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Comparative Analysis of Investment Protection Measures in Bilateral Investment Treaties signed by Rwanda

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CERTIFICATION

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DECLARATION

I, the undersigned Alex MUDAHERANWA, declare that this thesis is my own work, unless referenced otherwise, and to the best of my knowledge has not been presented in any academic institution.

Signature

DEDICATION

To my lovely wife and children

To my parents

To my siblings

To all my friends and academics

AKNOWLEDGMENTS

I am particularly pleased and humbled to extend special thanks to those who so generously contributed to the work presented in this research. This includes my lovely sister Sharon BATAMURIZA whose laptop she so generously offered to me, helped me a great deal for the completion of this work.

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Alex MUDAHERANWA

ACRONYMS

ASEAN : Association of Southeast Asian Nations

BIT : Bilateral Investment Treaty

COMESA : Common Market for Eastern and Southern Africa

EAC : East African Community

FCN : Friendship, Commerce and Navigation

GATT : General Agreement on Tariffs and Trade

ICJ : International Court of Justice

ICSID : International Center for Settlement of Investment Disputes

IMF : International Monetary Fund

IPA : investment promotion authority

ITO : International Trade Organization

MNCs : Multinational Corporations

MNE : Multinational Enterprises

OAG : Office of the Auditor General

OECD : Organization for Economic Co-operation and Development

RDB : Rwanda Development Board

USA : United States of America

VGGT : Voluntary Guidelines on the Responsible Governance of Tenure

WTO : World Trade Organization

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ABSTRACT

The global objective in the investment arena is to deal with investment regulation on a unilateral, bilateral and regional basis. in respect to bilateral investment, Rwanda has entered into bilateral investment agreements with many countries with the purpose of promoting investment hence fostering Rwanda's economic growth. However, in spite of the existence of Bilateral Investment Treaties between Rwanda and other countries, there are many lingering unresolved issues being raised in regards to the implementation of BITs. Key amongst these issues include: the irregularities in the implementation of expropriation concerning property valuation and lack of proper legal definition of public interest concept. In addition, the applicable environmental and health requirements are also allegedly pointed-out as violations of fair and equitable treatment. Therefore, with this study, this research examines the challenges encountered in the implementation of protection measures contained in the Bilateral Investment Treaties so far signed between Rwanda and other countries such as: Fair and Equitable Treatment, Expropriation to mention but a few.. The research further gives a detailed comparative assessment of these protection measures contained in these Investment treaties signed by Rwanda.

Key Word: Protection measures in Bilateral Investment Treaties signed by Rwanda

1. BACKGROUND OF THE STUDY

Traditionally, Rwanda has conjugated its effort to develop the culture of investment and creation of smooth environment for investors as well as enhancing cooperation with other countries in domain of investment. More importantly, the will of Rwanda to promote investment is demonstrated in the creation of robust institutional framework, which facilitates investors to bring their capital in the country. It is in this regard that the creation of Rwanda Development Board as per the law No 46/2013 of 16/06/2013 establishing Rwanda Development Board, determining its mission, organization, and functioning.[1]

Furthermore, a legal framework was put in place to promote investment and protection of investors.[2] The first law on investment was the law no 26/2005 of 17/12/2005 responsible for regulating investments and export promotion in Rwanda. This law was also repealed by the law No 06/2015 of 28/03/2015 relating to investment facilitation and promotion. This law came into force in 2015 two years after the law establishing Rwanda Development Board. The philosophy behind this was to create both institutional and legal framework in the field of investment. When one reads the provisions of the law, it is crystal clear it entails the protection measures accorded to investors in Rwanda.

In addition to enacted laws to create smooth environment of the investment, other laws also take into consideration the right of investors to their property. In Rwanda, the law that provides and protects investors' rights to property ownership is the law no 32/2015 of 11/06/2015 relating to expropriation in the public interest.[3] This law provides for procedures of expropriation and related compensation.[4] Bilateral Investment Treaties (BITs) have often regulated state-to-state trade and investment cooperation between state parties. Rwanda started entering in bilateral investment agreements with other countries since many years ago and others are still being negotiated. However, it is important with this study to ascertain whether these treaties contain protection measures to foreign investors and therefore assess their level of implementation especially in regards to the expropriation and business related disputes settlement. In this study researcher intends to shed a light on the protection measures embedded in Bilateral investment treaties (BITs)

[1] LAW No 46/2013 OF 16/06/2013 establishing Rwanda Development Board (RDB) and determining its mission, organization and functioning

[2] N° 06/2015 of 28/03/2015 Law relating to investment promotion and facilitation

[3] Law N° 32/2015 of 11/06/2015 Law relating to expropriation in the public interest

[4] See Article 4 of expropriation law in Rwanda

signed by Rwanda through a comparative analysis of protection measures in the BITs signed by the Government of Rwanda.

2. STATEMENT OF THE PROBLEM

The above-mentioned law on the facilitation and promotion of the investment and other laws that are in place to protect the interests of investors in Rwanda govern investment operations in Rwanda.[5] The law that establishes Rwanda Development Board gives this institution the mandate to promote investment, which makes it institutional framework for investment. With this investment atmosphere, one cannot ignore the role played by foreign investors. This atmosphere of investors is made smooth by the State, which demonstrates intention to negotiate with others, and come up with a string of Bilateral Investment Treaties. This practice of BITs further contributes to the international investment law and country development by increasing the capital market and opportunities for businesses.

The legal issues arising from the perspective of bilateral investment treaties are mostly relating to lack of adequacy in the implementation of BITs whereby claims have been increasing around expropriation and business related disputes settlement.[6] In addition, the issue of property valuation has been arising around the expropriation and therefore, with this study, the researcher will explore more about the above highlighted legal issues in the implementation of bilateral investment treaties and propose actionable solutions towards the effective implementation of BITs.

3. OBJECTIVES OF THE STUDY

This study intends to achieve the following specific objectives:

- To map up bilateral investment treaties signed and track the status of implementation;
- To identify challenges in the implementation of Bilateral Investment Treaties in regard to expropriation and settlement of Disputes;
- To assess protection measures for investors as provided by different BITs signed by the government of Rwanda.
- To advance actionable recommendations to improve protection mechanism for investors in Rwanda.

[5] See Article 1 of the law on the Promotion of investment in Rwanda
[6] *Ibid*.

4. RESEARCH QUESTIONS

1. What are the Bilateral Investment Treaties signed by Rwanda?
2. What are the current challenges in the implementation of Bilateral Investment Treaties signed by the government of Rwanda?
3. What are actionable recommendations to improve protection mechanism for investors operating under bilateral investment signed by Rwanda?

4. METHODOLOGY

For the purpose of this study, various methods and techniques have been used to facilitate the collection of information and the analysis of the key elements of the study. The methodology adopted in this study included a comparative approach whereby researcher investigated the concept of BIT from both the general international law and the investment law perspective. In the process, a documentary technique has been utilized to attain a doctrinal contribution to the problem in argument. A desk review was substantially used in order to analyze, interpret and explain legal instruments that tackle the topic with the purpose of understanding the scope of legal provisions under treaties. Different sources of literature have been assessed and other viable materials relating to the concept of Bilateral Investment Treaty such as internet data likely to provide necessary and appropriate information. The comparative approach helped to explore determinants and characteristics of the protective measures in Bilateral Investment Treaties with a view to draw a conclusion whether Rwandan BITs bear protection measures. Furthermore, the comparative method has been used to explain similarities, differences and trends in the implementation of BITs by countries in the region where Rwanda is located.

5. STUDY OUTLINE

This study is divided into three chapters commenced by a general introduction and wound up by a conclusion and recommendations; chapter one treats the overview of bilateral investment treaties and conceptual framework. This chapter will be devoted to the historical background of foreign bilateral investment treaties and conceptual framework. Chapter 2 discusses the challenges and trends in the implementation of bilateral investment treaties. It carries out a critical analysis of different barriers by pointing out different issues affecting small and large-scale investors operating their business under the bilateral investment treaties. Chapter 3 is devoted to protection measures in Bilateral

Investment Treaties signed by Rwanda. It deals with issues of expropriation and disputes settlement in relation with Bilateral Investment Treaties.

CHAPTER I: OVERVIEW OF BILATERAL INVESTMENT TREATIES AND CONCEPTUAL FRAMEWORK

1.1. Introduction

There is no code of the law of states which is definitely established than that, which entitles the property of a foreignor within the jurisdiction of another friendly state with their own to the protection of its sovereign by all efforts within its powers.[7] According to the theory of Carlos Calvo, in order for the intercontinental law to be in effect and be well upheld by the host state, it should diminish protection of foreigners' assets and reduce allowances for assets held by natives.[8] Calvo's view is criticized that it should have given a room for different elements of municipal laws allowing both strong guarantees, but also a comprehensive lack of safeguard.[9] The condition upon which any nation is entitled to amount the fairness due from it to an alien by the justice, which it accords to its own people, is that its modus operandi and governance shall conform to the general standards. If a nation's system of law and governance do not really adapt to the standard, even though the people of the country may be satisfied, other countries are not obliged to adhere to it as providing comprehensive way of treatment to its nationals.[10]

As the title indeed reflects, this chapter gives a clear overview of bilateral investment treaties and conceptual framework of terms married to this field of law.

1.1.1. Definitions of Bilateral investment treaty

Bilateral Investment Treaty is an agreement establishing the terms and conditions for private investment by nationals and companies of one state in another state.[11] This type of investment is known as foreign direct investment (FDI). A renowned 19th Century predecessor of the BIT is the famous Friendship, Commerce and Navigation Treaty.[12] What is common with majority of the BITs is the fact that they offer investment guarantees to investments set up by a foreign investor of a contracting state on the territory of another contracting state. These guarantees inter-alia include: Fair and

[7] J B Moore, *A Digest of International Law*, vol. 4, 1906, p.5
[8] Charles Calvo, *Le droit international : théorie et pratique*, vol 3 (1896) 138.
[9] Rudolf Dolzer, Christophe Schreuer, Principles of International Investment Law, Oxford University Press, great Clerendon street, Oxford, OX2, 6DP, United Kingdom
[10] E Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 *AJIL* 517, 528
[11] Bilateral investment treaty, available at : https://en.wikipedia.org/wiki/Bilateral_investment_treaty , accessed 12/10/2019
[12] See Report of the UN Conference on Trade and Development (2007) " Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking"

Equitable Treatment; Protection from possible Expropriation; Free Transfer of Means; and Full protection and Security. The remarkable uniqueness among the majority of the BITs is the fact that they give room to make a viable alternative option while making a recourse seeking for redress in case of disputes. This implies that wherever an investor's legitimate investment rights are deemed to have been infringed upon under the BIT, the aggrieved party is legally allowed to lodge a complaint at an international arbitration, which in most instances is under the aegis of the International Center for Settlement of Investment Disputes (ICSID), which is a preferred recourse than opting to the local courts of the host country.[13]

Some authors define BIT as a binding agreement between two states in which each assumes obligations with respect to investments made in ones country by the other's investors. These obligations are directly enforceable by the investors by way of international arbitration often before the International Centre for Settlement of Investment Disputes or a tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law. Investor-State arbitration, as opposed to state-state arbitration or indeed litigation, has the advantage of non-politicized dispute resolution, where an investor has greater control over pursuit of the claim.

