Articulating Clearer Fair and Equitable Treatment Clauses Within Tanzania's International Investment Agreements: Correcting the Disparity between Host State and International Investor Interests

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Declaration.

I declare that this research paper is presented for examination for the PhD degree of the Canterbury Christ Church University is Solely my own work.

Abstract

International Investment Agreements seek to promote foreign investment whilst protecting foreign investors. Despite the goal of International Investment Agreements being to secure parity between the interests of the host State and the foreign investor, there has been consequential disparity in the protection of the interests of both parties. Notably, the host State is susceptible to disadvantage. This research examines the extent to which International Investment Agreements in Tanzania have facilitated this disparity. In particular, the research evaluates the inclusion of fair and equitable treatment provisions in Tanzania's International Investment Agreements and the extent to which fair and equitable treatment provisions have in some way facilitated this disparity.

The research examines systematically the fair and equitable treatment provisions contained in twenty IIAs signed by Tanzania between 1965 and 2013 (eleven of which are still in force). The research takes a comparative approach in evaluating and contrasting the Tanzanian provisions with other fair and equitable treatment clauses in IIAs signed by India, Morocco and the Netherland. The Tanzanian provisions are vague and non-uniform in comparison.

The research is situated in the broader context of national sovereignty and the relationship between Tanzania and its foreign investors under international law. The substance of the analysis centres on foreign investors in the mining sector in Tanzania and the extent to which these investors have sought to take advantage of the fair and equitable treatment clauses in the IIAs in order to pursue their activities to the detriment of local populations. The research evidences the negative impact of their claims that changes in government policy (often aimed at benefiting citizens) amount to unfair treatment of the foreign investor. This has a significant impact on the ability of the government to develop its policies around sustainable development, environmental protection and the guarantee of human rights of the citizens of the host State.

The research demonstrates that a clearer and fuller articulation of fair and equitable treatment clauses within Tanzania's IIAs can act as a corrective to the disparity between the host State and the international investor. This requires that IIAs are drafted to include an exhaustive and full list of the State's obligations towards the foreign investor so as to limit foreign investor claims against the host State. The impact of not doing so has grave implications for the rights of the citizens of Tanzania and unnecessarily tips the balance of power in favour of the foreign investor and away from the host State. This undermines the ability of the host State to assert its sovereignty within its own borders.

List of Abbreviations

BIT – Bilateral Investment Treaties

CETA – Comprehensive Economic and Trade Agreement

EAC – East Africa Community

FDI – Foreign Direct Investment

FET – Fair and Equitable Treatment

ICSID – International Centre for Settlement of Investment Disputes.

IIA – International Investment Agreements

ISDS – Investor -State Dispute Settlement

OHCHR - Office of the United Nations High Commissioner for Human Rights

REC – Regional Economic Communities (RECs)

SADC – Southern African Development Community

SDG - Sustainable Development Goals

Tanzania – United Republic of Tanzania

UN – United Nations

UNICTAD – United Conference on Trade and Development

UNICTRAL – United Commission on International Trade Law

VCLT – Vienna Convention of Law of Treaties

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CHAPTER ONE: THE UNITED REPUBLIC OF TANZANIA'S EVOLVING INTERNATIONAL INVESTMENT POLICY

1. Introduction

This research examines the extent to which International Investment Agreements in Tanzania facilitate a disparity between host States and Foreign Investors through the inclusion of very vague fair and equitable treatment provisions in Tanzania's International Investment Agreements.

This chapter introduces this examination. It does so in five sections. Section 1.1 will briefly describe the country profile, then provides an overview of Foreign direct investment in Africa paying attention to Tanzania, explaining the purpose and reason of signing the exiting IIAs, and challenges that the exiting IIAs has posed to the state(s), and the available reform process and national, regional and international level. Section 1.2 explain the issues posed by IIAs particularly the core protection standard Fair and Equitable Treatment(s) and discuss a classic case that influenced the need of this research. Section 1.3 shared the research questions of this research, followed by the research significance in section 1.4, research contribution in 1.5, structure of the research 1.6 which provide a road map of the whole research and a summary of the chapter in 1.7.

1.1 Foreign Investment in Tanzania

The United Republic of Tanzania ((Tanzania hereafter) is one of the largest East African's countries with a total area of 945,087 square kilometres, of which 886,037 square kilometres are land, and 59,050 square kilometres are water, and population of approximately 60 million people.[1] The country is endowed with a diverse of natural resources, including minerals, Mount Kilimanjaro, Lakes, National Parks, and islands, which makes it one of the top foreign investment destinations in sub-Saharan Africa.[2] Since its independency Tanzania in 1961, the Government of Tanzania has been going through a number of fundamental changes in both

[1] Mr Madu, "Top 10 Largest Countries in East Africa" (2022) Available at https://talkafricana.com/top-10-largest-countries-in-east-africa/ accessed 17 July 2022

[2]Elizabeth Asiedu, "Foreign Direct Investment in Africa: The Role of Natural Resources, Market Size, Government Policy Institutions and Political Instability" (2006) *World Economy*, 29, 63-77.
Steven Poelhekke and Frederick van der Ploeg, "Do Natural Resources Attract Nonrecourse FDI?" (2013) *The Review of Economics and Statistics* Vol. 95, No. 3 (July 2013), pp. 1046-1065

national and international level to liberalise its economy.[3] In relation to foreign investments Tanzania offers numerous incentives, framework agreements for investments, and number agency such as The Tanzania Investment Centre (TIC) to help promote and attract Foreign Direct Investment (FDI).

Tanzania is fast becoming a Foreign Direct Investment hub in Africa, and it is a matter to which the Tanzanian government has responded by endorsing innovative investment treaty reforms aimed at limiting the country's exposure to investor-state disputes and rebalancing their International Investment Agreements (IIAs) to better protect national interests,[4] by limiting investor's ability to bring repeated suits against the Host State which inevitably negatively impacts on the Host State. For instance, Tanzania's emerging international investment policy is analogous with the developments across the entire African continent. It should be emphasised from the outset that during the mid-twentieth century, the international architecture that governed foreign investment was conceived in accordance with an arbitration-based dispute settlement mechanism. Concurrently, Bilateral Investment Treaties (BITs) were developed as a means of promoting and protecting foreign investment. However, the newly independent African States did not play an influential role in these developments.[5] Institutional bodies such as the International Centre for the Settlement of Investment Disputes (ICSID) were also created and vested with the responsibility to resolve disputes that may arise between signatory States and foreign investors on the breach of the terms in the BITs.[6]

As of June 2022, Tanzania has a total of 20 (twenty) BITs negotiated with different countries[7] (see chapter 4), which includes South Africa, Oman, Italy, Egypt, Germany, United Kingdom,

[3] David Potts, "Policy Reform and the Economic Development of Tanzania" (2008) *BCID Research Paper No.14*
Bradford Centre for International Development, Available at https://core.ac.uk/download/pdf/5563.pdf accessed 20th July 2022, Arne Bigsten and Anders Danielsson, "Is Tanzania an emerging economy?
A report for the OECD project" Emerging Africa" (1999) Available at
https://www.oecd.org/countries/tanzania/2674918.pdf accessed 12 July 2022

[4] OECD,"Overview of progress and policy challenges in Tanzania"(2013) in OECD Investment Policy Reviews available at https://www.oecd.org/daf/inv/investment-policy/IPR-Tanzania-2013-Overview-Progress-Policy-Challenges.pdf accessed 12 June 2020

[5] Cite literature that discusses African history on investment United Nations, "Investment Policy Review: The United Republic of Tanzania" (2002)

[6] ICSID Convention, Regulations and Rules, Available in
https://icsid.worldbank.org/sites/default/files/documents/ICSID%20Convention%20English.pdf accessed 12 June 2020

[7] See in International Investment Agreements Navigator: Tanzania available in
https://investmentpolicy.unctad.org/international-investment-agreements/countries/222/tanzania-united-republic-of accessed 17 June 2020

China, Sweden, Canada, and Mauritius. [8] However, only 11 (eleven) out of the 20 BITs are in force, and the other 7 (seven) are signed but not in ratified 2 (two) are terminated. Tanzania has also signed other treaties with investment provisions which includes the Southern Africa Development Community (SADC), East Africa Community (EAC) as well as the newly concluded African Continental Free Trade Agreement (AfCFTA) which includes a Protocol on Sustainable Development.[9] The investment agreements assumed to encourage the increase of FDI to host States mostly in developing States (such as Tanzania).[10]In addition, FDI considered to beneficial to developing State's Tanzania hence the increase of negotiated IIAs since independency. [11]

At the end of colonial era, in the 1960s, the majority of African nations experienced economic stagnation, which pushed them to sign BITs with developed economies to encourage more inward FDI and accelerate economic progress.[12] Many African countries including Tanzania, signed BITs not necessarily for economic liberation but as a demonstration of political independence.[13] And for such reason, the agreements were signed under excitement with little attention of the implications of them on their territories.[14]

[8] James Thuo Gathii, "Understanding Tanzania's Termination of Its BIT with the Netherlands in Context" (2019) Available from https://www.afronomicslaw.org/2019/04/01/understanding-tanzanias-termination-of-its-bit-with-the-netherlands-in-context (accessed 20 November 2020)

[9] See in https://investmentpolicy.unctad.org/international-investment-agreements/countries/222/tanzania-united-republic-of accessed 23 May 2020

[10] Michael Frenkel, and Benedikt Walter, "Do bilateral investment treaties attract foreign direct investment? The role of international dispute settlement provisions" (2018). Godbertha Kinyondo, "Determinants of Foreign Direct Investment in Africa: A Panel Data Analysis" (2012) *Global Journal of Management and Business Research* Volume 12 Issue 18 Version 1.0

[11] Cosmas Masanja, "The extent to which Foreign Direct Investment (FDI) contribute to the growth of host economies: evidence from Tanzania" (2018) *Business Management Review* 21(1), pp.1-22 ISSN 0856-2253 (eISSN 2546-213X). Gaston GohouIs and Issouf Soumaré, "Does Foreign Direct Investment Reduce Poverty in Africa and are There Regional Differences?" (2012) *World Development* Vol. 40, No. 1, pp. 75–95, 2012. Mercy T. Musakwa, Nicholas M. Odhiambo, "Foreign Direct Investment and the Poverty Reduction Nexus in Tanzania" (2020)
Journal of Applied Social Science, Available at the impact of foreign direct investments on sustainable development in Africa: Can this contribute to poverty alleviation."https://journals.sagepub.com/doi/abs/10.1177/1936724420913582 . Irene Joas Rugemalila, "The impact of foreign direct investments on sustainable development in Africa: Can this contribute to poverty alleviation." (2005) .ILO, " FDI in Mining and Sustainable Development in Africa" (2014) Available at https://www.ilo.org/empent/units/multinational-enterprises/WCMS_314429/lang--en/index.htm

[12] Talkmore Chidede, "The Right to Regulate in Africa's International Investment Law Regime" (2019) Oregon Review of International law vol. 20, 437

[13] Greg Hicks," BITs for Africa" (2015) Available at https://www.csis.org/analysis/bits-africa (Accessed 16, July 2017)

[14] Hamed El-Kady, and Mustaqeem De Gama, "The Reform of the International Investment Regime: An African Perspective" (2019) ICSID Review - Foreign Investment Law Journal, Volume 34, Issue 2, Pages 482–495, https://doi.org/10.1093/icsidreview/siz025 accessed 12 June 2020

On the other hand, developed or capital exporting states were eager to sign BITs with African nations to safeguard their nationals' investments there.[15]And for such reason the text of investment treaties were knee on favouring the interests of their nationals(investors) and not host states interest or addressing any issue related to sustainable development. [16]As rule takers and lack of expertise in the field majority of African countries including Tanzania signed IIAs without considering or understanding the nature, content and consequences of them in future.[17]

In recent years, the first generation of IIAs has been criticised on the implications it posed on developing host states when employing policies to achieve growth, industrialization, and sustainable development goals, including tackling inequality.[18] Understanding that, number of African states are now attempting to reorganise their own interests in a meaningful way in contrast to investors' interests as they face an unavoidable regime of International Investment Law (IIL). Akinkugbe argued leaving the IIL system is the least desirable choice; instead, African governments must continue to look for opportunities to make more significant, substantive reforms.[19]

African countries are now focussed more on economic liberations by active participation in the restructuring of the international economic system as reflected in three recent developments on that continent.[20] Firstly and foremost, a number of African countries including Tanzania have started to reform their national domestic framework protecting foreign investors, reviewing their domestic investment policies and embrace a new generation of BITs adopted

[15] Ibid
[16] Emmanuel Tetteh Laryea, Franziska Sucker, "The importance of an African voice in, and understanding and use of, international economic law" (2012) *International Economic Law: Voices of Africa*
[17] Alschner, Wolfgang, and Skougarevskiy, Dmitriy, "Rule-takers or Rule-makers? A New Look at African Bilateral Investment Treaty Practice" (2016) Available in https://www.transnational-dispute-management.com/article.asp?key=2357 accessed 06 July 2022. Gus Van Harten, *A Critique of Investment Treaties, in* rethinking bilateral investment treaties: critical issues and policy choices 41, 50 (Kavaljit Singh & Burghard Ilge eds., 2016).
[18] Kinda Mohamadieh, Challenges of Investment Treaties on PolicyAreas of Concern to Developing Countries" (2019) A G-24 Working Paper.Also see in UNCTAD, Reform of the IIA regime, available at: https://investmentpolicyhub.unctad.org/IIA/KeyIssueDetails/42. UNCTAD, in its World Investment Report 2016, stated that "reform to bring the IIA regime in line with today's sustainable development imperative is well under way." See UNCTAD, World Investment Report 2016, p. 108, available at: https://unctad.org/en/PublicationChapters/wir2016ch3_en.pdf accessed 12 June 2020
[19] Olabisi D. Akinkugbe, "Africanization and the Reform of International Investment Law" (2021) 53:1 Case W Res J Intl L 7.
[20] Anupam Basu, Evangelos A. Calamitsis, Dhaneshwar Ghura, "Promoting Growth in Sub-Saharan Africa: Learning What Works" (2000) *International Monetary Fund, Economic Issue No 23*. P.16

around the world while veering away from the European-style lean BIT model, characterised as first generation BITs, that is represented in a majority of older BITs.[21]

The Nigeria-Morocco (2016) BIT provides a canonical example of this departure, reflected in the longer than average BIT with innovative features with emphasis on sustainable development, imposition of limits and clarifications to the substantive protection stands and treaty obligations for investors.[22] These BITs have been classified as second generation due to their innovative features that seek to rebalance the treaty protection standards in favour of host States. As a result, a number of countries around the world such as South Africa, Canada, Egypt, China, Australia, India, Argentina, Bolivia, Venezuela and Ecuador have denounced the ICSID Convention or terminated BITs in response to concerns over national sovereignty and State exposure to investment claims. Furthermore, in process of resolving the issues that IIL has cause to African countries a non-binding continental investment law known as the Pan-African Investment Code (PAIC) was created and adopted by African nations under the aegis of the African Union. The PAIC seeks to establish a balanced investment agreement that encourages and safeguards investments while preserving the host states' policy options.[23]

Secondly, many academic commentators,[24] have started to undertake significant research on International Investment Law in Africa. The main thrust of this research being as exemplified

[21] Tarcisio Gazzini, "The 2016 Morocco–Nigeria BIT:An Important Contribution to the Reform of Investment Treaties" (2017) IISD ssue 3. Volume 8 ; Stanley Nweke-Eze, "BIT between Morocco and Nigeria – A Bold Step in the Right Direction?" (2017) Available at http://arbitrationblog.kluwerarbitration.com/2017/06/22/bit-morocco-nigeria-bold-step-right-direction/ (accessed 30 July 2017)

[22] "The Morocco-Nigeria BIT 2016 innovates, for instance requiring in mandatory terms that investors:
Uphold human rights, Act in accordance with ILO Declaration on Fundamental Principles and Rights at Work and Comply with environmental impact asse ssment requirements applicable under the law of the home state or the host state, whichever is more rigorous, and maintain appropriate environmental management systems." Available at IIED, "Responsible investment provisions in international investment treaties: where next?" (2017) Available at https://www.iied.org/responsible-investment-provisions-international-investment-treaties-where-next (assessed 2.06.2018). UNECA, "Reviving Investment in Africa: Constraints and Policies" (1995) Available at https://www.uneca.org/cfm1995/pages/reviving-investment-africa-constraints-and-policies accessed 12 July 2017); Tarcisio Gazzini, "The 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties" (2017) IISD ssue 3. Volume 8. p.2.

[23] African Union Commission [AUC], Draft Pan-African Investment Code (Dec. 2016), https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf [hereinafter Draft Pan-African Investment Code].

[24] Hamed El-Kady, and Mustaqeem De Gama, "The Reform of the International Investment Regime: An African Perspective" (2019) ICSID Review - Foreign Investment Law Journal, Volume 34, Issue 2, Pages 482–495, https://doi.org/10.1093/icsidreview/siz025 accessed 12 June 2020. Mmiselo Freedom Qumba, "assessing African regional investment instruments and investor–state dispute settlement" (2021) *International & Comparative Law Quarterly*, Volume 70, Issue 1, January 2021, pp. 197 – 232. Won Kidane, *Africa's International Investment Law Regimes* (2020). Talkmore Chidede, "The Right to Regulate in Africa's International Investment Law Regime" (2019*) Oregon review of International Law* [Vol. 20, 437. Olabisi D. Akinkugbe, "Africanization and the reform

by the Special Issue on developments in Africa (JWT (2017) 367–369).[25] They have also created platforms for debating pertinent issues in the field, such as the Arbitration Fund for African Students speaker series, which are likely to lead to further developments because of the continued exploration of these key challenges.[26] The findings show that African countries are starting to take active role in the development of innovative treaty practices in Africa coupled with the imposition of obligations on investors. For instance, the inclusion of obligations on investors is currently subject to negotiation at the at United Nations (UN) level in view of a Treaty on Business and Human Rights.[27] This transformation is supported by organisations such as the United Nations Conference on Trade and Development (UNCTAD) which continues to support Africa's reform efforts, by producing relevant statistical information on Africa.[28] The reform agenda is also driven forward by international organisations such as the United Nations Commission on International Trade Law (UNCITRAL) Working Group III. Furthermore, the renegotiation of many older BITs by Asian countries such as India and Indonesia clearly indicated that international investment law reform is no longer dominated by the capital exporting countries, Western Europe and North American States. [29]

Finally, Africa's transformation is being driven forward by regions rather than individual countries. The new regionalism in investment governance promises to recalibrate and harmonise international investment rules in Africa.[30] This is because Regional Economic Communities (RECs) such as the EAC, the Common Market for Eastern and Southern African Community (COMESA) and the SADC are coordinating and harmonising Member State's

Of international investment law" (2021) CaseWestern Reserve Journalof International Law 53. Yenkong Ngangjoh Hodu and Makane Moïse Mbengue*African perspectives in international investment law* (2021) Manchester University Press.

[25] UNCTAD, World Investment Report 2012: Towards a New Generation of Investment Policies (United Nations 2012). Karl P Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (OUP 2008)

[26] For example, Emilia Onyema, The Role of African States and Governments in Supporting the Development of Arbitration in Africa (SOAS/CRCICA, 2017).

[27] *See* United Nations, Report on the second session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (HRC, 04/01/2017) 34th session.

[28] *See* for example, UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD) and the 2012, 2013, 2014, 2015 and 2016 World Investment Reports.

[29] Investment Treaty News, "Ecuador denounces its remaining 16 BITs and publishes CAITISA audit report" (2017) Available at https://www.iisd.org/itn/en/2017/06/12/ecuador-denounces-its-remaining-16-bits-and-publishes-caitisa-audit-report/ accessed 24 June 2021 . Public Citizen Research, "Termination of Bilateral Investment Treaties Has Not Negatively Affected Countries' Foreign Direct Investment Inflows" (2018) Available at https://www.citizen.org/wp-content/uploads/pcgtw_fdi-inflows-from-bit-termination_0.pdf accessed 12 June2020 .

[30] It has also placed Africa in a unique position to make a contribution to international investment law on regional organisations as parties to IIAs.

investment policies while engaging with other regional organisations in a bid to achieve greater regional economic integration.[31]

These regional developments are not only shaping the course of international investment law reform but also intra-African investment policies through measures such a defragmentation of investment agreements from a bilateral to a multilateral model. This coalescing approach to investment law reform is evident in several regional and African Union (AU) led initiatives aimed at creating an African-wide Free Trade Area through a multilateral foreign investment agreement. On the latter, the Pan-African Investment Code (PAIC) represents the most tangible manifestation of an integrated policy on investment on the continent.[32] The PAIC is a strategic building block for the AfCFTA Sustainable Investment Protocol States; a move that promises greater economic integration, harmonisation in trade and investment, and sustainable development on the continent.[33] It is a move that is in tandem with Tanzania's new investment policy.

1.2 The Problem with International Investment Agreements in Tanzania

The IIAs do establish some terms, conditions, and rights between host States and home States (on behalf of foreign investors). However, the majority of the IIAs are centred on protecting foreign investors' interests, without the inclusion or recognition of State's interests. The difficulty appears to be striking the balance between investor protections and the host State's right to regulate its own economy and life of the citizen.

This research focuses on Tanzania's investment policy and the emerging concern over the potential risk posed by foreign investments and arbitrary State action under the law of host countries that could affect their investment. IIAs in Tanzania have posed threats to the nation's capacity to regulate in favour of national interests. According to the World Investment Report 2021, over 40 countries and about 4 regional integration organisations have revisited their model investment agreements.[34] For example, South Africa, Canada and the United States of

[31] See, United Nations Commission for Africa (UNECA), Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration: Implications for Regional Integration (Addis Ababa, Ethiopia, February 2016).

[32] Documents related to the negotiation of PAIC are not publicly available. An earlier draft of the PAIC (dated 26 March 2016) is available at <http://repository.uneca.org/handle/10855/23009> accessed 17 February 2017.

[33] *See* African Union, Draft Framework, Road Map and Architecture for Fast-tracking the Continental Free Trade Area, 2011

[34] UNCTAD, "World Investment Report: International tax Reforms and Sustainable Investment (2022) Available at https://unctad.org/system/files/official-document/wir2022_en.pdf accessed 22 July 2022

America have reviewed their BIT policy framework. Egypt, China, Australia, and India have stopped FDI inflows to some industries and terminated some of their treaties. The aim is to ensure that the agreements are balanced by promoting investment while enabling the States to regulate their economies and societies in a sustainable manner.

Furthermore, the benefits of attracting foreign investment in developing countries is outweighed by the cost of litigation associated with States resolving investment claims, which is often in millions of US dollars.[35] This is another reason for Tanzania to consider States revisiting investment protection standards within current and future IIAs. This is supported by Kollamparambil research which found 69 percent of claims brought by investors are against countries with a significant number of concluded BITs.[36] This means the higher number of treaties that a certain country has, the higher the chance of disputes, especially when such treaties are fashioned on the first-generation model.

FET clauses in Tanzania BIT's do not provide specific and precise meaning of it or set boundaries when it comes to interpretation of it. In other words, the wording of FET clauses in Tanzania BITs can now allow prediction of which State's measures can be considered as FET violation and require the state to be held accountable. Because of broadness and vagueness of exiting FET clause the 'right to regulate' in the public interest of the host state is frequently affected. These concerns have been raised specifically in response to FET claims, where investors have challenged a number of governmental measures taken for public interest even in sensitive areas.

This for instance, in Biwater *v. Tanzania* (2008) case.[37] It gave the impetus for Tanzania to review the wording of substantive protection standards in treaties as a result broad interpretation and inconsistency by investment tribunals. Like many other investment agreements Tanzania – United Kingdom included 'fair and equitable treatment' and 'full protection and security' as one of the substantive protections to investor, with the intention of granting investors and their assets protection, security and fair treatment in host States. The case of *Biwater v Tanzania* arose out of an agreement reached by Biwater Guff Limited and Tanzania under the United Republic of Tanzania – United Kingdom (1994) BIT for alleged

[35] Ibid
[36] Uma Kollamparambil, "Why developing countries are dumping investment treaties" (2016) The conversation. Available at https://theconversation.com/why-developing-countries-are-dumping-investment-treaties-56448 accessed 22 July 2022
[37] ICSID Case No. ARB/05/22

breach of Article 2(2) States that "investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered with regard to investments of nationals or companies of the other Contracting Party."[38] In the *Biwater case,* Tanzania terminated the contract with Biwater Gauff because Biwater failed to meet performance requirements. Biwater brought a case via ICSID with a claim that the contractual termination constituted a breached the BIT resulting in an illegal expropriation of their investment and a breach of the FET proposal.

Biwater claimed Tanzania had violated its obligation of providing FET and sought damages in range of $20 million (USD).[39] Even though Tanzania's decisions to terminate Biwater's contract was motivated by public interests. According to tribunal, full protection and security implies "a state guarantees stability in a secure environment, physical, commercial and legal".[40] Thus, the standard of protection can be extended beyond physical protection. The Tanzania's government's actions were deemed unreasonable and discriminatory, and characterised as unfair and inequitable.[41] The claim was successful as Tanzania was found to have violated Article (2) 'full protection and security' and Article (5) of Fair and Equitable Treatments.[42] Although the act done was in good faith, the investors still exercised their right to make claim believing they were not treated fairly. Damages were not awarded because Biwater failed to prove injury suffered. However, the Tanzanian government still faced the costly legal bills. In view of the *Biwater v. Tanzania* Case,[43] and other emerging cases against Tanzania.[44] In situation as such, this research aim to find out possible changes that can be made or implemented to address the inequalities between a country's rights and obligations to foreign

[38] Article 2(2) United Republic of Tanzania - United Kingdom BIT (1994)
[39] Andrea K Bjorklund, "ICSID Tribunal Finds Tanzania to Have Violated Bilateral Investment Treaty but Declines to Award Any Damages" (2008), The American Society of International Law Vol 17(27)
[40] Para 729. Krista Nadakavukaren Schefer 'International investment Law: Text, Cases and Materials'(Edward Publishing Limited, 2013)
[41] Epaminontas E. Triantafilou, "No remedy for an investor's own mismanagement: the award in the ICSID case Biwater Gauff v. Tanzania" (2009) Available in https://www.lexology.com/library/detail.aspx?g=50b20ce9-bb9a-4d6e-820f-c491ecc0e18c (accesses 12 January 2020)
[42] Biwater gauff (Tanzania) ltd., V. United republic of Tanzania, Arbitral award, ICSID CASE NO. ARB/05/22
[43] In (par.729) Tribunal Stated that "full protection and security implies a state guarantee of stability in a secure environment, both physical and commercial".
[44] Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited (TANESCO) (ARB/10/20

investors already in place? In other words, this research wishes to answer questions such as how can a circumstance similar to the Biwater v. Tanzania case be avoided? In situation where the Tanzanian government will be able to pass reasonable measures protecting its interest and public without being challenged by foreign investors.?

