. This argument is underpinned by the fact that MNE entry is generally found to raise productivity levels among host-country incumbents. Unsurprisingly, this effect is strongest in markets where there appears to have been little competition prior to the foreign entry.¹⁷³

¹⁷⁰Estrin (n 168 above) 96.

¹⁷¹H Grabbe *how does Europeanization affect CEE governance? conditionality, diffusion and diversity (2001) 31.*

¹⁷²The European Commission report (2004) 5.

¹⁷³(see n 175 above) 5.

2.7.6 FI leads to enterprise development

In an even when foreign investor takeovers the domestic establishment, the management of corporate governance will change and this leads enterprise development. MNEs mostly impose their own company policies, internal reporting systems and principles of information disclosure on acquired enterprises, and a number of foreign managers are normally appointed with the takeover. Where foreign corporate practices are superior to the ones prevailing in the host economy, this boosts corporate efficiency. However, in some cases country-specific competences are an asset for managers in subsidiaries; therefore MNEs need to strive towards an optimal mix of local and foreign management. Additionally, it has been argued by some writers that the good experiences with MNE participation in the privatization process of transition economies could simply reflect the fact that few domestic strategic investors have access to sufficient finance and in those cases where domestic private investors were brought into previously publicly owned enterprises, important efficiency gains also occurred.

2.7.7 FDI leads to environmental and social issues improvement

Di Mauro posits that, it is important to stress that not only does FDI affect the economy of the host country, but the foreign corporate presence also, in many cases, has important effects on social conditions and the environment. Taking the latter point first, Di Mauro explains that FDI has the potential to greatly benefit the environment in developing countries. However, for this potential to turn into tangible benefits, host country authorities need to pursue adequate environmental policies. The technologies that are normally transferred to developing countries in connection with FDI tend to be more modern and environmentally cleaner.¹⁷⁴

The World Bank Report also finds little support for the assertion that, efforts to attract FDI may lead to pollution havens or a race to the bottom. Apparently, the cost of environmental compliance is limited and, unsurprisingly, this is particularly the case where investors' home countries are wealthy or very environmentally concerned.¹⁷⁵ The report finds little evidence that "foreign corporate presence in developing countries leads to a general deterioration of basic

¹⁷⁴That regional integration agreements, in general, induce higher FDI inflows to host activity and a usually labor-intensive plant production abroad 8 (Di Mauro , types of production activities take place in different countries10 (Di Mauro, 2000)11 member countries that offer a more attractive overall environment for FDI.

¹⁷⁵The World Bank report (2000) finds little evidence that foreign corporate presence in developing countries leads to a general deterioration of basic social values, such as core labour standards.

social values, such as core labour standards. On the contrary, the report finds a positive relationship between FDI and workers' rights. Low labour standards may in some cases even act as a deterrent to FDI due to investors' concerns about their reputation elsewhere in the world and fears of social unrest in the host country.

2.8 Conclusion

In view of the above different definitions, FI in a broader sense involves the transfer of tangible or intangible assets from one country to 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. The distinction between FDI and portfolio investment "is the fact that with FDI, the purchaser/investor acquires a higher stake in a company, demonstrating a significant influence, while portfolio investment flow constitutes a purchase of ownership of less stake than in a company. FDI growth is not only limited to developed countries but also to developing countries and as a consequence the world market for it has become more competitive. FDI is an important form of private external funding for developing countries.

Today, FDI is regarded as the major source of foreign capital for developing countries as opposed to portfolio flows or foreign aid. In general, capital inflows will raise output and employment in an economy, from which it may be inferred that FDI improves potential levels of welfare in the country as long as it is not attracted by protectionist measures and as long as it does not create or worsen host country factors and capital market imperfections. It is with this realization that many economies around the globe including South Sudan are putting up efforts to attract this type of investment.

The two conflicting economic theories as discussed above have pointed out their views on foreign investments, both advantages and disadvantages. The classical economic theory on foreign investment takes the view that foreign investment is wholly beneficial to the host economy. However, the dependency theory opposes the classical theory, and takes the view that foreign investment will not bring about meaningful economic development. From the "discussions above, it can be seen that FI (especially FDI) with its various types has numerous advantages as well as the new forms of foreign investment, which are joint venture agreement and production-sharing agreement" that appear to outweigh the disadvantages brought about by

the dependency theory, therefore it is justifiable for countries to attract this type of investment through structured national efforts. With the above reasons in mind, the next chapter is assigned to the discussion of current legal dispensation in South Sudan, policies and regulations of foreign investment will be explored.

CHAPTER THREE

REGULATION OF FOREIGN INVESTMENT IN SOUTH SUDAN

3.1 Introduction

The laws and regulations of foreign investment in South Sudan have been a mixture of South Sudanese traditions and customs, the Sudanese laws, the laws of Southern Sudan during interim period (before the independence) and the recent laws and policies of the Republic of South Sudan (after the independence). The parliament promulgated the Investment Promotion Act in 2009 with other major pieces of legislation which set out the procedures for investment regulation in the country. At present, the government is doing all possible to improve the investment laws and regulations to attract foreign investment and trade in the country. Decrees have been amended and new laws enacted to make it conducive to invest in South Sudan.

South Sudan is exploring the laws of a variety of market-oriented countries around the neighboring countries and the world. Therefore, the understanding of foreign investment laws and regulation in South Sudan is premised in multiple laws applicable in the country. Although it has enacted several major pieces of legislation governing foreign investment since its independence from Sudan on July 9, 2011, it continues to use legislation passed during the country's semi-autonomous period, as part of Sudan and some Sudanese legislation. Since the private sector is governed by a mix of laws from Sudan, the pre-independence semi-autonomous Government of Southern Sudan laws, and the independent Republic of South Sudan laws, foreign investors are facing problem of legal uncertainty.

The discussion in chapter two above has shown that foreign investment can be beneficial to host-state's economy only when the regulation is certain and favorable for investment. As such, this chapter therefore, discusses the current laws and regulations governing foreign investment in South Sudan and their origins since pre-independence. The aim is to demonstrate how the fragmentation of foreign investment related laws contradict and create legal uncertainty. As such, the following laws and regulations will be examined:

3.2 Investment Promotion Act, 2009

The authority of this Act was provided for in accordance with the provision of articles 32(2) and 55 of the Interim Constitution of Southern Sudan, 2005, which granted the government of Southern Sudan the authority over matters of commerce, trade and commercial regulations.¹⁷⁶

The purpose of this Act was to provide for the promotion and facilitation of investment in Southern Sudan by then and the creation of the administrative, operational and government framework of the Southern Sudan investment authority.¹⁷⁷ Since 2009 before the independence of South Sudan, foreign investment has been regulated by the Investment Promotion Act, 2009 up to date. This Act, was promulgated one Sudan was still one country.

The Investment Promotion Act of 2009 outlines the promotion and facilitation of investment in South Sudan and creates the administrative and operational framework for the South Sudan Investment Authority. Any foreign investor who intends to invest in South Sudan must apply to the Investment Authority for an investment certificate.

Under Investment Promotion Act, sec.33, foreigners are generally treated equally under the commercial law framework, except that foreigners cannot own land or wholly own a domestically-formed corporation as we shall see later under Companies Act and Land Act. Section 24(4) of Investment Promotion Act, 2009 does not allow a foreign investor that does not have investment certificate to start up business, while it allows domestic investor to start up a business even without obtaining an investment certificate. this appears as discrimination as well as the fact that the Investment promotion Act lists seven economic sectors reserved for domestic investment and participation.¹⁷⁸ These sectors are: Security services, cooperative services, public relations businesses, postal services car hire and taxi operations and micro enterprises.