In summary, BITs are interstate agreements putting in place different terms and conditions for investment promotion by person being natural or juridical of one country in another country.

1.1.2. Historical Background and Development of the International Investment Law

The decisions of international courts, claims commissions and arbitration tribunals have played a major role in articulating the international standards of treatment applicable to foreign investors. Traditionally, the treatment of aliens under international law of state responsibility has been relied upon by international courts, claims commissions and tribunals to provide legal remedy to foreign investors when their investment was expropriated or unlawfully impaired by a foreign government. As stated by Asante: 'Traditional principles of customary international law relating to investments revolve around the law of state responsibility for injury to aliens and alien property. According to this doctrine, which was developed in the nineteenth century, host states are enjoined by

[13] Ibid.

international law to observe an international minimum standard in the treatment of aliens and alien property.[14]

1.1.2.1. Colonial period: No need for investment protection

In period of colonial time, FDI was purposely in the framework of colonies who aimed at extending their dominion in exercise of their colonial influence and foreign investors brought the required capital and requested a given level of protection.

More important to note, foreign investors did not have a problem regarding protection since the system of law was the same to the one of colonialist's nation.[15] For example, in the colonies of British while bringing in the use of money, the nationals were equivalently required to conform to common law with British origin.[16]

As evident in the previous section, in the colonial era, colonial exploitation was very rampant and European colonial powers focused on African immense resources in natural assets and the unexploited raw materials.[17] This without a doubt clarifies the prevalent antagonism before the scramble and partition of Africa owing to the fact many of the African countries were endowed with immense natural resources that were sought after and normal assets.[18]

Basically, this implies that the treaties signed between colonialists and the colonized states regarding trade and business were implemented for the protection of colonialists.[19]

Throughout this period, the resolution of disputes was purely imperial laws that ostensibly gave colonialists much more protection compared to the nationals of the colonized country.

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[14]Kenneth JVandervelde , *Bilateral Investment Treaties: History, Policy and Interpretation*, Oxford, Oxford University Press, 2010, P. 574

[15] Analysis of western European colonialism and colonization https://en.wikipedia.org/wiki/Analysis_of_Western_European_colonialism_and_colonization

[16]Ibid.

[17]Murombedzi, J C. World social science report (2016): Challenge inequalities, pathways to a just world, p. 59-60

[18]Anyanwu, J. C. 'Does Intra-Regional Trade Reduce Youth Unemployment in Africa', African Development Review, Vol. 26, No. 2, 2014, pp. 286–309.

[19]Hasse, K. , 'Non-tariff Barriers Choke African Trade. Africa in Fact', The Journal of Good Governance in Africa, Vol. 8,2013, P.17

1.1.2.2. Post-colonial period: Nationalism and capital-exporting states

After the World War II, different States thought on integration and inter-state commerce as very paramount for their prosperity and development.[20] Different institutions were henceforth created and these were the International Monetary Fund (IMF)[21] and the International Bank for Reconstruction and Development otherwise referred to as the World Bank. They were created with specific mandate for each; the IMF was given the powers to monitor monetary system at international level while the World Bank was bestowed with the role for reconstruction.[22]

Moreover, in the same vein, International Trade Organization which ideally would devise and reach an agreement on fair trade regulation and rules that are binding on all State Parties was also later created[23] and so was the International Trade Organization (ITO) which was in charge of proposing recommendations to facilitate bilateral treaties.[24]

1.1.2.3. Period immediately after independence: Foreign direct investment

FDI is taken as an investment when investors coming from overseas nations carries capital and invests it for the creation of assets but with full ownership and control over the enterprise and earnings or interests.[25]

In other words, FDI is an act where nationals or companies of one country acquire assets with the aim of manufacturing, distributing or other affairs of the corporation in other state.[26]

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

[21] The IMF was set up by member states in July 1944, when representatives from 45 countries convening at Bretton Woods, New Hampshire reached agreement on the international cooperation framework. This meeting was essentially meant to curb any further potential recurrence of economic repression following ineffective economic policies in the advent of the First World War economic woes.

[22] The IMF and the world bank: How do they differ? Available at: https://www.imf.org/external/pubs/ft/exrp/differ/differ.htm , accessed 12/10/2019

[23] Rondo Cameron, A Concise Economic History of the World: From the Paleolithic Times to the Present (3rd ed. 1997) 370.

[24] Idem.

[25] See the definition of foreign direct investment, available at: https://www.investopedia.com/terms/f/fdi.asp , accessed 14/10/2019

[26] UN Conference on trade and development "Scope and definition of international investment agreements", New York and Geneva, 1999

According to the IMF, which does consider FDI as investment, it is indispensable that the worth of the investment should be at least 10% of the summation of the value of the corporation properties, or a minimum of 10% of the ordinary shares.[27]

The basis of the investment does not affect the definition, as an FDI: the investment may be made "inorganically" either by buying a company in the target country or "organically" by intensifying the operations of an existing business in that country. Mostly, foreign direct investment embraces "mergers and acquisitions, building new facilities, reinvesting profits earned from overseas operations, and intra company loans". In a thin sense, foreign direct investment denotes just to building new facility, and a lasting management interest in an enterprise operating in an economy other than that of the investor. FDI is the sum of equity capital, long-term capital, and short-term capital as shown in the balance of payments.[28]

FDI, which is itself a sub-component of the international investment movements, is illustrated by the control exerted over the ownership of the investment portfolios transferred from one country to another.[29] A factor of control is what differentiates between FDI from other forms of foreign investment notably foreign portfolio investment which include public stocks, shares and bonds.[30] With the standard control of the 10% threshold of the voting shares, sometimes ownership of small shares for instance technological factors can trigger a wider control over larger companies.[31]

1.1.2.4. FDI in the Development of Host Countries

Developing countries and emerging economies, given the benefits that accrue from FDI have eased up their FDI system and embarked on best policy practices to lure investors.[32] It has been renowned hence that optimizing the dividends that accrue from FDI for the host country can be paramount, including but not limited to technological spillovers, human capital, creating of a viable investment climate, the integration of international trade and general enhancement of business venture. Additionally, besides socio-economic

[27] Kenneth J Vandevelde, supra note, (OUP 2010), p.35.
[28] Ibid.
[29] Foreign direct investment https://www.coursehero.com/file/44362732/FOREIGN-DIRECT-INVESMENTdocx/
[30] Ibid.
[31] Foreign portfolio vs foreign direct investment : what's the difference?, available at https://www.investopedia.com/ask/answers/060115/what-difference-between-foreign-portfolio-investment-and-foreign-direct-investment.asp , accessed 12/10/2019
[32] OECD, Foreign direct investment for development: supra note.

dividends, FDI can further enhance the sociological conditions in the host country destined to yield benefits that among others, reduce poverty levels.

1.1.2.5. Flourishing of Bilateral Investment Treaties

The foundation of the international legal system on investment is nothing else other than the Bilateral Investment Treaty. Bilateral investment treaties were borne as an outcome of a inevitability, which got its peak. A philosophical and political fight developed that pitted developed countries and some developing nations with regard to expropriation for investment of foreigners.[33] This is why, formerly, they were agreed upon primarily between developed and third world countries, because developed nations were well-heeled thus easy to mobilize capital to invest while developing countries were considered to be risky business ventures.

1.2. Synopsis of investment

Both the investor and investment are the main actors in deciding the application of rights and obligations in investment agreements. Policies related to investment are not made from utopia but rather from political and economic umbrella.[34]

The pledge to negotiate and enforce bilateral investment agreements designed to promote and protect investment, shows the increased significance allotted to various BITs.

Investment laws and policies are regarded as crucial prompts of economic growth and development and investment policies continue at the core of any country's development agenda. It also serves as enablers in pursuit of sustainable development through responsible investment, while placing socio-economic goals in tandem with economic growth and development objectives. What remains crucial is that, there is a generally shared understanding of the urgent need to improve the effectiveness of policies to facilitate and promote investment. These broad aspects of new generation investment policies translate into specific investment policy challenges at both national and

[33]See the Briefing paper on 1976 Paris Conference – the so-called Conference on international economic co-operation presented by the Overseas Development Institute,10-11 Percy Street, London W1P OJB
[34] UNCTAD-IPFSD, "Investment policy framework for sustainable development", 2015.

international levels.[35] New social and environmental regulations are being introduced or existing rules reinforced all of which have implications for investment.

1.2.1. Bilateral Investment Treaty Due Diligence

In normal situations, the word due diligence denotes to the investigation done before arriving at an agreement or a financial deal with another party or act with a certain measure of care.[36] It can be a legal obligation, but the term will more commonly apply to voluntary and personal inquiries. A common illustration of due diligence in various industries or firms is the process through which a potential acquirer evaluates a target company or its assets for acquisition.[37] The idea behind due diligence holds that performing this type of investigation contributes meaningfully to informed decision making by enhancing the amount of quality information available to decision makers and by ensuring that this information is systematically utilized in a deliberate manner taking into account all its costs, benefits , and risks.[38] Concluding BIT also requires to some extent a sort of due diligence with the overall objective of ascertaining the truth and enter an agreement with a trustworthy or a credible person.[39]

1.2.2. Resource transfer effect

Foreign Direct investment can stimulate and spur economic development to the economy of the host country through acquired capital, technology and resource management that could in other circumstances not be available.[40] In-so-far-as the capital is concerned, transnational companies or conglomerates invest in enduring enterprises that span for longer periods through risk taking and only repatriate profits when the investment yield

[35] (Davis & Melody, 2016), sited in Shirley Ayangbah1and Liu Sun, LAW, CRIMINOLOGY & CRIMINAL JUSTICE RESEARCH ARTICLE: Comparative study of foreign investment laws: The case of China and Ghana, p. 4

[36]Truitt, F. J. (1970). Expropriation of Foreign Investment: Summary of the Post World War II Experience of American and British Investors in the Less Developed Countries. Journal of International Business Studies, 1(2), 21–34. Williams. M. L.,T he Extent and Significance of the Nationalization of Foreign-Owned Assets in Developing Countries, 1956-1972. Oxford Economic Papers,1975,p.56

[37]Ibid.

[38]Kobrin, S. J. (1984). Expropriation as an Attempt to Control Foreign Firms in LDCs: Trends from 1960 to 1979. International Studies Quarterly, 28(3), 329–348.

[39] Idem. P. 349

[40]Balasubramanyam, V.N., Salisu, M, Sapsford, David (1996): Foreign Direct Investment and Growth in Develped and Developing countries. The Economic Journal, Royal Economic Society, Vol. 106, 93-105.

returns. Many economists seem to favour the free movement of capital across the world since it allows invested capital to ensure optimal rate of returns.[41]

1.2.3. Balance of Payments Effects

Foreign Direct Investment's influence on the state's balance of payment is a critical policy matter for majority of the host countries. There are two probable effects of the balance of payments on Foreign Direct Investments. One, when a Multinational Enterprise launches a auxiliary branch on a foreign territory, the host country reaps profits from the initial capital investment introduction,[42] although it bears a one-off impact. Two, when Foreign Direct Investment is import substitutes for goods or services, it has the prospective to rise the current account of the host state's balance of payment.