This research argues that the FET provision(s) drafting in Tanzania existing investment treaties and interpretation of it does not recognise or allow the government to exercise its sovereign power, particularly regulating in favour of public interest. Thus, proposing the need of clarifying the scope of FET standard in existing and future IIAs. The new FET proposed[45] is expected to protect the interest of foreign investors and allows Tanzania to exercise its sovereign such as regulating in public interest.

1.3 The Research Questions

As a result of these problems, this research therefore asks three questions.

1. How have the challenges Tanzania faces in developing its policies around sustainable development and the guarantee of human rights as a sovereign nation result from International Investment Agreements disparity been brought about by vague and unclear FET clauses in IIA' particularly BIT's?
2. To what extent can clearer and fuller articulation of fair and equitable treatment clauses within Tanzania's IIAs can act as a corrective to the disparity between the host State and the international investor? and
3. What should the suggested FET clauses include (to provide an exhaustive list of State's obligations towards the foreign investor so as) to limit foreign investor claims against the host State.

[45] FET with exhaustive list of States obligations. The obligations of FET towards foreign investors to be clarified in FET provision.

1.4 The Significance of this Research

Governmental and non-governmental organisations and academics have been pushing for changes to investor protection rules under investment agreements over the past 20 years.[46] All of this is done in an effort to balance the interests of investors through investment protection with other possibilities being investigated to assist States in regulating in the public's best interests.[47] The United Nations has been at the forefront of this reform drive through initiatives such as the UNCTAD Investment Policy Framework for Sustainable Development,[48] which propose reforming of old generation IIA by advising all nations to place a high priority on attracting investment that supports sustainable development and, and the Reform accelerator for IIA which focuses on the modification of the IIAs' substantive provisions to operationalize the concept of progressive innovation chosen focal points.[49]

The Economic Commission for Africa (ECA) noted, the majority of exiting BITs were signed decades ago and have a tendency to favour investors, leaving African states fighting investment disputes and having little to show for their investments. The research makes it abundantly obvious that investment is crucial for fostering economic growth, sustainable development, and funding development initiatives.[50] However, the findings also highlight the ambiguity surrounding bilateral investment treaties (BITs) and emphasise that it is still unclear how they will affect economic growth in Africa. In same report, Mr. Paul Jourdan, an independent mineral policy expert at the ECA, said perhaps African nations "signed these bilateral

[46] Chrispas Nyombi, *Rebalancing International Investment Agreements in Favour of Host States* (Hill Publishing 2018). OHCHR, "Reforming International Investment Agreements" (2021)Available at https://www.ohchr.org/sites/default/files/2022-06/Reforming-International-Investment-Agreements.pdf accessed 12 June 2022, UNCITRAL, "Reforming the International Investment Regime through a Framework Convention on Investment and Sustainable Development" (2020) Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a_framework_convention_on_investment.pdf accessed 22 June 20222, Lauge N. Skovgaard, Poulsen and Geoffrey Gertzm, "Reforming the investment treaty regime A 'backward-looking' approach" (2021) Briefing Paper Reforming the investment. Frank Garcia, Lindita Ciko, Apurv Gaurav, Kirrin Hough, "Reforming the International Investment Regime: Lessons from International Trade Law" (2015) Journal of International Economic Law, Volume 18, Issue 4,, Pages 861–892, https://doi.org/10.1093/jiel/jgv042

[47] UNCTAD, "Recent Developments in the IIA regime: Accelerating IIA reform" (2020) Available at https://unctad.org/system/files/official-document/diaepcbinf2021d6_en.pdf accessed 27 July 2022, OECD, "The future of investment treaties Background note on potential avenues for future policies" (2021) 6th Annual Conference on Investment Treaties, Available at https://www.oecd.org/daf/inv/investment-policy/Note-on-possible-directions-for-the-future-of-investment-treaties.pdf accessed 12 July 2022

[48]UNCTAD, "Investment Policy Framework for Sustainable Development" (2015) Available at https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf accessed 22 July 2022

[49] UNCTAD, "Recent Developments in the IIA regime: Accelerating IIA reform" (2020) Available at https://unctad.org/system/files/official-document/diaepcbinf2021d6_en.pdf accessed 27 July 2022,

[50] Economique Commission for Africa "New types of bilateral investment agreements offer Africa a chance for meaningful investments" (2016) available at https://archive.uneca.org/stories/new-types-bilateral-investment-agreements-offer-africa-chance-meaningful-investments accessed 22 July 2022

investment agreements too quickly" without carefully reviewing the fine print",[51] and acknowledged the need for reform.

Many new investment agreements are "getting to the stage where they may be renegotiated, and this creates a window of opportunity for African countries to make the BITS more favourable for each country" according to Haraguchi.[52]Thus, the new suggested IIAs are expected to promote foreign investment by assuring a good business environment to investors and protection and compensation (with limitations) while allowing governments to regulate in the public interest and other sustainable development goals.

Tanzania continues to look to FDI as a source of economic growth and development, and IIAs have been crucial in encouraging and safeguarding foreign investors.[53] However, if the government fail to examine and reform the current IIAs, Tanzania might not be able to accomplish its sustainable development goals.[54] However, Tanzania created a need for change by ending its BIT with the Netherlands, altering the criteria for investment in the area of natural resources, and restricting the use of international arbitration.

On the other hand, Tanzania has initiated a call for reform by first, terminating its BIT with the Netherlands in 2019 which its clauses were thought to be restricting the government's authority to control investments in the public interest, and that the BIT was seen as being inconsistent with Tanzania's most recent legal developments.[55] And second by introducing new legislation in natural resource sector,[56] altering that natural resources have exploited in a way that does not benefits the Tanzanian people, and reaffirming the nation's long-term sovereignty over

[51] Economiques Commission for Africa, "New types of bilateral investment agreements offer Africa a chance for meaningful investments" (2016) available at https://archive.uneca.org/stories/new-types-bilateral-investment-agreements-offer-africa-chance-meaningful-investments accessed 22 July 2022

[52] Mr. Nobuya Haraguchi, Industrial Research Officer at the UNIDO Office of the Deputy to the Director General in Economiques Commission for Africa, "New types of bilateral investment agreements offer Africa a chance for meaningful investments" (2016) available at https://archive.uneca.org/stories/new-types-bilateral-investment-agreements-offer-africa-chance-meaningful-investments accessed 22 July 2022

[53] Rosemary Stanley Taylor, "Foreign direct investment and economic growth. Analysis of sectoral foreign direct investment in Tanzania" (2020) *African Development Review* Volume32, Issue4

[54] Tanzania Data Portal, "Sustainable Development Goals of Tanzania" (2017) Available at https://tanzania.opendataforafrica.org/TZSDG2016/sustainable-development-goals-of-tanzania accessed 22 July 2022

[55] Sadaff Habib, "Tanzania Faces a New ICSID Claim under the Terminated Netherlands BIT" (2019) *Kluwer Arbitration Blog,* available at http://arbitrationblog.kluwerarbitration.com/2019/06/21/tanzania-faces-a-new-icsid-claim-under-the-terminated-netherlands-bit-2/#:~:text=The%20rationale%20behind%20the%20termination,that%20Tanzania%20had%20recently%20adopted. Accessed 12 July 2022

[56] See Natural Wealth and Resources Permanent Sovereignty Act 2017

those resources hence the introduction on new laws.[57]Is in line with research aims to give the government a purpose for reforming existing IIAs, this research will recommend a safe and reasonable method of reforming the existing investment treaties that will protect Tanzania and its public interests while promoting and protecting foreign investors.

1.5 Research Contribution

This research discusses how Tanzania's IIAs have made it difficult for the country to regulate in the national interest and propose potential solutions to sustainable development through modification of existing IIAs. The research argues that Tanzania can put in place investment agreements that would allow the government to regulate in the public interest while protecting the interests of foreign investors. According to Genevieve "BITs carry great potential for achieving development, but this potential can only be realized through substantial modifications to the current BIT regime."[58] Thus, through this research, the thesis suggests that investment agreements have the potential of supporting government (Tanzania) interests. And since the current relationship between FDI and IIAs is not clear,[59] this research encourages Tanzania's emerging policy direction of reviewing its existing BITs by suggesting the State to renegotiate its existing BIT by reduce the scope of FET clauses in to its existing and future IIAs to achieve sustainable development.

1.6 Structure of the Research

To address the research, purpose the thesis is divided in eight chapters. Chapter one is an introductory chapter which presents a general overview of the research, defines the problem, states the research significance, aims and articulates research questions. Chapter two focuses on a literature review and discussed the original contribution that this research makes to the

[57] James Thuo Gathii, "Understanding Tanzania's Termination of Its BIT with the Netherlands in Context" (2019) Available in https://www.afronomicslaw.org/2019/04/01/understanding-tanzanias-termination-of-its-bit-with-the-netherlands-in-context (accessed 22 February 2021). Also see Ibrahim Amir, "A Wind of Change! Tanzania's Attitude towards Foreign Investors and International Arbitration" (2018) Available in http://arbitrationblog.kluwerarbitration.com/2018/12/28/a-wind-of-change-tanzanias-attitude-towards-foreign-investors-and-international-arbitration/ accessed 22 March 2021

[58] Genevieve Fox, "A future for International Investment? Modifying BITs to drive Economic Development" (2014). Available at https://www.law.georgetown.edu/academics/law-journals/gjil/recent/upload/zsx00115000229.PDF accessed 20 February 2017

[59] The government have not made it clear if it wishes to terminate other IIAs after terminating its BIT with Netherland in 2019.However, following the introduction of new legislations which claims permanent sovereignty in natural resources, and not to forget the world trend of terminating and reforming IIAs (specifically BITs). It is concluded by this thesis that Tanzania Intent to reform its IIAs.

existing literature on this research. Chapter three explores and explains the methodology that will be used in this research and explains why particular methods were selected to support this methodology. Chapter four presents an overview on the legal system protecting foreign investments, at both national, regional and international level, by examining how FET in Tanzania's existing IIAs can pose challenges to the country and the reform options of FET that other countries have considered.

Chapter five explores the problems or limitations of the current legal framework though selected case studies, notably chapter five examines the challenges that Tanzania faces when protecting the interest of public, passing or reforming law within selected sectors host particularly, mining sectors. Chapter six discusses the findings from chapter five, and possible solutions that could resolve the problematic aspects of Tanzania by looking in details reform strategy taken by other selected countries (South Africa and India) who have faced similar challenges and from the analysis chapter seven will suggests the way forward to reforming IIAs in favour of host States through reform of FETs provision and discuss the limitation of implementing such reform proposal and chapter eight provides a comprehensive conclusion.

1.7 Summary of the Chapter

The chapter has introduced the purpose this research by providing a general background to the research topic, research problems, aims significance and questions expected to be answered throughout the research. It also includes the limitation and the structure of the research with a clear rationale premised on diagnosing the problem associated with broad FET provisions and seeking a solution by exploring different approaches from selected countries. In the next chapter the research moves forward by examining the existing literature relevant to these research questions and discusses the originality of this research.

CHAPTER TWO: LITERATURE REVIEW

2. Introduction

This chapter presents a review of the scholarly literature that has so far reviewed legal basis of protecting foreign investors under international law. But also examined and analysed the extent to which International Investment Agreements in Tanzania facilitate a disparity between host States and Foreign Investors, paying attention on the vague fair and equitable treatment provisions and examined and analysed solutions proposed for correcting the disparity brought about by very vague fair and equitable treatment provisions in International Investment Agreements. It further discusses the original or new contribution that this research makes to this existing literature.

A thematic approach is adopted into this literature review by examining different scholarly contributions in accordance to selected themes.[60] Using this approach will help justify the goals of this research and identify the significant areas related to the topic chosen and highlight the gap in the exiting literature is some of them such as the solution past of resolving the difference of host States and foreign investors interests. Accordingly, the discussion is divided into two parts according to three themes: first theme focuses on the literature that contributed to knowledge on evolution of IIAs in International Investment Law more importantly, the literature on the rationale of underpinning investments protection standards and its effectiveness. This will help a reader to have a clear understanding of the purpose of legal protection offered by international law and that is available in Tanzania. As they say "history is not only a gateway to the past, it is also suggestive of our present and the future"[61] this first theme looked at the source and purpose of international investment law for the purpose of understanding the need of protecting foreign investors with an international standard over it over the domestic law of host state to help the research search for the possible solution of reforming international investment law.

The second theme reviews the literature on the impacts of IIAs related to sustainable development in developing countries the way forward in resolving the gap in it. And the *third*

[60] Argued to be a foundation approach in qualitative research, flexible to modification and can simplify complex data. see in Braun, V., Clarke, V. "Using thematic analysis in psychology. Qualitative Research in Psychology" (2006).
[61] Sophie Austin, "The Importance of Literature in Modern Society" (2022)

reviewed literature that discussed challenges posed by IIAs paying attention to FET protection standard and solution suggested. And the last section provides a critical evaluation of the literature reviewed with aim to finding gap in existing literature, and in turn, propose the best way forward to reforming the FET provision in Tanzania's BITs, for instance, through termination and renegotiation of IIAs.

2.1 The Evolution of International Law on Foreign Investment

In a book titled "The International law on Foreign Investment"[62] Sornarajah explored the historical evolution of international investment law from the inception of the colonial period to the post-colonial period. Accordingly, the history underpinning the emergence of international investment law in the European countries and other parts of the World such as Asia, Middle East and Africa was traced to the early eighteenth and nineteenth centuries, an era where investment was made in context of colonial expansion. The author stated that during the colonial period, investment protection was not in contention, as the colonial legal systems were integrated with the imperial system to protect investments in colonies. However, in non-colonies, investments were protected using diplomacy and force commonly known as 'gun-boat' diplomacy whereby investors home state used a military force to protect foreign investments in the host States. In other word, state power was the final arbiter of investment disputes, that which continued even after second world war as a means to settling investment disputes.

In his book Sornarajah stated that investment relations between the United States of America and the Latin American States triggered the development of international investment law, as no colonial relationship existed at the time with this part of the world hence, state power was often used as last resort to protecting interest of investors in the host countries.[63] Thus, this was rationale underpinning the development of 'state responsibility' to protect citizens, for instance, diplomatic protection was used for injured US citizens that suffered in Latin American States.

[62] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* 7 (Cambridge University Press1994).
[63] MuthucumaraswamySornarajah, *The Pursuit of Nationalized Property* (Cambridge University Press1986).

Furthermore, Sornarajah stated that efforts of United States to introduce different ways to protect investors and their investments abroad was the motivation behind the development of 'international minimum standard' treatment. However, it is argued that the standard was more in favour of investors[64] and based on US domestic law. As a result, the Latin America States were not in support of the 'international minimum standard' treatment on the ground that foreign investment is a voluntary idea or action and therefore investors should be ready for any risks that might happen just like any other domestic investors. Instead, the Latin America States proposed a 'national treatment standard' – leading to the development of the 'Calvo doctrine', the notion that alien investors should find remedies that are available in host State and that foreign investors will be required to be treated under and to respect local law just like local investors and their investments.

However, during the post-colonial era, independent States played an economic role (reform) by taking foreigner (aliens) properties from former colonial powers. The process (nationalisation) involved force and did spread all over the World. This happened after the dissolution of colonial empires whereby different means of protecting foreign investment abroad became pertinent. This led to a surge in investment claims. Thus, Sornarajah stated that investment protection and treatment standard became important hereafter.

The efforts made by developed States to succeed were acknowledged by the scholar, as well as the efforts made by developing States towards adopting the Latin American means of foreign investment treatment (Calvo doctrine). Accordingly, Sornarajah the controversial areas of investment law today surround the process and protection of foreign investment.

During post-colonialism, three (3) levels of major development are identified. Firstly, the acceptance and increase of nationalisation as a way of recovering the economy from former colonizers. Secondly, the phase of rationalization which was done by importing States in international level where favourable climate for foreign investment was offered. Thirdly, one which is claimed to be rational change in international economic regime is the receding of communism. At this stage, developing countries change their ideology over investment protection by opening their borders and introducing open policies on foreign investment.

[64] "The foreign investor was entitled to compensation according to an external standard, which came to be described in the hallowed formula used by Cordell Hull that compensation should be 'prompt, adequate and effective'. The foreign investor was entitled to dispute resolution before an overseas tribunal, if the remedies provided by the host state proved inadequate".

Sornarajah explored how emergence of globalization and other factors influenced the development of international investment for example, due to liberalization, developing States seemed to identify the important need of FDI therefore, different measures were introduced to attract foreign investors in different industrial sectors, particularly in natural resources. Due to the fear of nationalisation, the new measures were accompanied by the capital exporting principles and in turn, the uses of treaties were adopted, and neo- liberalism followed. As time went by, old tensions between capital exporting and capital importing countries were denounced. States

The end of cold war era brought significant changes to the international business more specifically the international investment law.[65] For instance, different policies were introduced and affected the world differently. For example, the introduction of 'neo-liberal' policies by World Bank and the International Monetary Fund in foreign investment. According to Sornarajah, the neo-liberal package required "entry of foreign investment, national treatment, protection against violation of certain guaranteed standards of treatment, and secure means of dispute settlement."[66]

The policy was to be implemented by States who needed to secure their financial situations (be assisted by international financial institutions), because "States also had to sign bilateral investment treaties providing guarantees for the protection of foreign investment".[67]The author argued that the trend of arbitrators who tend to interpret treaties' texts could possibly be further instructions of neo–liberal rather than looking at the intention of parties of the treaty.

Sornarajah wrote that it is clear now that developed countries such as Canada, United Kingdom and United States are experiencing the position that developing countries were in before.[68] These countries mentioned above have revisited their respective legislation in the area of natural resources contracts due to the perception that they are not beneficial to the States interests.[69] For example, United States and Canada have modern treaties, which allows them to regulate or take action in favour of States when it comes to environment protections. In United State of America, Sornarajah identified the North America Free Trade Agreement (NAFTA) to be the product of neo-liberal ideology, because the provisions given under

[65] This was the war happened after 11 world war. I was between the United States and the Soviet Union.
[66] Ibid. 24
[67] Ibid
[68] Reform business environment for benefit the government.
[69] . P. D. Cameron, Property Rights and Sovereign Rights: The Case of North Sea Oil (1983)

NAFTA tend to impose obligations of protecting the developing country partner (Mexico) and it succeeded.

The author reasoned that economic liberalization had a great impact on international investment law and still continues. He addressed the formation of multilateral agreements and increase of BITs with its negative and positive impacts to developing countries. Sornarajah also identified different movements that are productive now under investment law as a result of liberalization, such as Corporate Social Responsibility (CSR) and human rights (done by different NGOs).

However, notwithstanding modern changes in the international investment law, most FDI recipient countries such as India, China and Brazil are standing outside the investment treaty system even though they invest in developed countries. According to Sornarajah, the interesting part was that, developed countries are now becoming respondent to investment claims on the law that they made themselves to protect investors.[70] As a result, arbitrators and legal practitioners in the developed countries are now focusing on how to develop new defences to investment claims brought against them and in some cases, seek to withdraw from the treaty system.[71]

Such changes in narrative according to Sornarajah simply suggests that developed States may now have clear understanding of situations that developing States had been subjected to. On this background, Sornarajah concluded that the driving forces behind international investment law reform are somewhat difficult to assess, as there will always, arguments between those who favour the system on one hand, and those are resistant against the system largely to their interests. Be that as it may, Sornarajah stated that,

[70] "Indian national has brought an ICSID claim against the UK. Sanchetti v. UK (for the facts, see the Court of Appeal judgment regarding a stay order, reported at [2008] EWCA Civ 1283). A Chinese national has a pending ICSID claim against Peru. Tza Yap Shum v. Peru, ICSID Case No. ARB/07/6 (Decision on Jurisdiction and Competence, 19 June 2009). There is a claim pending against Germany: Vattenfall AB v. Germany (request filed on 30 March 2009). The long lists of NAFTA cases against the United States and Canada are well known and can be found on several websites, including that of the US Trade Representative".

[71] "The United States withdrew from systems it did not favour or refused to participate. It has pursued a unilateralist policy in many fields. It did not subscribe to the International Criminal Court. It kept out of discussions of human rights".

> "Each of these opposing groups will support a different set of norms relating to investment protection. They will also differ on issues such as rights of access, types of treatment of investment and dispute resolution".[72]

This literature is relevant for the purpose of this research, because it contributes knowledge on the development of foreign investment law before, during, and after colonialism. The literature identified various issues facing foreign investment and how it started (nationalisation movement). The author was able to demonstrate the establishment of foreign investment protection and dispute resolution mechanism under international investment law.[73] The author also explained how both developed and developing countries take measures to protect their economic interest and sovereignty.

On a contrary, there are gaps in the literature, firstly, Sornarajah left few questions unanswered for example, what is the way forward to balancing interests between contracting parties in developed and developing countries in relation to protection of investments? Even though Sornarajah acknowledged that they will always be an issue(s) on foreign investment law such as, conflict of interest and or nature of control that could be exercised over the foreign investment whether NGOs or host States, Sornarajah failed to provide possible solution for the issue of balancing the interest between the two opposing parties.

Secondly, few developed and developing countries were mentioned in the literature by Sornarajah. African countries were omitted which makes the literature less relevant for developing African countries such as Tanzania. Thirdly, in the literature Sornarajah seemed to pay more attention to economic development and not sustainable development which involves economic, societal and environmental protection. In present era, developing countries are exploring different strategies to foster economic development for example, CRS strategies that focus on society (issue such as human right movement, employees' rights etc.) and environment. This is because exploitation of natural resources has been linked to global warming.

[72] Ibid pg 34
[73] The law on foreign investment protection, governs how States treats foreign investors and their investments and how host States exercise their power

On the other hand, Vandevelde[74] conducted research to evaluate the rationale underpinning the increased in number of IIAs. Accordingly, it was stated that there is a history explanation behind such increase. To start with, Vandevelde stated that the development of investment protection provisions can be traced to the 18th century. The history surrounding the development of investment protection provisions was divided into three era that which include, a) colonial era b) post-colonial era and, (c) the global era and the present (from 1990 to date).[75]

According to Vandevelde, during the colonial era, there was no IIAs as a means of protection for foreign investment abroad. However, he explained that most of trade agreements between States were done through international economic agreements and sometimes included protection provisions such as 'special protection or full and perfect protection' on properties of a certain national in other territory of another state.[76] He used the United States as an example, which had concluded as a bilateral treaty of 'Friendship, Commerce and Navigation treaty' (FCN) in the 18th century with a purpose of establishing trade partners (economic relation). He argued that the treaties at this time also required compensation for expropriation[77] and offered most favoured national treatment in respect to some business activities.

The scholar addressed major highlights from the precolonial era. First, States the customary international law set an obligation on States to treat investment with 'international minimum standard'. According to Vandevelde, some of the States adopted the international minimum standard. Although they were vague, some States disputed such obligation and others such as Latin Americans adhered to the Calvo doctrine, which offered foreign investors same treatment as domestic investors. Secondly, investment agreements in colonial era lack an agreement on where to submit investment disputes. Host States were against arbitration, which was the only means of resolving investment disputes at the time. Vandevelde concluded that when treaties failed as a means of protection, non-legal mechanism called gun-boat diplomacy' were used by powerful States to protect investments abroad.

Vandevelde also reviewed the post-colonial era where the history of international investment agreements began. He explained it from the end of Second World War up to the collapse of

[74] Kenneth Vandevelde, "A brief history of International Investment Agreements", (2005) 12 U.C., Davis Journal of International Law & Policy, Vol. 157
[75] Kenneth J. Vandevelde, Sustainable Liberalism and the International Investment Regime, 19 Mich. J. Int'l L. 373 (1998).
[76] Page 158
[77] For example, the treaty of Amity

Soviet Union. In addition, the author addressed three events that shaped the structure and content of international investment agreements in the post- colonial era. First, the scholar discussed the great depression, which impacted heavily on countries. However, some countries came under the influence of protectionist policies of the 1920s. As a result, victorious allies claimed to form a 'consensus in favour of liberalizing trade,[78] and the consensus led to the formation of 'General Agreement on Tariffs and Trade (GATT) in 1947. GATT did change the framework of international trade relation from bilateral to multilateral agreements.

Vandevelde explained that the promulgation of GATT affected the trade relationship between States and not the investment between States. However, the scholar added that, as bilateral agreements were diminishing, international trade negotiations continued to witness a sharp increase. However, the United States launched treaties of 'Friendship, Commerce, and Navigation (FCN).[79] FCN agreements included the principle of protecting foreign investors properties abroad. The agreements guaranteed different protections such as FET,[80] constant protection and security," [81] and some foreign investments were entitled to standard national treatment while others were provided the 'Most Favoured Nation' (MFN) treatment.[82] Lastly, the agreements were clear that foreign nationals and companies could not be paid without compensation,[83] and included the jurisdiction of International Court of Justice (ICJ) as a dispute resolution body. However, the use of ICJ did not stop other dispute resolving mechanisms, for example, the use of local remedies but resolved several issues such as misuse of power that host States claimed to.