Section 37(1) of the Act, however, does allow unfettered disposition of enterprise proceeds in any lawful manner. Sub-section (2) also guarantees full and free transfer of convertible funds in and out of South Sudan in three instances: capital for investment, service of foreign loans, and remittance of earnings following a liquidation or sale of all or part of the enterprise.¹⁷⁹ Contrary

¹⁷⁶Act of 2009 (n 46 above) section 4.

¹⁷⁷Act of 2009 (n 46 above) section 3.

¹⁷⁸Act of 2009 (n 46 above) section 33.

¹⁷⁹Act of 2009 (n 46 above) section 37.

to this guarantee, the Banking Act restricts the repatriation of investment profits which will be discussed later under the Banking Act.

The Act provides access to land for investment, that the government of South Sudan and the land authorities shall provide land for investment in any of the priority areas that are: General investment in agriculture other than forestry and paper wood, least developed areas, rural development, scientific research and advancement, joint venture where South Sudanese shareholding is 30% and above, re-investment of at least 20%, employment creation, physical infrastructure, textile industry, quarrying and mining, transport, commercial banking, tourism, Pharmaceutical and import substitution and export promotion.¹⁸⁰ However, the land Act has a contrary provisions which will be discussed later. Section 38 of the Act provides labour and employment procedures. It states that, employees of enterprises owned by foreign investors in South Sudan, regardless of nationality, shall be subject to the laws applicable in South Sudan and principles of equal pay for equal job. It gives foreign investors and employees to regulate their labour agreement through their contract, which agreements shall not establish standards lower than the mandatory requirement applicable in South Sudan.

The Act also allows foreign investors to employ managers of any nationality in order to conduct their investment and business activities. It also gives foreign investors right to employ non-managerial staff of any nationality, provided that South Sudanese citizens of similar qualification and experience shall be given preferences in recruitment.¹⁸¹

Under section 35, protection of intellectual property rights is guaranteed. South Sudan has not yet enacted a law on intellectual property rights. However, this section gives government powers to protect intellectual property rights of all persons and investors in South Sudan and shall enforce rights to trademarks, copyrights, patents and other intellectual property rights in accordance with any related international conventions to which the Republic of Sudan is a signatory.¹⁸² Republic of Sudan is a signatory to international conventions that relate to intellectual property rights. Section 39 covers the disputes settlement, which vests the

¹⁸⁰In implementing priority areas identified in the first schedule, the following types of projects favorable for priority areas shall be taken into consideration.

¹⁸¹Act of 2009 (n 46 above) section 38.

¹⁸²Act of 2009 (n 46 above) section 35.

jurisdiction to International Center for Settlement of Investment Disputes (ICSID) and the Courts. South Sudan acceded to the International Centre for the Settlement of Investment Disputes (ICSID Convention) in April 2012. However, section 91 of the Land Act, 2009 vests the dispute settlement to land authority in the matters related to land.¹⁸³

The policies framework that are in place to protect foreign investment under investment Act started by recently created Ministry of Investment" which was created in order to become a one-stop shop for potential foreign and strategic domestic investors; however, it is falling far short of its mandate, notwithstanding support from the World Bank's International Finance Corporation. Upon granting an investment certificate to a foreign investor, the Ministry helps that investor obtains the necessary licenses, land, incorporation, etc., and the investor may be eligible for various tax breaks and incentives.¹⁸⁴ The researcher how is aware of quite a few foreign investors who applied for tax incentive and were granted from either the Ministry, or its predecessor the Southern Sudan Investment Authority.

3.3 The Land Act, 2009 and regulations

As part of the peace process, Sudan and South Sudan recognized the need to develop land policy, legislation, functioning institutions and supporting services, and so included institutional and governance mechanisms into the Comprehensive Peace Agreement (CPA). The CPA mandated the establishment of the National Land Commission (NLC) and the South Sudan Land Commission (SSLC) to develop land policies and draft legislation to clarify and strengthen land administrative systems and the rights of landholders.¹⁸⁵ The Transitional Constitution of 2011 states that all land in South Sudan is owned by the people of South Sudan, and charges the government with regulating land tenure, land use and exercise of rights to land.¹⁸⁶

According to the Constitution and the Land Act, section 7, *"classifies land as public, community or private land, and requires the government of South Sudan to recognize customary land rights when exercising the government's rights to land and other natural resources. The Constitution does not clarify the extent to which customary rights can limit government's rights, but does*

¹⁸³The land Act of 2009 section 91.

¹⁸⁴The Act of 2009 (n 186 above) section 32.

¹⁸⁵The Comprehensive Peace Agreement of 2005 art.9.

¹⁸⁶The Transitional Constitution of the Republic of South Sudan of 2011 art. 170.

require that all levels of government incorporate customary rights and practices into their policies and strategies. As a result, the Land Act 2009, the Local Government Act 2009 and the Investment Promotion Act 2009 were developed under the Interim Constitution of Southern Sudan 2005 (before independence) to establish the institutions and mechanisms of governance that would address pressure points and fill vacuums created by conflict, uneven development and lack of transparency and accountability in resources governance".¹⁸⁷

The three laws, establish the fundamental framework for the fair and transparent administration of land rights in South Sudan. The Land Act regulates land tenure and equally recognizes rights to customary, public and private tenure. The Local Government Act defines primary responsibilities of local government and traditional government authorities in the regulation and management of land, which includes charging customary institutions with particular responsibilities for administering community land rights. The Investment Promotion Act establishes procedures for facilitating access to land for private investment, including foreign investors, in ways that balance the interests of both current right holders and investors.¹⁸⁸ Though the structure has been modified, government officials have a poor understanding of the laws and lack the capacity to interpret and carry them out.

The Land Act prohibits foreigners from purchasing land but allows foreigners to lease land for up to 99 years. The Land Act and draft Land Policy do create a framework that allows customary land to be leased on various terms, with the community or individual community member retaining underlying land rights. The Land Act states that citizens and foreigners can obtain access to land for investment purposes and allows for states to prepare land-use plans that delineate zones; however, the Land Act is not clear about the applicability of the investment provisions to community land. Land-use plans must be filed with the South Sudan Investment Authority, which was established under the Investment Protection Act, and is charged with encouraging private investment and working with entrepreneurs.¹⁸⁹

¹⁸⁷The Act of 2009 (n 186 above) section 7.

¹⁸⁸Goss draft land policy. Southern Sudan Land Commission (2011) 7.

¹⁸⁹T Tech-Ard land tenure issues in Southern Sudan: Key findings and recommendations for Southern land policy, Prepared by United States Agency for International Development (2010)8 available at http://usaidlandtenure.net/sites/default/files/USAID_Land_Tenure_Southern_Sudan_Findings_and_Recommendations. (accessed on 27 August 2017).

Access to land in South Sudan is still a restrictive issue for private-sector expansion. Even though a basic statutory framework has been established, a number of land administration matters require attention. Investment in areas outside of the major cities have over-burdened and confused land registries through the lack of clarity in rights to land governed by customary law and the frequent lack of a cadastre or other registry of real property rights.¹⁹⁰

The Land Act, 2009, the drafting of which was rushed through the then Ministry of Legal Affairs and Constitutional Development (now the Ministry of Justice) under pressure from the Southern Sudan Legislative Assembly has been criticized because it preceded the land policy and because it was not developed in conjunction with judiciary, which until the passage of the Land Act was responsible for land registration. The responsibility for land titling had been shifted to the Ministry of Housing and Physical Planning which had not established the land registration infrastructure, and, as a result, no real property was being registered in South Sudan for a few years. It however seems that, recently, the judiciary has regained its previous role and land is once again being registered.¹⁹¹ The Land Registry Office in Juba is currently not issuing title certificates, but is able to do title searches.¹⁹²

Since then, there was no progress in 2015 from the National Legislative Assembly (NLA) to approve a land policy in order to provide a clarity in land reform since there has been no law drafted on mortgage, valuations and the registration of land titles. While the 2009 Land Act and the 2009 Investment Promotion Act both state that, "non-citizens can access land for investment purposes and there is no clear regulations governing how a business acquires land up to date.