1.2.4. International Trade

The consequences of FDI on a host state depend on purpose being efficient, market oriented, recourse or strategic asset acquisition. FDI has a lot in view towards contributing to the country's economic growth especially developing countries through enhanced export growth.[43] Whether or not FDI exports in host countries increase is immaterial; what is important is whether the efficiency- seeking FDI was really intended to promote exports.

1.2.5. Sources of Foreign Investment

The sources of law that regulate foreign investment fall into three overlapping categories: domestic law, international investment contracts, and investment treaties.[44] The primary source of law that controls or governs foreign investment is usually the domestic law of the state where the investment is concluded.[45]

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[41] Julius, R. (1990): Global Companies and Public Policy. New York: Council on Foreign Relations for the Royal Institute of International Affairs

[42]Markusen, J.R., Venables, (1999): Foreign Direct Investment as a catalyst for Industrial. European Economic Review, 43, 334-350.

[43] Jenkins, C., Thomas, L. (2002): Foreign Direct Investment in Southern Africa: Determinants, Characteritics, and Implications for Economic Growth and Poverty Alleviation.. Globalization and Poverty Project. University of Oxford., P.107

[44] Ibid.

[45]Ibid.

The second source of law governing foreign investment is international investment contract. Sometimes called host government agreements, these are direct contracts between a foreign investor and the host country.[46]

The third source of law are the investment treaties between states governing promotion and protection of foreign investment. Finally, some investment treaties take the form of regional investment treaties.[47]

1.2.6. Features of Rwandan legislation on foreign investment

Subsequently 2005, Rwanda has recognized enacted two-investment codes. The first investment one was enacted and promulgated in 2005 and this was repealed by the law N° 06/2015 of 28/03/2015 relating to investment promotion and facilitation. When one analyses substantively the wording of investment law of 2015, the first thing one can note, at the outset, is that the current law is well thought-out when compared to the previous one.

Referring to its Article 1, the rationale of the new investment law is to enhance and ease up investment in Rwanda. It is evident from this article that the law specially focuses on the promotion and facilitation of investment taking into consideration both local and foreign aspects. In fact, although both export and investment promotion seems to be intertwined concepts, there is no doubt that they are different in nature.[48]

1.2.7. Recognition of foreign investments and related Conditions

The loss of host state controlling autonomy features prominently in current debates regarding the legitimacy of international investment law. The existing literature on the subject has tended to distillate on the scope of post-admission investor protections such as fair and equitable treatment, while the regulatory implications of pre-admission obligations are sometimes overlooked. The recently promulgated investment law has made a kind of revisit on definition of foreign investor in two angles. Firstly, there is a removal of prudential requirement of minimum paid up capital.[49] This denotes that not

[46] Ibidem.
[47] Investment provisions in economic integration agreements, available at https://unctad.org/en/docs/iteiit200510_en.pdf
[48] See J. Morrison and K Andrews-Johnson, The Effectiveness of Promotion Agencies at Attracting Foreign Direct Investment, FIAS, Occasional Paper, 2004, p. 55
[49] See Article 2(5) of the Investment Law of 2005 in Rwanda

only foreign investors had to have that paid up capital available, that capital is supposed to originate from a foreign country.

The second angle is that a business enterprise or corporation that is incorporated in Rwanda, in any of the East African Community Partner States (EAC) partner states, or in any member state of the Common Market of Eastern and Southern Africa (COMESA) does not spontaneously bestow to such an enterprise a domestic status. Besides, the current law entails in its provisions the EAC and COMESA regional integration considerations.[50] It is imperative to note, however, that on top of the nationality of the country where the enterprise or a company is registered, the nationality of the shareholders is also paramount in deciding the nationality of the said enterprise.

1.2.8. Issuance and cancellation of an Investment Certificate

Article 11 prescribes in a clear manner the list of items that investors have to provide while in the process of registering an investment. These include among others: (i) certificate of a legal personality of an enterprise/company; (ii) a table showing a five-year income projections for the investment project; (iii) a business plan; (iv) the project environmental impact assessment certificates issued in accordance with relevant laws; (v) an estimative number of employees and job classification; (vi) Business license offered to the investor; and (viii) receipt acknowledging payment of a registration fee. It is rather crucial to highlight that in a bid to collect listed requirements above; the investor is legally allowed to obtain requisite support from RDB, which is duty-bound to accord investors "appropriate investment-related support that may be required".[51]

To conclude this chapter, it is essential to note that it has gone through different concepts and the historical background of foreign bilateral investment from the colonial period up to the actual period. The conceptual framework of bilateral investment treaties and their implementation related legal framework have also been elucidated. The second chapter will focus on challenges so far registered in the implementation of bilateral investment treaties signed by Rwanda.

[50] In fact, according to article 2(24)(a) nationals of the EAC and COMESA partner states are considered as local investors with the same treatment as Rwandans.
[51] Art 14 of 2015 Investment Law

CHAPTER II: CHALLENGES IN THE IMPLEMENTATION OF BILATERAL INVESTMENT TREATIES

2.1. Introduction

In most investment treaties, Rwanda like any other country commits to providing fair and equitable treatment to foreign investors. This has become provision of moot point , as it can become a catch-all clause for investors, allowing them to flourish where their non-discrimination, expropriation, and other bilateral investment claims have failed. In addition, the wording of the treaty does not offer detailed guidance on how dispute settlement bodies should interpret these provisions, resulting in widely differing interpretation some of which are expansive and lack of legal security for host states.

Therefore, with this chapter researcher tried to look at the case of Rwanda to find out what are the challenges impeding the effective implementation of bilateral investment treaties. The particular attention has been the analysis of challenges within the existing legal and institutional frameworks when it comes to property expropriation and investment business related disputed resolution.

2.1.1. Challenges in the enforcement of Bilateral Investment Treaties

The International Chamber for Settlement of Investment Disputes (ICSID) Convention offers one of the strongest regimes for enforcement of its awards. Consequently, finality of the ICSID awards was rarely disputed in the past. Nevertheless, recently, there has been a growing sense of investment awards being subjected to challenge by domestic courts. Moreover, this phenomenon is not only confined to investment disputes arising under the ICSID Convention and even amongst non-ICSID states too, taking advantage of the greater space granted to the national law under the New York Convention, the investment treaty awards are subject to unwarranted challenges at the stage of enforcement of awards. The mere fact that Rwanda considers obligations resulting from signed BITs lures investors from different countries to invest in Rwanda and further results into conclusion of other BITs with other countries in the world.

2.1.1.1. Position of BITs vis-à-vis Expropriation in Rwanda

The concept of expropriation means taking of private property or rights by the government for just compensation when it is for a public purpose. In the Rwandan law context, the term expropriation goes in tandem with public interest and it bears international concepts such as public interest, fair compensation and done with authorities that are duly mandated by the law. In other words, such administrative authorities should have a legal personality in order to effect expropriation. Under article 6 of Investment Law in Rwanda, it clears demonstrates the intention of Rwandan legislator in the protection of ones' assets including investors where article provides that:

> "An investor shall have the right to own private property, whether individually or in association with others. Private property, whether individually or collectively owned, shall be inviolable. No investment, interest in or right over any property forming part of such investment shall be seized or confiscated except where provided under relevant laws. No action to expropriate an investor's property in public interest shall be taken, unless the investor is given fair compensation in accordance with relevant laws".

The highlighted articles of the two laws show clearly how individuals including investors' assets being aliens or investors are protected under Rwandan law against arbitrary expropriation.[52]

The issues of expropriation feature prominently among those that affect the relationship between investors and States on the mere fact that it directly affects the property that have been acquired by investors in the business running. If let unrestrained, expropriation bear the potential to remodel and unduly put on scale relations among States and investors in one way or another but which has effect on business. Important to note is that expropriation involves the sophisticated bearing of balance between two sided competing benefits. Under international legal/law context, the existence of foreign investors in host countries is optional basing on government's overall political social and economic features and realities. Albeit, international law admits that once foreign investors are

[52] Rwanda Business Law Handbook Volume 1 Strategic Information and Basic Laws at https://books.google.rw/books?

allowed into a host state, it is rather imperative and compelling for the host state to grant compensation resulting from damages suffered from any expropriation measure that is taken by the hosting state.

Whereas the duty to compensate foreign investors is rather less cumbersome, International Law fails on delineating or demarcating procedures that comprise indirect expropriation. Previously, there have been intense mismatches in the relationship between both developed countries and developing ones that are called to be collectively objecting the level of compensation. Predominantly, the common held opinion among less developed or developing countries is that the standard measure set for compensating investors is a further expansion of neo-colonialism where powerful wealthy nations seek to dominate developing nations. It was hence concluded to be a new form of colonialism by civilized nations against third world countries. Despite this, as emphasized earlier, the argument was bought by many developing countries but appear to have been restrained in the advent of the signing of numerous BITs that largely allows expropriation to happen after effecting the payment in the manner that is prompt, adequate and effective compensation. This paradigm shift in the approach towards foreign investment hinges on the perception that FDIs foster socio-economic development and in this vein, BITs are avenues that encourage foreign capital flows that in the end render investments rather attractive.

In addition, safeguarding foreign investors against possible expropriation, which is uncompensated, provided by the BITs remains vital since contemporary BITs afford foreign investors a leeway to make recourse to arbitration directly dispensed by arbitral tribunal, which is neutral. It hence becomes incumbent upon arbitral tribunals to ascertain whether states' conduct tantamount to expropriation and also determine the compensatory damages calculated in tandem with the losses incurred by the foreign investors in the host countries.

As formerly emphasized, the doctrine of expropriation in BITs is accepted but under conditions that protect the interests of investors. To shield them from illegal expropriation and other arbitrary or discriminatory governmental conduct that threatens to discourage foreign investment because states at times find themselves compelled to take private property to serve a public function inter-alia development or environmental preservation, the practice of eminent domain, in so far as it serves quintessential sovereign interests,

will not cease. The law on expropriation defines the concept itself and how it should be done in a way that protects the investors as well.

The article 6 of the Rwanda-USA and Rwanda-Turkey BITs provides for expropriation and compensation in these words. Party may either expropriate or nationalize a covered investment directly or indirectly through measures equivalent to expropriation or nationalization except:

- For a public purpose;
- In a non-discriminatory manner;
- On payment of prompt, adequate, and effective compensation; and
- In accordance with due process of law and Article 5(1) through (3).
- Shall: (a) be paid without delay; (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation"); not reflect any change in value occurring because the intended expropriation had become known earlier; and (d) be fully realizable and freely transferable.