The Second event that shaped International Investment law in the Post-Colonial Era is or was the 'process of decolonization'. Vandevelde discussed that, the era occurred after the second world war, where most of colonized countries became free and independent but economically undeveloped. [84] At this stage, most of undeveloped countries were sceptical of any foreign activities within their territories, and therefore they were not ready to welcome foreign

[78] The Policy claimed to restrict imports from other countries, through different measures such as tariffs on imported goods, import quotas and other government measures. Bernard Hoekman and Michael Kostecki, "The Political Economy of the World Trading System" (1995)
[79] 1946
[80] See the FCN between US and Greece, provided that, "Each Party shall at all times accord equitable treatment to the persons, property, enterprise or other interest of nationals and companies of the other party."
[81] FCN Greece article VII (1) provided that, "Property of nationals and companies of either party shall receive the constant protection and security within the territories of the other party."
[82] See FCN with Japan
[83] See FCN with Greece.
[84] David S.Landes, The Wealth and Poverty of Nations 431(W.W Norton& Co.L.td. 1999) 1998

investors believing it could be part of neo-colonialism and that foreign investments as a means of production might take control and affects domestic affairs. Thus, many developing countries closed their economy to new foreign investment and expropriated the existing one.[85] According to Vandevelde, after colonialism, in fear of neo-colonialism, most of developing countries adopted an 'import substitution policy', which did stop importation and required countries to produce goods and services locally.[86]

The third event that shaped the structure and content of IIA sin the post-colonial era addressed by the scholar was the 'emergency of Socialist Block', which was led by soviet group. After the second world war, the Socialists were notorious for expropriating private property including foreign properties. The action did encourage developing countries to do the same and initiated a path that for developing countries to succeed against developed countries they were supposed to adopt the process of exploitation. In early 1970s, both socialist and developing countries sought a resolution at the general assembly of United Nations for the right of expropriating foreign assets without paying a fair market value of the exploited assets as it was demanded by foreign investors.

According to the scholar, in May 1974, the New International Economic Order (NIEO) was declared by the General Assembly, which approved the "full sovereignty of States over their natural resources and other activities", and "it did not specify any obligation to pay compensation".[87] However, in December 1974, the Charter of Economic Rights and Duties of States was adopted, which declared the right of States to "Nationalise, expropriate and transfer of ownership of foreign properties" though the expropriator state were required to pay appropriate compensation according to the local laws and regulations. [88]

Following the threat of uncompensated expropriation, developed countries did create BITs. The BIT was used as a new (effective) way of protecting foreign investors abroad because other protection methods such as the use of military force was illegal under international law. According to the scholar, Germany from her experience was the first country to conclude such agreement, and in 1959, two treaties were signed by Germany one was with Pakistan and the

[85] The United Nations study reports 875 expropriations occurring in 62 countries between 1960 and 1974.
[86] John Rapley, Understanding Development: Theory and Practice in the third World (1996) 22-25
[87] Declaration of the New Economic Order, G.A. Res.3201(S-VI), U.N
[88] Economic Rights and Duties of States, Article 2(2)

second one was with Dominican Republic. Other countries did follow,[89] however it is argued that the new BITs contained several distinctive features. In his argument, Vandevelde explained that the BITs were typically negotiated between developed and developing countries with the assumption of protecting 'investment'. However, claimed that BIT agreements were prepared by developed countries and offered to developing countries to sign. To ensure that there was an agreement between the two parties, minor changes (from the original draft) were made before the final agreement. [90] The scholar added that they were motivated to sign the agreements as a strategy of attracting foreign investors.[91]

On the other hand, developed countries were motivated to conclude BIT to obtain protection for its (foreign) investment.[92] However, protection of foreign investment was not a major concern for other developed countries such as the United States. Therefore, the Unites States refused to conclude BITs unless the provision of 'prompt, adequate and effective compensation was offered to foreign investment'. Vandevelde did mention the two other major changes (innovation) that happened to BIT. First is the inclusion of arbitration provision in the BIT in 1960s, which prompted by the conclusion of ICSID Convention in 1965.[93] The second major change was the introduction of World Trade Organisation (WTO) that was done by the conclusion of Uruguay round of GATT in 1965. The agreement managed to remove barriers across borders on trade in services.[94]

In summary the scholar argued that BITs, which are concluded today (global era) are not much different to those that were concluded in the Post-Colonial Era and issues addressed are still the same. He claimed that changes have been made through the incorporation of new terms or use of new languages, but the nature is still the same.[95] He also discussed the new trend of investment that now there is a flow of foreign investment from the so called developing or importing countries to the exporting countries (developed countries) and vice-versa.[96]

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[89] In 1960 some Western Countries followed the lead of using BITs as a way of protecting investors abroad. Also, in 1970s UK, Japan and Australia joined the trend

[90] UNICTAD Supra note 71 (8 -19)

[91] Developing countries believed assuring legal protection would attract foreign investors to invest for their economic development.

[92] Protection given under BIT were similar to the ones that were offered by FCN.

[93] Convention on the Settlement of Investment Disputes between States and Nationals of other States, March 18, 1965.

[94] General Agreements on Trade in Services (GATS). This enables to increase the commitment of protecting foreign investment.

[95] See NAFTA use full reference

[96] Singapore is now investing in countries such as Denmark, Norway, Greece and Ireland. Also developed country such as United States has become and importation country.

The scholar raised existing issues in the area now (global era), issues such as, whether IIAs are still effective. The scholar raised this question because of floodgate in foreign investment claims which raises doubt on the effectiveness of the IIAs. However, to some extent, arbitration awards, which have been in favour of investors (many times), can explain how foreign investors are protected. Nevertheless, the conclusion of foreign investment agreements as a strategy or mechanism of attracting investment flows statistically has not been proved. Therefore, there could be other factors that contribute to the attraction of foreign investment. Another issue discovered by the scholar is that, developed countries who previously were much in support of IIAs are losing interest as time goes. This is because, investment agreements can now impose obligations and cost on them.[97]

The author contributed to literature on the history of international investment treaties from colonial era to date. In addition, the author ability to explain the link between establishment of investment protections and sharp increase in numbers of IIAs is a good contribution to literature particularly on the impact of protection clauses on various investment treaties. On the other hand, the author also contributed to literature by explaining how political and economic change affect and contribute to the evolution of international investment regime and shape the new era. He successfully identified issues that face IIAs in present such as arbitration awards that tend to favour investors in most of cases. However, he could not provide a solution on how to resolve the issues discussed of which this research aims to propose a means of resolving some of the issues discussed.

2.2 International Investments Agreements and Sustainable Development

In the same theme, Schill,[98] and the co-authors[99] analysed the relationship between international investment law and development, accordingly it was stated that the two variables are intricately linked but the history between them is suspicious, and that investment law has always been a barrier to sustainable development. The co-authors argued that there is a doubt

[97] When investment agreements are made between them (developed to developed country). For example, United State has been a respondent of claim made under NAFTA.
[98] Stephan Schill, Christian Tams and Rainer Hofmann, "International Investment Law and Development: Friends or Foes?", (2015) Amsterdam Law School Legal Studies Research Paper, No. 2017-26
[99] Stephan W Schill, Christian J Tams and Rainer Hofmann

whether FDI development foster 'sustainability' or favour the protection of investments only.[100]However, the co-authors agreed with jurisprudence, development policy instruments and other Scholar's opinion, that investment have a positive impact on economic development and contribute to other developing activities such as transfer of technology and knowledge.[101] But raised question of whether there would be international investment law (as a body of law) if promotion and protection of foreign investment would not be offered.

In addition, there is also question as to the relationship between investment law and development, for instance, to ensure there is a clear relationship between investment law and development. The United Nations Conference on Trade and Development (UNCTAD) launched an investment policy framework for sustainable development (IPFSD),[102] which introduced principles and guidelines for nationals' investment policies, and it gives options on how to design IIA, which will meet the needs (sustainable development) of countries, especially developing countries. The IPFSD also gives guidelines on how to design IIAs, which can balance the rights and obligations of the two contracting parties States.

On a contrary, although the framework established by UNCTAD attempted to provide meaningful reform to the relationship between investment law and development, scholars argued that UNCTAD is not the only forum that established the role of development in international investment policy. Other forums such as Organisation for Economic Co-operation and Development (OECD),[103] Southern African Development Community (SADC),[104] the Commonwealth Secretariat and Association of Southeast Asian Nations (ASEAN).[105]Furthermore, several literatures in international investment law addresses the

[100] Marie-Claire Cordonier Segger and Ashfaq Khalfan (eds), Sustainable Development Law: Principles, Practices, and Prospects (OUP 2004); Duncan French, International Law and Policy of Sustainable Development (Juris Publishing 2005)
[101] Henrik Hansen and John Rand, 'On the Causal Links between FDI and Growth in Developing Countries' (2006) 29. United Nations, 'Doha Declaration on Financing for Development' (9 December 2008) (UN Doc A/CONF.212/L.1/Rev.1) para 23 ('We recognize that private international capital flows, particularly Foreign Direct Investment are vital complements to national and international development efforts.').
[102] See UNCTAD, World Investment Report 2012—Towards a New Generation of Investment Policies (2012) 97
[103] See, Kathryn Gordon, Joachim Pohl and Marie Bouchard, 'Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact-Finding Survey' (2014) OECD Working Papers on International Investment, 2014/01
[104] See, South African Development Community (SADC) Model Bilateral Investment Treaty Template with Commentary (2012).
[105] See, the ASEAN Comprehensive Investment Agreement (adopted 26 February 2009, entered into force 29 March 2012)

relationship between investment and development.[106] The scholars were able to present other views over investment and development. In this line of argument, Sornarajah's work,[107] which claims investment and development to be foes was analysed. In one of his works,[108]Sornarajah criticise investment agreements in developing countries and argued that there is no proof that investment treaties do contribute to economic development. In addition, he argued that "investment treaties are based on lies", all they do is to limit the sovereignty of developing countries who are the recipient of foreign investment from developed countries. He added that, the only economic development that investment treaties brought are experienced by arbitrators and lawyers "who interpret treaties, argue and represent before tribunals".[109]

On whether international investment law and development are friends or foes, Schill and his fellow divided their study into three parts. Part, one named 'legal regime of sustainable development' analysed the notion of development, which he claimed to be multi-faceted. Different phases (from the post- colonial era until now), and issues were addressed in this part regarding development, and it was concluded, that "the notion of development has acquired many things" and that the effectiveness of development needed to be analysed under the legal regime.

Part two of this study analysed the 'gap between international investment law and the notion of development and developmental principles. The scholars believed in an economic view that investment is an instrument for development. However, they wanted to understand the relationship between international investment law and (sustainable) development.[110] To

[106] "Anne van Aaken and Tobias A Lehmann, 'Sustainable Development and International Investment Law: A Harmonious View from Economics' in Roberto Echandi and Pierre Sauvé (eds), Prospects of International Investment Law and Policy (CUP 2013) 317–40; Ilze Dubava, 'The Future of International Investment Protection Law: The Promotion of Sustainable (Economic) Development as a Public Good' in Marise Cremona et al (eds), Reflections on the Constitutionalisation of International Economic Law: Liber Amicorum for ErnstUlrich Petersmann (Kluwer 2013) 389; see further the contributions by Markus W Gehring and Avidan Kent, Wolfgang Alschner and Elisabeth Tuerk, Pierre-Olivier Savoie, Diane A Desierto, Ursula Kriebaum, and Maria Gritsenko in Freya Baetens (ed.), Investment Law Within International Law: Integrationaist Perspectives (CUP 2013); the contributions by Lise Johnson and Rahim Moloo, Rahim Moloo and Jenny J Chao, Caroline Henckels, Stephan W Schill, Vid Prislan and Ruben Zandvliet, Mavluda Sattorova and Alessandra Asteriti as part of the 'Symposium on Sustainable Development and International Investment Law: Bridging the Divide' in Andrea K Bjorklund (ed), *Yearbook of International Investment Law & Policy* 2012-2013 (OUP 2014) 2."

[107] Muthucumaraswamy Sornarajah, 'Mutations of Neo-Liberalism in International Investment Law' (2011) 3 Trade, Law and Development 203. See further Muthucumaraswamy Sornarajah, Resistance and Change in the International Law on Foreign Investment (CUP 2015).

[108] Muthucumaraswamy Sornarajah, 'Developing Countries in the Investment Treaty System: A Law for Need ora Law for Greed?', in this volume, 43

[109] Ibid 46.

[110] Sustainable development encompasses economic growth, environmental protection, and social development in an intra-generational perspective.

identify the gap, the scholars considered the evolution of investment law by observing "the struggle between capital exporting countries and capital importing countries, development within investment arbitration and legitimacy crises of international investment law". The scholars concluded that international investment law does not hinder development but acts as a chain that connects the notion of development and development principles and "guide the interpretation and negotiation of investment treaties".

The third part considered and criticised the conceptual linkages between 'international investment law and development as explored in the chapters of this book'. The scholars used literature that criticised international investment law and argued that investment law does not contribute to economic development of host State, more specifically in developing countries.[111] adopt

In their conclusion, the scholars agreed that the relationship between international investment law and development is complicated, more specific when one is aiming for sustainable development. However, investment and economic development are closely interconnected. Furthermore, scholars addressed that the generation of investment treaties might change the present perspective between international investment law and sustainable development. This is because, the new generation of investment agreements draws a clear line between investment protection, development, sovereignty, and the interpretation of investment treaties in terms of sustainable development.

Schill and his fellow concluded that international law and development relationship has a mixed picture and therefore it is difficult to announce the relationship between the two variables. However, following the new framework of treaties suggested by UNCTAD, scholars predicted the future relationship between international investment law and sustainable development to be positive. To achieve this, a host country needs to regulate their relationship with investors, this can be done through investment policies that will protect environment, natural resources and society, also adopt the new generation of IIAs.[112]

[111] M. Sornarajah sort reference

[112]"New generation of IIAs controlling the use of States' regulatory power with the view to protect/promote sustainable development objectives constitute a major innovation in IIL." Radi, Yannick, International Investment Law and Development: A History of Two Concepts (December 1, 2014). Grotius Centre Working Paper 2015/045 - IEL; Leiden Law School Research Paper. Available at SSRN: https://ssrn.com/abstract=2572987 accessed 12 June 2020

Despite this, States the question of whether "international investment law and development are friends or foes" remained unanswered. This could be the reason why scholars could now come up with a clear answer. In discussion, there is a bit of confusion between FDI, investment and international investment law as variables used to measure development in host States.

Alschner and Tuerk[113] discussed the role of International Investment Agreements in Fostering sustainable development, paying attention to IIAs. The authors reported that the relationship between IIAs, foreign investment, and sustainable development is complicated. Alschner and Tuerk reason that foreign investment does not inherently contribute to sustainable development, nor does the mere conclusion of an IIA guarantee more foreign investment. And as much as the authors acknowledged FDI to be a significant source of funding for development in developing States they reasoned that FDI has a chance of fostering sustainable development.

The complicated relationship between FDI and sustainable development argued to be caused by the commitments of protection investors agreed under IIAs which tends to limit the host nations' ability to regulate foreign investment in the public benefit. Hence, from the perspective of sustainable development, IIAs touch on delicate public policy issues, which affects a large variety of stakeholders (include investors') and raise complex considerations regarding their impact. However, to achieve these benefits, States have to carefully consider the policy at the national and international levels making sure policies encourage foreign investment that supports sustainable development.[114]

The article looked at the history and current trends in the use of IIA treaties and examines the connections between IIAs and three sectors of public policy that have been at the centre of UNCTAD's research and policy analysis on IIAs and sustainable development. And conclude by saying there is a necessity for increasing inter-State cooperation to address the various issues the IIA regime is now dealing with and to improve its sustainability dimension and suggested the UNCTAD's Policy Framework for Sustainable Development (IPFSD) as a guidance of writing new IIAs that support sustainable development. This paper provided a brief overview of previous and current efforts of balancing investor protection with other public policy goals through new IIAs generations in reference to sustainable development.

[113] Alschner, Wolfgang and Tuerk, Elisabeth, The Role of International Investment Agreements in Fostering Sustainable Development (July 18, 2013).Baetens, F., (Ed.), Investment Law Within International Law: Integrationist Perspectives (CUP 2013) , Available at SSRN: https://ssrn.com/abstract=2295440 or http://dx.doi.org/10.2139/ssrn.2295440

[114] Page 1

Zhu[115] reported that since 1990, there has been a growing number of investment arbitration disputes where investors accused host states' environmental protection measures to be in breach of international investment agreements. In same line of argument Zhu reasoned, that IIAs affects sovereign states regulation power in two perspectives, one is that the host state's unilateral environmental measures might be seen as a breach of its international investment duties, and second, a means of host state implementing international environmental law could be seen as a breach of its international investment law.[116]

In her article Zhu examined one of the most well-known and invoked protection in IIAs, 'the Fair and Equitable Treatment Standard,' using investment case(s) to understand how tribunals determine the fairness of the environmental regulation in the host state and concluded that the vagueness of FET provision affects the ruling of investment environmental claims and suggests a better way to harmonize the jurisprudential chaos. She proposed that the host State's should not be accused of breach of FET standard by passing reasonable environmental policy to achieve a genuine environmental protection more specifically if the measures taken are non-discriminatorily and with due process.

The scholar supported the argument made by number of academics, governments, and non-governmental organisations (NGO) that the effective protective mechanisms offered to foreign investors and their investments for protecting investments cause the 'chilling effects'[117] which can affect host state's sovereign power to regulate for public interests, such as environmental protection. The Fair and Equitable Treatment ("FET") Standard is the subject of one particular criticism of such a 'chilling effect 'under IIAs.[118]

In summary it can be said that this article has shown the challenges IIAs can intrude host States sovereign power to regulate in favour of public and proved that FET provision pose, challenge on host states to decide on sustainable development. Thus, it encourages this research to revisit Tanzania FET provision and see whether it made explicit commitments to the foreign investor to the contrary, the host state's environmental regulation to avoid unreasonable FET claims and

[115] Ying Zhu "Fair and Equitable Treatment of Foreign Investors in an Era of Sustainable Development" (2018) *Natural Resources Journal* Volume 58(2)
[116] See in *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003); *Waste Mgmt., Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004).
[117] Chilling effects prevents host States from enjoying its sovereign power. See in Penney, Jonathon, "Understanding Chilling Effects" (2021). 106 Minnesota Law Review 101 (2021, Forthcoming), Osgood Legal Studies Research Paper, Available at SSRN: https://ssrn.com/abstract=3855619 accessed 12 June 2022
[118] Page 321

suggest a solution that will allow Tanzania to practise its sovereign power and pass measures that support sustainable development without being accused of breach of FET.

2.3 Challenges in International Investment Agreements and Potential Solutions.

IIAs are viewed as an 'equilibrium' agreement established between contracting States that at least each part reflects their counter-balancing interests and negotiating strengths'.[119] However, the literature has expressed some concerns that because of the restriction imposed by IIAs that affects countries' ability to respond to more general concerns about human development or environmental sustainability, the current international investment regime can seriously undermine the welfare of the general public.[120]And that most of provisions in international investment agreements general and succinct, which gives arbitrators a lot of leeway in interpreting them while deciding on various issues, hence most of investor – State disputes decisions usually favours foreign investors interests.[121]

Recently, IIAs have been a source of political controversy, resulting in a number of countries denouncing their IIAs and some are revising their model investment agreements. Even though foreign investment is a major source development in developing countries, it is argued that these developing countries are not developed even though they have the highest number of FDI inflows. The reason behind this is partly down to the use of 'poor investment treaties' (investment agreements serve the purpose of protection foreign investors and not facilitate investment flows) hence the need for moderation. In addition, most of investment agreements contain unequal distribution of rights and obligations between developed and developing countries (host States). Thus, several developing countries are now reviewing their investment agreements to rebalance the rights and obligations between them and developed countries. Below are literatures that explain more the issues in international investment law and options on how to resolve them.

[119] Alex Mills, "The Balancing (and Unbalancing?) of Interests in International Investment Law and Arbitration" (u.n) Final draft, for inclusion in Z Douglas, J Pauwelyn and J Vinuales (eds), 'The Foundations of International Investment Law' (forthcoming, OUP) Available on https://core.ac.uk/download/pdf/16262819.pdf (accessed 14/11/2021)
[120] Javier Perez, Myriam Gistelinck, Dima Karbala, "Sleeping Lions International investment treaties, state investor disputes and access to food, land and water" (2011) *Oxfam Discussion Papers* Available at http://rrojasdatabank.info/oxfamsleeping2011.pdf Accessed 12 July 2022
[121] Ibid

Sauvant in his paper[122] covered three important issues that are relevant to my research questions. Issues discussed includes the evolution of national FDI policies, challenges that face national and international investment law and policy regime, and options that can resolve international investment law challenges. Furthermore, Sauvant explained the reasons behind FDI, types of FDI and how important it is to host countries and paid attention the BIT, which claimed to be the international governance of international investment.

The scholar reports that there has been an increase in FDI since late 1980s and it is likely that the growth in FDI will continue to increase. He argued on the basis that investment is central to economic growth and development, therefore, every nation is or will always be in demand to accomplish their development goals. Moreover, the scholar gave an example of the 'United Nations Sustainable Goals over the period 2015 -2030', with an annual investment gap of 2 – 3 trillion US dollars as needed finance. Independently of these goals, global infrastructure needs by 2030 will require financing a gap of US$ 15–20 trillion. Thus, to fill these gaps, FDI has risen significantly considering that bilateral and multilateral official development assistance and lending, domestic resource mobilisation in developing countries, and various innovative sources of finance for development are very unlikely to be sufficient for this purpose. Following statistics on FDI inflow in developing and developed countries, the scholar believed that there is a chance the above goals could be accomplished.

In this paper, the scholar clarified the motives and determinations behind FDI, and wrote that, governments can possibly "tap the reservoir for FDI depends on the motivations for firms to invest abroad, as well as the nature of the FDI determinants that characterise host countries". Motives refer to the factors that can motivate investors to invest in a certain country. This includes the regulatory framework of the host country, economic situations and investment promotion. However, there are factors which attract investors and can help to determine FDI flow in a certain country (more specific who locate production process) to countries. These factors include the availability of cheap labour, natural resource, market, technology, and efficiency. An improvement in the factors that motivates investors could potentially lead to sustainable development for developing countries in future.

Sauvant also discussed the national and international regulatory framework for international investment as one of the necessities, which determine FDI inflows. He argued that "the

[122] Karl P. Sauvant, "The International Investment Law and Policy Regime: Challenges and Options" (2015)

national regulatory framework for FDI defines whether and under what conditions such investment can enter a host country, operate in it, and exit it." This means, for countries that wish to attract FDI, they must set a regulatory framework, which will attract foreign investors. In addition, investors have a duty to establish a good portfolio that will attract host countries to trade with them.[123] He gave an example of how the national FDI framework in 1960s to early 1980s affected by FDI inflows in most countries. Then compared it to the 1990s when FDI policy changed through UNCTAD, this allowed several countries to open doors for foreign investors by providing favourable environment to investors.

The scholar also addressed the tension that governments face when they are making policies; he argued that it difficult for governments to make policies that would claim national development and encourage FDI at the same time. This is because the two parties (investors and governments) have different interests, multinational companies and other investors have interest on maximizing profits while host governments seek to "maximise the benefits of the same projects within their own territorial boundaries". Also, home countries and host countries have conflict of interest, home countries' government seek to protect their investments abroad by limiting policy space in host countries, while host countries' government seeks to maintain policies for public interests.

This conflict of interest creates dilemma and makes it difficult for host countries to make decisions or policies that will favour them but also not to affect foreign investors and their investments because they believe FDI is the tool for economic development. Furthermore, the dilemma and tension do affect the formulation of national laws and regulations in host countries; similarly impose the limitation in signing or entering into international investment agreements such as BITs.

Thus, the challenge that host countries (policy maker) face is finding the right way to balance investor's interest and public interests. However, the scholar argued that both home and host countries "ultimate policy objective is to maximize the benefits of FDI and limit any potential negative effects". This explains why "national regulatory frameworks for FDI are becoming more nuanced".

[123] "Majority of governments seek to attract as much FDI as possible by making their countries' investment climate more welcoming. But a growing number of investment promotion agencies also pursue a more targeted approach, focussing on attracting the kind of FDI that is particularly important for their economies' economic growth and development."

In reference to international regulatory framework for international investment, scholar argued that the objectives persuaded by governments when they are establishing the national framework for FDI are the ones that influence when concluding IIA. He explained the purpose of IIA such as FDI and how the conclusion of increased FDI inflows in many countries. He argued that the purpose of IIAs was to protect and promote investments. As times went by, different substantive provisions were added to these agreements; however, the establishment of ISDS[124] and it being part of majority of IIA has caused several issues in international investment law.

He claimed that number of disputes increased after the rise ISDS. However, critics raised concerns over an independent dispute resolution mechanism. These criticisms include cost, privacy, inconsistent decisions, and the major one is favouritism.[125] The scholar argued that "poor countries are not in a position to defend themselves as respondents; that the decisions of tribunals may chill policy-making in such areas as the protection of the environment, the observance of social standards, the protection of human rights, and the advancement of development".

To provide a solution, Sauvant focused on legitimacy of the dispute settlement process. He stated that "if the agreements contain language that refers to general principles and rules that are open textured, imprecise, and leave considerable room for interpretation, then the possibility that disputes arise is commensurately high, as is the unpredictability for governments as to what they can or cannot do." To cure the problem, host States need to conclude IIAs that leave little room for interpretation. The scholar added, in order to reduce the number of disputes, substantive protections need to be reviewed and the reviewed IIAs should provide clear standard of FDI for sustainable development and substantive protections should contain "tight wording that defines as clearly as possible the sort of injuries for which investors can seek compensation and, the type of actions that governments can take".

The scholar successfully evaluated the history of FDI and explained how national and international regulatory framework for international investment could affect investment and its effects. While discussing the national and international regulatory framework for international investment he discovered the tension and challenges those countries face in the face of FDI.