Currently, foreign investors do lease land directly from the local communities and individuals. Under the Land Act, any investment in land acquired from local communities must contribute economically and socially to the development of the local community. The normal practice is that, investors often sign agreements with the local communities in which they agree to employ locals or invest in social services in exchange for use of the land. However, this process of negotiations with communities requires several months to complete. Ownership of land is often unclear, with communities and government both claiming the same property. In several

¹⁹⁰The Act of 2009 (n 186 above) section 61.

¹⁹¹William Kosar South Sudan: Ready for business (2016)4 available at www.mojss.org.

¹⁹²Williamkosar.com.

occasions, more than one persons hold a registration certificate on the same plot or piece of land. According to the World Bank's reports on doing business in South Sudan, South Sudan ranks number 180 out of 187 countries in registering property.¹⁹³

3.4 Banking Act, 2012 and Bank of South Sudan Act, 2011

The IMF has categorized South Sudan's financial sector as small and undeveloped. The Bank of South Sudan is the country's Central Bank. There are a number of domestic and international banks operating in Southern Sudan; however, lending activity remains low. Kenya Commercial Bank and Equity Bank are both well established in South Sudan. However interest rates, like in many other African countries, remain high (up to 18%) for what is essentially an unsecured loan. Further, credit-seekers lack the capacity to present a proper business plan or feasibility study to justify a loan. It should be noted that there is no credit-reporting mechanism as of yet. The banks that are in South Sudan appear primarily to perform foreign exchange operations or to have a presence in South Sudan.

The Investment Promotion Act, 2009, guarantees unconditional transferability in and out of South Sudan in freely convertible currency of capital for investment; payments in respect of loan servicing where foreign loans have been obtained; and the remittance of proceeds, net of all taxes and other statutory obligations, in the event of sale or liquidation of the enterprise.¹⁹⁴

In reality, the ability to exchange local currency for foreign currency is severely restricted. South Sudan relies on oil exports for the inflow of hard currency. Those exports and the accompanying revenues were reduced after the outbreak of an internal conflict in 2013. Revenues have decreased further with the fall in the price of oil. The Bank of South Sudan, the country's Central Bank, adopted a floating exchange rate in December 2015 and currently allocates U.S. dollars to commercial banks through periodic auctions. Previously, traders were allocated U.S. dollars through an opaque process. Foreign investors found it difficult to repatriate their locally-generated income. Multi-international companies suspended businesses in South Sudan in 2015,

¹⁹³The World Bank's Doing Business Report (2016) 2 available at <http://www.doingbusiness.org/rankings> (accessed on 27 August 2017).

¹⁹⁴Act of 2009 (n 46 above) section 34.

claiming that, despite promises at the highest levels to rectify the situation, they were unable to convert their profits in the local currency into USD.

Remittance policies is that foreign investors cannot remit through the parallel market. By law, they should remit through banks or foreign exchange bureaus. South Sudan up to date has not joined the Financial Action Task Force (FATF).

3.5 Companies Act, 2012 and regulations

The authority of this Act is provided for in accordance with the provision of articles 55 (2)(b) read together with Article 85 (1) of the Transitional Constitution of the Republic of South Sudan, 2011. The Act is a fundamental piece of legislation supporting companies start-up and basic corporate governance in the country.¹⁹⁵ "The registration process is relatively straight-forward. There is no explicit requirement in laws or regulations that there be South Sudanese ownership in any company owned by foreigners". Yet this requirement does informally exist as a policy that 31% of the shares shall be owned by a South Sudanese contrary to provision of Investment Promotion Act, 2009.¹⁹⁶ There is no paid-up capital requirement in the new Companies Act, 2012. However most foreign companies are informally required to have an issued share capital of \$500,000, whereas the share capital of domestic companies only need to be \$100,000. The Companies Act, 2012 still permits the archaic Company Limited by Guarantee as well as Unlimited Company and notes a distinction between a private company (which requires a minimum of 2 shareholders) and a public company which requires a minimum of 7 shareholders.¹⁹⁷

A foreign company registering as a branch in South Sudan does not face many hurdles. There is an unwritten rule that a foreign company must get a letter saying that the company is in good standing from its consulate in South Sudan and then send to the Ministry of Foreign Affairs, which then sends the letter to the Ministry of Justice confirming that registration may proceed.¹⁹⁸ As a matter of facts, there is a conflict between the companies Act, 2012 and Investment Promotion Act, 2009 on ownership of shares.

¹⁹⁵The Transitional Constitution of the Republic of South Sudan of 2011, Art. 55(2)(b).

¹⁹⁶Tech-Ard (n 192 above) 2 available at www.mojss.org.

¹⁹⁷Company Act of 2012 section 84.

¹⁹⁸Tech-Ard (n 192 above) 2.

3.6 Income Tax Act, 2009 amended in 2011 and regulations

The wartime tax system, composed primarily of roadblocks at county, state, and national borders, has a very negative effect on prices and decisions by entrepreneurs to operate outside single areas. The prices of goods, including inputs into domestically produced goods, are extremely high and can render these goods uncompetitive with imported finished goods.

Multiple taxation as products move to market throughout Southern Sudan by then, increases its price and prevents some enterprises from even trying to expand operations beyond Juba, the Capital City. However, work continues to remove these barriers.¹⁹⁹ Business Profit Taxes range from 10% for a small business or enterprise, to 15% for a medium-sized business to a maximum of 20% for a large business or enterprise.²⁰⁰ However, applications for investment incentives are made to the Ministry of Finance and Economic Planning through the One Stop Shop Investment Centre (OSSIC). Tax exemptions and concessions on machinery, equipment, capital and net profits are approved for stated periods by the Ministry of Finance, at its discretion. Financial incentives also include capital allowances, deductible annual allowances, and annual depreciation allowances.

The Investment Promotion Act provides for various tax incentives, including capital allowances ranging from 20 to 100 percent of eligible expenditures, deductible annual allowances ranging from 20 to 40 percent, and depreciation allowances ranging from 8 to 10 percent.²⁰¹ Tax incentives and duty exemptions are requested through an application to the Ministry of Finance and Economic Planning. A foreign tax credit is granted to any resident company paying foreign taxes on income from business activities outside South Sudan.

3.7 The Sudan Labour Code Act, 1997 and regulations

The Sudanese Labour Code of 1997 is still applicable in South Sudan despite its independence and it is the only legislation that regulate labour issues in the country. This law does not have any authority in the Constitution, rather the Constitution illegalizes it, as stated that a foreign

¹⁹⁹Bureau of economic and business affairs US embassy: 2016 South Sudan investment climate.

²⁰⁰The income tax Act of 2009 amended in 2011 section 56.

²⁰¹The Act of 2009 (n 48 above) section 32.

legislation is not applicable in the Republic South Sudan. The legislation covers labour and employment matters in South Sudan.²⁰² This law applies to both domestic companies and foreign companies. The legislation covers the rights and obligations of employees and employers. The Labour law requires a written contract between employers and employees. However, in some cases an employment contract can be verbal, depending on employment conditions and the nature of the work, such as work on a temporary or daily basis, or employment involving only a small amount of work.²⁰³

According to the Act, an employment contract can either be temporary or permanent. Under sec. 28 of this Act, a contract shall be concluded in writing. The law permits foreign investors to employ foreign workers when necessary, if no appropriately qualified workers are available in the Sudan. According to section 28(5), the employment of foreign workers shall be limited in number and in duration, and a detailed scheme shall be established for the transfer of skills to Sudanese workers to replace such foreign workers once the duration of their employment contract has been completed.²⁰⁴

The preface of a short and long term foreign workers shall be authorized by the labour administration prior to their entry into the Republic of Sudan, except in cases where workers are imported by international and foreign aid projects to which special regulations shall apply. If workers are employed on an indefinite contract, to dismiss a worker, 30 days notice must be given to workers. In the case of dismissal because of misconduct by the worker the employer has the right to terminate the contract within 3 days notice.²⁰⁵ However, the employer must also notify the trade union or worker's representative in the labour unit and the local labour administration. In the case of dismissal to reduce staff numbers, dismissed workers are entitled to compensation depending on their length of service. When a contract is for a long term, the parties shall notify each other at least 15 days prior to the expiry of such contract. But if they wish to continue with the contract, then they will conclude a new employment.²⁰⁶

²⁰²The Sudan labour code Act of 1997 section 28 (1).