The above article highlights two things that are very fundamental but as a matter of principle, expropriation is permitted but with some attached conditions. From this provision, there is public purpose and after public purpose the owner has to be paid fair compensation in due time. It is important to note that the fair value is denominated in a sound and free usable currency and should not be less than the fair market value on the date of expropriation including the commercially reasonable interest that accrue from when expropriation is done and the payment is effected. When one reads the provisions of this article together with article 28 of the law on expropriation of 2015, which provides for criteria for fair compensation. The article provides that:

> The value of land and property incorporated thereon to be expropriated in the public interest shall be calculated because of their size, nature and location and the prevailing market rates. The compensation for disruption caused by expropriation

> to be paid to the expropriated person shall be equivalent to five percent (5%) of the total value of his/her property expropriated.[53]

Analyzing the above article we find that the legislator had in mind the threshold of fair compensation by taking into consideration the size, nature and the place where the property to be expropriated is located. More important to note is that expropriation and modalities of doing it, is proved respectively under article 6 of the BIT between Rwanda and USA, and article 6 of the BIT between Rwanda and Turkey as well as article 5 between Rwanda and South Africa.

> "In case of expropriation for purposes of public utility, the citizens of one of the two countries, residing or established in the other, shall be placed on an equal footing with the citizens of the country in which they reside in respect to indemnities for damages they may have sustained".

2.1.1.2. Controversial Valuation of Property and questionable concept of public interest

The government has the right to expropriate property in the public interest and for qualified private investment under the expropriation law. The government and landowner negotiate compensation directly depending on the significance of the investment and the size of the expropriated property. Valuation of expropriated property is often controversial. For instance, for the case of Rwanda, the implementation of the Kigali Master Plan has from time to time prompted some cases of expropriation, and some proprietors of the property in chosen zonal places were obliged to erect storied business buildings or risk being potentially evicted from their property. The afore-mentioned law on the expropriation for the public interest requires the government to pay adequate compensation to property owners before evicting them from their property. As previously highlighted, the 2015 law on the investment promotion and facilitation does not allow the expropriation of the property of a foreign investor for the public interest to happen unless the said investor is adequately compensated. The questions, nevertheless, remain whether expropriation process was duly adhered to before investors are evicted.

For example with the BIT between Rwanda and Morocco and Mauritius the concept of expropriation has gained more prominence and it is become one of the indispensable

[53] Law N° 32/2015 of 11/06/2015 Relating to Expropriation in the Public Interest. Article 28.

provisions while signing the bilateral treaties Because article 4 of the above mentioned BIT with morocco and art 6 of the BIT with Mauritius provide for expropriation in the following terms: "investments of investors of either Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalized or subjected to any other measures of dispossession (hereinafter referred to as "expropriation" except for a public purpose, in accordance with due process of law, on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the fair market value of investment expropriated immediately before the expropriation has taken place or before impending expropriation become publicly knowledge whichever is the earlier. Compensation shall be paid without any undue delay and shall be freely transferable. In case of a late payment, the compensation shall include interest at a commercial rate from the due date in accordance with national legislation until the date of payment". [54]

There have been disagreements hovering over the concept of public interest in reference to land expropriation in Rwanda. Infrastructural utility projects such as putting in place roads, public schools, hospitals, electricity, water facilities and sewage disposal facilities are considered of public interest for they generally reap benefits to the public. However, the definition of the expropriation law also includes other activities including but not limited to: activities to implement master plans of the organization and management of cities and national land in general as well as any other activities destined or considered of public interest like national land in general as well as any other activities which are not indicated on this list which are approved by the Ministerial Order in charge of expropriation, at own discretion or upon request by other concerned persons.

It is worth noting that the scope of public interest has been extended and has offered a window for private commercial activities to be regarded to be of public interest which, as highlighted in the preceding paragraphs, include the implementation of the Master Plan. Conversely, this remains a contentious issue as some would feel that these shouldn't be considered of public interest. Confronted with the predicament, this has been exploited by private investors to lobby relevant government authorities to consider their projects as serving public interest. And once they are successful, investors obtain a benefit from

[54] Both article 4 and 6 of the BIT between Rwanda, Morocco (2016) and Mauritius (2001)

government assuming responsibility for locating, surveying and expropriating land on their behalf.

2.1.1.3. Interference over property rights during expropriation

Expropriation by and large bears negative consequences to property owners since it deprives them of uninterrupted use, enjoyment or disposal of property but this has to be done within a reasonable timeframe. It hence can be argued that when host nation's measures, for a long, do seriously affect or interfere with the property rights of investors, courts are more or less expected to establish that such measures tantamount to expropriation. Conversely, in a situation where the host nation's measures do modestly affect or interfere with the rights that accrue from the property of the investor and that such interference is for a relatively short period, the courts shall likely deem such a measure doesn't equate to expropriation. A number of arbitral courts have bought this idea and subscribed to this school of thought without necessarily giving a distinct perspective regarding the seriousness or severity or when a court ascertains such measures are for a long period to amount to an expropriation.

Relatedly, it is imperative to have a glance at the following courts' jurisprudences where tribunals have rules on the issue of state intrusion over property rights through expropriation method. The well known case in the "Theory of interference is the popular case of Pope and Tabold Inc V Canada". In this case, a U.S. fully owned company with a subsidiary registered in Canada defied the enforcement of the famous Sofwood Lumber Agreement, which has imposed an export control regime.

The aggrieved party (Investor) put forward an argument that the export control regime amounts to expropriation as per article 1110 of the North American Free Trade Agreement (NAFTA), which provides the following:

> "no party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment, except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law

> and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6."[55]

The arbitral tribunal argued that the interfering with the investor's property needs to be considerably adequate in order to be considered as expropriation. This is to say that the arbitral court in a bid to define interference, there are certain checks to pass in order to determine that such interference has indeed deprived the owner of his or her rightful property. The arbitral court analytically opined that in order for expropriation to occur, it necessitated a considerable amount of interference and not an insignificant one.

In the arbitral court's point of view even though there was a considerable amount of interference, it did not meet all the requirements to be considered expropriation since the investor reserved full ownership rights over the company business. This is what also inspired a philosophy of reasoning in a popular case of Sempra Energy International V Republic of Argentina. In this case, the arbitral court reached the conclusion thus:

> "Significant withdrawal results from depriving the investor of control over the investment, daily management of company's operations , arresting and detaining company officials or employees, supervising the work of officials, interfering in administration, impeding the distribution of dividends, interfering in the appointment of officials or managers, or depriving the company of its property control in the whole or in part.[56]

In the context of Rwanda, taking cognizance of the pressures from the central government for districts to encourage investment and planned urbanization give rise to the valuation controversy from which different views including scholars qualify the as state interference. There have been a number of cases following the land market price; the valuated fair compensation during expropriation was much higher than what was budgeted by the district considering outsourced land and property valuators mandated by the law to carry out land and property valuation. From the perspective of the provisions of the 2007 expropriation law, there was a lacuna of the definition of market value and clear guidance on how to compute it. Compensation needs to reflect the market value of the

[55] Article 1110 of north American free trade agreement (NAFTA)
[56] See case of Sempra Energy International v. Argentine Republic (ICSID Case No. ARB/02/16)

property at the time of expropriation and reflects the price of a transaction between a seller and a buyer.

Extra difficulties in property valuation originate from corruption and failure to abide by ethical codes of conduct; lack or limited skills among those in the valuation profession; and inadequate management and capacity of the Institute of Real Property Valuators.

2.2. Other Issues Surrounding Compensation

Claims over late compensation have been numerous in a number of expropriation deals. In some places, owners of properties have waited for long time to be compensated and this is dissimilar to what the law stipulates. Specifically, article 36 par.1 of the law N° 32/2015 of 11/06/2015 Law relating to expropriation in the public interest reads thus:

> "The approved fair compensation shall be paid within a period not exceeding one hundred and twenty (120) days from the day of its approval by the District or City of Kigali Council or the relevant Ministry. If fair compensation is not paid within the period provided under Paragraph One of this Article, expropriation shall become null and void unless otherwise agreed upon between the expropriator and the person to be expropriated.[57]

Another analysis of the expropriation procedure is that there is absence of public consultation though it is provided in expropriation law under its article 14 to convene a consultative meeting with the population prior to expropriation.[58] The claim of people is that they are not adequately informed thus there is inefficiency in expropriation acts because people do not have enough information so that they may participate in the process. While people have an opportunity to express their views, they articulate that they do not have influence over the expropriation decision. This process does not concede any share in decision-making, and district personnel are under no obligation to consider people's views or adopt their recommendations, which can implicate much interests of investor from the countries that have entered into bilateral investment treaty.

[57] Article 36 of the law N° 32/2015 of 11/06/2015 Law relating to expropriation in the public interest
[58] Idem. Article 14

2.2.1. Position of BITs vis-a-vis Investment Disputes Settlement

As a matter of principle, dispute settlement is one of the key elements to be considered while signing an agreement being civil or commercial. In investment related cases, parties have to choose the way of the dispute settlement. More importantly, there is an institutional framework on dispute settlement and one such avenue is through the International Center for Settlement of Investment Disputes (ICSID). Nevertheless, it is rather essential to first analyze the dispute settlement provisions embedded in BITs signed by Rwanda.

Taking the example to the BIT between Rwanda and USA both parties agreed to include in the agreement a mechanism for dispute settlement whenever they arise. The important thing to note in this treaty is that both parties decided to resort to consultation and negotiation before submitting the issue in arbitration. Article 23 of the treaty provides that: "*In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of nonbinding, third-party procedures*."[59]

The treaty further provides for arbitration in case of failure to reach on the agreement in consultation and negotiation. The crucial thing to note in this agreement is that before submitting the claim to arbitration for determination, the claimant has to give the respondent a notice of intention to sue. In this notice the claimant has to indicate the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise; for each claim, the provision of this Treaty, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions; the legal and factual basis for each claim; and the relief sought and the approximate amount of damages claimed. In a situation where six months elapses without relief, the claimant may submit to arbitration the case as explained in the above provision.

Looking at the BIT between Rwanda and turkey concerning the point on dispute settlement, the parties have opted for provisions under article 10 which provides that *"this article shall apply to disputes between one contracting party and an investor of the other*

[59] Article 23 of the bilateral investment treaty between Rwanda and the United States of America (2008)

contracting party concerning an alleged breach of an obligation of the former under this agreement that may cause loss or damage to the investor or his /her investments".[60]

As stated in the preceding paragraph, when negotiation in good faith fails, within six months' period, the aggrieved party has the option to submit the case to a competent court for determination. This is different from the BIT signed between Rwanda and USA, which provides for arbitration. The article 10(2) (i) provide for court of the contracting party in whose territory the investment has been made. This entails that the domestic courts of the contracting states are taken into consideration in dispute settlement. This is a good aspect of the treaty because choosing another jurisdiction entails also the additional costs in case of the determination.

For the issue of dispute settlement, the BIT signed between Rwanda and South Korea has set a mechanism for settling controversies that may arise throughout the treaty. This particular treaty provides for disputes settlement between the party state and the investor and on the other hand, the dispute between two contracting states, on the other. While starting from the settlement of disputes opposing the state party and the investor article 11, which provides for Settlement of Investment Disputes between a Contracting Party and an Investor of the other Contracting Party. This article provides that it will apply whenever there is a breach of the provision of the treaty on the side of investor.[61] This treaty offers the same points with other talked about ones since the component of consultation and negotiation is progressed, which appears the purposeful of parties to cooperate with each other. With respect to contentions that may emerge between two contracting parties, the settlement of these disputes is highlighted under article 10 of the treaty. Like within the dispute contradicting state party and speculator investor, the endeavor to resolve the dispute in ways of amicable settlement and arrangement takes priority.