[124] An independent body where investors could make claims against host governments and get remedies.
[125] Statistics of 2013 - 2016 UNICTAD report shows 60 percent of the cases in developing countries were decided in favour of investors.

He argued that nationals face tension when it comes to make FDI policies and policy maker find difficult to balance investors and public interests.

In his opinion, a change of dispute resolution mechanism would not end the problem discussed. He argued that, to resolve the issue one should think on how to reduce number of disputes than paying attention on how to resolve them. However, he believes refining the concept of IIA including substantive protection could be the solution to problem.

Johnson in his paper[126] reported from World Bank that, Sub Saharan countries struggle with poverty more than other countries in the world. To minimise poverty these countries might need to increase living standards by promoting economic growth and development. Johnson added that, FDI had been and could play an n important role in improving living standards of sub-Saharan countries. Therefore, for Sub Sahara countries to develop, they will need to continue attracting foreign investors and rely on investment agreements, especially BITs.

On the other hand, Johnson argued that despite Sub-Saharan countries increased attraction FDI and depend on BITs, poverty has not been mitigated. The reason behind these unsuccessful efforts is the convenience of unequal FDI, accordingly, the scholar argues that Africa have attracted extractive industries and have failed to convince investors to invest in other industries.

The scholar argued that, in theory, BITs have the potential to attract FDI and fuel economic development, but sub-Saharan countries rely on a standard model that has developed over time. A BIT model that emphasizes on protection of foreign investors than protecting home (host) country interest. Therefore, to see change, African model BITs "must account for, and be better tailored to, individual countries' circumstances and needs"[127] Hence, for Sub-Saharan countries to tackle poverty, they need to attract investment at all costs but also create protective BITs.

Johnson gave an example of the modern U.S. and Canada BITs, which have adopted 'innovative provisions' that provide effective protection to investors but also "heightened commitment to economic liberalism that may encourage more sustainable growth." However, scholar argued that African countries need to adopt a type of BIT according to its resources and investment level. Thus, he grouped the African developing countries into three taxonomies to discourse about FDI and BITs. Group one is composed of countries with low FDI and low

[126] Alec Johnson, "Rethinking Bilateral Investment Treaties in Sub-Saharan Africa", (2018), Emory Law Journal, Vol. 59
[127] Page 920

domestic investment levels, also characterised with poor infrastructure and weak institutions. The scholar advised countries in this group to make efforts that will help them negotiate BITs with developed countries more specifically, the United States, also they should maximize FDI protections by granting investors many substantive rights. In addition, the (host) countries should limit discretion to implement policies that might affect FDI and grant investors the rights to make claims through international arbitration.[128] A BIT between US and Rwanda was used as an example that countries in-group one might need to follow.[129]

Group two is composed of countries with high FDI level but low domestic investment level. Countries in this group have high GDP per capita and improved infrastructure and they aim to attract more foreign and domestic investors.[130] The scholar advised countries in-group two to take actions that will stimulate domestic investment, by doing so, society will benefit by getting jobs and support sustainable economic development. In addition, because these countries are more attractive to FDI, it places them in a better position to negotiate "BITs that will strengthen the rule of law and grant policy makers room to level the playing field so that foreign and domestic investors can compete as equals".

Moreover, for countries that wish to graduate to group three then they need to encourage the use of local courts. However, while doing that they should be careful not to make decision or policy that will risk or discourage foreign investors. The scholar added that "Group Two BITs must balance investor rights and host country interests and should not grant policy makers so much room to manoeuvre that foreigner fear they will implement policies that threaten FDI".

Lastly, Group Three is composed of countries with "high FDI and high domestic investment levels." This group is argued to have a "larger and more robust economy, stronger institutions, better investment policies, an improved reputation among foreign investors, and more competitive domestic firms". The scholar argued that countries in Group three are in path towards sustainable growth and therefore "policy makers must encourage positive spill overs from FDI and implement domestic reforms that will attract higher quality investment in the

[128] 8 Susan D. Franck, Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 337, 342 (2007) (explaining that BITs "articulate specific substantive standards for investment rights" that protect FDI from "inappropriate risks").
[129] It offers the right to prompt compensation for direct or indirect "measures equivalent to expropriation or nationalization, Fair and Equitable treatment, Full protection and Security, National Treatment, most favourable Nation and non-discriminatory treatment." See Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Rwanda, art. 6, Feb. 19, 2008, S. TREATY DOC. NO. 110–23 (2008)
[130] Tanzania, Uganda, Burundi and Ethiopia reported to be part of this group.

future." According to the scholar, countries in this group can negotiate BITs that go beyond mere investment protection (liberalizing BIT).

However, changes are allowed from lower group to the higher group (group one to group three), when a country in a certain group increase its level of FDI. Moreover, he recommended specific BIT provisions that will help countries from each group achieve a corresponding set goal. According to the scholar, these "BIT provisions that reduce risk to FDI will help Group One countries attract FDI. BITs that strengthen democratic institutions and the rule of law and grant Group Two countries a degree of freedom to promote equal competition among foreign and local firms will encourage domestic investment. Liberal BIT provisions will attract higher-quality FDI in Group Three countries." Similarly, the scholar argued that "the measures that a country takes to graduate to the next stage of development, place the country in a better position to negotiate new BIT provisions and to pursue its new set of goals." The 'virtuous cycle' is expected to guide African developing countries towards economic development.

Furthermore, Johnson divided his paper into five parts. Part, one gave an overview of BITs and explained why developing countries have signed BITs but not lived up to their maximum potential. In this analysis, he explained the meaning and mechanism behind BITs. In his discussion, he defined BITs as a 'bargain' between developed countries and developing ones, who exchange promises and expect something(s) in return. In exchange of promise (s) developing countries tend to promise protecting foreign investors and 'retain their power to regulate' in exchange of capital inflows and its effects.

He argued that BITs have the potential of attracting foreign investors, however they "have failed to achieve their full potential as tools for economic development in Africa." The reasons given are first, "modern BITs vary little across individual African countries and rarely deviate from a standard format that has developed over time." They all include basic provisions, which are "scope of application, conditions for entry of FDI, standards for treatment, protection against expropriation and compensation, and investment dispute settlement". The scholar argued that Africa is a large and diverse continent; therefore, using similar provisions to attract FDI, which might not work in some of the African countries. Thus, every host country might need to design a BIT model with certain provisions based on the country's FDI and domestic investment level.

The second reason why BITs have failed to achieve their full potential of economic development in Africa was that "BITs and the whole discourse surrounding them have become so focused on foreign investment, they tend to ignore important domestic considerations to the detriment of home and host countries alike." He claimed that domestic investment has been an important source of sustainable development, stimulating FDI but most of African countries have not recognise this fact.

Furthermore, the scholar looked at various papers, which explained the relationship between BITs and FDI.[131] However, the findings were contradictory; some showed BITs attract foreign investors, while others disagreed. The scholars who were in support of the positive relationship between inflows of foreign investment argued that countries who signs BITs tend to be trusted by investors, this is because BITs assure protection to investors and reduce expected risks to FDI. However, some scholars reasoned that lack of investment flow data and wide variations of BITs make it difficult to prove whether the signing BITs results to FDI inflows.[132]

Johnson insists that Africa might need to learn strategies or adopted policies used by other developing and developed countries outside Africa to develop.[133] The Scholar said that although FDI in Africa has increased steadily over time, both private and public domestic investment levels have been decreasing. This argued to be a serious problem; therefore, an exploration of BITs as a tool for "improving Africa's investment climate" was examined in both levels (foreign and domestic investment).

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[131] Vandevelde supra note 10, at 523. Eric Neumayer & Laura Spess, Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries? 33 WORLD DEV. 1567 (2005). Kim Sokchea, Bilateral Investment Treaties, Political Risk and Foreign Direct Investment, 11 ASIA PAC. J. ECON. & BUS. 6, 18–20 (2007) (concluding that BITs with countries from the OECD signify a more credible commitment to a "stable legal investment framework").

[132] See, Rudolf Dolzer & Christoph Schreuer, Principles of International Investment LAW 8 (2008) (arguing that the availability of real-time information on international economic and legal matters suggest that potential investors would be dissuaded from investing in countries that have failed to sign a BIT), Mary Hallward-Driemeier, Do Bilateral Investment Treaties Attract FDI? Only a Bit . . . and They Could Bite 22–23 (World Bank, Policy Research Working Paper No. 3121, 2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=636541 (finding little evidence that BITs have stimulated FDI inflows and suggesting that the costs of signing a BIT outweigh the benefits), and Jennifer Tobin & Susan Rose-Ackerman, Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties 23, 30–31 (Yale Law Sch., Ctr. for Law Econ. & Pub. Policy, Research Paper No. 293, 2005), available at http://ssrn.com/abstract=557121 (finding a very weak relationship between BITs and FDI flows that is only present in countries with stable business environments), with Neumayer & Spess, supra note 39, at 27 (finding that developing countries, especially countries with weak institutions have increased FDI inflows by signing multiple BITs), and Salacuse & Sullivan, supra note 19, at 105–06 (finding that signing a BIT, especially with the United States, positively affects FDI).

[133] "Gross FDI inflows to Africa have increased over time, Africa's share of FDI has decreased compared to other developing countries".

The scholar discussed the three classified groups of African developing countries based on their investment level and explained how they can increase their level of investment and benefit from it. Different suggestions were given in part two, three and four, which made a large contribution to investment law literature, more specific in Africa.

In conclusion (part five), the scholar gave a recommendation on how to amend BITs for sustainable development. He insisted that BITs should be revisited, in his words he wrote, "a new BIT can easily be drafted to include provisions based on the level of development of the home-country signatory". Most countries have begun to question whether the tradition BIT[134] reduce their freedom to regulate in favour of the public. Meanwhile, several countries, including Tanzania have demonstrated their interest of avoiding 'restrictive provision of BITs', as result there is growing desire to renegotiate BITs recently.[135]

In addition to the discussion above, notable commentators such as Makane,[136] Laura Paez[137], also added that European model of BIT has dominated international investment agreements in Africa,[138] and that the continent need to upgrade Africanise investment law. In addition, it was also added that it is time for Africa to redesign their investment agreements and a dispute resolution mechanism (instead of ICSID thus, an African court should be established).

The reform procedure has been introduced through the Pan–African Investment Code (PAIC) as a new model of investment agreements for sustainable development whereby several countries joined such as Morocco.[139] The advantage is that regionalism will reflect African values, whereby an investment agreement model will be improved and home made by Africans, because it appears that the BIT model concluded by African countries with non-African countries is exported or adopted from developed countries. This is a good idea; however, it is somewhat important to use other Unions such as European Union under Lisbon Treaty as case study to evaluate how easy or difficult regionalism is before making a conclusion.

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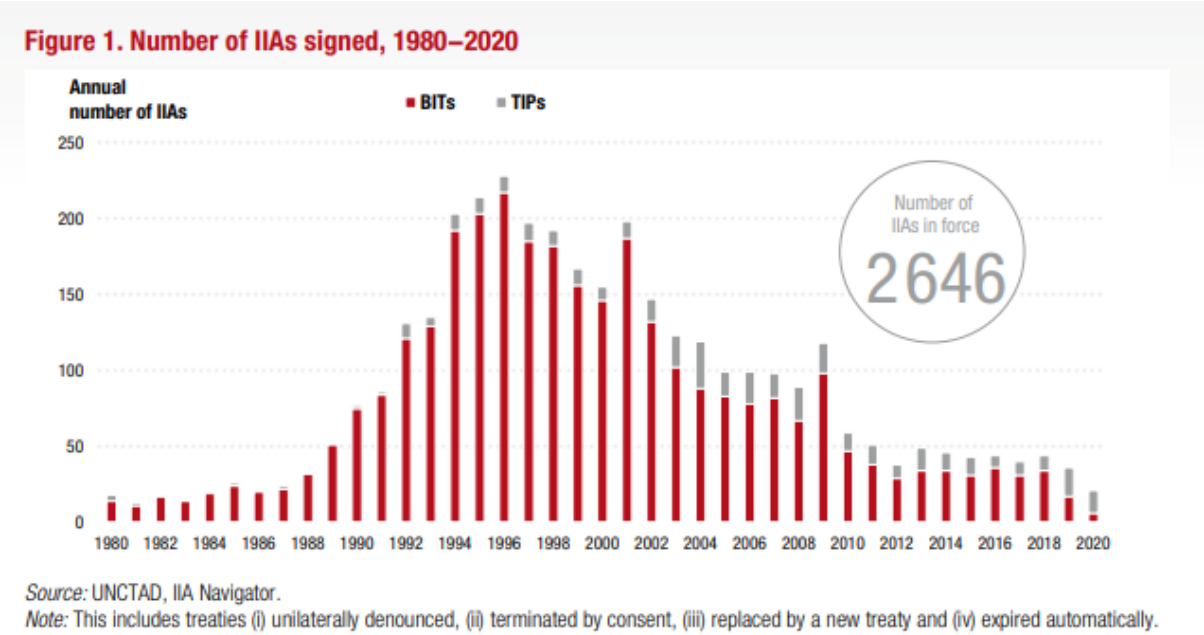
[134] A BIT with broad investor protection provision.
[135] See Sachs and Sauvant, supra note 41, at xxxiii; UNCTAD, Recent Developments in International Investment Agreements (2008–June 2009)
[136] Makane Moïse Mbengue, "Special Issue: Africa and the Reform of the International Investment Regime" (2017) Journal of World Investment & Trade 18 (2017) 371–378
[137] Laura Páez, "Bilateral Investment Treaties and Regional Investment Regulation in Africa: Towards a Continental Investment Area?" (2017) Journal of World Investment & Trade 18 (2017) 379–413
[138] Stephan Schill, "Editorial: The New (African) Regionalism in International Investment Law" 2017 Journal of World investment and Trade (367 -369)
[139] The final text of the PAIC is not yet officially public. The author has been the lead expert of the African Union for the negotiation and drafting of the PAIC. His views do not necessarily reflect the views of the African Union and its Member States. A version of the PAIC is available at accessed 17 February 2017.

The UNCTAD 2021 reports that, "Investment treaty has reached a turning point".[140] This has been proved by the increase of terminated IIAs as 42 were recorded in 2019 and increase of reformed IIAs least 2,646 see figure 1 below.



Source: UNCTAD, IIA Navigator.[141]

Furthermore, UNCTAD reports an increase in countries who have changed the content of IIAs from the old ones premised on promoting investment and protecting investors, to the one in action of pursuing sustainable development as recommended in UNCTAD 's Reform Package for International Investment Regime.[142] Several countries have reviewed their treaty models and made reform in line with the UNCTAD IIA reform package. These treaties give rights to investors to regulate while providing protection by "reforming investment disputes settlement, promoting and facilitating investment; ensuring responsible investment; and enhancing systemic consistency) or include clauses that were set out in UNCTAD's Investment Policy Framework for Sustainable Development".

Furthermore, it is argued that the new IIAs has a lot of changes compare to the old generation treaties. The modern IIAs claimed to have a greater number of provisions that refers to

[140] UNICTAD, "Recent Developments in The International Investment Regime" (2018) Available at http://unctad.org/en/PublicationsLibrary/diaepcbinf2018d1_en.pdf (assessed 31.08.2018)
[141] UNCTAD, "Recent Developments in the IIA regime: Accelerating IIA reform" (2021) Available athttps://unctad.org/system/files/official-document/diaepcbinf2021d6_en.pdf accessed 22 July 2022
[142] Over 150 Countries since 2012

sustainable development issues.[143]On the other hand, the modern treaties do limit the scope of investment and have more clarification of obligations (detailed clauses such as FET and indirect expropriation),[144]also some have omitted umbrella clauses, and some have attached interpretations of the provisions which can be useful whenever there is a dispute.[145]

The UNCTAD reports that countries that are aiming to change their BIT model are facing a number of challenges including the opposition from contracting parties, political issues which affects the level of policy making, also insufficient of human, legal and financial resources. However, despite of these challenges, the survey confirms number of countries have begun to change their outdated BITs.

The standard of IIAs concluded in Africa has improved,[146] the efforts can be seen in Congo and Mauritius BIT (2014), and Egypt – Mauritius (2014) in which the issue of public health is well addressed.[147]Also, South Africa terminated Thirteen BITs and changed a way of protecting investors by adopting a passing restrictive legislation.[148] The department of Trade and industry in South Africa also mentioned that future BITs should reduce the scope for "unpredictable, inconsistent, and arbitrary interpretation".[149] This is found in the "Promotion

[143] "The 13 agreements concluded in 2017, 12 have general exceptions – for example, for the protection of human, animal or plant life or health, or the conservation of exhaustible natural resources. All but one also explicitly recognize that the parties should not relax health, safety or environmental standards to attract investment; and 11 refer to the protection of health and safety, labour rights, the environment or sustainable development in their preambles." See, Burundi– Turkey BIT, Mozambique–Turkey BIT, Turkey– Ukraine BIT

[144] China–Hong Kong investment agreements

[145] See India new BIT model

[146] See, a BIT between Mozambique and Japan that has entered to force in August 2014. Article 18 "Settlement of Investment Disputes between a Contracting Party and an Investor of the Other Contracting Party "(where it is agreed disputes to be settled by consultants first before ICSID), Article 20 "Temporary Safeguard Measures" and Article 24 "health, safety and environmental measures and labour standards"

[147] Accord entre le gouvernement de la République du Congo et le gouvernement de la République de Maurice sur l'encouragement et la protection réciproque des investissements (signed 20 December 2010, entered into force 15 December 2013).

[148] See Xavier Carim, 'Lessons from South Africa's BITs Review' Columbia FDI Perspectives No 109 (2013) Jackwell Feris, 'Challenging the Status Quo – South Africa's Termination of Its Bilateral Trade Agreements' (10 December 2014) Erik Denters and Tarcisio Gazzini , "The Role of African Regional Organizations in the Promotion and Protection of Foreign Investment" (2017) *Journal of World Investment and Trade* 18 (2017) 449–492

[149] Xolelwa Mlumbi-Peter, "Presentation to the Parliamentary Portfolio Committee on Trade and Industry" (2015) South Africa's Investment Policy.

and Protection of Investment Act (PPIB)[150] containing provisions such 'National treatment' that grant investors the right to be treated no less favourably than South African investors.[151]

According to Nottage, international investment law may improve by rebalancing the interest of foreign investors and host States.[152] In the two books are reviewed, one by Polsen's book and the second book by Henckels's. Firstly, Henckle's approach[153] could be relevant for developing countries and some of the problems identified in Henckles's book were also acknowledged in Poulsen book. Although Poulsen argued and proved that 'bounded rationality'[154] troubled developing countries in negotiating past investment agreements, there remains doubts and lack of understanding on whether 'historical arrangement need not dictate the future. The two reviewed books offer different reasoning but however, the two books agreed on harmonising perspective on how to rebalance the system.

Poulsen in his book suggested how international investment law would improve by proposing rational reform that might balance the interest of foreign investors and host States or balance in favour of host States in developing countries. Poulsen's book paid attention to the quantitative and qualitative (interview based) research that proved how developing States "rushed to sign up to investment treaties mainly from the 1980's", also developing countries incorporated pro investor's protections such as the option of opting arbitration as a dispute resolution mechanism which display the concept of 'bounded rationality'.[155] According to Poulsen, most of developing countries signed IIAs more specific BITs due to the following reasons, first, host States were in confidence that signing BITs would attract foreign investors.[156] Secondly, "host States underestimated the risks of being held liable for breaching

[150] Ms J Fubbs (ANC), "Promotion and Protection of Investment Bill [B18-2015]: public hearings"(2015) available at https://pmg.org.za/committee-meeting/21502/ assessed 11 June 2017 "The Bill emphasises compliance with domestic law and the role that Government has to play in achieving socioeconomic objectives and does not interfere with any norms that may be relevant to investment e.g. labour legislation."
[151] The "like circumstances test" determines that if foreign investors are not "in like circumstances" in respect of South African investors, then national treatment will not be granted.
[152] In Luke Nottage, "Rebalancing Investment Treaties and Investor Arbitration: Two Approaches" (2016), Journal of World Investment and Trade, Vol. 17, issue 6
[153] Discussing problems of institutional incapacity.
[154] Bounded rationality is an economic theory proposed by Herbert Simon, it is the notion that challenges human's rationality. It is argued that "Rationality is bounded because there are limits to our thinking capacity, Available atformation, and time". (Simon, 1982).
[155] "They wanted to believe that this would attract cross-border investment, without or discounting empirical evidence; kept signing treaties on Western European templates despite contemporaneous US models offering even more provisions favouring foreign investors; and only reassessed risks to regulatory autonomy when subjected to an initial arbitration claim."
[156] "Chapter 1 on 'unintended consequences' goes on to highlight the key puzzle addressed by the book:

substantive treaty commitments, such as non-discrimination, expropriation or FET , until foreign investors brought the first ISDS claim against that state – illustrating 'salience bias[157].". And thirdly, "policy-makers engaged in 'satisfying' rather than optimizing treaty drafting, agreeing to and maintaining BITs based on the shorter models developed by major European capital-exporting States rather than the more elaborate US model, due primarily to 'status quo bias'.

However, after discussing and analysing the problem, Poulsen recommends recalibration of the interests of foreign investors and host States under investment treaties by urging investor-state tribunals to consistently apply proportionality analysis, combined with principled deference to regulatory decision-making by host States. Indeed, her overarching approach to interpreting more specific substantive treaty commitments may be particularly attractive to developing countries, which are now engaged or interested in other ways of building in more host state deference.

Andrea[158] argued that IIAs are aimed at protecting the interest of both investors and host States particularly where the host States exercise unchecked regulatory power that encroach on investors properties in the host States.[159] However, Bjorklund examined the implication where an investment treaty permit investors to bring a claim against host States but do not give the host States the opportunity to commence claims against an investor. According to Bjorkhund, the implication of such isolation suggests an imbalance and impropriety in procedure and substance in the regime of international investment treaties.[160] It is stated procedurally, an investor has the legal right to commence proceedings against the host state under investment treaty arbitration.[161] Bjorkhund stated that host States cannot institute proceedings against an investor under most of the investment treaties.[162] According to Bjorkhund, most investment treaties give rights to an investor to commence proceeding against

'why did practically all developing countries suddenly rush to sign largely identical treaties, which significantly constrained their sovereignty? Why did they expose themselves to expensive investment claims and give such a remarkable degree of flexibility to private lawyers to determine the scope of their regulatory autonomy?'" p(5)

[157] The salience bias (also known as perceptual salience) "refers to the fact that individuals are more likely to focus on items or information that are more prominent and ignore those that are less so. This creates a bias in favour of things that are striking and perceptible" (Kahneman et al. 1982, Bordalo et al. 2012, Allcott and Wozny 2013).

[158] In "The Role of Counterclaims in Rebalancing Investment Law", (2018) Lewis & Clark Law Review

[159] Andrea K, "The Role of Counterclaims in Rebalancing Investment Law", (2018) Lewis & Clark Law Review

[160] Ibid

[161] Ibid

[162] Ibid

host States for breach of terms in the investment treaties.[163] It was stated ordinarily the host States have no power to bring claims against foreign investors unless otherwise agreed by the parties to the agreement.[164] It was also stated that where parties agreed that the host States can commenced proceedings in disputes concerning breach of terms of agreements between the parties in investment arbitration then, it means the host States would also have rights to bring counterclaims against foreign investors.[165]

On a contrary, where parties to disputes failed to consent to arbitration, scholar stated that it is most likely that proceeding will be resolve through the national courts of the host States while using domestic law. However, investment treaty arbitration will continue in a separate forum while using the international law.[166] On other hand, Bjorkhund went further to explain the substantive defect under the investment treaties. It was stated that most IIAs make provisions for obligations that host States must follow, but no provision for obligations on the foreign investors.[167] Furthermore, it was stated that "international law generally does not impose obligations directly on non-state entities".[168] Even though there are requirements, both implicit and explicit that foreign investors should comply with the host State law.[169] However, Bjorkhund stated that rarely is there provision in most investment treaties, that gives host state power to commence proceeding against an investor for violation of the host state laws, or to bring counterclaim against foreign investor.[170]

Bjorkhund argued that in order to ensure a balance of interest between investors and host State under the regime of IIAs, it is important to give the host State the ability to bring counterclaims against foreign investors for violations of the host state laws.[171] It was stated that without the ability of the state to submit a counterclaim, a state is not likely to succeed in their claim against the foreign investors. According to Bjorkhund, the "States are becoming more aggressive in

[163] James Paulsson, *Arbitration Without Privity*, (1995) 10 ICSID Rev. 232, 232-34
[164] Ibid, at 234
[165] Andrea K, "The Role of Counterclaims in Rebalancing Investment Law", (2018) Lewis and Clark Law Review
[166] Ibid
[167] Ibid; Jeswald W, "The Three Laws of International Investment: National Contractual AND International Frameworks for Foreign Capital", (2013); Jason Webb, "Investment Treaties and Investor Corruption: An Emerging Defense for Host States?", (2012) Va. J. Int'l L., 723, 742
[168] Andrea K, "The Role of Counterclaims in Rebalancing Investment Law", (2018) Lewis & Clark Law Review, p. 463
[169] Jason (n.10), page 366-74
[170] Andrew, (n 1); Ana Vohryzek-Griest, "State counterclaims in Investor-State Disputes: A History of 30 Years of Failure", (2009), Int'l Law: Revista Colombiana De Derecho Internacional, 83, 1100001-14
[171] Andrew Bjorklund, "Improving the International Investment Law and Policy System: Report of the Rapporteur Second Columbia International Investmetn Conference: What's Next in International Investment Law and Policy?", (2011)

asserting counterclaims against investors".[172] While the host States are not yet successful in counterclaims brought against foreign investors,[173] however, there is a growing concern among host State on the use of counterclaims in investment arbitration, to protect the interest of the host State against the foreign investors where there is violation of the host state laws.[174]Although host State may not have ability to bring counterclaim however, Bjorkhund stated that where a state establish improper conduct or behaviour on the part of an investor, then it will be possible for the host State to defend itself against any claim of fair and equitable treatment brought by the foreign investor.