²⁰³The Act of 1997(n 204 above) section 28 (4).

²⁰⁴The Act of 1997(n 204 above) section 28 (5).

²⁰⁵The Act of 1997(n 204 above) section 50.

²⁰⁶The Act of 1997 (n 204 above section 50(1)(a).

Article 50 (2) allows the termination of employment contract by dismissing an employee if the employee lacks the required skills or where an employee is not in good health condition or when it is necessary for employer to reduce the number of workers in order to improve the organization of work within the labour unit. If the contract of employment is terminated based on the reasons mentioned above, the employer will be required to pay compensation in accordance with this law and the length of service. The calculation of compensation amount to 17 per cent of the monthly salary that is payable to an employee at the time of termination of the contract for each month of service.

The labour law prohibits foreign firms from employing persons under 18 years of age to perform arduous work or work which is damaging to their health, including all mining and quarrying work; work involving chemicals or explosives and poisonous substances.²⁰⁷

In addition to the above requirements, the Investment Promotion Act, 2009 and Labour Code Act, 1997 requires foreign investors to give priority to Sudanese citizens when hiring staff. In light with the government's policy to attract inward investment, foreign companies are allowed to employ foreign personnel who are equipped with required skills or expert when necessary and with approval from the relevant authority. Investors are required to upgrade the skills of their local employees through training within the Sudanese territory or abroad. In case of wrongful dismissal, the employer is required to pay compensation of 6 months' salary to employee wrongfully dismissed.

The legislation is an Islamic origin that it prohibits the employment of women in a night work contrary to South Sudanese Constitution and Investment Promotion Act, 2009.

As a matter of public policy, the Ministry of Labour thoroughly reviews all work permit applications in an attempt to determine whether a position could be filled by a South Sudanese national. Some foreign-owned companies reported long delays in receiving work permits for expatriate staff, and many expatriates are issued work permits for just one to three months, rather than the standard one year.²⁰⁸

²⁰⁷The Act of 2012 (n 199 above) section 53.

²⁰⁸Tech-Ard (n 192 above) 4 available at www.mojss.org.

3.8 Intellectual property Code 1979

The Investment Promotion Act, 2009 contains a provision on the protection of intellectual property rights. However, implementing legislation on copyrights, patents and trademarks has not yet been passed. To date, the only intellectual property law which has been put forward to the legislature is the Trade Marks Bill of 2013. South Sudan is neither a member of, nor an observer to, the WTO, nor is it a member of WIPO. While the legal structure is weak and enforcement negligent, instances of intellectual property theft are rare. Section 35 of Investment Promotion Act, 2009 guarantees the protection of intellectual property rights in accordance with any related international conventions to which Republic of the Sudan is a signatory.²⁰⁹ As a policy, South Sudan has adopted 1979 intellectual property Code of the Sudan.

3.9 Conclusion

The chapter has reviewed the laws and regulations of foreign investment in South Sudan including Investment Promotion Act, 2009 which sets the procedures governing foreign investment. Although the Act draws most of the provisions from Sudanese laws, it seems to more flexible than the Sudanese Act. In the Act, there is a unique features concerning wholly foreign owned investment enterprises in South Sudan is that there is restriction on the activities in which a wholly foreign owned investment expertise can operate. Investment can be 100 per cent foreign owned and can take the form of a new company or a branch or representative office of a foreign company, but this does not practically work since the Ministry of Justice imposes a South Sudanese shareholding as a policy.

The Investment Promotion Act requires that any business shall obtain approval and be issued the appropriate licenses by South Sudan Investment Authority in order to operate. Since 2009, foreign investment in South Sudan has been governed by unconsolidated laws as discussed above. Simply, there are too many fragmented investment laws and regulations in South Sudan which were passed by different lawmaking bodies from Sudan, Southern Sudan(pre independence) and South Sudan (post independence). This fragmentation has added great complexity to the system of protection offered to foreign investors in several ways, some laws contradict others and no reliable mechanism exist to settle inconsistencies. Some laws are

²⁰⁹The Act of 2009 (n 48 above) section 35.

outdate because of non conformity with the current Constitution. Now it is difficult to identify the law governing a particular situation and to keep track of whether particular laws have been amended or replaced.

As demonstrated above that the legal backbone of foreign investment laws in South Sudan is still Sudanese laws, though heavily now supplemented with statutes enacted after independence, large portion of Sudanese provisions remained in force. Therefore, the legal uncertainty has affected investment climate negatively which in turns affects economic development in the Republic of South Sudan. It is for this reason that the next chapter has been dedicated to the discussion of negative impacts of unconsolidated foreign investment related laws on South Sudan's economy.

CHAPTER FOUR

THE NEGATIVE IMPACTS OF FRAGMENTED LAWS ON FOREIGN INVESTMENT INFLOWS TO SOUTH SUDAN'S ECONOMY

4.1 Introduction

Doing business in South Sudan is not an easy task for foreign investors. South Sudan is currently in the rank of 187 out of 189 according to the World Bank reports.²¹⁰ Deploying capital in South Sudan, like many other emerging markets, involves a number of associated inherent risk and uncertainties.²¹¹ Some of the key risks considered to be significant in determining investor investment decision include potential political instability, corruption, complicated legal environment and legal uncertainties and infrastructure shortfalls. Particularly for South Sudan, legal and regulatory risk can be perceived as the most significant impediment to a successful investment. A widespread matter concerns legal uncertainties connected to the lack of a comprehensive legal and rigid structure. vital regulations can be either be scattered in diverse regulations or not yet regulated.

Furthermore, new laws introduced are most often not being subsequently complemented with the promulgation of detail regulations for implementation in a timely fashion. This creates a constraint in an effective and efficient application of law due to conflicts. The nonappearance of comprehensive rules has created a vacuum in the regulation leading to practice of applying unwritten policies and administrative discretion by the authorities, which in the investors' view it is difficult to rely fully upon. In addition, potential divergent legal interpretation of ambiguous provisions of scattered foreign investment related laws by the government authorities, courts and legal practitioners is another occurring issue. These issues add up increase the legal uncertainties risk.²¹² an unattractive legal environment has affected investment and economic development in South Sudan and the government has recognized this and has been taking measures in regulatory reforms to facilitate inwards investment towards a more efficient and certain legal environment.

²¹⁰The World Bank reports on doing business in South Sudan 2016.

²¹¹G Setu-Tafese economic and security challenges to state building in the horn of Africa. The case of South Sudan1.

²¹²J Omar Mohammad (2013) 2. '*Challenges and aspirations of state building in South Sudan*'. Working Paper.

During the interim period from 2005 to 2011, Southern Sudan's economic development was outstanding. Within a few years after independence, South Sudan's economy was growing gradually until 2013. Commencing from that year, many legal issues arose on investment contracts, leases and many others as a result of legal uncertainty. In particular, complaints about legal uncertainty that seems inherent was revealed by business survey that, South Sudanese laws on foreign investment are generally unclear and contradict one another and mechanisms for enforcement rarely lead to predictable outcome.²¹³ In this context, legal uncertainty has become a barrier to investment in South Sudan which leads to negative impacts on economic development.