2.2.2. The cost of arbitration for business disputes resolution

Arbitration has got to be progressively well known and it is the foremost a fundamental method of dispute settlement in a number of investment disputes. But parties regularly embed these agreements without a genuine understanding of what these clauses can have.

[60] Article 10 of the bilateral investment treaty between Rwanda and Turkey (2016)
[61] Article 11 of the BIT signed between Rwanda and South Korea (2013)

Disputes on circumstances can be a less alluring elective to the court framework. Arbitration is ordinarily seen as a quicker, less costly when compared to courts' proceedings. Whereas this may be genuine, there are no guarantees. Arbitration , depending on the referee and the institution administering arbitration can move gradually.

In Rwanda, the cost of an administrative agent and the arbitrator can make simple matters much more expensive than litigation when it comes to arbitration. In the case involving one arbitrator the total cost of arbitration is $1750. The costs include administrative fees ($750) and arbitrator fees ($ 1000) whereas the case that involves three (3) arbitrators the cost goes up to 3750 in total for administrative and arbitrators' fees.[62]

2.2.3. Lack of formal mechanism to publish draft laws for public comment

The government frequently uses policies and effective laws to raise clear rules consistent with global standards and institutions have clear rules and procedures. Nevertheless, there is lack of official platform upon which one can make public proposed laws seeking public observations to sustain transparency of laws and regulations framework and efficiency in capital markets and investment portfolio, even though civil society on occasional basis has the chance to review and give comments on the draft laws. Some investors do often claim that there is harsh implementation of the taxation law, labour laws that truly affect investment despite the presence of BITs.

Consequently, there is no proper legal method to be used by non-governmental organizations to give views and comments over draft laws. The present legal and accounting structures are transparent and they are consistent with worldwide standards but what is amazing they are not always implemented. In Rwanda, the Office of Auditor General was created in 1999 and its main mission was to audit and controls government and its entities. The discovered misconducts and corruptions are reported and criminal investigations are initiated to hold those involved liable.[63]

[62] See the calculation fees in arbitration at http://kiac.org.rw/feecalculator.php, accessed on 20/10/2019
[63] Rwanda Business Law Handbook Volume 1 Strategic Information and Basic Laws (2015), available at: www.ibpus.com, accessed 20/10/2019

Both foreign and local investors can find detailed information on administrative procedures that are applied in investment and the income generation applicable to investment. This inter-alia include: the number of necessary steps; name of people in charge of processes and procedures; entities' contact details, requisite documentation and requirements, cost details, time-frame for the processing; and the required legal framework. These, by and large, determine market dynamics and help foreign investors negotiate loans from local financial institutions.[64]

2.2.4. Other challenges impeding effective implementation of BITs

In Rwanda business incorporation is very easy. However, operation can sometimes be encumbered with difficulties pertaining to often bureaucratic delays by government to effect payment services and goods furnished and sometimes changes in terms and conditions obtaining from a Memorandum of Understanding (MoU) throughout the period of contract dealings or issues of additional taxes. In this globalized world, land ownership and administration are subjected to both domestic and international rules. Given the fact that foreign investments have accumulated overtime, it has led to land pressures often triggering land wrangles to become more trans-nationalized. Therefore, in order to regulate this predicament, investors have often sought redress in BITs and arbitral tribunals to address tensions and wrangles emanating from land ownership. Inter-state investment treaties can consequently have impact in influencing major land reforms geared towards regulating land malpractices like land grabbing and hence ensuring a sound land administration regime. Whereas in certain aspects these repercussions are just imaginary, the arbitral courts have now revised the legitimacy of host country's behavior vis-à-vis land re-allocation, land restoration and assessment, land zoning regulations, corporations, occupations, and land transaction dissolution. A real safeguard against subjective host nation's behavior is essential in upholding fairness and due process.[65]

However, land ownership matters are also complex and controversial, since investment treaties often shield foreign landowners from rightful claims by the local population (often poor and marginalized groups), over land. By hiking the cost of land redistribution, land tenure restitution or of public action to tackle land grabbing, investment treaties are more likely to be at crossroads with contemporary progressive land policies including the

[64] Ibid.
[65] World Investment Report 2018, p. 93

implementation of the VGGT. The pre-determined investment treaties necessitated countries to eliminate limitations on land acquisition rights that distinguish foreign investors and the local investors.[66]

In reference to the context, this has the potential to enhance transactions over land related issues in areas where land plays a vital role of social value. Investment treaties could further render governments liable for their conduct caused in main by shortfalls in judicial and administrative matters. Courts' decisions provide indicators on how arbitral courts consider the intricacies of land relationships in relation to investment misunderstandings by removing illegal investments from protection, and also considering whether investors were conscious and knowledgeable about land tenure related risks whenever they are interring in investment framework. Nevertheless, there are lingering critical issues which are unresolved and it is fascinating to see how courts decisions will develop eventually.[67] Further research will be paramount to establish how investment treaties will operate in the wake of complex situations where arbitration do not offer clear-cut solutions and to large extent remain obscure to the public knowledge.

Nevertheless, further thorough study and assessment of legal perspectives and the developing body of investor state arbitration literature offer various passages that link international investment treaties to local land rights. Scholars advance that government should bear in mind the total expenses and cost needed as well as government action in compensating when foreign investors suffer losses due to acts of the government or its entities. They further observe the stark divergence between the legal protection conferred to foreign investors, and the legal insecurity that many of people in rural areas are subjected to. Given increasing competing interests on the worlds natural resources that have exacerbated land tensions, there are still misgivings on the law regulating foreign investment about whose rights are being protected and how. However, from the policy point of view, there are certain international arrangements that protect land owners from arbitrary host state's possible abuses.[68]

[66]Investment treaties, land rights and a shrinking planet, available at: https://www.iied.org/investment-treaties-land-rights-shrinking-planet , accessed 15/10/2019
[67] Lorenzo Cotul, Land rights and investment treaties Exploring the interface (2015), p.3
[68] Democracy and International Investment Law, available at: https://www.researchgate.net/publication/314244548_Democracy_and_International_Investment_Law, accessed on 16/10/2019

On the one hand, there are genuine queries concerning why foreign investors are accorded more protection when compared to what is offered by international law while on the other hand one also wonders why identical lands could attract dissimilar amounts of compensation owing to differences in the origin of the owner of the land. The main aim of investment treaties remains primarily to stimulate the flow of investment between state parties to investment agreement, by means of guaranteeing investors assurances that they shall enjoy the benefits that accrue from the investments made. However, indications determining whether the protective measures are provided for in the provisions of investment treaty seems to have procedural complications. For instance, there is no probative proof that shows that compensation norms excluding a major factor of public interest while acquiring investor's land play a crucial role in promoting investment. Sometimes, it is debatable that foreign investors should enjoy distinct protection on the mere fact that they are not represented in decision making of the country that has hosted them.

It is important to note however, that the above interpretation of being in political decision making gives a picture of different ways that can be used by both foreign and domestic corporations to have influence in policy initiation or implementation. While big foreign investments are mostly linked with greater monetary value that are deemed to involve extra complex legal protection, the loss that people suffer because investment may be more greater is relative. The loss of a very small land can lead to the total incapacitation of people in affording their necessary needs of the daily life and of course people may become very poor and lose hope.

Citizens in countryside value much the rights over immovable properties and they do consider this as the fundamental and basic right and the international human right law really recognizes this and it considers this as protection of both collective and customary immovable properties rights of native citizens as well as local communities. The reason behind this is that people in rural areas depend much on land to get food, housing but also to protects the territories of their ancestors.

These various concerns demonstrate that the land customary rights of people living in the countryside are as worth and deserving of legal protection as is the case with foreign investors. Ultimately, the edge between investment treaties and land rights reflects tension between land rights and investment treaties reflects an encounter and tensions

among different stakeholders from the poor landless people to commercial farmers and global capitalists. This therefore calls for different approaches in order to address different systems of property claims from the local customary systems to international treaties; and also different considerations of land as a commercial asset, or as a source of socio-cultural and spiritual value.

The late jurist Patrick McAuslan narrated that:

> "There is a clash here of laws and cultures. At the formal national and international level, it is the culture of globalization that impels the development of laws and policies based on the free and equal opportunity to invest in land to facilitate land being used to its highest and best purpose without regard to such irrelevant matters as the nationality of the user. A government that ignores the social aspect of land however retrogressive it may seem to devotees of the market does so at its peril. At best, there will be clashes on the ground between investor and locals; at worst, ignoring local beliefs and attitudes to land can lead and has led to widespread local violence and civil wars."[69]

To conclude this part of the research, it is very imperative to note that utmost difficulties as earlier mentioned are linked to various measures in connection to the operation of sensible issues of expropriation and differences resolution. Consequently, according to the findings that have been identified as part of the difficulties met, foreign investors are also affected by the measures that are being implemented when there are issues related to expropriation, to valuate property without forgetting to indicate the lacuna of legal definition and elements of the concept itself in public interest in the context of expropriation. After thorough discussion about difficulties in this chapter, the third and last chapter of this research work will put much emphasis on protection mechanisms for investors in the bilateral investment treaties.

[69] Lorenzo C., Land Rights and Investment Treaties. Exploring the Interface. https://www.iss.nl/sites/corporate/files/67-ICAS_CP_Cotula.pdf

CHAPTER III: PROTECTIVE MECHANISMS FOR INVESTORS IN BILATERAL INVESTMENT TREATIES

3.1. Introduction

Throughout the previous chapters, numerous impediments impeding effective implementation of bilateral investment treaties were highlighted. Therefore, while introducing a chapter on possible protection mechanisms for investors, it is appropriate to talk about African BITs. As noted by Dr. Karugarama Richard in his PhD Thesis, the BITs signed by African countries bear small discrepancies in the headings of the treaties which include expressions such as reinforcement of reciprocal and mutual protection of investment and economic cooperation. Albeit, fundamentally, there are no clear distinctions among distinct expressions used while signing BITs between African States.

As earlier stated, the headings of BITs entered by African countries are entitled using catch phrases of promotion and protection of foreign investment or reciprocal and mutual protection og investment. The difference lies on the selection of words rather than actual connotation of words. Preambles of BITs that have been signed by African Countries show that negotiators bear in mind social cultural bonds including good sociability and as the outcome of this, the benefit from this is to enhance economic relations among states parties. Important to note, the African's ways of living are inserted in BITs they do sign. A typical sample is the BIT signed between the Republic of Tanzania and the Netherlands.

The first words of this treaty show that there is a clear and regulated framework that the security accorded for foreign investors shall bring more capital and technological flows thus trigger advanced economic prosperity mutually advantageous to both states' parties to the treaty. Throughout this chapter, numerous mechanisms for protection available for investors in Rwanda as the host county are discussed. Therefore, these protection measures are at various levels of decision making and policy and laws reform.