According to Bjorkhund, "counterclaims show some promise as means to rebalance investment law by bringing all claims related to the subject matter at hand within the purview of a single tribunal's authority".[175] He added that, both parties would need to agree on the applicable law that should governed the disputes between the parties where there is violation of the state's law. The applicable law to apply where there is an issue as to the conduct of the investors is that of the host state.[176] Although it is logical to give apply the municipal laws where there is violation of state laws by foreign investors, however, Bjorkhund cautioned that "one should not lose sight of a different questions of balance"[177] while addressing one imbalance.[178] He added that placing the domestic law over international law may further result in another imbalance.

In addition, Bjorkhund examined the basis for tribunal authority to hear counterclaims. It was stated that the ability of a state to assert a counterclaim in investment arbitration is based on the consent of the investor in the arbitration proceeding. According to Bjorkhund, investors need to give consent that host State could arbitrate counterclaims against.[179] It was stated that IIAs generally contain a unilateral offer of consent on the part of the host sate, that which is accepted by other contracting state to the treaty.[180] Bjourkhund examined few treaties that provide for the ability of state to bring counterclaim in investment arbitration; for example, The Common Market for Eastern and Southern Africa (COMESA).[181]

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[172] Andrew, (n 1)
[173] Vohryzek-Griest, (n 13) pg. 86, 92-111
[174] ICSID Case No. ARB/06/1, *Compare Roussalis v Romania,* (Dec. 7, 20110) Award, 871-76
[175] Andrea (n 1), pg. 465
[176] Ibid
[177] Ibid, pg 465
[178] Ibid
[179] Ibid; Christoph Schreuer, *The* ICSID Convention: A Commentary 106, (2009), 751-52
[180] Ibid
[181] The Common Market for Eastern and Southern Africa (COMESA) Investment Agreement (2007)

Under the COMESA, Article 28 (9) provide as follows: A Member State against whom a claim is brought by investor under this agreement (COMESA) may raise a defence, counterclaim, right of set off or similar claim, that the investor bringing the claim has failed to conduct itself in manner that comply with all applicable domestic laws of the host state and that the investor has failed to comply with its obligation stipulated in the Agreement.[182]

Also, under the ICSID Convention, article 46[183] provide that: Except the parties agreed otherwise, the Tribunal shall, upon the application or request by a party in the proceedings, determine any incidental, defence, claim or counterclaims arising directly out of the subject-matter of the dispute between the parties to the proceedings, provided that the parties gave consent that such claims should be arbitrated, and provided that the claim and the subject-matter are within the jurisdiction of the tribunal.[184]

Under the 1976 UNCITRAL Arbitration Rules, article 9(3) provide that: "…Respondent may make a counterclaim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off…"[185]Similarly, under the 2010 UNCITRAL Arbitration Rules, article 21(3) provide that:…A tribunal may hear counterclaim brought by parties in the proceedings provided that the counterclaim and the subject matter is within the jurisdiction of the tribunal…[186]

While explaining the provision for counterclaim in all these treaties, Bjorkhund stated that the fundamental questions regarding counterclaims related to consent and the tribunal's jurisdiction to hear the counterclaims. According to Bjorkhund, although there is a provision for counterclaim in all these treaties, the consent of the parties to the agreement is crucial, as well as the tribunal's jurisdiction to determine the counterclaims. Bjorkhund noted that tribunals have continue to adopt different approach to determine the possibility of granting counterclaims in arbitral proceedings, firstly, tribunals suggests that in order to grant the application for

[182] Investment Agreement for the COMESA, Common Investment Area, article 28(9)
[183] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, article 46
[184] Ibid, article 46
[185] UNCITRAL Arbitration Rules, art. 9(3)
[186] UNCITRAL Arbitration Rules, article 21 (3)

counterclaim, the investment treaty must provide for investor consent to counterclaim, as "consent cannot be implied from the procedural provisions referring to counterclaim in the applicable arbitral rules".[187] Other tribunals suggests that investors consent to counterclaims can be implied on applicable rules and their references to counterclaims. Here, the tribunal simply focuses on the interrelation between the counterclaim and the main subject matter or allegations of treaty breach.

Bjorkhund further examined the benefits of counterclaims in investment arbitration. According to Bjorkhund, those tribunals who have acknowledged the ability of host state to bring counterclaims have also recognised the potential benefits of bringing related claims together. Bjorkhund stated that by bringing related claims together (counterclaims) it has several benefits that which include, procedural efficiency, legitimacy, enhance the rule of law and in turn discourage frivolous claims and frivolous objections. Bjorkhund, stated that "permitting counterclaims make it more possible that investors will be called to account for their actions".[188] Furthermore, Bjorkhund noted that "if an investor has to take account of claims that might be filled against it, its zeal to file might diminish".[189]

Notwithstanding the potential benefits of counterclaims, Bjorkhund examined some of the drawbacks to submitting counterclaims in international investment arbitration. Some of the drawbacks highlighted by Bjorkhund include procedural inefficiency, illegitimacy, and likelihood to undermine the rule of law. Bjorkhund concluded that while there are drawbacks surrounding counterclaims, the advantages surrounding the use of counterclaims outweighed those drawbacks. Bjorkhund contributed to literature on issue relating to international investment treaties particularly the problem of imbalance between the interest of host state and the foreign investors. Suggestion for counterclaims is also a welcoming proposal, that which is likely to be embraced by the host State and in turn prevent frivolous claims.

Another scholar that contributed to this debate was Jason Haynes, in his paper titled "The Evolving Nature of the Fair and Equitable Treatment (FET) Standard: Challenging its Increasing Pervasiveness in Lights of Developing Countries Concerns: The Case for Regulator"[190] Notwithstanding the significance of the FET standard in IIAs particularly in the

[187] *Roussalis,* (n 17), paragraphs 869-77
[188] Andrew (n 1) pg. 477
[189] Ibid, pg. 476
[190] Jason H., "The Evolving Nature of the Fair and Equitable Treatment (FET) Standard: Challenging its Increasing Pervasiveness in Light of Developing Countries' Concerns' – The Case for Regulator", (2013) The Journal of World Investment and Trade

respect of ensuring balance of interest between both the host States and foreign investors[191] , Jason Haynes explained that standards of protection cast doubt as to the effectiveness of the FET .[192] In the article, Jason analysed the increasing intrusiveness of the FET standards drawing inspiration from the several arbitral claims against the developing countries by foreign investors. Jason further critiqued the conceptual underpinnings of the provision of FET standard in IIAs and other substantive elements of the standard.

Jason argued that the FET standard has been incorporated into numbers of IIAs to protect the investment of foreign investors against expropriation, unlawful regulations, and measures by the host States.[193] It was added that the incorporation of the FET standard in the IIAs has a recorded rate of about 62 per centre.[194] Jason expressed that the increasing pervasiveness of the FET standards raised "a number of potent concerns which have not gone unnoticed".[195] Jason went further to emphasise that "not only are developing countries particularly concerned about the overly intrusive formal legal underpinnings of the standard"[196], developing countries are particularly concerned about the uncertain nature of the FET standard that which empower foreign investors that challenge the regulatory power of the host State to enact law that will benefits the public interest.

The scholar cited Argentina as example of a host state that placed caution against the uncertain nature of the FET standard in their IIAs. In *Elpaso Energy International Company v. Angetine Republic*[197], the Argentina government warned that, if left unamended, the FET standard could potentially empower foreign investor to bring unscrupulously claim against developing countries for exercising sovereign power to make law and measures for the protection of environment and public interest of their citizen. According to Jason, the implication here is that such uncertain nature of the FET standard is likely to create regulatory chill,[198]as host States are more likely to reluctant to enact laws and measures due to fear of

[191] Ibid
[192] Jason, (n 1) (Jason Haynes stated that, "The FET Standard is undoubtedly a pro0minent and evolutionary feature of most international investment agreements concluded by developing countries today. In practice however, the standard raises a number of potent concerns which have not gone unnoticed") at page 114.
[193] Ibid
[194] Reinisch A., *Standards investment protection,* (2008), Oxford University Press, page 2.
[195] Jason (n 1) pg 115; Rudolf D., "The impact of International Investment Treaties on Domestic Administrative Lawa" (2005) N.Y University JIL & Politics
[196] Jason (n 1), pg. 115
[197] ICSID Case No. ARB/03/15, *El Paso Energy International Company v. Argentine Republic,* (2000110), para 230
[198] This is a situation whereby host States are reluctant to enact laws and measures for the protection of environment and public interest largely due to the fear of litigation and unscrupulous arbitral claims from foreign investors.

arbitral claims by the foreign investors. Other scholars such as Jose Alvarez and Katherine Khamsi added that unscrupulous claims will also have detriment on the economies of the host state and the sustainable livelihood of taxpayers.[199]

Jason examined the historical development of the FET standard in IIAs. Accordingly, it was stated that the FET standard is a new phenomenon in IIAs.[200] Furthermore, Jason argued that the first citing of the FET standard in IIAs can be traced from the 1848 Havana Charter for an International Organisation.[201] The scholar added that although the Charter (1848 Havana Charter) never became fully effective, the promulgation of the Charter paved way for subsequent developments of FET standard in IIAs, for example, the Economic Agreement of Bogota, the Abs-Shaw cross and OECD draft treaties. According to Jason, other BITs and IIAs that adopted the FET standard include, the Draft UN Code of Conduct on Transnational Corporation,[202] the 1948 Multinational Investment Guarantee Agency Convention, the North American Free Trade Area (NAFTA) Agreement (1993), the Colonia and Buenos Aires Protocol to the Common Market of the South (MERCOSUR),[203] and the 1995 Energy Charter Treaty (ECT).

The scholar further added that the FET standard has been incorporated in more "2600 BITs as well as regional and multinational investment treaties".[204] Accordingly, the scholar stated that the inclusion of the FET standard in numbers of BITs shows that the standard continues to gain recognition in IIAs, as standard of protection for foreign investment in the host state.[205] On other hand, the scholar examined the conceptual underpinning of FET standard in IIAs; accordingly it was stated that the "standard can be aptly described as the ground norm of modern investment agreements, effectively embodying the cardinal principle of the rule of law".[206] It was added that, the FET standard espoused restriction and guideline which host

[199] Jose A., & Katherine K., "The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime", (2009) Yearbook on Int'l Investment L. Policy
[200] Jason (n 1); Benedict Kingsbury and Stephan Schill, "Investor State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law", (2009) Yearbook of the N.Y Convention
[201] http://www.wto.org/English/docs_e/legal_e/havana_e.pdf> accessed on 18 Nov. 2020.
[202] UNCTAD, The Draft United Nations Code of Conduct on Transnational Corporation and the OECD Guidelines for Multinational Enterprises, (1984) UN Doc. ST/CTC/SER.A/4 Annex 1
[203] Haines F., *The MERCOSUR Codes,* (2000)
[204] Jason (n 1), at page 116
[205] Ibid, Stephen V., "The Fair and Equitable Treatment Standard in International Investment Law and Practice", (1994) Yearbook Int'l L., 99
[206] Jason (n 1), at page 117; Schill S., "Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law" (2006), TDM, 4.

States must adhered to while dealing with investment of foreign investors in their countries.[207] These redefined restriction and guideline are codified into legal framework governing IIAs.[208] Jason also cited the argued of Dr Francis Mann[209] about FET standard, explaining the significance of the FET standard in IIAs as follows that:

> While Clauses such as most-favoured national and national treatment are construed to protect the interest of both the investors and host States however, the FET standard provide right and obligation that which is more likely to be accepted by the host state and foreign investors.[210]

Despite the incorporation of FET standard in a number of BITs to protect investments and restrain the sovereign power of the developing countries against unattended measures that are likely to interfere with investments of foreigners, Jason emphasised that there are preliminary points underlying the FET standard. The scholar asserted that first and foremost, the sovereign power of the host state to make laws and measures over their territorial space need to be recognised, even though the developing countries and host state may choose to compromise their sovereign power to favour foreign investors.[211] Second, where the host States has compromised their sovereign power to favour investors and FDI then, the foreign investors becomes subject to the domestic law and legal infrastructure of the host state hence, the government of the host state need to deal with the investments of the foreign investors in fair and equitable manner. In addition, the host States also need to ensure that its sovereign power are not used in a conceive and or oppressive manner to interfere on the investments of the foreign investors. On that background, Jason argued that "the FET standard, with its sharp rule of law characterization, not only refers to the affairs of foreign investors, but also to the 'institutional aspiration that governments in developing countries have to use law as a means of exercising power".[212] However, Jason noted that the rights[213] and remedies[214] accorded to

[207] Jason (n 1); Knoll-Tudor, *The Fair and Equitable Treatment Standard and human right norms*, (2009) Oxford University Press.
[208] Rudolf, (n 6)
[209] Mann F.A, "British Treaties fort the Promotion and Protection of Investments" (1981) BYIL
[210] Ibid, at page 241
[211] Jason (n 1); Sornarajah M., *The International Law on Foreign Investment,* (2010), University of Cambridge Press, 193.
[212] Jason (n 1), at page 118
[213] Dyzenhaus d., "The rule of law in international law" (20050) Law and Contemp. Prob, 127-129
[214] Katia Y.S., *Fair and Equitable Treatment Standard: Recent developments'* (2008) Oxford University Publication, 111-30

investors to bring claims against host States for breach of terms in the IIAs can be set aside in a situation where investors has failed to abide with procedural requirements provided under the domestic laws of the host countries.

Jason explained the issue of divergent perception underpinning the FET standard in IIAs. Jason stated that notwithstanding the importance of FDI the growth of economies of the host countries, there is divergence in the perceptions of both the host countries and investors as to the definitional and normative content of the FET standard in IIAs.

According to Jason, the perception of the foreign investors on the definitional and normative content of the FET standard is based on the notion that: "Governments in developing countries must seek to adopt a particular approach to governance which is encapsulated in the obligations to 'act in a consistent manner, free from ambiguity and in total transparency, without arbitrariness and in accordance with the principle of good faith."[215] Professor Detlev also supported this perception. Professor Detlev stated that the FET standard in IIAs aimed to "protects against acts or omissions taken by host States which are designed to make the investor's business unprofitable."[216] He added that foreign investors have continued to rely on this perception as basis for their arbitral claims and demand for protection of their investment in the territory of the host countries.

On other hand, while explaining the perception of the host countries on the definitional and content of FET standard in IIAs, Jason explained that while the FET standards has been accepted and incorporated in numbers of BITs between investors and host countries, developing countries "have been careful to underscore that the FET standard should not be understood as an absolute guarantee but rather as a principle that allows for a balance between investment protection and their public interest".[217] Jason further added that, most developing countries have also raised concern about the conceptual underpinnings of the FET standard largely due to the fear that it will give the developed countries the power to uphold the rights of foreign investors against the government of the developing countries at the expense of their vulnerable economies.[218] Other scholars such Hoekman and Newfarmer also asserted that "the legal and macroeconomic consequences of this development are largely unknown, and are

[215] ICSID Case No. ARB (AF) *Tecmed v. Mexico* (2004) AF/00/2 award
[216] Detlev Vagts, "Coercion and Foreign Investment Rearrangements" (1978) AM J. Int'l L., 17, 34-35
[217] Jason, (n 1) at page 119; Mark K, "Fair and Equitable Treatment: Echoes of FDR's Court-Packing Plan in the International Law Approach Towards Regulatory Expropriation" (2006) LPICT, 231
[218] Brian T., "The Lessons of Law and Development Studies" (1995) AM. Journal of Int'l L., 478

without precedent."[219] Accordingly, Jason stated that "what was once merely a fear has now become the fate of many developing countries, particularly in light of increasingly large arbitral awards which have been brought against some developing countries"[220]

Having examined the issue of divergent perception and conceptual underpinnings of the FET standard in IIAs, Jason went further to suggest possible solutions to address the increasing persuasiveness of the FET standards. The scholar suggests regulatory rebalancing to restore the sovereign power of the developing countries to enact laws and measures to protect investments and public interest without the fear of arbitral claims.

Firstly, the scholar suggested that regulatory bodies should focus on developing clearer, qualified, and more specific FET clauses in IIAs. While explaining the rationale surrounding this solution, the scholar stated "in light of increasing discontent among developing countries with respect to the overly intrusive manner in which arbitral tribunals have sought to construe the fair and equitable treatment standard, time is ripe for clearer, qualified, and more specific FET clauses to feature more prominently in international investment agreements concluded by developing countries".[221] Thus, the scholar argued that this rebalancing effort might very well combines elements of the FET standard and the minimum standard of treatment under customary international law. In addition, the scholar opined that there should also be *caveat* (caution) while applying the FET standard. According to the scholar, there should be *caveat* that "though an evolutionary standard, only conduct which falls to be considered as gross, manifest, evident, flagrant, continuous and unjustified will violate the FET standard"[222]. On other hand, scholar suggests a closed or illustrative list that clearly state the legitimacy of host state conducts that will amount to violation of the IIAs, scholar stated that such list will serve as guideline to tribunal in the assessment of host state conduct.

Secondly, the scholar proposed for a more vigorous proportionality analysis. The scholar stated that arbitral tribunal often failed to embrace a rigorous proportionality analysis while determining claims brought against host States. Accordingly, it was stated that a comparative approach that draws on both domestic and international law should be adopted by

[219] Hoekman B and Newfarmer R., "Preferential Trade Agreements, Investment Disciplines and Investment Flows" (2005) Journal of World Trade, 966
[220] Jason (n 1), page. 119; Luke Peterson, "Czech Republic Hit with Massive Compensation Bill in Investment Treaty Disputes" (2004) Invest-SD News Bulleting
[221] Jason H., "The Evolving Nature of the Fair and Equitable Treatment (FET) Standard: Challenging its Increasing Pervasiveness in Light of Developing Countries' Concerns' – The Case for Regulator", (2013) The Journal of World Investment and Trade, page 142.
[222] Ibid, at page 142

arbitral tribunals. The start points for such approach according to scholar might well be to determine the outcome of the regulations and measure put in place by the host state, for instance, it is important to determine whether such measure justified its legitimate objective. The second step according to the scholar is to determine whether there are other means through which the host state could achieve the legitimate objective without interfering or encroaching on investments of investors in the territory of the host state. To ensure balance of interest between investors and host state, the scholar stated that arbitral tribunal should engage in a rigorous balancing exercise. It was stated while considering the effect of the host state's measure on the investment of the foreign investors, it is somewhat important to consider the importance of the objectives pursued by the host state while enacting the laws and measure.

The paper contributed to literature on the scope and conceptual underpinnings of FET standards in IIAs. The Scholar also contributed to discussion on the challenges faced FET standard in the aspect of divergent perceptions of investors and host state. Thus, the proposed solution in the paper will consider this research to suggest the best way forward to rebalancing BITs.

Pasipanodya and Hoag[223] argue that foreign direct investment will undoubtedly be seen as a powerful tool to assist African countries weather the triple storm and rebuild in its aftermath. As a result, the investment treaties that African countries have signed – and will sign – are crucial. Even noble intentions to encourage a green recovery can result in a slew of costly investment arbitrations for states, as demonstrated by Spain's experience defending itself against approximately 40 arbitrations emanating from its effort to attract renewable energy investment.

In their article Pasipanodya and Hoag, did look at how African countries have recently innovated when it comes to signing bilateral and regional investment accords. These developments are representative of the reforms that governments throughout the world are implementing in response to critiques of investor-state dispute settlement (ISDS) processes. They also appear to reflect African states' desire to equalise the balance of investment treaties, which have long seen to favour foreign investment at the expense of African states. African

[223] Tafadzwa Pasipanodya and Foley Hoag, "21st century investment protection: Africa's innovations in investment law reform (2021) Available at https://www.ibanet.org/africas-innovations-in-investment-law-reform accessed 20.June.2020

governments are ideally positioned to inform investment law reform, having signed some of the first bilateral investment treaties (BITs) over sixty years ago and having been compelled to defend themselves against numerous arbitration cases originating from them.

In their article they were able to discuss policies that would limit the use of international arbitration to resolve investment disputes and new ways for states to safeguard their ability to regulate in the public interest, as well as measures that clarify and limit the amount of substantive legal protection available to investors. The authors were also able to outlines ways for holding investors accountable by raising their investment treaty commitments and establishing mechanisms for enforcing those obligations.

Their many inventions have the potential to help states reclaim control over their investor relationships and better align their goals of soliciting foreign investment with their desire to promote sustainable development. Some analysts have referred to the 'Africanization' of international investment law due to the extent of these reforms across the continent and their worldwide impact.

On other hand the scholars paid attention to the ISDS system arguing it has the potential to limit states' ability to regulate in the public interest and that it is investment claims contesting legitimate regulatory behaviour that has harmed investors' bottom lines inadvertently discourage states from regulating to protect the public interest and because of the ISDS the authors argued that several African countries have responded by drafting treaties that expressly protect their authority to govern by giving an example of the article 23 of 2016 Nigeria–Morocco BIT.

On the other hand, Pasipanodya and Hoag did suggest clarification and limitation of substantive legal protections could help and reason that number of African countries have tried to rewrite and limit the substantive legal safeguards provided by bilateral and regional investment accords. They further explained that since the fair and equitable treatment (FET) requirement has been a source of special concern, as certain arbitral tribunals have been accused of interpreting the standard in an overly broad manner, allowing for greater investor protection than intended by state parties to investment treaties. African States should follow Some investment treaty designs, such as the African Union's 2016 Pan-African Investment Code and the Economic Community of West African States' 2018 Common Investment Policy, specifically prohibit FET. Others, such as COMESA's Revised Investment Agreement, protect

investors from states that fail to give specified 'fair judicial and administrative treatment,' rather than FET. Other instruments, such as the Southern African Development Community's (SADC) Model BIT from 2012, article five limit the standard by requiring an investor to show "an act or actions by the government that are an outrage, in bad faith, a wilful neglect of duty, or an insufficiency so far below international standards that every reasonable and impartial person would readily recognise its insufficiency."

One of the points discussed by the authors that add value to this research is the 2017 Rwanda–United Arab Emirates BIT which provided a list of actions that could be construed as a breach of the FET requirement (see article four). A Contracting Party violates the responsibility of fair and equal treatment referred to in paragraph l if a measure or set of measures: a. denial of justice in criminal, civil, or administrative adjudicative proceedings; b. fundamental breach of due process in judicial and administrative proceedings; c. targeted discrimination on manifestly wrongful grounds, such as gender, race, or religious belief; d. abusive treatment, such as coercion, abuse of power, or similar bad faith conduct; or e. any other elements of the fair and equitable treatment obligation adopted by the Parties in accordance with the article.

To conclude the authors clarified how the modernization and better-balanced provisions of recently negotiated international investment agreements show that Africa is well on its path to reforming its investment law system. Many of the innovations listed above are incorporated in treaties that have yet to be ratified, but they show that many African countries want to attract and preserve foreign investment in ways that benefit their broader public interests. As they embark on the difficult process of reconstructing their economies in the aftermath of the triple crises that have paralysed them, states on the continent and overseas will benefit from careful assessment of the technologies that are most suited for their specific circumstances.

On other hand, Brew[224] discussed how international investment law has long struggled to find a suitable balance between investor protection and governments' regulatory independence. He reasoned how Stakeholders have a shared interest in ensuring that IIAs not only fully realise their goal of protecting foreign investors to the fullest extent possible, but also more clearly define and secure states' right to regulate for legitimate objectives, even where doing so may compromise investment protection. In his study presented a model exception clause[225] that

[224] Robert Brew, Exception clauses in international investment agreements as a tool for appropriately balancing the right to regulate with investment protection" (2019) *Canterbury Law Review Vol 25*

[225] The purpose of exclusion provisions in IIAs is to increase regulatory flexibility by enabling host states to control foreign investment without facing international legal repercussions. See in Levent Sabanogullari, "The

permits states to specify their policy objectives and the extent to which they wish to pursue them. In his discussion Brew argued that by having exceptions clauses states will be able to regulate under certain restrictions meant to reduce the instances in which investors will lose their protection. Exception clauses are expected to persuade a government to embrace IIAs commitments that it otherwise could not accept and may thus appeal even to investors and predominately capital exporting states as a path of change, at least in comparison to their alternatives," according to one study.

In his words Many IIAs give foreign investors the opportunity to actively contest state regulatory actions through ISDS processes, giving them a credible means of enforcing their legal rights under international investment law. However, IIAs also threatens governments' ability to regulate in the public good, which is a crucial aspect of state sovereignty and for such reason majority did withdraw from old IIAs to new generation of IIAs which incorporated clauses asserting their right to regulate.

Scholar did discus majority of exception clauses which limit state's sovereign power including FET reasoning its wording allow tribunals to apply the "weighing and balancing" method which consider more foreign investor's interests over States. The IIA reform strategies include lowering states' substantive duties, as CETA's article 8.10 did (limiting FET) in order to ensure their regulatory autonomy. These techniques universally weaken investment protection, making it impossible to make a judgement call about when investor protection should give way to a valid regulatory goal. On other hand the scholar suggested while states design IIA exceptions clauses they should make it clearer through exception clauses, connection between the right to regulate and investment protection particularly by limiting the interpretation latitude of tribunals. This explains that FET can help to promote treaty norms while allowing for rebalancing when appropriate provided it is thoughtfully worded and free of self-judging wording. This article guide how treaty drafting can influence the interpretation of IIAs and how important the language of treaty clauses is in protecting states sovereign power while protecting foreign investors interest.