This chapter identifies and describes the negative effects caused by these fragmented foreign investment related laws to South Sudan's economy. Some of identified constraints are presented below:

4.2 Fear of nationalization

Protection against nationalization under domestic law for foreign investors in South Sudan lies in the nationalization provision of Investment Promotion Act, 2009. Section 34 of this Act provides that there shall be nationalization of foreign investment except for the purpose of public interest, in which case compensation is required to be paid based upon market value.²¹⁴ Such guarantee under domestic law is often perceived by foreign investors as has limited value in practice and could expose their business to risk at any time.

Apart from the risk that the Investment Promotion Act, 2009 may be changed due to its inconsistency with the current Constitution, the reality is that no investor in South Sudan has ever mounted a claim in South Sudanese courts alleging its nationalization of its assets, notwithstanding the occurrence of events that may arguably constitute nationalization. Investors fear to initiate an action against the government of South Sudan because of insecurity consequences. Thus, investors become very reluctant to frame an action of creeping nationalization before local courts.²¹⁵ Since there is no legislative and judicial guidance in South Sudan on the meaning of 'nationalization and calculation of compensation, it creates difficulties

²¹³South Sudan investment climate 2016. Bureau of economic and business affairs US embassy 4.

²¹⁴The Act of 2009 (n 48 above) section 34.

²¹⁵(see n 4 above) 5.

for an investor attempting to prove that nationalization has occurred, especially creeping nationalization.

On the occurrences to which laws and regulations on foreign investment conflict, it means that it is difficult for an investor to succeed in a claim against South Sudanese government for nationalization because the court has no capacity to enforce unclear laws and regulations. In light of these, it is not surprising that no claim of nationalization has been successful against the government, even though events which arguably constitute expropriation or nationalization of asset has occurred. The more recent example is the action brought against the Ministry of Health by Juba Regency Hotel Ltd in 2016 for an amount of 8,000,000 South Sudanese pounds as an accommodation dues. In this case, the Ministry of Health accommodated its staff including the current Minister of Health for a year and failed to pay. When the matter was taken to court, the government resorted to threatening foreign investors who are Eritrean nationals, the researcher was involved in this matter.²¹⁶ Such irregularities have discouraged foreign investors to invest in South Sudan. As a result, revenue collections have drastically gone down, which in turn, leads to economic stagnant.²¹⁷

4.3 Foreign exchange controls

Foreign exchange is an important issue for foreign investors in South Sudan. Every investor has ultimate objective of making profits and remitting such profits out of South Sudan in freely convertible currencies, typically, in US dollars. This guarantee is provided under section 37 of Investment Promotion Act, 2009. However, the reality is that, except for those in export oriented projects, most foreign investors, having made the investment in foreign currencies, will earn in South Sudanese pounds.

Under the Banking Act, 2011, all prices and payments made in South Sudan must be denominated and paid in South Sudanese pounds.²¹⁸ This makes it difficult for foreign investor to convert its revenue to foreign currencies and remit such revenue out of South Sudan. Protection under domestic law on this matter is not sufficient, especially for investors who have

²¹⁶Un decided case between Juba Regency hotel ltd against the ministry of health 2016, drawn and filed by Kiirdit and Co. Advocates.

²¹⁷Alfred Strolla South Sudan Highlights 2015: Deloitte international tax 1.

²¹⁸The Banking Act of 2011 section 54.

invested large amounts of capital. While Investment Promotion Act, 2009 section 37 expressly allowing foreign investors to convert their revenues into foreign currencies and remit such foreign currencies offshore, the Bank of South Sudan Act, 2011 contains a strict foreign exchange control. In order to convert South Sudanese pounds into US dollars, for example, an investor will need to prove its legitimate needs such as the need to pay foreign parties for goods or service or the need to repatriate profits.²¹⁹

The paperwork required in this process of conversion and remittance process makes many foreign investors much concern because of the delays involved, especially at the current economic crisis where market is volatile and scarcity of foreign currencies.²²⁰ Such delays causes foreign investors significant losses. In addition, the real concern for investors in capital intensive project is the shortages or unavailability of foreign currencies in the market which is caused by government foreign exchange control.

For example, in 2016 when the market was tied to the extent that the government ordered that the available foreign currencies be prioritized for government facilities and importation of food items. This leads to close down of a leading drinks industry (SABMiller) in South Sudan. SABMiller industry was closed down February 2016 due to shortages of foreign currencies to import raw materials.²²¹ This leads to a huge number of employees rendered redundant. Subsequently, the level of income of employees reduced as well as the taxes payable to government and this has affected economic growth negatively.²²² And other problem of banking control is that, withdrawal is limited to \$ 200 per day. As a result, large project capital intensive are affected and currently, most investors don't keep their money in the banks but keep it in their houses for the fear of this restriction. This has also affected the banks negatively leading to some branches being closed down and reduction of number of employees. Kenya Commercial Bank,

²¹⁹The foreign currency exchange control decree 2015.

²²⁰Alfred Strolla (n 2 above) 3.

²²¹South Sudan's only domestically made beer, White Bull, will soon to be discontinued 'Agence France-Presse' 15 Jan 2016 available at <http://www.industryweek.com/global-economy/last-call-south-sudans-only-beer-factory> (accessed on 2nd September 2017).

²²²Zlatko Gegic *South Sudan faces economic collapse (2016) 1* available at <http://oxf.am/ZBEq> (accessed on 2nd September 2017).

the leading banking company in South Sudan has closed down 2 branches, the researcher is aware of this problem

4.4 Fear of changes in investment law

In reality, changes in law represent a much greater risk to foreign investors than nationalization. The South Sudanese legal system is constantly evolving and changing.²²³ After independence in 2011, there were several amendments made in the Constitution as well as other foreign investment related laws for example, Income Tax Act, 2009 amended in 2011. This represents a serious risk for investors because a change in tax law or related laws results in drastic change to the economic viability of the project, rendering project less feasible as originally envisaged. In South Sudan, protection against change in law is not available under the domestic laws. This has raised the fear to investors of future risk.

After independence, there was an increase of the number of foreign investors in the country and upon facing some of these unclear future of the laws in the country, foreign investors slow down in investing in South Sudan. A typical example is an administrative decision such as an investment certificate issued by a state authority to approve a specific project. A change in an investment certificate is unlikely to be considered a change in law.

A recent example of Juba City Council against Juba Bridge Hotel Ltd, where the City Council decided to revoke the operation license unless a certain amount was paid. The matter was solved amicably, however, it was a change of law and policy as well. Several cases on lease agreement termination are very common in South Sudan. This fear of the change in law has interrupted investment and many companies are divesting out of South Sudan as a result, unemployment has shot up in these two recent years. As mentioned earlier that foreign investment is important for less developed countries and its failure in South Sudan seems to be one of the cause of economic crisis in the country.²²⁴

4.5 Difficulties in dispute resolutions

²²³William Kosar South Sudan ready for business (2016) 4.

²²⁴Chariton Doki *After war, economic crisis hits South Sudan (2012) 1*. The United Nations has warned that despite the austerity measures put in place by South Sudan to deal with its economic woes, humanitarian agencies will have to increase relief efforts in order to keep the country's poor alive as the financial situation worsens.