3.1.1. Protection Measures in the grounds of BITs signed by Rwanda

Apart from Fair and Equitable Treatment, it is clear in the Treaty of investment protection signed between Rwanda and USA that parties have deliberately opted to include in the same provision the element of full protection and security. The treaty further provides for

the notion of National Treatment and Most Favored Nation and more importantly, the treaty provides for Compensation for damage or loss and transfers of capital returns from investment.

In all bilateral treaties, State parties take into consideration protection measures ranging from National Treatment, protection of investment, security and unlawful expropriation. This particular part substantively analyzes protection measures that are embedded in the BIT signed between Rwanda and United States. National treatment is the assurance of a country to accord to foreign investors and to foreign controlled enterprises in its territory treatment no less favourable than that accorded in similar situations to domestic enterprises. This particular element is taken into consideration in the Treaty of investment protection signed between Rwanda and USA.

As earlier indicated, investors should be accorded the protection against unlawful expropriation so that they feel comfortable with their business and whenever this happen; they are assured that fair compensation is granted. This protection is stipulated under Article 6 of the BIT between Rwanda and USA. The article provides that:

> Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization, except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law and Article 5(1) (3).[70]

Transfer clause is the clause in BITs that targets to enable the transfer of funds being capital, interest and other benefits that are attached to investment. In the BIT between Rwanda and USA, this clause is provided under article 7 where it is provided that each Party shall allow all transfers linked to a covered investment to be made freely and without delay into and out of its territory.[71] In the spirit of stimulating investors and promotion of investment, Turkey is one of the countries that accepted to cooperate with Rwanda in terms of investment promotion. The BIT between two countries was signed on 3 November 2016. When one looks at the heading of this treaty, it is clear and obvious

[70] Article 6 of the BIT between Rwanda and USA
[71] Idem. Article 7

that the overall purpose of the treaty is to promote investment. Unlike the USA-Rwanda BIT, Article 3 of this treaty provides for Promotion and protection of investments.

As highlighted, the momentum for the signing of BITs has gradually increased in this enhanced business era. The year 2000 marked the signing of the BIT between Rwanda and South Africa. This BIT was signed on 19th October 2000 in Kigali. As the purpose of the BIT itself indicates, article 3 of the agreement provides for investment promotion between parties. In addition to promotion of investment, State parties have agreed on mutual cooperation on compensation for loss in case of war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot. In a nutshell, one can argue that the BIT concluded between Rwanda and United Arab Emirates has put much emphasis on the protection measures since by and large, it included all standards of fair and equitable treatment in tandem with investors' protection measures. With regard to protection measures, the treaty provides for Compensation for Losses and Transfers

In all aspects of business life, investment is a key source of revenues that boost countries' economies. Rwanda and Mauritius signed a BIT in order to foster the smooth environment of business. The signed BIT envisaged establishing protection measures for the investors that are incorporated in the treaty. At the outset, like the USA BIT, there is a provision on the compensation for loss. Article 5 par.1 of the treaty provides that:

> "Investors of either Contracting Party whose investments in the territory of the other contracting party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, not less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State. Resulting payments shall be freely transferable at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force."[72]

[72] BIT between Rwanda and USA. Supra note. Article 6.

In addition to the above, the treaty has set out a threshold of transfer of investment capital and return. Under article 7 of this treaty, the transfer of investment capital and returns are provided as a measure to promote the protection of investors. The preamble of this treaty shows the will of State parties to promote investment between States. The paragraph 2 of the preamble stipulates that parties wish to put in place conducive environment for greater investments by investors of states parties in the territory of the other Contracting Party, based on the doctrines of equality and mutual benefit.[73] Under no circumstance can this be achieved without inserting provisions on the protection. Article 4 of this treaty provides for compensation for loss departing from war or other armed conflict, a state of national emergency, revolt, insurrection, riot or other similar situation.[74] In addition to compensation, the transfer of capital and returns is provided under article 6.

The BIT between Rwanda and Germany is among the most ancient investment treaties that Rwanda has signed. This treaty was signed in 1967 shortly after Rwanda gained independence in 1962. It is rather intriguing to understand how this treaty was negotiated given the undeveloped nature of the business environment that was prevailing in the country at the time. The treaty does not provide much protection for the investors since it is not well developed. The translation of article 2 of the treaty provides that *"a contracting party will not submit on its territory, the companies and the companies of the other contracting party , with regard to investments of which they are proprietary or subject to their influence. In addition to the above protection, Article 4 provides for right to capital transfer"*.[75]

The BIT between Rwanda and Belgium is also among the oldest BITs that Government of Rwanda has since it was signed in 1985 on 2nd November. This treaty is very detailed and it provides for all aspects of business life. Starting from protection of investment provided in Fair and Equitable Treatment, which is stipulated in article 3 of this treaty. The treaty further provides for transfer of capital and returns from investment in order to facilitate movement of investors' capital.

[73] Idem. Art 7 (2)
[74] BIT between Rwanda and USA. Supra note. Article 4
[75] Article 2 of the BIT between Rwanda and Germany of 1967

3.1.2. Effective implementation of rule of law Protecting Foreign Investors

Whenever there is a need to stimulate and attract investors from across the world it is imperative to primarily have in place the legal framework on the protection of their investments since no investor wishes to venture into businesses without established guarantees for their protection. To overcome this anxiety, a number of laws have been enacted and investment climate smoothened to ease the flow of investments. It is in this context that the law N° 06/2015 of 28/03/2015 relating to investment promotion and facilitation was promulgated. This law specifically has articles on the protection of investors and the asset being immovable or movables.

Article 6 of the law reads that:

> "an investor shall have the right to own private property, whether individually or in association with others. Private property, whether individually or collectively owned, shall be inviolable. No investment, interest in or right over any property forming part of such investment shall be seized or confiscated except where provided under relevant laws. No action to expropriate an investor's property in public interest shall be taken, unless the investor is given fair compensation in accordance with relevant laws."[76]

According to the above provision there is protection of investors in Rwanda. Protection does not come from the vacuum but rather on other existing legal instrument that have been adopted. A very good example is the Rwanda constitution of 4ht June 2003 as revised in December 2015 especially article 34, which provides that *"Everyone has the right to private property, whether individually or collectively owned. Private property, whether owned individually or collectively, is inviolable. The right to property shall not be encroached upon except in public interest and in accordance with the provisions of the law".*[77]

According to the article 34 of the law N° 43/2013 of 16/06/2013 governing t land in Rwanda, it is evident that the ownership of the land is protected from any eviction unless

[76] Law n° 06/2015 of 28/03/2015 relating to investment promotion and facilitation. Article 6
[77] The constitution of Rwanda of 4ht June 2003 revised in December 2015. Article 34

there is an issue of expropriation.[78] These legal protection measures enshrined under the laws of Rwanda have also taken into consideration investment protection. The crucial thing and good example to note is the aforementioned BIT between Rwanda and United States whereby it has even the title of investment protection. In this particular treaty between the United States of America and the Government of Rwanda concerning the encouragement and reciprocal protection of investment, article 5 provides for minimum standards of protection and security. The article provides that either party has an obligation to accord and cover investments in accordance with existing customary international law that include fair and equitable treatment and full protection as well as security."[79] Article 6 partly mentions that to foster the protection measures one has to put much emphasis on arbitrary expropriation so that the investor may feel comfortable on the land where they have invested. This article highlights that neither party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization except for a public purpose in a non-discriminatory manner on payment of prompt, adequate, and effective compensation; and in accordance with due process of law.

The concept of the rule of law has both substantive and procedural dimensions. The procedural dimension of it largely addresses the means by which the state applies the law to a particular individual. This dimension is largely governed by the principle of due process. Due process in general requires that one to whom the coercive power of the state is to be applied receive notice of the intended application and an opportunity to contest that application before an impartial tribunal. Customary international law has set as a prerequisite that investors from foreign countries be treated fairly with due process before local and administrative jurisdictions. Failure to comply tantamounts to denial of justice. Denial of justice which implies failure of the due process constitutes a breach of the fair and equitable standards that are meant to encourage investment. Hence, fair and equitable treatment requires a conduct consistent with the procedural dimension of the rule of law.

The rule of law also has a substantive facet which is ingrained in the scope of the concept itself. The rule of law concept is often defined in relation to its alternative, the rule of mankind. This necessity for the rule of law rests on the desire to forestall arbitrariness. In

[78] Article 34 of the law N° 43/2013 of 16/06/2013 governing the land in Rwanda
[79] BIT between Rwanda and USA. Supra note. Article 5

other words, in a government of men, a person is subjected to mercy of the rulers whereas in a government of law, it restrains the rulers from exercising their powers arbitrarily. Thus, at its core, the rule of law requires judiciousness. Thus, a first principle of the rule of law is reasonableness. A law by definition needs to be general and precludes discrimination; it stipulates that under specific circumstances, a duty or right arises in relation to specific people. This infers that all conditions that fall within the category will bear similar legal effect. Cases of likeness must be dealt with in a like manner. This is what is termed "the Principle of Consistency". At the upper degree of generality, this principle may likely invoke security. Furthermore, the legal effect or consequence may also occur with respect to persons without regard to their distinct individual identity. This is what is known as "the Principle of Nondiscrimination". Lastly, in order for the law to be binding, it has to be known by means of publication both in the country and worldwide and this implies the standard of transparency.

The afore-mentioned four (04) principles of reasonableness, consistency, non-discrimination, and transparency substantively stand at the heart of the rule of law. The content of the law is hence characterized by reasonableness; its structure by consistency and nondiscrimination, while its operability by transparency. Thus, international arbitral awards interpreting the fair and equitable treatment standard have incorporated the substantive and procedural principles of the rule of law into that standard. In a nutshell, the Fair and Equitable standard found in BITs has been interpreted as requiring that foreign investors and their investments receive treatment that is reasonable, consistent, non-discriminatory, transparent, and accorded due process. These principles explain virtually all of the awards applying the fair and equitable treatment standard.

Understanding fair and equitable treatment as legality is in line with the objectives of the BITs. BITs fundamentally are tools that impose legal restraints on the treatment of covered investments and investors by host states. The rationale of a BIT is a partial subordination of the sovereign's power to the legal constraints of the treaty. Additionally, individual BIT provisions reflect the principles of the rule of law and its underlying principles as previously highlighted. As an illustration, the warranty of most-favored nation and national treatment plainly invokes the non-discrimination norm; the prevention or guarding against discrimination unequivocally reflect the reasonableness principle; the obligation of full protection and security on its part invokes the security principle;

whereas the provisions for investor-state dispute settlement overtly reflect the due process standard. The principles of BIT are at the same time rule of law principles.

When one reflects on the BIT signed between Rwanda and Belgium its article 3 provides that:

> "All investments that are made by individuals or corporations under private law of one state which is party to the agreement must be accorded fair and equitable treatment in the territory of the other state".

This shows that FET is an essential element in BITs since it gives ample protection of nationals of contracting party.