Merits and Limitations of General Exception Clauses in Contemporary Investment Treaty Practice" (2015). Also see in Mori Tadashi and Kotera Akira, 2014. "General Exception Clauses in International Investment Agreements Concluded by Japan (Japanese)," Discussion Papers (Japanese) 14007, Research Institute of Economy, Trade and Industry (RIETI), and Kenneth J Vandevelde "Rebalancing through Exceptions" (2013) 17 Lewis & Clark Law Review 449 at 455

In the same topic, Spear[226] admitted that One of the most pressing issues confronting the international investment law regime today is how to find a balance between rules governing the protection and promotion of foreign investment and principles governing the protection of society and the environment. A number of countries have made great progress toward addressing this difficulty by including interpretive provisions, broad exceptions clauses, and new preambles language in a new generation of international investment treaties (IIAs).

On other hand Vandevelde argued, given the nature of BIT requirements, the precise drafting of exclusions is very crucial and argued that the five principles that makes up a BIT which are —security, fairness, non-discrimination, transparency, and due process these components meet up the rule of law. Thus, emphasising on prioritising on encouraging the right interpretation of the BITs' provisions over adding numerous new broad exclusions.[227]

Carvalho, Soares and Karlina[228] discussed the Disparity in Investor and Host State Interests Regarding Fair and Equitable Treatment in Bilateral Investment Treaty. Scholars explained the need of host State mostly developing ones inviting foreign investors is to boost a developing nation's foreign exchange, create a lot of jobs, advance industry and trade, as well as accelerate regional growth and knowledge transfer. While foreign investors to invest in a particular state they consider variety of investment-related characteristics, such as low labour costs, natural resources, low costs, a sizable market share, the infrastructure, and a commercial way of life.

Carvalho, Soares and Karlina reasoned, despite the need of the two contracting parties, developing states have been making it hard for foreign investors to keep investing by changing laws and policies which make investors to feel unsecured and unprotected and such situation is referred to as the Dynamic Inconsistency Problem in foreign investments (DIP), hence the need of bilateral investment treaties (a binding agreement) to enhance the investment climate by defining what can, and cannot be done for investors or host countries in time of investments simply to avoid uncertainty in time of investment agreed. Carvalho, Soares and Karlina reasoned that given the fact that the primary goal of BIT, is to protect investors, investors often

[226] Suzanne A. Spears, The Quest for Policy Space in a New Generation of International Investment Agreements" (2010) Journal of International Economic Law, Volume 13, Issue 4.
[227] Kenneth J. Vandevelde, "Rebalancing through exceptions" (2014)

[228] Ana D. Carvalho, Maria Soares, Widya R. Karlina, "The Difference of Interests between Host State and Investors Related to Fair and Equitable Treatment in Bilateral Investment Treaty" (2020) International Journal of Multicultural and Multireligious Understanding (IJMMU) Vol. 7, No. 6, J.

see the need of FET clause in the BIT to ensure the longevity of their investment. This is due to the host state's perception that the FET is the most effective provision for dealing with DIP, for such reason the FET is considered to be the most practical provision for addressing DIP.

The issue is that there has been a conflict of interests between the host state and the investors, while Host State wish to safeguarding national interests from foreign influence in the investment sector. The investors, on the other hand, have different hopes and expectations from the host state which is a stable commercial climate. Since FET considered to be the key protection of investors life in time of investments then it posed a question of whether the state's actions to preserve its national interests count as a violation of fair and equitable treatment clause and how can host State or investors should react to uncertainty in the inevitable investment climate?

Scholars examined the theory by looking in number of investment cases involving the fair and equitable treatment clause and presented two findings one is that the FET provision is broad, and its interpretation is unpredictable and second is that the FET provision has no limit on the accountability of host state with evidence majority of government actions are now seen as having violated the FET from the current arbitration procedure.

Scholars discussed the issue of state sovereignty (regulating within its territory) under BITs and other states interests state's interests by arguing that states have number of other international responsibilities to honour in its territory such as protecting environment, human rights, natural resources, and health and for such reason they measure to put things in action hence change or law or measures in inevitable. However not ignoring the purpose of BIT which is to protect the interest of foreign investors scholars argued absence of specific obligation that qualify breach of FET is possible for BITs to harm State's interest.

To summarise, Carvalho, Soares and Karlina wrote FET provision is the key protection standard used to protect investors' rights. For such reasons investors can use it as a legal strategy to demand that a state live up to their reasonable expectations. However, the FET provision do not mention what activities done by the state are specifically considered as violations of the FET, make the state liable for these actions.

Carvalho, Soares and Karlina research provide evidence over the FET provision in balancing the interest of State's and foreign investors. However, scholars paid attention on one element or interests that FET protects "reasonable expectations". This research aims to examine FET

the broadness of FET provision in Tanzania IIAs and propose a way forward of limiting FET to protect the interests of host State.

2.4 Summary of the Chapter

This chapter reviewed the existing literature in three themes; first (1) looked at the evolution of international investment law from pre-colonial era, during colonialism, post-colonial era, up to today (global era) and, issues faced international investment law as well as options given to resolve the issues thus, two (2) gaps have been identified. The research discovered, most of the history of international investment law were written by western States influenced by Latin Americans. Thus, there seems to be a scarcity of African scholarship on this topic reasoning the need and purpose of IIAs in Africa, particularly Tanzania. Secondly, most of literature did not provide solutions and some who did, only provided general point views and nothing specific on Tanzania's investment treaty programme.

Thus, this research contributes to research literature by examining major issues facing IIAs by using Tanzania as a case study and provides solutions to issues identified. The aim of this research is to find the best investment provisions for Tanzania's IIAs that will rebalance IIAs in favour of the host state by proposing a reform method that will acknowledge that the state has the right and responsibility to defend genuine public interests (including human rights, public health and safety, and environmental sustainability) by amending FET provision in existing and future IIAs. The result will help to improve the manner in which Tanzania IIA's l and help the Government to benefit from the FDI they attract or invite through BITs in a sustainable manner.

CHAPTER THREE: RESEARCH METHODOLOGY

3. Introduction

The previous chapter has reviewed literature in developing States are facing a challenge of balancing the interest of the two contracting parties.[229] The literature review established the imbalance caused by the core object of IIAs which is to protect the interests of foreign investors and their investment,[230] and disregard the interest of host States.[231] Tanzania is used as a case study to evidence that States concluded investment agreements with potentially harmful provisions such as FET.

The government of Tanzania is now attempting to renounce these treaties arguing amongst other things that the BITs limit the government's ability to regulate in the public interest.[232]Acknowledging this, several States have established various initiatives to reform IIAs perceives the existing ones being unbalanced and inadequate. These initiatives have been done in different levels (global, regional, the national) and the most common one has been termination of old generation BITs and replacing them with new ones.[233] This research aims to balance the interest of host States with foreign investors by making sure that host States are allowed to regulate without its action without unnecessary being challenged by foreign investors interest through FET provisions.

Having identified the research problems and gap in literature, it is important to explore the process that will be used to resolve those identified problems and the gap in literature (discover new facts about a chosen topic). Research methodology is defined, 'a systematic way of solving

[229] Nasser Mehsin Al-Adba, "The Limitation of State Sovereignty in Host Foreign Investments And the Role of Investor-State Arbitration to Rebalance the Investment Relationship" (2014) *A Research Submitted to The University of Manchester for the Degree of PhD School of Law*
[230] Yannick Radi," Rules and Practices of International Investment Law and Arbitration" (2020) *UCLouvain – Faculty of Law.* Federico Ortino, "Substantive Provisions in IIAs and Future Treaty-Making: Addressing Three Challenges" (2015) TheE15Initiative Strengthening the Global Trade System. Johns, L., Thrall, C. & Wellhausen, R.L, (2019), Judicial economy and moving bars in international investment arbitration. Rev Int Organ. Available at https://doi.org/10.1007/s11558-019-09364- accessed 12 June 2020
[231] Gazzini T, "States and foreign investment: a law of the treaties perspective" (2014). In: Lalini S, Polanco R (eds) The role of the state in investor-state arbitration. Martinus Nijhoff, Leiden, pp 23–48. In Nicolette Butler, & Surya Subedi, "The Future of International Investment Regulation: Towards a World Investment Organisation?" (2017*) Netherlands International Law Review* volume 64, pages43–72
[232] Gazzini T, "States and foreign investment: a law of the treaties perspective" (2014). In: Lalini S, Polanco R (eds) The role of the state in investor-state arbitration. Martinus Nijhoff, Leiden, pp 23–48. In Nicolette Butler, & Surya Subedi, "The Future of International Investment Regulation: Towards a World Investment Organisation?" (2017*) Netherlands International Law Review* volume 64, pages43–72
[233] Ibid

research problem.' It determines a process that a researcher intends to adopt in gathering information and how the research will be conducted. Aside from studying a subject chosen, a research method and methodology can also be used as process of gathering relevant information. In the area of data collection (gathering information).

Thus, after a careful study of the nature of IIAs, and protection standards offered under Tanzania IIAs, it is therefore important to identify relevant research methodology (process) that will be used to find the challenges imposed mostly by FET provision in Tanzania IIAs, and a possible means of rebalancing IIAs in favour of host States.

This chapter is crucial part of a research study, which provides a discussion on the selected research method (techniques that will be used to collect data), and methodology (research strategy) for the justification of this research.[234] The selection of a research method and methodology is based on the research area and research questions of this research . Research method and methodology chosen would guide the way this research study is conducted and guide the reader through the relevant research material used to provide answers to the research question.[235]

This research uses a qualitative method for data collection.[236]The research will focus on published, and unpublished material, such as books, treatise, international law and national law on foreign investments. [237] This would be achieved by examining relevant law journals and websites. There are other research methodologies that are applicable depending on the research topic or questions in a research study. These research methodologies include but not limited to, case studies, conceptualisation, comparative, doctrinal, documentary, and economic analysis law.

The next subsection in this chapter provides a discussion on the conceptualisation research methodology. In this subsection, discussion will cover justification for the selection conceptual research methodology and how it is going to be utilised in this research. Scholarly works by

[234] Matt Henn, Mark Weinstein and Nick Foard, *A Critical Introduction to Social Research (2006)* 2nd edn, Sage, Michael Salter and Julie Mason, Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research (2007)
[235]Trochim William M.K, *Research Methods Knowledge Base,* 2006; Paul, Dianna Gardner and Lynne, *when to use What Research Design,* New York: Guilford, 2012.
[236] Gina Wisker, *The Postgraduate Research Handbook* (2007,2nd Edition).
[237] Ian Parker, "Qualitative Research'" in Peter Banister, Erica Burman, Ian Parker, Maye Taylor, Carol Tindall (eds), Qualitative Methods in Psychology: A Research Guide (OU 1994) 2.

Newman, Corbin and Strauss on the scope and application of the conceptual methodology is also discussed.

3.1 Conceptualisation Methodology

In this research, a pertinent approach has been identified as conceptualization research methodology. The study field is a major factor in the explanation for the methodological choice. This study examines several theories and concepts related to international investment law. The concept of IIAs is present in international investment law. This idea was created by States with the intention of protecting the assets and financial investments of foreign investors in the host country. FET is one of the IIAs' additional notions. These ideas are developed within the framework of the IIAs as a substantive investment protection to support investments in the host countries even more.

According to Corbin and Strauss, conceptualization methodologies are frequently utilised in research studies to facilitate understanding of the concepts and theories supporting a given phenomenon. A "working idea" is provided to the researcher during the data collection process by a conceptualisation approach, which is a legal methodology under qualitative methodology.[238] This study examines several theories and concepts related to international investment law using a conceptual methodology. It will be easier to determine the logic behind the scope of the many ideas under the IIAs regime, especially the FET, if these "concepts" are clearly understood.[239]

This research also employs a conceptualization process to develop original notions, theories, concepts, and definitions in the area of law. In order to generate a new concept or idea, according to Newman, it is crucial to examine previous research to find out how other academics have put the notion or thoughts into words.[240] In line with Newman's suggestion, this research will draw on previously published academic studies to produce fresh ideas and concepts that may be applied to comprehending efforts to rebalance IIAs in favour of investors' and host States' interests.[241] The scope and interpretation of various terminology under

[238] Corbin, J., & Strauss, A. *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* ((2008, 3rd ed.). Thousand Oaks, CA: Sage
[239] Oxford Dictionary, 'An idea or mental image which corresponds to some distinct entity or class or entities, or essential features, or determine the application of term ….' (2016)
[240] Newman, L. *Basics of Social Research: Qualitative and Qualitative Approaches.* (2012) 3rd Ed., Upper Saddle River, NJ,
[241] Ibid (n 7)

international investment law, on the other hand, can be clearly understood with the aid of a conceptualization process.

However, cultural factors can make conceptualization approach challenging.[242] Additionally, it takes time to gather facts or ideas while using conceptualization methods. Despite this, conceptualization is the best methodology to apply because it enables concepts to be understood and criticised, which is essential to this research.[243] The comparative research methodology, another research approach that is thought to be pertinent in this research, will be discussed in more detail in the following subsection. The choices of this approach and how it complemented this research are discussed in this part. A review of the historical roots of the comparative research approach is also provided in this section.

3.2 Comparative Methodology

A comparative methodology is, in the words of Hay and Mak, "a type of methodology which examines the correlation between various legal systems in the world and is used to obtain a deeper understanding of foreign legal system," and it is used to compare various legal systems within a particular system of law, their differences and similarities.[244] This type of methodology used for comparing different legal systems within a specific system of law, their differences and similarities.[245] This is a common element of research method, which needs two elements to establish the empirical relationship between the variables of which in this research will compare developed and developing states IIAs challenges and solutions.

Comparative research is also identified in this research as a relevant research methodology. This methodology is selected based on the research questions in this research especially in relation to the way forward to rebalancing IIAs to favour of host States (Tanzania). As Eberle reasoned "the essence of comparative law is the act of comparing the law of one country to that of another."[246] The research acknowledges the similar standard that international law has established, yet reasoned States have rights and power to negotiate IIAs that fits the purpose of itself. Eberle, added in the context of law, comparison offers perspective into the

[242] Allison DiBianca, Fasoli Middlebury, Vasudevi Reddy and Michael Mascolo, "The concept of culture: Introduction to spotlight series on conceptualizing culture" (2020)
[243] Dr.A.H.Sequeira "Conceptualization Research" (2014) National Institute of Technology Karnataka
[244] E. Hay and E.Mak, "Introduction; The possibilities of Comparative Law Methods for Research on the Rule of Law in a Global Context"(2009)
[245] Jaap Hage 'Comparative Law as the Method of Comparative Law' (2014) Maastricht European Private Law Institute Working Paper No.2014/11
[246] Edward J. Eberle, "The Methodology of Comparative Law" (2011) Roger Williams University Law Review: Vol. 16: Iss. 1, Article 2. Available at: http://docs.rwu.edu/rwu_LR/vol16/iss1/2 accessed 12 June 2021

other law, our own law, and, equally important, our own perceptions and intuitions, a self-reflection that frequently can provide perception into our understanding of the law.[247]

As a result, this study will compare the BIT model in a number of nations, including South Africa, and India. Using a comparative methodological framework aims to improve understanding of how law is applied in various countries. Understanding, for instance, why and how India adopted a new BIT model (2015). South Africa's use of domestic law is contrasted with Tanzania's BIT model. Based on the similarities and differences of the countries Tanzania will be compared with in the research, comparing the new BIT will help to identify potential reforms and areas in need of improvement prior to renegotiation of the existing IIIs.

This research has chosen its own technique, adhering to its historical base. As already established, the Greeks are credited with developing comparative legal theory.[248] However, other empirical evidence suggests that the historical foundation of comparative methodology can be traced to the period of 41 century BC.[249] The period of 41 century BC was traced to the Aristotle era. An era where Aristotle's conducted a study on the documentation of the constitution of 158 City States. Aristotle evaluated the factors underpinning the sustenance of constitutions in 158 City State. Meeting the need of this methodology, the research aims to compared IIAs between developed and developing countries and understand weather a reform might affect the current condition of Tanzania in aspect of FDI.

Last but not least, employing a comparative technique in this study will help to learn how other countries (developed and developing countries) use their BITs and profit from them, as well as how to test this study's premise and add to its research proposal. Comparative technique does have certain restrictions, though. For example, it can be necessary to track negotiations where the country made mistakes for a renegotiation. Additionally, a particular model might favour one country over another while being unfavourable to Tanzania. The next section in this chapter will provides discussion on case study methodology. The next sub-section provides justification on why this methodology is relevant and how it is going to be used in this research.

[247] Ibid
[248] Ibid
[249] Anthony JP Kenny, 'Aristotle' *Encyclopaedia Britannica Online (*2015) <http://www.britannica.com/EBchecked/topic/34560/Aristotle> accessed 10 May 2015.

3.3 Case Study Methodology

This research identified a qualitative case study methodology as a relevant research method. A case study methodology is relevant to accomplish the aim in this research, which is to analyse a real-life situation in Tanzania, and her foreign investors to get the fact that will help to evidence the existing problems. As Rashid wrote a "case study research, through reports of past studies, allows the exploration and understanding of complex issues".[250]As mentioned, the aim in this research is to examine and understand issues posed by FET in Tanzania using selected foreign investors to establish the evidence.

Yin mentioned, a case study is relevant in a research study that aims to answer 'how' and 'why' questions, also it extends directions to researcher together evidence on a case.[251] As proven, in literature, IIAs limit States to regulate in favour of public which is the problem. However, the literature reviews the lack of information answering what, is the provision in IIAs that support such problem, why so, and how is Tanzania affected by that. It is understood that there are lot of problems that cause the imbalance in IIAs however, this research aims to select the major problems in Tanzania to be solved. A case study will help me to closely explore and examine the privilege that foreign investors enjoy in the mining industry and challenges they cause or may cause to Tanzania then show how BITs have made it difficult for the state to exercise its sovereign power in Tanzania.

Yin defines a case study "an empirical inquiry that investigates a contemporary phenomenon within its real-life context; when the boundaries between phenomenon and context are not clearly evident; and in which multiple sources of evidence are used".[252] This is a type of methodology used in this research because I am interested in understanding a specific problem in detail. Similar, since there is a lack of literature to answer some of the research questions, the use of documentations, interviews, survey and direct observation will be used as part of the case study methodology to gather information.

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[250] Yasir Rashid, Ammar Rashid, Muhammad Akib Warraich, Sana Sameen Sabir, Ansar Waseem, "Case Study Method: A Step-by-Step Guide for Business Researchers." (2019). *International Journal of Qualitative Methods* Available in https://journals.sagepub.com/doi/full/10.1177/1609406919862424 accessed 12 June 2020

[251] Robert K Yin, *Case study research, design and methods* (3rd edn, SAGE Publications, Thousand Oaks 2003) 13.; Yasir Rashid, Ammar Rashid, Muhammad Akib Warraich, Sana Sameen Sabir, Ansar Waseem, "Case Study Method: A Step-by-Step Guide for Business Researchers" (2019)

[252] Ibid

However, this methodology has its weaknesses, this includes living an open room for criticism because the study is based on an individual country, and intensive involvement of researcher's feelings and so could result in bias. On the other hand, this research methodology is beneficial because it provides an in-depth understanding of a subject chosen, develop new theory and establish the basis of future research.

3.4 Doctrinal Research Methodology

In this research , a doctrinal methodology will be used to evaluate the inadequacy in the existing rules and principles governing international Investment law. The benefit of using this methodology is that this research topic is library based; it entails the use of legal concepts, wording of provisions, cases, statues, rules as well as existing literature before reaching a circumspect conclusion.[253] Therefore, to archive the goal, Tanzanian investment agreements, national policies, statues and relevant investment case awards.

The doctrinal research methodology originated from the Latin word (noun) "*Doctrina*"[254] which simply means 'to instruct, a lesson and precept'.[255] It is "a detailed and highly technical commentary upon, and systematic exposition of, the context of legal doctrine"[256] which is acceptable in interpretation law of treaties, investment protection standards, and cases. Accordingly, Hoecke States that doctrinal methodology is a scientific theory that helps to find logic of certain views on a certain area of reality.[257] It further assists in finding a solution to the problem or question researched.[258] Pearce argued that doctrinal "research provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future

[253] Emerson Tiller and Frank B. Cross 'What is Legal Doctrine' (2006) North -Western University Law Review 517. Richard A Posner, 'The Present Situation of legal Scholarship' (1980)90 (5) Yale Law Journal 1113. Ashish Kumar Singhal and Ikramuddin Malik, 'Doctrinal and Social – legal methods of research; Merits and Demerits' (2012) 2(7) Educational Research Journal 252-256. Ashish Kumar Singhal and Ikramuddin Malik, 'Doctrinal and Social – legal methods of research; Merits and Demerits' (2012) 2(7) Educational Research Journal 252-256

[254] Defined as "synresearch of various rules, principles, norms, interpretative guidelines and values. It explains, makes coherentor justifies a segment of law as part of larger system of law" See at Hutchnson Terry C and Duncan, Nigel 'Describing what we do: Doctrinal legal research', Deakin Law Review 17(1) pp.83-119

[255] Dr Terry Hutchison and Nigel Duncan, "Defining what we do: Doctrinal Legal Research" (2010) Lecture Notes City University London

[256] Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson 2007)

[257] Van Hoecke 'Methodologies of legal Research: Which Kind of method, for what kind of discipline?' (Hart Publisher, 2011)

[258] Van Hoecke 'Methodologies of legal Research: Which Kind of method, for what kind of discipline?' (Hart Publisher, 2011)

developments".[259] Since this approach is concerned with rules that govern particular legal category, the methodology will help to analyse the FDI, in relation to national and international investment law.[260] In addition, this research will critically examine Tanzanian's BITs and its provisions under international investment law. This methodology often 'helps to find logic of certain view'.

However, doctrinal research has some limitations. For instance, a reasoning power and skills of a researcher can change other scholar's perception and projection of the same legal facts.[261] Furthermore, the research methodology is based on a researcher's experience from the material he or she has researched on, thus the finding do not involve social, economic or political facts.[262]

3.5 Data Required.

Relevant data for this study will be gathered from both primary and secondary sources. Most of data will be gathered from published sources and archive data related to foreign investment agreements in both developed and developing nations. The International Centre for Settlement of Investment Disputes' and publications on UNCTAD will also be consulted for information. The pertinent data from government publications and other documents in the public domain regarding IIAs will also be used in this study. Before coming to any conclusions that will be used in this research to make recommendations for rebalancing IIAs, all the data gathered for this study will be carefully analysed and contrasted. This study will produce recommendations based on its analysis of the data from the case studies and literature.

[259] Pearce D, Campbell E and Harding D, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987)
[260] Van Hoecke 'Methodologies of legal Research: Which Kind of method, for what kind of discipline?' (Hart Publisher, 2011)
[261] Prof, Khushal Vibhute and Filipos Aynalem, "Legal Research Method" (2009) Teaching Material, available at http://www.academia.edu/8221697/Legal_Research_Methodology (accessed 11 July 2016)
[262] Prof, Khushal Vibhute and Filipos Aynalem, "Legal Research Method" (2009) Teaching Material, available at http://www.academia.edu/8221697/Legal_Research_Methodology (accessed 11 July 2016)

3.6 Limitation and Delimitation of this Research

Every study, regardless of how effectively it is done and organised, has limitations, according to Simon and Goes' article on limitations.[263] There are several restrictions (factors outside of the researchers' control) that had an impact on this study. This covers obstacles that prevented the gathering, analysis, and recommendation of certain data that might have influenced the outcome of this study.

To start, the validity of the data utilised for analysis may have been impacted by the use of qualitative research, which mostly uses secondary sources of information. For instance, while conducting research, I was unable to locate any comprehensive documents outlining how and sign Tanzania IIAs, as well as the country's model BIT and some information regarding departing investment claims. On the other hand, there was a plan to interview Tanzanian government representatives and legal experts who signed pre-existing BITs and those who are involved in reforming domestic law in favour of foreign investors and returning the favour to the public in 2017 to explain whether a lack of knowledge affected the decisions made, but for various reasons time and means of locating them were not favourable, so this was not a success. Additionally, there is a restriction on the sourcing of essential research data on Tanzania.

In certain circumstances, the internet was used to gather information such as the fact of recent investment claims. Finally, it is important to note that this research acknowledges many elements that have an impact on the study's scope; these are "deliberate exclusionary and inclusionary judgments" that were taken prior to the research's investigations. Even though other issues were noted in the literature, the research chose to focus on FET provision within BITs. The research topic (problem to be solved) is the researcher's option.

3.7 Summary of the Chapter

The theory, case study, and doctrinal methodology employed in this research have all been covered in this chapter. The chapter also covered the problems, the data needed to make

[263] Marlyn K Simon & Jim Goes, "Scope, Limitation, and Delimitation" (u.n) Available at https://ders.es/limitationscopedelimitation1.pdf (accessed 02/04/2021). Price, James and Judy Murnan, "Research Limitations and the Necessity of Reporting Them" *American Journal of Health Education.* Vol. 35, pp. 66-67. Available at http://libguides.usc.edu/writingguide/limitations

research viable, the limitations for the approaches chosen, and the scope limitation of this research, as well as providing rationale for the choice of research methodology.