It is the desire of all foreign investors in South Sudan that any dispute they have with a South Sudanese government will be resolved in a fair and objective forum, and that the decision of that forum will be enforced.²²⁵ Such a wish, however, seems difficult to realize in South Sudan due to the facts that both courts and arbitration systems in the country are still developing and that foreign arbitration awards are hard to be enforced in South Sudan. This is because South Sudan has not ratified New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. In April 2012, South Sudan became a member state to the "International Centre for the Settlement of Investment Disputes (ICSID Convention)". Currently South Sudan is not a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 . There is no specific domestic legislation that enforces awards under the ICSID Convention. As mentioned above, the country lacks a dedicated legal framework for enforcing court judgments on commercial matters, and has emphasized criminal cases in the development of its judicial system due to conflicts of commercial laws.²²⁶

Under South Sudanese laws, where a foreign investor has a dispute with the government authorities, the dispute may be resolved in South Sudanese courts, arbitration in South Sudan or ICSID. Obviously, arbitration is only possible by agreement. In the absence of such agreement, the dispute will have to be resolved by the courts of South Sudan. South Sudanese laws do not allow or contemplate, the possibility of an investment dispute being resolved by foreign courts. Foreign investors often try to stay out of South Sudanese courts because the courts system is overloaded and judges are inexperienced in cross-border commercial disputes.²²⁷ Therefore, foreign investors often negotiate for arbitration agreements in their project contracts, especially where the contract is with state authority, in which case international arbitration is critically required. The problem with domestic arbitration in South Sudan is that, the arbitral process is not yet adequate for complex dispute.²²⁸

Currently, there is Juba Center for Arbitration which is still developing in terms of qualified staff and institutional supports. For this reason, foreign investors are caught in dilemma. If they

²²⁵Vivienne B & Luke N *foreign investment and dispute resolution law and practice in Asia* 134.

²²⁶South Sudan Investment climate 2016 (n 215 above) 5.

²²⁷South Sudan Investment climate 2016 (n 215 above) 5.

²²⁸Setu-Tafese (n 213 above) 2.

arbitrate in South Sudan, the arbitral process may not be adequate.²²⁹ On the other hand, if they arbitrate outside South Sudan, specially ICSID, the arbitral process may be adequate but the enforcement may be difficult. This has become a serious concern for many foreign investors. The lack of official channels for businesses to resolve land or other contractual disagreements lead businesses to seek informal mediation, through private lawyers, tribal elders, law enforcement officials, or business organizations and this has discouraged many investors, as a result, financial contribution to economy is diminished.²³⁰

4.6 Problem with mortgage and land use rights

Many foreign invested projects in South Sudan need to raise loans from international banks by way of project finance. For lenders to loan money, they require a strong security package, which in most cases includes a mortgage of the land use rights for the duration of the project and the asset on the land.²³¹ In the event that the investors as the borrowers default on the loan, the lenders may step in, foreclose on the mortgage and take over the land and assets on land and run the project to repay the debt.

The problem under South Sudanese land law and policy is that companies may only mortgage land use rights and assets on land in favor of banks authorized to operate in South Sudan. This includes mostly South Sudanese national banks and foreign banks having commercial presence in South Sudan.²³² However, in case of a large project finance deal, the syndicate of commercial banks often includes many banks with no commercial presence in South Sudan. Therefore, it is legally impossible for them to have a mortgage of the land and assets on land in this sort of case. Another problem is that, banks are unwilling to lend due to the lack of adequate laws to protect lenders and difficulties related to personal identification in regards to land rights.

After the Bank of South Sudan confiscated commercial banks' reserves on deposit at the Central Bank in autumn 2015, diverting them to the use of the government, companies and individuals

²²⁹Omar Mohammad (n 214 above) 7.

²³⁰Charton Doki n 226 above) 3.

²³¹K Deng David *The New Frontier: A baseline survey of large-scale land-based investment in Southern Sudan (2011)* available at <http://reliefweb.int/report/sudan/new-frontier-baseline-survey-large-scale-investment-southern-sudan> (accessed on 3 September 2017).

²³²Deng, David and Anuradha Mittal *understanding Land Investments Deals in Africa: Country Report South Sudan (2011)* available at <http://media.oaklandinstitute.org/understanding-land-investment-deals-africa-south-sudan> (accessed on 3 September 2017).

had difficulties in accessing their funds. This has made depositors reluctant to trust the banking system. As a result, businesses fail to achieve their objectives which eventually, affects economic growth in the country.

4.7 Service constraint

Enforcement in the laws and regulations in South Sudan remains a significant challenge to foreign investors in South Sudan. Most of the judges and private attorneys do not have expertise on foreign investment and foreign attorneys are prohibited to represent clients in South Sudanese courts. In addition to this, many areas of business and finance are not yet covered by viable statutes. Therefore, South Sudan requires assistance from international organizations to develop the legal sector, and new laws are gradually updating prevailing in draft form. When it comes to accounting sector, foreign accounting firms may not operate in the field of accounting in South Sudan. All these contradictions in laws and regulation have constrained better service to foreign investors and this has discouraged many foreign investors.

Despite the fact that Investment promotion Act and Sudanese Labour Code allow foreign employees to work in the area of expertise, areas like private legal practice are prohibited to foreigners. As a result, most companies are divesting out of South Sudan. Regulation of construction is one of the critical constraints in South Sudan. "But it needs to be efficient, to avoid excessive constraints on a sector that plays an important part in the economy. Complying with building regulations is excessively costly in time and money, many builders opt out. Others may pay bribes to pass inspections or simply build illegally, leading to hazardous construction that puts public safety at risk. All these constraints have failed economic growth in the country."²³³

Globally, South Sudan stands at 178 in the ranking of 190 economies on the ease of dealing with construction permits. The rankings for comparator economies and the regional average ranking provide other useful information for assessing how easy it is for an entrepreneur in South Sudan to legally build a warehouse for instance. The permit takes 124 days to be granted with a lot of kickbacks required illegally by the authorities.²³⁴

²³³World Bank report *Doing business in South Sudan* (2017) 25.

²³⁴(see n 135 above) 26.

4.8 Conclusion

This chapter has described and discussed some legal negative impacts that affect foreign investment inflows in South Sudan, especially those in large scale projects. Based on uncertainty associated with fragmentation of foreign investment related laws, foreign investors feel that, deploying capital in South Sudan, which is an emerging market, involves a number of associated inherent risk. Some of the key risks considered to be significant in South Sudan include potential political instability, corruption, complicated legal environment, and infrastructure shortfalls.

Particularly, legal and regulatory risk is the most significant challenge to a successful investment in South Sudan. The common issue is that, legal uncertainties related to the lack of a consolidated foreign investment related laws. This problem has affected the regulation of foreign investment in the country. The risk which is so apparent is that, legitimate expectations, fair and equitable treatment, transparency and minimum standard of treatment cannot be achieved unless these laws are consolidated. As a result, foreign investment in South Sudan is constrained and investors confidence is put down. In particular, the court system facing difficulties in enforcing these laws, the arbitration environment, and enforcement mechanism for domestic and foreign arbitration awards has sent negative signals to the international community that foreign investment climate in South Sudan is not friendly.

In light of these, the economic development is affected negatively because the businesses have gone down due to difficulties imposed by these laws and regulations. The solution to this problem of legal uncertainty can be resolved by consolidating these fragmented foreign investment related laws in the country. Therefore, the next chapter is designated to how this consolidation can be done.

CHAPTER FIVE

SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The research problem which this study has sought to solve is that despite efforts by the government of South Sudan to attract foreign investment in the country, foreign investors are still facing an extremely challenging investment climate because of fragmented investment related laws which are scattered in different legislation passed by different law-making bodies. Some laws contradict others, and no reliable mechanisms exist to settle inconsistencies. In other words, the laws governing foreign investment in South Sudan are not consolidated making enforcement difficult and creating legal uncertainty. This legal uncertainty does not inspire or encourage investors' confidence. It is against this backdrop that this study has sought to make a case for consolidation of fragmented foreign investment related laws in South Sudan.

5.2 Summary of findings

Chapter 2 has critically assessed the patterns and various definitions of FI by various scholars of which Sornarajah provides the most suitable definition that, FI is transfer of tangible or intangible assets from one country to 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. He advances his argument that, there can be no doubt that the transfer of physical property such as equipment, or physical property that is bought or constructed such as plantations or manufacturing plants, constitute FDI. Such investment is contrasted with PI which is normally represented by a movement of money for the purpose of buying shares in a company formed or functioning in another country.