3.2. Guaranteeing the invocation of the fair and equitable treatment standard

The fair and equitable treatment, without doubt, is the most invoked principle in investment treaty and settlement of disputes that arise in enforcement of treaty through arbitration. Its importance and relevance, as a measure of investment protection, should not under any circumstance, be undervalued. The existence of the fair and equitable treatment standard in international BITs is not a new concept by any means. In principle, the first citation of the of fair and equitable treatment standard traces its origins from 1948 Havana Charter of the International Trade Organization though it has not been effective but has since influenced subsequent developments in as far as the advancement of the standard is concerned. Certainly, that very same year, this showed to be the case when the Economic Agreement of Bogota was concluded albeit the fact that it was objected to by Guatemala and Mexico. Relatedly, the 1950s and 1960s ushered in renewed relative progression of the FET standard with such clauses often featuring in various investment protection texts with heightened frequency including the Abs-Shaw cross and OECD draft treaties as well as several BITs concluded by the United States during this period.

Certainly, as the time evolved, the FET standard gradually but steadily formed part of the formally ratified regional and international legal instruments notable among them the Draft UN Code of Conduct on Transnational Corporations and the 1985 Multilateral Investment Guarantee Agency Convention.

The FET standard is absolutely an outstanding feature among most International Investment Agreements (IIAs) concluded by less developed countries to date. It is worth to note that the standard can be applied whereby it can be described as the ground rule of modern foreign direct investment agreements, in actual fact underscoring the fundamental tenet of the rule of law. Widely seen as a benchmark for developing countries' exercise of administrative, judicial or legislative powers in relation to foreign investors, the FET standard has taken over the mantle of its own, in effect, redefining acceptable restrictions on state integrity whilst also bringing about changes to the legal system pertaining to investments in these particular states. The right to Fair and Equitable Treatment has more coverage and scope than the right to most-favored nation and to national treatment.[80]

Whereas FET principle certainly has wide-ranging implications for governments of developing countries, there is no effective conceptual scrutiny of the standard that can be completed without first forming some initial points. Firstly, one must consider the fact that developing countries should enjoy complete sovereignty over their territorial space and this enables them to permit foreign investors to set up investments on their territory. In case a license of operation is granted, the investor is then subjected to the existing legal framework of the state in question, while the government, has to adhere to the rules set and published beforehand in order to pursue its actions, which enable persons to ascertain how much of coercive force shall authority embark on in a given circumstance.

Professor Detlev Vagts advanced his argument that in principle FET being the embodiment of these principles guards against acts or omissions taken by host states, which culminates into the failure of foreign investments. It is against this backdrop that foreign investors have demanded governments in developing countries clear and sound protection measures of their immovable and movable properties, in order to effectively forestall unpredictable or unnecessary arbitrary outcomes of government actions which may negatively affect investment climate. In understanding of an investor, maintaining a constitutional and administrative framework that actually functions represents a considerable progression of the rule of law and the imposition of the FET standard in a top-down approach is probably the most efficient and remarkable avenue of circumventing the entrenched practices of local elites and special interest groups, who are

[80] Marcela K, B. Fair and Equitable Treatment: An Evolving Standard University of Heidelberg, Max Planck Institute for Comparative Public Law and International Law and the University of Chile, March 2005

one of main persons in charge for the organizational weaknesses of developing countries. When taking a typical example of the Investment treaty signed between USA and Rwanda in 2008, it is clear in its article 5 that FET is well developed but implementation needs to be reviewed and effectively implemented.

The fair and equitable treatment standard is a key component is the modern international investment agreements. Over the past years, FET has come out as the most relied upon and flourishing foundation for international investment agreements claims by investors. The FET standard protects investors against serious cases of arbitrariness, discrimination or any abusive conduct by host countries. Therefore, it constitutes a core investment protection aspect of international investment treaty. The central concern of this research is that the FET standard may be applied in investor State arbitration to limit host-country administrative and governmental actions to a level that could likely jeopardize the autonomy and territorial integrity of that country. This comes about due lack of clarity in respect to the best approach to both the interpretation and application of the standard. On the one hand, there is uncertainty surrounding which sources of law can be employed while deciding the good and formal limitations of discretion to interpret the principle in question. Besides, there is anxiety of the actual substantive content of the principle.

Experts in legal and economists alike have a habit to approach the discussion of foreign investment in developing countries from the point of view of property rights. They advance that a clear protection of property rights is essential for the overall purpose of encouraging foreign investment in developing countries and that once this investment has occurred, corrupt States must protect these property rights in order to prevent arbitrary expropriation of investor's property. A number of experts have suggested that developing countries adopt legal property regimes from developed countries without considering whether the formal and informal mechanisms for protecting property rights in a developing country can be exploited or developed in order to provide the type of confidence and stability necessary to encourage foreign direct investment.

This part tries to bridge the gap regarding analysis of one legal standard often found in investment agreement, which is of course, the standard of fair and equitable treatment. At present, there is considerable debate about whether this standard; common too many BITs should be interpreted in line with the minimum standard set out in international law, or whether these treaties are intended to apply a more rigorous standard. The minimum

standard is supposed to ensure a minimum standards of treatment for foreigners in a host state that is separate from the treatment guaranteed by domestic law to citizens of the host country.

In different decisions of investment arbitration tribunals, the standard of fair and equitable treatment was broader compared to the traditionally minimum standards. These tribunals have argued that fair and equitable treatment should provide substantive protection for the investment of a foreign country. This interpretation does not accord with the case law or State practice, which suggests that fair and equitable treatment, should be equivalent to the minimum standard and provide protection for procedural fairness and duly diligent consideration of the effects of a proposed government policy on foreign investors. This means that a host country must ensure that it consults foreign investors and properly take into consideration the impact of proposed domestic policy changes on them. However, the principle of fair and equitable treatment should not provide protection against financial losses that do not amount to expropriation.

It may sound strange to discuss the equivalence of the principle of fair and equitable treatment with the minimum standards, given that developing countries have frequently objected to the recognition of a minimum standards that are embedded in international law. This objection was built on the fear that the standards are enforced negatively in favour of developed countries seeking to uphold the rights of foreign investors who are most of the time from those developed World. International trade and investment agreements already impose obligations on a host State concerning investors that are separate from the treatment required by domestic law. It is thus too late to roll the clock back and oppose minimal fairness requirements in international law

As discussed above, National Treatment protects citizens from the discrimination on the basis of its nationality and in recent years the nationality treatment standard has been overlapped by other international norms , for example the standard of fair and equitable treatment. A number of reasons are advanced for this. First and foremost, FET standard does not, like national treatment standard require" like "situations and conditions. Secondly, the FET standard does not require discrimination based on the origin of the investor. Third, if the State has expropriated in public interest the investor's investment the discrimination is a fact and it has to be taken into consideration while assessing the situation. For some authors, FET principle was put in place to grant better and favorable

conditions to investors when compared to those offered to nationals when the situations are not god, injurious and unfair for investors but the combination of the two need the mind and brain of courts to set a clear cut.

A number of experts and arbitrators have analytically discussed the distinction between national treatment and fair and equitable treatment standard. For instance, some reached the conclusion that the right to fair and equitable treatment goes much farther than the right to most favored nation and to national treatment. Generally a provision is likely almost sufficient to cover all believable cases and it may all be that provision of the agreement affording substantive protection are not more than example of specific instances of this overriding duty.

3.2.1. Adopting FET by recognizing the role International Court of Justice

To study the legal basis of FET standard, it is indispensable to examine the source of international law. The main source of international law which has commonly been accepted is article 38 (1) of the statute of International Court of Justice (ICJ) which states that:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law;[81] the general principles of law recognized by civilized nations; subject to the provisions of Article 59, [.e. that only the parties bound by the decision in any particular case,] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The sources of international law are described in the above-mentioned article of ICJ statute and it is beyond doubt that it establishes three main bases namely treaties, customs and general principles of laws. According to Roland, the sources of all the sources listed up in the article are legal basis for the FET standard. Article 42 (1) of ICSID, convention provides that: The tribunal shall decide parties may agree a dispute in accordance with

[81] Article 38 (1) of the statute of International Court of Justice (ICJ)

such rules of law as. In the absence of such agreement, the tribunal shall apply the law of contracting State party to the dispute including its rules on the conflict of laws and such rules of international law as may be applicable.[82]

3.2.2. The place of the Convention on the Settlement of Investment Disputes

In addition to article 38 (1) of ICJ , article 41 (2) of the Convention International Centre for settlement of Investment Disputes which makes also the source of law because it refers to applicable law in the field of ICSID arbitral disputes, the provisions of article 42 (1) of ICSID convention is not directly linked to the provisions of article 38 (1) of the Statute of ICJ, the expression and such rules of international law as may be applicable" gives the arbitrators a room to choose to use the provisions of article38 (1) the ICJ statute. Article 42 (1) is therefore understood as an option for the tribunal to determine the applicable substantive rules of international law , to be applied, in accordance with the source set forth in article 38(1) of the statute of International Court of Justice. In the case of MTD v. Chile, the tribunal applied international and departed from the provisions of BIT.[83]

Article 42 (1) of the Convention on the ICSID is crucial in determining the applicable law to the merits of the dispute between parties. This article requires the arbitral tribunal to "decide a dispute in accordance with such rules of law when the parties have opted so". This being a dispute under the BIT, the parties have agreed that the merits of the dispute be decided in accordance with international law.[84] For the purpose of article 42(1) of the convention, the parties have agreed to this arbitration under BIT. This instrument being a treaty, the agreement to arbitrate under BIT requires the tribunal to apply international law.

3.2.3. The place of Vienna Convention on the Law on Treaties

Another relevant convention, which has the face that can help in interpretation of investment standards, is the Vienna Convention on the law on treaties (VCLT) of 1969. Article 31 of the Convention is normally accepted and considered the most important as it states the general rule of interpretations based on customary international law. The article

[82] Article 42 (1) of ICSID
[83] Case No. ARB/01/7 MTD Equity Sdn. Bhd. and MTD Chile S.A. ICSID
[84] Article 42 (1) of the Convention on the ICSID

have also been repeatedly accepted by international arbitration tribunals as constituting rules of interpretation which are binding upon them in the interpretation of investment treaties, whether by virtue of being directly binding upon the parties to BIT as a treaty rules, or as customary international law.[85] In the case opposed Azurix and Argentina exemplifies this, the tribunal confirmed that the BIT should be interpreted in accordance with the provisions of Vienna Convention on the Law on treaties. The BIT is an international treaty and it should be interpreted in accordance with international norms set by Vienna Convention on the Law on Treaties, which is binding on States parties to the BIT. The provisions of article 31 (1) of the Vienna Convention requires that the treaty be interpreted in good faith in accordance with ordinary meaning to be given to the terms of the treaty.