CHAPTER FOUR: FAIR AND EQUITABLE TREATMENT PROVISIONS IN INTERNATIONAL INVESTMENT AGREEMENTS

4. Introduction

Building off from the existing literature, this chapter seeks to analyse FET clause and discuss the challenges posed by FET standard within existing IIAs, mainly BITs negotiated by Tanzania. The chapter will provide evolution of FET provision and an examination of FET clause in Tanzania IIAs' then examine the reason of incorporating FET standard in exiting IIAs and different standard of FET offered in in Tanzania IIAs will be analysed. Furthermore, the chapter will discuss the interpretation and application of FET standard, analyse some FET claims and rewards to determine how FET can impact on the interests of the host state (using Tanzania as an example). Lastly the chapter will examine how FET interferes with domestic legislation States and provide different options that States use to moderate FET for the purpose of reducing the broad interpretation and other challenges that Tanzania is facing through FET provision(s)

4.1. Fair and Equitable Treatment in Context

This section will examine the background and development of FET for the purposes of understanding the challenges caused by FET in most of IIAs, and how controversial and important the FET provision is to foreign investors.[264]

[264] Roland Klager, "Revisiting Treatment Standards – Fair and Equitable Treatment in Light of Sustainable Development" in S. Hindelang, M. Krajewski (eds.) Shifting Paradigms in International Investment Law (Oxford University Press, 2016) 65

Legal protection for foreigners in host States started in nineteenth to twentieth century, where aliens were protected by mechanisms such as "gunboat diplomacy".[265] However, after second world war, some factors (such as the prohibition of the use of Gun boat diplomacy by the UN charter) influenced the emergency of arbitration treaties.[266] On FET , the first reference of 'equitable treatment' as a concept appeared in 1948 in the Havana charter[267] where it was suggested in Article 11(2a) ii to "make recommendations for and promote bilateral or multilateral agreements on measures designed. (i) to assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another."[268] This Article made a recommendation to the International Trade Organisation to promote BITs and other IIAs. Members were given the rights, without prejudice to existing international agreements, and ensure that foreign investment is not to be used as a basis for interference in their internal affairs or national policies.[269] Furthermore, part of the agreement made was to avoid discrimination between foreign investments. Finally, "members also undertake, upon request, to participate in negotiations for bilateral and multilateral agreements on the subject of investments"[270] and assured just equitable treatment between members.

After the Second World War, where countries were busy rebuilding peace and reconstruct their economies by opening borders, the United States introduced a major change in national and international trade by making policies to promote international trade.[271]Political and economic position of US after Second World War helped the country to have an influence in global economic development policy thus, presenting its desired treaty language for investment negotiations of BITs and multinational treaties, and supported the inclusion of FET in IIAs.[272]

Mr Harry S. Truman (US president) in 1949 while addressing Congress, encouraged US capital and foreign investment abroad. To support this, different strategies and policies such as special

[265] This involved the use of military, threats or force to ensure the right injured nations were fully vindicated. See, Catherine A. Rogers, Roger P. Alford, (2009) The Future of Investment Arbitration. *Published by ITA-ASIL and Oxford University Press;* John Dugard, (2016) Articles on Diplomatic Protection. Available at https://legal.un.org/avl/ha/adp/adp.html

[266] Christoph Schreuer, "Fair and Equitable Treatment in Arbitral Practice" (2005) The Journal of World Investment & Trade 357.

[267] Patrick Dumberry, "Fair and Equitable Treatment: Its Interaction with the Minimum Standard and Its Customary Status" (2017) In Brill Research Perspectives in International Investment Law and Arbitration.

[268] Available at https://www.wto.org/english/docs_e/legal_e/havana_e.pdf

[269] Article (12) of the Havana charter for an international trade organization

[270] Stephan W. Schill, Christian J. Tams and Rainer Hofmann, International *Investment Law and History (2018)*

[271] This was done by the office of Economic affairs for the State department under William Fowler

[272] Walker, H., "Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice," (1956) *The American Journal of Comparative Law*. Fair and Equitable Treatment as protection standard appeared first in Friendship, Commerce, and Navigation (FCN) treaties done by the United States (US) in the context of investment promotion and protection.

tax were introduced.[273] the government also supported the existence of FET in their commercial agreements as a mechanism that would attract more investors and maximize its economic development.

The concept of FET in investment treaties was introduced by United States in friendship, commerce and navigation treaties (FCN) and continue to be used and applied in commercial treaties and negotiations to encourage fairness and promote foreign investment.[274] In 1951, the FET provision appeared first as a provision in FCN treaties done by the United States (US) in the context of investment promotion and protection.[275] Article 1 Stating "*each party shall all time accord equitable treatment to persons, property, enterprises and other interest of nationals and companies of other party*".[276]

The FET provision appeared as a standard element of investment treaties in the Germany and Pakistan BIT of 1959.[277] Since then the FET provision included a right to a "stable and predictable" business and regulatory environment, allowing investors to seek compensation for changes in tax and regulatory standards.[278]

In emphasising investors protection, the Organisation for Economic Co-operation and Development (OECD) Council in 1967 adopted the Draft Convention on the Protection of Foreign Property.[279] This convention required each Party to at all times ensure FET to the property of the nationals of the other Parties.[280] As mentioned in Article 1(a), *"*Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other

[273] Ibid
[274] Stephan W. Schill, Christian J. Tams and Rainer Hofmann, International Investment Law and History (2018)
[275] Pinchis-Paulsen, Mona (2017) "Fair and equitable treatment in international trade and investment law, 1919-1956."https://kclpure.kcl.ac.uk/portal/en/theses/fair-and-equitable-treatment-in-international-trade-and-investment-law-1919--1956(1fd522e3-9a9c-4682-b12e-d164ba1e08f1).html accessed 12 June 2020
[276]See article 1 of the US-Denmark FCN Treaty (1951). Also see, Herman Walker, Jr.(1956) "Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice."*The American Journal of Comparative Law* .Vol. 5, No. 2 (Spring, 1956), pp. 229-247
[277] Agreement Between the Federal Republic of Germany and the Islamic Republic of Pakistan on the Encouragement and Reciprocal Protection of Investments, art. 2.2 (1959) state that "Neither Party shall subject to discriminatory treatment any activities carried on in connection with investments including the effective management, use or enjoyment of such investments by the nationals or companies of either Party in the territory of the other Party unless specific stipulations are made in the documents of admission of an investment."
[278] Occidental Exploration & Prod. Co. v. Republic of Ecuador, Final Award, paras. 180-92 (July 1, 2004) (Ecuador's change in policy regarding assessment of a value-added tax violated Occidental's rights to a stable and predictable legal environment as an "essential element" of FET).
[279] Draft convention on the protection of foreign property Available at https://www.oecd.org/daf/inv/internationalinvestmentagreements/39286571.pdf accessed 12 June 2020
[280] Fiona Marshall (2007) "Fair and Equitable Treatment in International Investment Agreements" Issues in International Investment Law Background Papers for the Developing Country Investment Negotiators' Forum Singapore, October 1-2, 2007

Parties. It shall accord within its territory the most constant protection and security to such property and shall not in any way impair the management, maintenance, use, enjoyment or disposal thereof by unreasonable or discriminatory measures. The fact that certain nationals of any State are accorded treatment more favourable that provide for in this Convention shall not be regarded as discriminatory against nationals of a Party by reason only of the fact that such treatment is not accorded to the latter.*"*[281] Even though it was never opened for signature, it left a mark on the importance of foreign investment protection in both developed and developing countries and developed the fundamental means of encouraging private and foreign capital for the purpose of the country development.

Furthermore, the OECD Draft Convention influenced the growing number of BITs in the world, which were negotiated between developed and developing countries beginning in the late 50s.[282] In I960s, a Convention on the settlement of Investment disputes between States was announced, and a minimum standard of treatment known as 'just equitable treatment'[283] under international law was introduced, as the primary source of international legal rules governing foreign investment.[284] Since then, States began to formulate treaties with the aim of establishing rules for the regulation of international commerce and investment.[285] On other hand, in 1992 the World Bank guidelines on the treatment of Foreign investment required hosts States to treat investors and their investments fair as stated in article iii (2) *"[e]ach State will extend to investments established in its territory by nationals of any other State fair and equitable treatment according to the standards recommended in the Guidelines*."[286]

The FET standard of treatment appeared in case law 1997,[287] in *the American Manufacturing & Trading, Inc. v Democratic Republic of Congo* (AMT case).[288] Since then, FET has been invoked in most investor state cases.

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[281] Article 1 of Draft Convention on the Protection of Foreign Property. Available at http://www.oecd.org/dataoecd/35/4/39286571.pdf accessed 12 June 2020
[282] See Pakistan and Germany 1959
[283] This s equivalent to Fair and Equitable treatment.
[284] See Andrew C. Blandford, "The History of Fair and Equitable Treatment before the Second World War" (2017) *ICSID Review - Foreign Investment Law Journal*, Volume 32, Issue 2, Spring 2017, Pages 287–303. https://unctad.org/en/PublicationChapters/wir2015ch4_en.pdf accessed 12 June 2020
[285] Catherine A. Rogers, Roger P. Alford (2009), The Future of Investment Arbitration (Oxford)
[286] World Bank, World Bank Guidelines see in http://italaw.com/documents/WorldBank.pdf
[287] Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (2009) Published to Oxford Scholarship; Stephan W. Schill, "Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law", in International Investment Law and Comparative Public Law 155 (Stephan W. Schill ed., 2010).
[288] ICSID Case No.ARB/93/1

This section traced the concept of FET as a standard of treatment to foreign investors to understand the purpose and importance of it in international law and investment treaties in general. Following the fact above this research opine that FET is an important(minimum) standard of treatment and the use of it in international investment treaties promotes investment and ensures fair treatment to foreigners in host States.

4.1.1 Fair and Equitable Treatment as a protection standard

FET is the most commonly invoked and controversial protection standard in international investment law.[289] It is described as 'a short-hand formula for the combined legal effects of all other standards of treatment prescribed by an investment treaty'.[290] It covers the protection against procedural injustices by the executive, judicial misconduct, infringement on property rights and contractual breaches.[291] This protection standard is not drafted uniformly and most of investment agreements have not provided the exact meaning of it.[292]

The absence of FET definition in treaties is contributed by the historical background of FET, because the old treaties such as the Harvana Charter failed to provide a meaning of it.[293] Though, the interpretation of this protection standard is influenced by the language and context of FET provision in a given treaty.[294] The lack of uniformity in interpretation has allowed contracting parties (foreign investors and host States) to take an opposite stand in defining it.[295] Host States generally espouse a restrictive view of FET which reflects the origin purpose of it (historically) to discourage uncompensated expropriation and potential denial of justice.[296]

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[289] Enrique Boone Barrera, "The Case for Removing the Fair and Equitable Treatment Standard from NAFTA" (2017) CIGI Papers No. 128 — April 2017; Stephan W. Schill, "Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law" (2006) IILJ Working Paper 2006/6 Global Administrative Law Series

[291] *Noble Ventures Inc v Romania*, ICSID Case No ARB/01/11, Award (5 October 2005) para 182.

[292] Marcela K, Bronfman, "Fair and Equitable treatment: An Evolving Standard" (2005) PhD Research , University of Heidelberg.

[293] Barnali Choudhury, "Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law" (2005) The Journal of World Investment & Trade Volume 6: Issue 2

[294] Ibid

[295] Barnali Choudhury, "Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law" (2005) The Journal of World Investment & Trade Volume 6: Issue 2; OECD, "Fair and Equitable Treatment Standard in International Investment Law", (2004) OECD Working Papers on International Investment, 2004/03, OECD Publishing. http://dx.doi.org/10.1787/675702255435; UNICTAD, "Fair and Equitable Treatment" (1999) UNCTAD Series on issues in international investment agreements, Vol.3

[296] Jorge E. Viñuales, *Foreign Investment and the* Environment *in International Law (*Cambridge University Press 2012)

While, foreign investors prefer an expansive view, which gives scope to a claim for breach of FET.[297]

It is argued, "even with an ordinary interpretation, 'Fair' and 'Equitable' treatment replace the term with 'Just', even-handed, unbiased or legitimate'",[298] this has not been successful in clarifying FET. In short, several scholars, and tribunals have attempted to define the precise nature, scope and meaning of FET with no success, leading some scholars to a conclude (based on literature) that FET treatment has no clear definition.[299]

I therefore argue that a lack of clear meaning of FET in investment treaties has given foreign investors an advantage to make claims over different measures done by host States to stablish it as a ground of unfair treatment. I suggest that the meaning of FET is supposed to follow the historical context, as mentioned in Havana Charter for international Organisation, "(i) to assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another.",[300] and not otherwise (claim for legitimate expectation). This description should be used to establish the purpose and meaning of FET, and the State should only be held responsible for breach of FET if it leads to a denial justice in "criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."[301] This means the interpretation FET should be associated only with the protection of foreign investors and their investments against 'arbitrary treatment and denial of justice',[302] and not otherwise.

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[297] Malta Law Guide, "Fair and Equitable Treatment standard in International Investment Law" (2018) Available at https://maltalawguide.com/international-investment-law/fair-and-equitable-treatment/

[298] See, Siemens A.G. v. Argentina, ICSID Case No. ARB/02/08, Award, 6 February 2007. Para 290 in Jason Haynes, "The Evolving Nature of the Fair and Equitable Treatment (FET) Standard: Challenging Its Increasing Pervasiveness in Light of Developing Countries' Concerns - The Case for Regulatory Rebalancing" (2013) The Journal of World Investment & Trade 14(1):114-146

[299] Barnali Choudhury, "Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law" (2005) *The Journal of World Investment & Trade* Volume 6: Issue 2; Marcela Klein Bronfman, "Fair and Equitable Treatment: An Evolving Standard", (2006) Max Planck UNYB, Vol. 10 609-680, available at www.mpil.de/shared/data/pdf/pdfmpunyb/15_marcela_iii.pdf ; Mayeda Graham, "Playing Fair: The Meaning of Fair and Equitable Treatment in Biilateral Investment Treaties" (2007). Journal of World Trade, Vol. 41, No. 2, pp. 273-291, 2007, Available at SSRN: https://ssrn.com/abstract=1427307

[300] Article 11(2)i

[301] OECD (2004), "Fair and Equitable Treatment Standard in International Investment Law", OECD Working Papers on International Investment, 2004/03, OECD Publishing. http://dx.doi.org/10.1787/675702255435

[302]Rudoff Dolzer, "Fair and Equitable Treatment: A Key Standard in Investment Treaties", 39 International Law. 87 (2005). M. Sonarajah, 'Fair and Equitable Treatment: Conserving Relevance' in M. Sonarajah (ed.); UNICTAD, "International Investment Agreements Reform Accelerator" (2020)Available at https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf accessed 12 June 2020

In the next section(s), I will the examine the use of FET provision in current IIAs looking at the challenge it has establish mostly on the host States, then paying attention to the interpretation and application of it. This is done for the purposes of evaluating the problem that affect IIAs to balance the interests of the two-contracting parties.

4.1.2 Challenges of FET in International Investment Agreements

History points out that FET was a recommendation, and not an obligation, though modern treaties have incorporated FET as a significant protection standard in IIAs as a binding obligation on host States to ensure there is a basic justice and fairness standard of treatment granted to them.[303] FET is reported to have a spotlight in investment arbitration as the most invoked protection standard in investment arbitration where a state is found reliable.[304]

Lack of meaning and uniform method of determining or explaining what actions done by state violate FET standard has influenced the increase of FET claim in investment tribunals.[305] Statistics show nearly every claimant in investment claim suit have used or tempted to make a claim for violation of FET.[306] For example, out of 600 claims (allegation breach of IIAs), 499 are alleged of breach of fair and equitable treatment.[307] This is largely due to the unclear meaning and different interpretations offered in recent IIAs has lot lost track (main purpose of it) and now fills the gaps of other specific standards just to obtain level of protection intended by treaties.[308]

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[303] Catherine Yannaca-Small, "Fair and Equitable Treatment Standard in International Investment Law", (2004) [OECD], Working Papers on International Investment No. 2004/3.
[304] Denning Jin,(2013),China: Fair and Equitable Treatment (FET) – Should the Standard be Differentiated According to Level of Development, Government Capacity and Resources of Host Countries?", King & Wood Mallesons.
[305] Ibid
[306] Rudoff Dolzer, "Fair and Equitable Treatment: A Key Standard in Investment Treaties", 39 INT'l LAW. 87 (2005)
[307] Antoine Duval, "Towards reforming the fair and equitable treatment standard in International Investment Agreements" (2019), *Doing business right blog*; Rumana Islam, "Interplay between Fair and Equitable Treatment (FET) Standard and other Investment Protection Standards" (2014), Eric De Brabandere, "Fair and Equitable Treatment and (Full) Protection and Security in African Investment Treaties Between Generality and Contextual Specificity" (2017). OECD, "Fair and Equitable Treatment Standard in International Investment Law", (2004) OECD Working Papers on International Investment, 2004/03, OECD Publishing. http://dx.doi.org/10.1787/675702255435
https://investmentpolicy.unctad.org/investment-dispute-settlement?status=2 accessed 12 June 2021
[308] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008) https://core.ac.uk/download/pdf/216910288.pdf accessed 12 June 2021

At other times a violation of another standard may lead to a violation of FET or, a violation of FET triggers a violation of the other standard.

The typical wording of FET in treaties is not detailed and so the clause serves as a 'catch-all 'provision.[309] This means a violation of other protection standards may lead to a violation of FET and vice versa. For example, in occidental v Ecuador case[310] the host state was alleged to be in breach of other protection standard automatically after being accused of breach of FET.[311] Dolzer wrote, "nearly every claimant or counsel who brings a suit feels tempted to argue that the treatment accorded by the host state was in violation of the standard of fair and equitable treatment".[312] Mann added, "fair and equitable treatment provision is likely to be almost sufficient to cover all conceivable cases.".[313] With simple interpretation, the FET clause can be "synonymous with other standards prescribed by the particular investment treaties."[314] The flexibility and generality of the FET has extended to affect all other substantive protection claims within investment treaty,[315] and the absence of meaning of it in IIAs States.[316]Dolzer added "the open-ended language of clauses on fair and equitable treatment gives rise to speculation which assumes that, if only properly argued, it will be possible to identify one or more aspects, individually or combined, which may amount to an act of violation."[317]

In a research study on the scope of FET, Marshall identified three approaches to FET, which impose obligation on the State.[318] The first approach of FET requires host State to treat investors with the standard under international law, the second approach require the host state to treat investors with the standard under customary international law (minimum standard). The

[309] Simran Kaplish, "Fair and Equitable Treatment in International Investment law" (2021) Available on https://taxguru.in/corporate-law/fair-equitable-treatment-international-investment-law.html (accessed 20/11/2021)
[310] Occidental Exploration and Production Co. v. Ecuador, Award, 1 July 2004
[311] See Para 187
[312] Rudolf Dolzer, "Fair and Equitable Treatment: A Key Standard in Investment Treaties" (2005) Available at
[313] Francis, A. Mann, "British Treaties for the Promotion and Protection of Investments" (1981) 52 BYIL 241.In Jason Haynes, "The Evolving Nature of the Fair and Equitable Treatment (FET) Standard: Challenging Its Increasing Pervasiveness in Light of Developing Countries' Concerns - The Case for Regulatory Rebalancing" (2013) The Journal of World Investment & Trade 14(1):114-146
[314] Rumana Islam, "Interplay between Fair and Equitable treatment (FET) standard and other investment protection standards" (2014)
[315] Fiona Marshall,(2007) "Fair and Equitable Treatment in International Investment Agreements" Available at https://www.iisd.org/pdf/2007/inv_fair_treatment.pdf (assessed 09/08/2019)
[316] Enrique Boone Barrera, "The Case for Removing the Fair and Equitable Treatment Standard from NAFTA" (2017) CIGI Papers No. 128; OECD (2004), "Fair and Equitable Treatment Standard in International Investment Law", OECD Working Papers on International Investment, 2004/03, OECD Publishing. http://dx.doi.org/10.1787/675702255435 accessed 12 June 2021
[317] Ibid (page 88)
[318] Fiona Marshall, "Issues in International Investment Law Background Papers for the Developing Country Investment Negotiators" Forum Singapore, October 1-2, 2007.

third approach requires host States to treat investors according to the wording of the provisions , this approach requires tribunals look at the plain meaning of FET (based on its wording).[319] Therefore, arbitrators end up with no options but to look at the plain meaning of FET as it is written and decide in accordance to their interpretation.[320] Tribunals use all approaches mentioned, however a number of tribunals practising the third approach especially a provision that does not specify the standard of treatment offered. This flexibility explain why FET has been a centre of debate in international investment law.

The UNICTAD mentioned about seven forms of FET provisions contained in BITs that were surveyed in 1996 -2006. These forms of FET provisions include:

(i) FET without reference to any standard,[321] which is open for any obligation,

(ii) FET with standard that linked to principle of international law.[322] The linkage suggests the interpretation not to be done separately from customary international law standard,

(iii) FET with language that is relying on domestic laws of host state,

(iv) FET with reference to customary international law minimum standard,[323]

(v) FET with reference to international law (this goes beyond minimum standard of treatment),[324]

(vi) FET with additional obligations to host States not to affect investments through irrational or discriminatory criteria,[325]

(vii) and FET that distinctly expressed through other treatments such as not less favourable to its own investors or most favoured nation treatment,[326] this means the treatment is not limited to international minimum standard.

The different forms of FET has affected the application, and exact meaning of it and made FET a controversial protection standard in the field of international investment law.[327] It has put dispute resolution mechanisms in a difficult position when it comes to

[319] Ibid.
[320] F A Mann, *British Treaties for the Promotion and Protection of Investments. (British yearbook of I'Law,1981). Put full reference*
[321] See article ii of Cambodia and Cuba (2001)
[322] See Article 3 of France and Uganda (2002)
[323] See Canada BIT model (2004), also Article 4 of the United States and Uruguay (2005)
[324] See 4 of France and Mexico (1998)
[325] See article 2 of Hungary and Lebanon (2001)
[326] See article 4 of Bangladesh and the Islamic Republic of Iran (2001)
[327] Ibid

interpretation.[328]Although some scholars claim that various forms of FET (different standards) are 'nothing but just semantic,'[329] tribunals do not always interpret them according to the standard mentioned.

In summary, FET is now a crucial tool for foreign investors to make claims against host countries, and the standard of it has gained a particular prominence which makes it more unpredictable to recognise. Even if an investment treaty does not contain FET provision investors can still claim for fair treatment through other provision such as Most Favoured Nation (MFN) that is in treaties.[330]

The high volume of dispute of FET against host States has impacted the sovereign power and the economy of most of developing countries (as host States) which raises serious concern over the use of it.[331] Thus, I will use Tanzania as an example of the host States and examine FET provision(s) and explore challenges that FET has or ought to create.

4.2 FET in Tanzania's International Investment Agreements

Section 4.1 has explained the purpose and interpretation of FET in IIAs; This section examines why Tanzania should consider revisiting its policy on the FET provision.[332]

Beside the creation of a safe, secure and stable environment for foreign investors, and their investments within the country, Tanzania is committed to protecting any investors coming from other nations through investment agreements by offering a FET even though the text of FET provision varies. The reason is that, after independence, 1961 Tanzania nationalised some of foreign investor's properties.[333] This action thought to be unfair, created fear to foreign investors investing in Tanzania, thinking the government could possibly expropriate their

[328] Roland Kläger, (2017) "Fair and Equitable Treatment in International Investment Agreements"
[329] Md. Rizwanul Islam, "Review of The Fair and Equitable Treatment (FET) Standard in International Investment Arbitration: Developing Countries in Context" (2021) Available in https://www.afronomicslaw.org/category/analysis/review-fair-and-equitable-treatment-fet-standard-international-investment accessed 12 June 2021
[330] Patrick Dumberry University of Ottawa, "Fair and Equitable Treatment', in: Stefanie Schacherer & Makane Moïse Mbengue (eds), Foreign Investment under the Comprehensive Economic and Trade Agreement (CETA)", (2018)
[331] Rumana Islam (Ibid)
[332] See Croatia-Ukraine BIT (1997), Australia-Singapore free trade agreement (2003)
[333] Clarence Dias, "Tanzanian Nationalizations: 1967-1970" (1970) Volume 4(1) Cornell International Law Journal

investments.[334] They therefore demanded protection from the government to protect them and their investments.[335]

Tanzania sought to create appropriate legal framework(s) to attract foreign investments for the purpose of promoting development. Thus, in late 1980s to 1990s the government of Tanzania initiated economic reform in which the country created laws and policies in favour of foreign investors,[336] arguing it would help to promote foreign investments, and increase the inflow of FDI.[337] This was done in national level, to put more effort, Tanzania ratified different IIAs which incorporated a number of standard treatments including FET. States adopt States. Thus, the FET standard stands to "protects acts or omissions taken by host States which are designed to make the investors business unprofitable".[338]

As Dulac and Hoeto reports, the fair and equitable treatment (FET) standard is one of the protection standards that is important to foreign investors, even though it is frequently found to be violated in investment treaty disputes.[339]Bronfman reasoned FET standard is, has been, and will continue to be important to foreign investors because it provides them certain treatments that host States are and will be committed to provided differently from domestic investors this makes FET standard a main focus of international Law.[340] The research reasons that this probably could be the main reason explaining why FET incorporated in Tanzania most of its IIAs.

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[334] Tanzania followed a state cantered socialist policies called 'Ujamaa' which restricted foreign investment after her independence. During socialization policy (late 1960s to early 1980s) where the government of Tanzania nationalised (expropriate) most of foreign investors the properties with no compensation. This history scared most of foreign investors to invest in Tanzania with fear that the government could possibly expropriate their investments.

[335] Richard A. Posner, "Creating A Legal Framework for Economic Development" (1998) World Bank researcher observer, Volume 13 Issue 1.

[336] Chris Maina Peter, "Promotion and Protection of Foreign Investments in Tanzania. A Comment on the New Investment Code." (1990); Yumpu, Foreign Direct Investment: A Lead Driver for Sustainable Development?" Towards Earth Summit 2002 Economic Briefing Series No. 1

[337] Lilian Melkizedeki Kimaro, "Examination of the effectiveness of regulation of Foreign Direct Investment in Tanzania" (u.k) Master research. Available on https://repository.up.ac.za/bitstream/handle/2263/30071/dissertation.PDF?sequence=1 ; Naumi Kassim Mohammed, Dexiang Guo, Yongyeh Ngalim Elizabeth, "Legal Protection of Foreign Investment (FI) in Zanzibar: Lesson for China Investments" (2021) Beijing Law Review, Vol.12 No.4

[338] Detlev Vagts, "Coercion and Foreign Investment Rearrangements" (1978) 72 AM. J. INT'L L. 17, 34-35

[339] Elodie Dulac and Jia Lin Hoe, "Substantive Protections: Fairness" (2022) Available at https://globalarbitrationreview.com/guide/the-guide-investment-treaty-protection-and-enforcement/first-edition/article/substantive-protections-fairness

[340] Marcela Klein Bronfman, "Fair and Equitable Treatment: an Evolving Standard" (2005) *Estudios Internacionales Año* 38, No. 150, pp. 89-105 (17 pages)

Just like other developing countries, IIAs have contributed to the increase in FDI in Tanzania,[341] by establishing a favourable climate for foreign investments by contributing to legal certainty for foreign investors.[342] This research reasons the inclusion FET standard in Tanzania IIAs as a key protection standard in International Law has contributed to the fact of increasing FDI in Tanzania as it assures investors fair treatment in time of their investments. On the other hand, this research joins other scholars arguing that FET provision has been frequently interpretated broadly and affects States interests. As reported by Cosbay and Mann, that "the standard of FET is a very misleading one in many ways. In is normal social use it seems fairly simple: what state would not say it will treat foreign investors fairly and equitably? However, once included in a treaty, FET becomes a legal standard that has attracted an extremely broad meaning in several arbitrations."[343]this chapter will establish how Tanzania FET standard is vague and are open to extensive interpretation which fail to secure the interests of state and its people.