The chapter also has discussed the distinction between FDI and PI. The distinction is that, FDI involves (a) the transfer of funds, (b) a long-term project, (c) the purpose of regular income, (d) the participation of the person transferring the funds, at least to some extent, in the management of the project, and (e) a business risk. These elements distinguish FDI from PI (no element of personal management), from an ordinary transaction for the purpose of a sale of a good or a service (no management, no continuous flow of income), and from a short-term financial

transaction. The chapter has also explained five types of FDI flows into an economy. They are export-oriented investment, market-development investment, government-initiated investment, acquisition investment and greenfield investment. Two new forms of foreign investment are explored which are joint Venture Agreements and production-sharing agreements.

Issues of conflicting economic theories are also considered in this chapter. The literature views the three theories which are: The classical theory which takes the view that foreign investment is wholly beneficial to the host economy, the dependency theory which argues that foreign investment will not bring about meaningful economic development and the middle path theory which argues in support and against the two conflicting theories depending on the situation of the host state. Finally, the chapter also discusses importance of foreign investment to South Sudan which include economic growth, knowledge and technology transfers to domestic firms and the labour force, productivity spill-over, enhanced competition and improved access for exports abroad.

In chapter 3, the fragmentation of foreign investment related laws and development of foreign investment regulations in South Sudan were discussed. In the discussion above, it is clear that the laws and regulations governing foreign investment in South Sudan have been a mixture of South Sudanese traditions and customs, the Sudanese laws, the laws of Southern Sudan during interim period (before the independence) and the current laws and regulations of the Republic of South Sudan (after the independence).

These laws include Investment Promotion Act, 2009 which outlines the promotion and facilitation of investment in South Sudan and creates the administrative and operational framework for the South Sudan Investment Authority, The Land Act, 2009 which regulates land tenure and equally recognizes rights to customary, public and private tenure, The Banking Act, 2012 and The Bank of South Sudan Act, 2012 that regulate the financial transactions in the country, The companies Act, 2012 that sets out the registration procedures, Income Tax Act, 2009 amended in 2011 the deals with taxation regulation, the Sudanese Labour Code Act, 1997 that regulates the labour market and finally, the Intellectual Property Code 1979 which deals with the protection of property rights.

In chapter 4, the negative effects caused by these fragmented foreign investment related laws to South Sudan's economy were identified and discussed. These include fear of nationalization, foreign exchange controls, fear of changes in investment law, difficulties in disputes resolution, problem with mortgage and land use rights and finally, services constraints.

5.3 Conclusion

In view of the forgoing discussion, FI is an important form of private external funding for developing countries and less developed countries like South Sudan. Today, FDI is regarded as the major source of foreign capital for South Sudan more than PI. In general, capital inflows raises the level of economic growth in South Sudan, from which it may be inferred that FI improves potential levels of welfare in the country as long as it does not create or worsen host country's factors of production and capital market imperfections. It is with this realization that many economies around the globe including South Sudan are putting up efforts to attract foreign investment.

The two conflicting economic theories as discussed above have pointed out their views on foreign investments, both advantages and disadvantages. In my observation therefore, it can be seen that FI (especially FDI) with its various types has numerous advantages, which appear to outweigh the disadvantages brought about by the dependency theory, therefore it is justifiable for countries to attract this type of investment through structured national efforts and legal certainty.

Since 2009, foreign investment in South Sudan has been governed by unconsolidated laws, which are : Investment Promotion Act, 2009, The land Act, 2009, Bank of South Sudan Act, 2011 and Banking Act, 2012, Companies Act, 2012, Income Tax Act, 2009 amended in 2011, The Sudan Labour Code 1997 and Intellectual property rights 1979. Simply, there are too many fragmented investment related laws and regulations in South Sudan. These different types of laws were passed by different lawmaking bodies from Sudan, Southern Sudan (pre independence) and South Sudan (post independence). This fragmentation of laws has added great complexity to the system of regulation of foreign investment in several ways, some laws contradict others and no reliable mechanism exist to settle inconsistencies. Some laws are outdated because of non conformity with the current Constitution. Now it is difficult to identify

the law governing a particular situation and to keep track of whether particular laws have been amended or replaced.

As proved above that the legal backbone of foreign investment laws in South Sudan is still Sudanese laws, though heavily now supplemented with statutes enacted after the independence, large portion of Sudanese provisions remained in force. Therefore, the legal uncertainty has affected investment climate negatively which in turns affects economic development in the Republic of South Sudan.

Deploying capital in South Sudan, like many other emerging markets, involves a number of associated inherent risks. Some of the key risks considered to be significant in determining investors' decision include potential political instability, corruption, complicated legal environment, legal uncertainties and infrastructure shortfalls. Particularly for South Sudan, legal and regulatory risk can be perceived as the most significant impediment to a successful investment.

A common issue of concern is that, legal uncertainties related to the lack of a comprehensive regulatory framework due to conflicting fragmented investment laws and regulations. This problem has affected foreign investment inflow in the country. The risk which is so apparent is that, legitimate expectations, fair and equitable treatment, transparency and minimum standard of treatment have not been achieved by these foreign investment and related laws. As a result, foreign investment in South Sudan is constrained and investors confidence is put down. In particular, the court system facing difficulties in enforcing these laws, the arbitration environment, and enforcement mechanism for domestic and foreign arbitration awards has sent negative signals to the international community that foreign investment climate in South Sudan is not friendly.

In light of these, the economic development is affected negatively because the businesses have gone down due to difficulties imposed by these laws and regulations. The solution to this problem of legal uncertainty can be resolved by consolidating these fragmented foreign investment and related laws in the country.

The proposed regulatory changes by this study may make it easier for private equity investors to invest in South Sudan through onshore funds and strategic investors, in particular, remain motivated to participate in what remains a growing and vibrant economy. South Sudan's unique regulatory and legal environment is an important factor to be consolidated to provide a clear legal certainty and build investors confidence in investing in South Sudan, this will attract more investors to invest in the youngest nation which will boost its economic development.

The complex fragmented laws and regulations which create conflict in regulatory supervision has arguably led to significant amount overlap and duplication in regulatory effort, thus reducing efficiency and effectiveness as well as increasing risks foreign investors.

5.4 Recommendations

In order to produce a satisfactory consolidated legislation that conforms with the current Constitution, the researcher advises the South Sudan authority to enact a new Investment law that will bring together investment provisions that are scattered in different legislation into a single Investment Promotion Act. This proposed Act will replace the provisions in different legislation in order to remove outdated materials and resolve many of the minor inconsistencies and ambiguities that crept in over the years. With a single Act rather than multiple laws, the regulatory environment can be more transparent and certain.

BIBLIOGRAPHY

Books

Dolzer R & Schreuer C (2008) *principles of international investment law* Oxford University Press: Oxford.

Maria C & Nagesh K (2003) *protecting foreign investment. Implications on a WTO regime and policy options* Zed Books press: London & New York.

Peter V & B Werner (2015) *The Law and Policy of the World Trade Organization* Cambridge University Press: Cambridge.

Sodersten B & Reed (1994) *International Economics* St Martine's Press: New York.

Sornarajah M (2014) *The International Law on Foreign Investment* Cambridge University Press: Cambridge.

V Bath & L Nottage (2001) *Foreign Investment and Dispute Resolution Law and Practice in Asia* Routledge Press: New York.

Journal Articles

Abul, F 'economic determinants of foreign direct investment in less developed countries'(1994) *44 Pakistan Development Review*.

Anthony, O & John, A 'direct foreign investment strategies and economic performance in Ghana and Ivory Coast (1999)134 *Journal of Economic Development volume 24*.

Dunning, J 'Location and the Multinational Enterprise: A neglected Factor' (1998) *45 Journal of International Business Studies vol.29*.

Hermes, N & Lensink, R 'foreign direct investment, financial development and economic growth' (2003) *142 The Journal of Development Studies 40*.