3.2.4. Role of Umbrella Clause in the implementation of BITs

Known worldwide as the mirror or parallel effect clause or pacta sunt servanda, the umbrella clause is a treaty provision found in many BITs that requires each Contracting State to observe all investment obligations it has assumed with respect to investors from the other Contracting State. The idea behind the metaphor is that an umbrella clause brings otherwise independent investment arrangements between a Contracting State and private investors from the other Contracting State under the treaty's "umbrella of protection." Its purpose is to create an equal shared obligation between states to observe investment agreements that investors may enforce when the BIT confers a direct right of recourse to arbitration.86 More specifically, the history of the umbrella clause makes clear that it was designed to allow for any breach of a relevant investment contract to be resolved under the treaty in an international forum.

Within the framework of a bilateral investment treaty, a clause that confers to the host state to observe specific obligations towards foreign investors who bring their capital inside the country. An umbrella clause protects investments by bringing obligations or commitments that the host state entered into in connection with a foreign investment

[85] See the provision of the article 31of the Vienna Convention on the law on treaties (VCLT) of 1969.
[86] Yannaca-Small, K. (2006), "Interpretation of the Umbrella Clause in Investment Agreements", OECD Working Papers on International Investment, 2006/03, OECD Publishing. http://dx.doi.org/10.1787/415453814578OECD Working Papers on International Investment 2006/03Interpretation of the Umbrella Clause in Investment Agreements Katia Yannaca-Small

under the protective "umbrella" of the BIT.[87] Investors often rely on an umbrella clause as a catchall provision to follow claims when a host state's actions do not otherwise breach the BIT. Umbrella clauses are usually broadly written to cover every conceivable obligation of the host state.

An umbrella clause can raise a contract claim to the level of a treaty claim. Frequently, the breach of a contract does not entail treaty protection under international law. However, adding an umbrella clause to a BIT imply the following:

i. Efficiently circumvents that customary restriction by expressly stating that a violation of an investment contract equates to a violation of the BIT.
ii. Removes the need for investors to rely on the dispute settlement clauses in an investment contract (which may, for example, give exclusive jurisdiction to local courts).
iii. Permits an investor to bring the claim before an international arbitral body, such as the International Centre for Settlement of Investment Disputes (ICSID).

In the context of international law, it is not clear whether a state breaching the clauses of a contract with an investor qualifies total violation of an international obligation. Such a breach may simply be treated as a simple and pure domestic commercial matter. As such, investors were often forced to resolve any disputes over their contracts with the host state in that state's local courts and under its domestic laws and it was criticized to be vulnerable because state concerned may to unilateral make a variation or amendment of the applicable law and the investor falls into loss while international courts/ tribunal considers parties to the dispute on the same footing.

3.3. Guaranteeing full Protection and Security of BITs

All recent BITs have some kind of clause that ensures protection and security of investors of either party to it. The language that is used for the purposes of protecting and safeguarding investment varies depending on the desire of parties, but these variances in wording do not cause harm in the ways of interpretation. Important to note, as observed some non-US provisions do not include or refer to FET, neither do they make reference to

[87] Ibid.

international law, and just a small number appear to include the standard of FPS together with the doctrine of FET under the same Article in a BIT.

As scholars like Schreuer, have argued that the opinion that supports the FPS, just like fair and equitable treatment standard, was suggested to stand as an independent agreement principle that is autonomous from the minimum standard of treatment in international law should be a better one and more appropriate. He further insisted that, 'in respect to the well-known meaning of the phrase, it is not easy to pinpoint the reason why negotiators and writers choose to employ the terminology 'full protection and security' to signify the 'minimum standard under customary international law'. He concluded that the idea would be good and well designed if the agreement includes different wording to accommodate traditional international law'.

One cannot advance an argument that the terminology of fair and equitable treatment and the standard of FPS are parts of customary international law when considering a number of investment treaties, traditional international law, and minimum standards of treatment granted by host States to aliens as it has been clearly addressed, rather that, its protective length to investments should be extended to legal security and should not be limited to physical security only if the protective length is not extended to legal security, foreign investors and their investments will not cease to undergo harms caused by the host state yet they should enjoy protection as nationals of the host state.

Additionally, full protection and security is found in a number of international instruments and comes in different patterns and forms. For example, in older treaties practices the FPS standard was typically a stand-alone provision but nowadays it is combined with Fair and Equitable Treatment standard in one BIT. A typical and good example is article 1105 (1) of Northern America Free Trade Agreement (NAFTA) where two standards are combined.[88]

Other BITs contain FET standard, the FET standard and also the non- impairment standard in one clause. For example, the BIT signed between Israel and Georgia provides that investment made by investors of each party shall be granted fair and equitable

88 Article 1105 (1) of Northern America Free Trade Agreement (NAFTA)" "Each party shall accord to investments of another party investment treatment in accordance with international law with fair and equitable treatment and full protection and security"

treatment and shall enjoy full protection and security in the territory of the other state and no party impair by unreasonable or discriminatory measures.

On the other hand, some BITs have the FPS standard and the non- impairment standard without the FET standard.[89] The fair and equitable treatment without doubt is the most invoked principle inmost investment treaty arbitration. Its significance, as a standard of investment protection, is very valuable. While the full protection and security standard is less invoked in isolation of FET, it has in the past played an important role in relation to investments affected by armed conflict.

There is a noteworthy and rather neat distinction between the design of FET and FPS in both, North-American investment treaties and 'Western Hemisphere' bilateral investment treaties (BITs) which are used in European States. The latter tend to include FET as a stand-alone standard of treatment, while North-American investment treaties, as exemplified inter alia in the North-American Free Trade Agreement and the US Model BIT 2012, tend to equate FET with the customary norm on the international minimum standard of treatment that includes providing full protection and security.

In addition to North-American investment treaties and 'Western Hemisphere' BITs, The United Nations Conference on Trade and Development (UNCTAD) considered in a 2005 study, that a third approach is found in South-South BITs which however differs only limitedly from the preceding two models. This research thesis tends also to test that finding and its relevance today, by investigating whether African investment agreements have specific ways of approaching things. It will give a clear-cut line in relation to the FET and FPS standards of treatment.

The focal reason of this thesis on this particular aspect is that the concepts of FET and FPS are not significantly impacted by the mere fact of being included in investment treaties between African States or between African states and third States from other part of the world. The main reason for this, as I will explain, is that African States usually make no use of their own model BIT and thus, when negotiating and signing BITs with

[89] Article 3(1) of the BIT signed between Croatia and Latvia (2002). For instance, article provides that each contracting party shall extend in its territory full protection and security to investment and returns of investors of the other contracting party. Neither contracting shall hamper by arbitrary and discriminatory measures

third States, use is made of the model BITs of the European or North American partner States which sometimes affect African countries..

The FET standard is a supple and rather ambiguous notion. Nevertheless, it is largely accepted that the genuine prospects of the foreign investor make a potential element of FET, as are obligations of due process, transparency, freedom from coercion and harassment, stability, predictability and a general duty of due diligence.

Practically, there are roughly four models of FET clauses that are used while interpreting BITs , except for the possibility of course to not include any FET provision at all such as in the Australia-Singapore Free Trade Agreement of 2003. First, FET can be a standalone (unqualified) clause, in that FET is included without any specific reference to another treaty standard or to its content. Because of their stand-alone and unqualified character, tribunals usually consider the clause in a broad manner. Secondly, FET can be attached to the phrase 'in accordance with international law'. Such clauses purpose is meant for ensuring that the interpreter uses principles of international law, including, international customary law and general principles of law to recognize the scope and content of the standard. Thirdly, FET can be equated to the IMS, as is the case, for instance, in the 2012 US Model BIT. Fourthly, FET can be used in combination with some specific substantive content, such as the prohibition of a denial of justice or non-discrimination.

GENERAL CONCLUSION

Throughout the study, different treaties have been substantially analyzed in their provisions with the purpose of finding out protection measures. The complex issue is to ascertain which among the signed treaties by Rwanda offers better protection measures. What is more apparent is the fact that these treaties do not offer same protection measures. The reason to explain this is perhaps that these treaties have been concluded in different times with the new evolving business environment and changes in understanding. As discussed the BIT between Rwanda and United States of America gives much emphasis on the protection measures and is more elaborate compared to the one between Rwanda and Germany signed in 1967, the two treaties cannot offer the same protection because the time of conclusion, things have changed dramatically to extent that the current BITs have new features of protection that had never been envisaged before.

The role of investment, particularly foreign direct investment (FDI), is regarded as one of the most important contributors of economic growth. At different periods of the development of the human society, the attitudes of different countries towards FDI have changed. Until recently, some countries maintained a restrictive stance. While some countries have closed their markets to foreign direct investments, others, including Rwanda, have become liberal and they opened their markets to foreign direct investment.

Therefore, they see foreign capital as an opportunity for market development. Lately, most of the countries that have implemented a restrictive stance, seeing the effects of FDIs in the economic development of countries that have open their markets have changed their attitudes toward FDIs. Hence, they are becoming open to foreign direct investment and are implementing various programs with various measures to attract foreign direct investment. In this context, many countries especially developing countries have recognized the importance of foreign capital and the impact that the flow of that capital has for the local economy in a view to ensure the FDI is strengthened, several BITs have been concluded by a number of countries.

In all these BITs, there are protection clauses on both sides. On the Rwandan side, in all ratified BITs, protection measures are incorporated although the protection measures differ in content and scope given different periods they were concluded as previously discussed in the aforementioned paragraphs. The current BITs are well developed and they detail all protection measures ranging from fair and equitable treatment and full

protection and security to investors, transfer of capital and returns from investment, treatment in accordance with international law minimum standard of treatment, restitution, indemnification, and compensation in case of loss. All the treaties do share these protection measures but as this study's findings shown the implementation of BITs have resulted in some challenges, which constitute impediments to the protection measures for foreign investors as highlighted in previous paragraphs. The interest behind all these protection measures is to promote investment by making investors feel like they are in their home countries when they are transferring their capital in host states.

Along this study different aspect in investment including protection measures and standards such as fair and equitable treatment, full protection security, and the relationship among all those standards in investment promotion have been subject to analysis. In addition, the study touched on the concept of expropriation and how it sustains investment in the sense that foreign investors are given security guarantees for their investments. However, its implementation is challenged in many ways whereby some irregularities were pointed-out as obstacles to the BITs implementation.

It is evident that the provisions in many BITs signed by Rwanda are more or less similar and largely offer sufficient protection to foreign investors. It is however unclear whether Rwanda, signatory to these treaties, reap commendable benefits from these treaties or whether her nationals have benefited from these treaties to invest in foreign countries.

The reality is that many States now, especially from the West, have a tradition of influencing developing countries where they want to invest to subscribe to their BIT models irrespective of being unrealistic to their context. Consequently, some of the developing States have designed their own BIT models rather than subscribing to rubber-stamp BITs. Rwanda, as well, in one way or another, is a victim of rubber-stamp BITs, and thus it is imperative to design its own model aligned with national priorities, as well as mutual benefits. Therefore, for the purpose of this study some recommendations are advanced:

- Rwanda should adopt its own model of BITs to serve as reference point to ensure national priorities;
- Rwanda should establish permanent chamber so that all investment disputes between African countries can be settled in the land other than pushing the

disputes out of the country, which entails of course the extra cost that comes to become a burden to the State.

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