Jose, L 'export-oriented entrepreneurship and regional economic growth' (2000) *Pernía Basque Institute of Competitiveness 4*.

Lall, S 'Foreign Direct Investment, Technology Development and Competitiveness': issues and evidence (2001) *4 Oxfordshire, Oxford University Press*.

Maria, C & Nagesh, K 'protecting foreign investment. Implications on a WTO regime and policy options' (2003)1 *Anchor Academic publishing*.

Minota, S 'the impact of foreign direct investment on economic growth in Eastern Africa': Evidence from panel data analysis (2016) 147 *University of Addis Ababa Redfame Publishing 3* <http://redfame.com/journal/index.php/aef/article/view/1317> (accessed on 9th March 2017).

Nguyen, D 'exports, growth and causality in developing countries' (2001)12 *Journal of Development Economics* Vol. 18.

Nobakht, M & Madani, S 'is FDI Spillover Conditioned on Financial Development and Trade Liberalization: Evidence from UMCs (2014) 26 *Journal of Business and Management Sciences*.

Rangasamy, L 'exports and economic growth' (2009) 21 *The case of South Africa. Journal of International Development*.

Rothger, J 'investment dependence and political conflict' (1990) 27 *Journal of Peace Research* 255.

Reuber, G & Crookell, H 'private foreign investment in development (1975) 633 *The Canadian Journal of economic vol.8 no 4*.

Reuber, G 'Private Foreign Investment in Development' (1973) 40 *Clarendon Press Oxford*.

Saul, E 'economic transition and privatization: The issues in Estrin Saul (ed). Privatization in Central and Eastern Europe. Key issues in realignment of Central and Eastern Europe' (1994) 6 *Longman journal*, www.lse.ac.uk (accessed on 9 March 2017).

Sethi, D & Guisinger, S 'trends in foreign direct investment flows: A theoretical and empirical analysis' (2003) 80 *Journal of international business studies*.

Thomas, M ' Institutional Investment across market anoma' (1994) 1 *Journal of financial and strategic division vol*.

Vernon, R 'International Investment and International Trade in the Product Cycle' (1966) 190 *Quarterly Journal of Economics vol. 80*.

Working Papers

'Bureau of economic and business affairs US embassy' (2016) *South Sudan investment climate working paper*.

Carkovik, M & Levine, R 'does foreign direct investment accelerate economic growth?' (2002) *University of Minnesota Working Paper June*.

Dolzer, R 'the notion of investment in recent practice (2005) *essay in honor of Florentino Feliciano*.

Flume, W, Hain, H, Kegel, G & Simmond, K 'international law and economic order' (1997) *essay in honor of FA Mann*.

Lipsey, ER 'foreign direct investment and the operations of multinational firms: concept, history and data'. *working paper (2001)* available at <http://www.nber.org/papers/w8665> (accessed on 9th March 2017).

Mohammad, JO 'Challenges and aspirations of state building in South Sudan'(2013) *Working Paper*.

Obwona, MB 'Determinants of FDI and their impact on economic growth in Uganda' (2001) *African Development Bank*.

OECD 'indirect expropriation and the right to regulate in international investment Law' (2004) *OECD working papers on international investment* available at <http://dx.doi.org/10.1787/780155872321> (accessed on 29th August 2017).

'Project appraisal document on a proposed loan in the amount of US\$35 million to the Republic of Tunisia for an export development project' (1999) *document of the World Bank Report 18778 TUN 3*.

Report by the secretariat of the United Nations Conference on Trade and Development (2001) *working paper 7*.

'United Nations Conference on Trade and Development' (UNCTAD 2001) *Investment Country Profiles: South Africa, Geneva*.

William, K 'South Sudan ready for business' (2016) *working paper*.

World Bank report, 'doing business in South Sudan' (2017) *working paper*.

Dissertation

Sue Y, Tax Compliance and Small and Medium Enterprise Operators: An Intra-cultural Study in New Zealand A Thesis submitted to Auckland University of Technology in Fulfillment of the Requirements for the Degree of Doctor of Philosophy (PhD) (2011).

Laws

Banking Act of 2012.

Bank of South Sudan Act of 2011.

Companies Act of 2012.

Income tax Act of 2009 (amended in 2011).

Investment Promotion Act of 2009.

Intellectual property Code of 1979.

The land Act of 2009.

The Transitional Constitution of the republic of South Sudan 2011.

The Sudan labour code of 1997.

National Policies

Goss draft land policy. Southern Sudan Land Commission (2011).

National Oil and Gas policy in South Sudan (2011).

South Sudan Environmental Policy (2011).

South Sudan foreign exchange policy (2014).

South Sudan Investment Authority (SSIA) (2011).

International and National Instruments

The comprehensive Peace Agreement (2005) between Southern Sudan and Sudan.

UNCTAD Bilateral investment treaties 1995-2006: Trends in investment rules making (2007)
<http://unctad.org/en/docs/iteiia20065> (accessed on 29th August 2017).

K Vandeveld United States Investment Treaties (1992).

Internet Sources

Basic information on tax system in South Sudan Directorate of taxation (2015)
www.grss-mof.org (accessed on 13 August 2017).

Foreign Direct Investment (2000)
<http://econpapers.repec.org/RePEc:idb:wpaper:4203> (accessed on 16 August 2017).

Foreign direct investment theories: An overview of the main FDI theories (2010)
<https://www.researchgate.net/publication/228259720> (accessed on 17th August 2017).

How does foreign direct investment promote economic growth? Exploring the effects of financial markets on linkages (2006) <http://www.tandfonline.com> (accessed on 9th March 2017).

How to promote FDI? the regulatory and institutional environment for attracting FDI (2002)
<http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPA> (accessed on 10th March 2017).

Introduction to foreign investment
<http://www.investopedia.com/terms/f/foreign-investment> (accessed on the 9th March 2017).

Land tenure issues in Southern Sudan: Key findings and recommendations for Southern land policy (2010)
http://usaidlandtenure.net/sites/default/files/USAID_Land_Tenure_Southern_Sudan_Findings_and_Recommendations. (accessed on 27th August 2017).

South Sudan investment basic highlights (2015)
www.gurtong.org (accessed on 13th August 2017).

The Encyclopedia of public international law vol.8
<https://doi.org> (accessed on 29th August 2017).

The New Frontier: A baseline survey of large-scale land-based investment in Southern Sudan (2011)

<http://reliefweb.int/report/sudan/new-frontier-baseline-survey-large-scale-investment-southern-sudan> (accessed on 3rd September 2017).

The World Bank working document on South Sudan, (2011)

<http://data.worldbank.org/country/south-sudan> (accessed on 16th August 2017).

Understanding land investments deals in Africa: Country report South Sudan (2011)

<http://media.oaklandinstitute.org/understanding-land-investment-deals-africa-south-sudan> (accessed on 3rd September 2017).

Newspapers

South Sudan's only domestically made beer, White Bull, will soon to be discontinued, Agence France-Presse 15 Jan 2016 available at <http://www.industryweek.com/global-economy/last-call-south-sudans-only-beer-factory> (accessed on 2nd September 2017).

The importance of Foreign Direct Investment, the Sunday Times Economic Analysis 29 May 2011 available at <http://www.sundaytimes.lk/110529/Columns/eco.html> (accessed on 9th March 2017).

Cases Law

Amco v. Indonesia (1984) 23 ILM 351 at 369 (para. 23).

In Fedax v. Venezuela (1998) 37 ILM 1378, would have it, an investment treaty could be interpreted as extending to portfolio investments.

R Peet *global capitalism: Theories of social development (1991)*.

Some of the issues in Amco v. Indonesia concerned such administrative controls. The fact that the rights of the foreign investor are dependent on administrative decisions has been pointed out in this case.

Un decided case between Juba rency hotel ltd against the ministry of health 2016, drawn and filed by Kiirdit and Co. Advocates.