This research reasons that the current FET provision(s) found in all bilateral investments signed by Tanzania and its wording are not precise enough to describe what action done by state can be considered unfair.[344] Lack of clear definition of FET Tanzania's BITs has given investors scope to sue for a wide range of unfair treatment. This has affected most of States regulatory power by putting pressure on governments not to take measures that will affect investors interest. Table 1 below shows the wording of FET(s) available in Tanzania BITs.

Table 1 FET provisions in Tanzania BITs

Bilateral Investment Treaty	**Article**

[341] UNICTAD, "The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries" (2009) Available at https://unctad.org/system/files/official-document/diaeia20095_en.pdf (accessed 04/08/2020)

[342] *Mwampaghale, William Timoth (2017) International Legal Framework for Foreign Investment Protection: An Analysis of Tanzania Treaty Practice.* Master's research, The Open University of Tanzania.

[343] See page 16 of Aaron Cosbey and Howard Mann, "Bilateral Investment Treaties, Mining and National Champions: Making it work"(2014)https://www.iisd.org/system/files/publications/bilateral_investment_treaties_mining_national_uneca.pdf (accessed 16/12/2021)

[344] See Article 4 of Columbia – France (2014) and Article 8.10 of CETA

1. China - United Republic of Tanzania BIT (2013)	*5 (1). Each Contracting Party shall ensure that it accords to investors of the other Contracting Party and associated investments in its territory fair and equitable treatment and full protection and security. 2. "Fair and equitable treatment" means that investors of one Contracting Party shall not be denied fair judicial proceedings by the other Contracting Party or be treated with obvious discriminatory or arbitrary measures.*
2. Kuwait - Tanzania, United Republic of BIT (2013)	*Not enforced (text unavailable)*
3. Canada - United Republic of Tanzania BIT (2013)	*Article 6 - Minimum Standard of Treatment* *1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security. (2). The concepts of "fair and equitable treatment" and "full protection and security" in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. (3). A breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.*
4. Oman - United Republic of Tanzania BIT (2012)	*2(3) Each Contracting Party shall ensure fair and equitable treatment of investments by investors or the other Contracting party. and shall not impair the management, maintenance. use. enjoyment or disposal thereof nor acquisition of goods and services or the sale or their production through unreasonable or discriminatory measures.*

5. United Republic of Tanzania - Turkey BIT (2011)	*2(2) Investments of investors of each Contracting Party shall at all times be accorded treatment in accordance with international law minimum standard of treatment, including fair and equitable treatment and full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair the management, maintenance, use, enjoyment, extension, or disposal of such investments by unreasonable or discriminatory measures.*
6. Mauritius - United Republic of Tanzania BIT (2009)	*4(1) Investments and returns of investors of either Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable nor discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory by investors of the other Contracting Party.*
7. Mauritius - United Republic of Tanzania BIT (2009)	*4. (3) Investments approved under Article 2 shall be accorded fair and equitable protection in accordance with this Agreement.*
8. Finland - United Republic of Tanzania BIT (2001)	*2(2) Each Contracting Party shall in its territory accord to investments and returns of investments of investors of the other Contracting Party fair and equitable treatment and full protection and security no case shall a Contracting Party accord to treatment less favourable than that required by international law.*
9. Jordan - United Republic of Tanzania BIT (2009)	*2(4) Each Contracting Party should guarantee the fair and equitable treatment of the investments made by the investors of the other Contracting Party and will not hinder the management, perpetuation, use, enjoyment or disposition of them, nor the acquisition of goods and services, or the sale of their products through unreasonable or discriminatory procedures.*

10. South Africa - United Republic of Tanzania BIT (2005)	*(1) Investments and returns that are reinvested by investors of either Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Party. Neither Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Party.*
11. United Republic of Tanzania - United Kingdom BIT (1994)	*2(2) Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party.*
12. Germany - United Republic of Tanzania BIT (1965)	*Article 1- Each Contracting Party Shall in its territory promote as far as possible the investment of capital by nationals or companies of the other Contracting Party and admit such investments in accordance · with its· legislation. It shall in any case accord such investments fair and equitable treatment.*
13. Denmark - United Republic of Tanzania BIT (1999)	*3(1) Each Contracting Party shall in its territory accord to investments made by investors of the other Contracting Party fair and equitable treatment which in no case shall be less favourable than that accord to its own investors or to investors of any third state, whichever is t h e more favourable from the point of view of the investor.*

14. Sweden - United Republic of Tanzania BIT (1999)	*2(3) Each Contracting Party shall at all times ensure fair and equitable treatment of the investments by investors of the other Contracting Party and shall not. impair the management, maintenance, use, enjoyment or disposal thereof nor acquisition of goods and services or the sale of their production, through unreasonable or discriminatory measures*
15. Italy - United Republic of Tanzania BIT (2001)	*2(2) Each Contracting Party shall create and maintain In its territory a legal system guaranteeing that investments of nationals or companies of the other Contracting Party shall at all-time be accorded fair and equitable treatment and shall enjoy full protection and security as accorded to the residents in its territory.*
16. United Republic of Tanzania - Zimbabwe BIT (2003)	*Coexists with SADC Investment Protocol (2006)* *6(1) Investments and investors shall enjoy fair and equitable treatment in the territory of any State Party.*
17. Netherlands - United Republic of Tanzania BIT (2001)	*Terminated*
18. Switzerland - United Republic of Tanzania BIT (2004)	*4(1) Investments and returns of Investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension or disposal of such Investments and returns.*
19. Korea, Republic of - United Republic of Tanzania BIT (1998)	*Article 2(2) Investments made by investors of each Contracting Party shall at all times be accorded fair and equitable treatment*

	and shall enjoy full protection and security in the territory of the other Contracting Party.
20. Egypt - United Republic of Tanzania BIT (1997)	*Not mapped*

Other investment treaties that Tanzania with FET provision is the Southern Africa Development Community (SADC) Investment agreement.

Table 2 Regional investment Agreements

Agreement and year signed	Parties	Provision
SADC Investment Protocol (2006)	SADC (Southern African Development Community)	6(1) Investments and investors shall enjoy fair and equitable treatment in the territory of any State Party.

Following the obligation of FET as stated in the table(s) above, Tanzania negotiated FET in different forms of FET as shown in the table(s) above. The table(s) provides an example of how FET is represented within Tanzania's IIAs comes in different format and broad (see section 4.3), which contribute to the issue that this research is investigating to provide evidence that perhaps Tanzania needs to have a model BIT that States clearly what the FET clause is meant to protect and what state obligations qualify to be in breach of FET.

The next subsection will discuss exiting FET(s) standard in Tanzania and prove how the wording of this protection standard has contributed to the interpretation challenges that lead to unbalanced interests of contracting parties.

4.3 FET standard in Tanzania BITs

Based on Table 1, there are four types of FET provision(s) identified in two categories: qualified and unqualified.[345] These are.

(i) Stand free FET, also called simple FET.[346]

(ii) FET with an international law standard.[347] Or FET with reference to international law standard.

(iii) FET with customary international law standard,[348] sometimes referred as an international minimum standard of treatment.

(iv) FET with additional obligation, also called FET plus.[349]

(v) FET with other specific substantive content.[350]

Each of above (FET type) has its own consequence, and for some reasons, Tanzania is using almost all of them. In no particular order the section below will examine all of FET type identified in several IIAs signed by Tanzania and explore challenges posed by it.

4.3.1 Standing free FET

A standing free FET is a form of FET that does not reference any standards of treatment (not prescribing minimum standard). The broad interpretation of the FET standard can have severe consequences for Tanzania.[351] For example, in *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India,*[352] the host state (India) was held liable for breach of

[345] A "qualified" FET clause is one that is directly linked to the Minimum Standard Treatment and international customary law. While "unqualified" FET provision one that is not linked to the MST or described in much more detail the threshold was said to be lower, which exposed the state to more liability." See in Enrique Boone Barrera. (ibid); Also see in UNICTAD, "Fair and Equitable Treatment UNCTAD Series on Issues in International Investment Agreements II" (2012) Available at https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf

[346] See Germany - United Republic of Tanzania BIT (1965)

[347] See United Republic of Tanzania - Turkey BIT (2011)

[348] See Canada - United Republic of Tanzania BIT (2013)

[349]See China - United Republic of Tanzania BIT (2013), and Korea, Republic of - United Republic of Tanzania BIT (1998),

[350] See, Oman - United Republic of Tanzania BIT (2012), and 6. Mauritius - United Republic of Tanzania BIT (2009)

[351] Matthew C Porterfield, "A Distinction without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunals" (2013) *Investment Treaty News* .Available at https://www.iisd.org/itn/en/2013/03/22/a-distinction-without-a-difference-the-interpretation-of-fair-and-equitable-treatment-under-customary-international-law-by-investment-tribunals/; Rudolf Dolzer, "Fair and Equitable Treatment: A Key Standard in Investment Treaties" (2005) 39 International Lawyer 90

[352] PCA Case No. 2016-7

FET (provision did not specify standard of treatment) through the India – UK BIT (1994) which States, "*Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party."*[353] The FET provision did not provide the standard of treatment applicable. However, the State argued standard of treatment meant to be limited to minimum standard of treatment which is according to Customary International Law (CIL).

On the other hand, the investors argued against that and claim that for the standard to be autonomous as there was no specific reference to minimum standard treatment.[354] Similarly, the tribunal rejected to refer FET as stand-alone FET to be treated as a minimum standard of treatment, instead interpreted it with a *greater protection standard* than a minimum standard offered under CIL and rule in favour of foreign investors.[355] As a result, India has modified FET provision in its new model BIT 2016 and replaced stand free with a Customary International law.[356] The case of *Cairn V India*[357] shows how a stand free FET can impact host States interests.

4.3.2 Customary International law minimum standard

The customary international law minimum standard (autonomous), is a traditional standard, also referred as customary minimum standard.[358] This is the most common standard offered by international investment law (historically),[359] ensuring foreign citizens from capital exporting

[353] Article 3(2) of India – UK BIT (1994)
[354] Ameya Vikram Mishra & Nikhil Pratap, "Unqualified Fair & Equitable Treatment Clause: It's Time to Revamp" (2021) Available at https://indiacorplaw.in/2021/05/unqualified-fair-equitable-treatment-clause-its-time-to-revamp.html
[355] See in Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India (PCA Case No. 2016-7)
[356] See Article 3 of India model BIT (2016)
[357] Ibid
[358]Crawford, J., Brownlie's, *Principles of Public International Law*, Oxford, 8th ed., 2012; Matthew C. Porterfield, "A Distinction Without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunals" (2013) Available at https://www.iisd.org/itn/en/2013/03/22/a-distinction-without-a-difference-the-interpretation-of-fair-and-equitable-treatment-under-customary-international-law-by-investment-tribunals/ (Accessed 12/07/2020); Borja Alvarez, "Minimum Standard of Treatment (MST)" (2012) Available at https://jusmundi.com/en/document/wiki/en-minimum-standard-of-treatment-mst (accessed 22/04/2021)
[359] The US Secretary of State Cordell Hull in his historical note to the Mexican Government of 22 August 1938, mentioned "under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment thereof", see in Mavluda Sattorova (ibid)from Burns H Weston and Frank G Dawson , " Prompt, adequate, and effective " ? : A Universal Standard of Compensation" (1961 – 1962) 30 Fordham Law Review 727, 735 . ; Also Mavluda Sattorova, "The Impact of Investment Treaty Law on Host States Enabling Good Governance?" (2018) *Oxford and Portland, Oregon*

States enjoying fair treatment in the host States 'limited to elements that compromise minimum standard'.[360]

The customary minimum standard is also referred to as the international minimum standard was developed in response to the assertion of Latin Americans States with the in relation to the protection aliens from bad governance practice such as 'denial of justice and uncompensated takings of property by host States'.[361] The international minimum standard was then developed in reference to developing countries such as Tanzania because local (national) legal standard of equity and justice assumed to be below the international standard.[362]

Consequently, most tribunal have been interpreting FET with reference to the international minimum standard.[363] Though the standard is also used by developed countries such as United States, and as a means of limiting the broad interpretation of FET clause. Article 5 of U.S model BIT States that *"Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security".*[364] Similarly, Article 1105(1) of the old NAFTA agreement provides that "each party shall accord…treatment in accordance with international law, including fair and equitable treatment".[365]

Given the universality of the international minimum standards, it is accepted by tribunals when interpreting FET when FET provision did not provide the standard to be measured of.[366] This was done by tribunal when deciding different cases such as Bywater v Tanzania,[367] Occidental v Ecuador,[368] and Azurix V Argentina.[369] This exemplifies how and why the nature and standard of FET remains unclear and unpredictable.

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[360] Matthew Coleman, and Thomas Innes, "Investor-State Arbitration and "Fair and Equitable" Treatment" (2015) Available at https://www.steptoe.com/en/news-publications/investor-state-arbitration-and-fair-and-equitable-treatment.html (accessed 12/08/2021)
[361] Georg Schwarzenberger, *Foreign Investments and International Law* (London, Steven & Sons, 1969).
[362] Andreas Hans Roth, *The Minimum Standard of International Law Applied to Aliens* (Leiden, A W Sijthoff' s Uitgeversmaatschappij,1949).
[363] Surya P. Subedi, *International Investment Law: Reconciling Policy and Principle* (2016)
[364] 2012 U.S. Model Bilateral Investment Treaty
[365] Ibid
[366] See Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania (ICSID Case No. ARB/05/22); Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy) (1989); ADF Group Inc. v. United States of America, ICSID Case No. ARB (AF)/00/1.
[367] ICSID Case No ARB/05/22, Award, 24 July 2008, para. 592.
[368] LCIA Administered Case No. UN 3467, Award, 1 July 2004, para. 190.
[369] ICSID Case No. ARB/01/12, Final Award, 14 July 2006, para. 361.

On other hand, the customary international law minimum standard is criticised to impose a broad interpretation. This is evident in *Mondev* case[370] where the tribunal had a different opinion as the history provided by pointing out that international minimum standard today "cannot be limited to the content of customary international law as recognised in arbitral decisions in 1920s".[371]As useful as the customary international law minimum standard has been, recently it has been criticised as an old standard applied belonging to the 20th century, and so argued not to be applicable in this century.[372] This is proved following *RDC v. Guatemala*[373] case decision where tribunal did not interpret FET standard as offered but instead it followed a different approach.[374]

As Porterfield wrote, "the reluctance of investment tribunals to base their interpretations of customary international law on actual state practice, and *opinio juris* suggests that more aggressive approaches may be necessary to deter tribunals from adopting increasingly broad interpretations of FET."[375] Thus, even with specification of the standard of treatment such us 'international minimum standard', tribunal can still use their opinion which are outside the limit issued in FET provision.

On a separate note, the OECD working paper suggested the customary standard of fair and equitable treatment standard in International investment law extends its minimum protections in areas that "i) prevents denial of justice, ii) Proper treatment of detained foreign nationals; iii) Taking proper measures to physically protect the property of foreign nationals when this property is under attack; iv) The exercise of the right of expulsion in a way that least injures the foreign national being expelled."[376] Given the aforementioned, this research is supportive of the customary international minimum standard to be used as a right measure of FET because it measures the basic standard of justice such as equity, non-discrimination, due process,

[370] Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2.
[371] Ibid
[372] See Mondev International Ltd. v. United States of America (ICSID Case No. ARB (AF)/99/2) (NAFTA), Award 11 October 2002, para 116-117, 125. Mondev para 125 cited in Azurix Corp. v. The Argentine Republic (ICSID Case No. ARB/01/12), Award 14 July 2006, para 368; Siemens AG v. Argentina (ICSID Case No. ARB/02/8) (Germany/Argentina BIT) Award 6 February 2007 para 295. In Fiona Marshall, (2007) "Fair and Equitable Treatment in International Investment Agreements", Issues in International Investment Law Background Papers for the Developing Country Investment Negotiators' Forum Singapore, October 1-2, 2007
[373] Railroad Development Corporation v. Republic of Guatemala, ICSID Case No. ARB/07/23
[374] Ibid
[375] Matthew C. Porterfield, "A Distinction Without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunals" (2013) *Investment Treaty News*
[376] OECD, "Fair and Equitable Treatment Standard in International Investment Law," Working Papers on International Investment No. 2004/3 (Paris: OECD, 2004), p. 8, note 32

fairness, expropriation and human rights.[377] However sometimes tribunals use objective view to test whether the weather host state has breached FET obligation and because the standard may lead to a broad interpretation. Thus, States might need to moderate FET provision by clarifying what actual state practice can be considered to be in breach of FET and avoid opinion juris that comes from secondary source or other arbitral awards.

4.3.3 FET with other standard of treatment

In this wording of FET, its wording includes other standards of treatment such as national treatment, most favoured nation, and the most common one is the combination between FET and full protection and security in same clause. Here is an example "*Investments made by investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party."* [378] The reason of attaching other treatment obligation to FET provision is lack of examples or specific instances, thus the use FET as an overriding obligation.[379]

Such a FET provision adds more obligation to host state and can complicate the interpretation of it, because the standard of other obligation can influence the interpretation of FET.[380] As Rumana mentioned "tribunals are at odds as whether full protection and security is an autonomous standard or subspaces of FET".[381] Rumana in his discussion added that the interpretation of FET has contributed to a unfair awards because looking at different investment cases that were decided following a FET claim that had more obligations. One will see each FET was interpreted differently. Some balanced the obligations mentioned in clause,[382] some interpreted differently (separate).[383] The combination of FET with other

[377] OECD (2004), "Fair and Equitable Treatment Standard in International Investment Law", OECD Working Papers on International Investment, 2004/03, OECD Publishing. http://dx.doi.org/10.1787/675702255435
[378] Korea, Republic of - United Republic of Tanzania BIT (1998)
[379] Mann, F.A., "British Treaties for the Promotion and Protection of Investments' 52 (1999) The British Yearbook of International Law 241 at p. 243.Islam, Rumana "Interplay between Fair and Equitable Treatment (FET) Standard and other Investment Protection Standards." (2014) Bangladesh Journal of Law
[380] Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment: Relationship Between the FET and the Other Treaty Provisions.* (Published to Oxford Scholarship Online, 2009)
[381] Islam, Rumana "Interplay between Fair and Equitable Treatment (FET) Standard and other Investment Protection Standards." (2014) Bangladesh Journal of Law
[382] See in *Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4;* and *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador,* ICSID Case No. ARB/06/11
[383] See in *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, and in *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5

protection standard has establish the fact that FET is indeed a complicated and an overarching principle.

In summary, there is still an ongoing debate on which standard should be used to interpret FET whether the interpretation is in line with the minimum standard of international law or what investment treaties intended (another standard). Either way arbitration tribunals have been given a broader scope for treaty interpretation as opposed to the traditional means.

*4.2.*2.4 FET with reference to international law standard

Furthermore, FET with reference to International law, is also a standard offered in IIAs.[384]Tanzania make up the number above, stating *in some of its BITs "….fair and equitable treatment and full protection and security no case shall a Contracting Party accord to treatment less favourable than that required by international law.*[385] It is submitted that a FET standard in accordance to international law gives interpreter(s) a wide range of interpretation by allow them uses principles of international law which can fall under customary international law.[386] It also includes other established sources of international law such as customs, duties imposed on host States in accordance with State practice, judicial or arbitral case law and other sources of general law.[387].

There has been a tradition where formulation of international law to be treated as a minimum standard of protection as the doctrine of state responsibility. It States that: "*Host States are enjoined by international law to observe an international minimum standard in the treatment of aliens and alien property. The duty to observe this standard - objective international standard, is not necessarily discharged by according to aliens and alien property the same treatment available to nationals. Where national standards fall below the international minimum standard, the latter prevails*."[388] However, it is argued that FET linked to

[384] Ibid
[385] Article 2(2) of Finland – Tanzania BIT (2012). Also see Article 2 of US – Argentina (1994)
[386] UNCTAD "Fair and Equitable Treatment: UNCTAD Series on International Investment Agreements II" (2012); Also See in USA (LF Neer) v United Mexican States, 4 R.I.A.A. 60, 3 I.L.R. (1927) 21 AJIL 555,556
[387] See Mondev v. United States, para 119; cited in ADF Group Inc. v. United States of America (ICSID Case No. ARB (AF)/00/1) (NAFTA), Award 9 January 2003, para 184. Both ADF and Mondev cited in Waste Management, Inc. v. Mexico (Number 2) (ICSID Case No. ARB (AF)/00/3) (NAFTA), Final Award 30 April 2004, para 96. From Fiona Marshall (2007) "Fair and Equitable Treatment in International Investment Agreements" Issues in International Investment Law Background Papers for the Developing Country Investment Negotiators' Forum Singapore, October 1-2, 2007
[388] See in Surya P Subed, *International Investment Law: Reconciling Policy and Principle* (Hart publishing 2020)

international law should not be interpreted as a minimum standard (customary international minimum standard).

For example, in *Azurin case*[389] FET standard offered that: "*Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law*". [390] The claimant argued that international standard of FET should be treated independent from the customary international minimum standard because the text of FET provision did not refer to customary minimum standard. Even though the host state did not expect so, Argentina argued against Azurix that the FET standard offered had no difference from an international Minimum standard.[391]

The international law standard provides an obligation that is independent from other protection standard which makes it easy to be violated because even if a host state treats foreign investors with the same standard of its national 'International minimum standard', a state can be accused of treating foreign investor against promised standard which is international standard.[392] States have an obligation of protecting other States (nationalities) under the international law,[393] as part of responsibility is placed by either customary international law and treaties. Thus, any state that breaches an international obligation will be internationally responsible for reparation hence the international standard places a higher standard to be achieved.[394]

Different formulation, and poor wordings of FET clause have provided arbitrators with interpretative leeway enabling them to challenge a broad range of public interest regulation. This has given arbitrators flexibility during interpretations which has brought issues in the light of balancing investment protection with the policy of host countries, in particular States have a right to regulate in favour of its citizens.[395]

Despite the non-uniformity of FET standard clauses in investment treaties, the interpretation of them by tribunals has been similar and this is due to the vagueness of it. The poor wording

[389] Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12
[390] See Article II(2)(a) of US- Argentina BIT (1991)
[391] Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12
[392] Ibid
[393] Article 36 United of Responsibility of States for Internationally Wrongful Acts (2001), Sompong Sucharitkul, "State Responsibility and International Liability Under International Law" (1996)
[394] Ian Brownie (1990) *principles of public international law*. http://www.lapres.net/brownlie.pdf
[395] Ibid

of FET clause(s) and lack of coherence of FET,[396] has influenced different opinion on the interpretation in both developed and developing countries.[397] Tanzania can possibly avoid this broad interpretation by having a different approach of writing FET clause (have a uniform FET) which could possibly constrain tribunals interpretation of FET.[398] However, he argued that negotiating partners of developing States such as Tanzania usually decide on the standard of treatment to be incorporated in BITs.[399] This explains why Tanzania has different form of FET.

Tanzania has followed traditional model BIT(s) of developed States which resulted in two different model BIT(s); the North America version (International minimum standards), and western which has stand-alone FET or FET that combines with other obligations or FET with reference to international Law.[400]

It is argued in this research that, not having a uniform standard could also be the reason why Tanzania is facing increased investment cases. Moreover, the available standard of treatment adopt is not moderated to reflect Tanzania's own legal capacity. Therefore, this research will propose a uniform FET standard to protect the interests of Tanzania.

4.4 International investment tribunals regulating FET

This section will look at the most popular mechanisms that resolves investment disputes which are International Centre for Settlement of Investment Disputes (ICSID)[401] and *ad hoc* arbitral tribunal under the United Nations Commission on International Trade Law (UNCITRAL)[402] to assess how the interpretation of FET have negatively impacted state interests,[403] and relate to Tanzania current situation.

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[396] Ibid
[397] Bronfman MK, "Fair and equitable treatment: an evolving standard". (2006) In: Bogdany AV, Wolfrum R (eds) Max Planck year book of United Nations law, vol 10. Koninklijke Brill N.V, The Netherlands, pp 609–680
[398] See options in chapter 7.
[399] Eric De Brabandere, "Fair and Equitable Treatment and (Full) Protection and Security in African Investment Treaties Between Generality and Contextual Specificity" (2017) The Journal of World Investment & Trade. Available at https://brill.com/view/journals/jwit/18/3/article-p530_7.xml?language=en (accessed 22/06/2021)
[400] Eric De Brabandere, "Fair and Equitable Treatment and (Full) Protection and Security in African Investment Treaties Between Generality and Contextual Specificity" (2017) *The Journal of World Investment & Trade.* Available at https://brill.com/view/journals/jwit/18/3/article-p530_7.xml?language=en (accessed 22/06/2021)
[401] ICSID is an independent international institution, which was established by a treaty (the ICSID convention) in 1965. It was designed to promote the settlement of disputes between States and foreign investors.
[402] See https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf . See article 10 of Tanzania – Turkey (2011).
[403] Investment tribunals have no political power of affecting public interests however the case decision can affect economic power of a state and decision making in future. See in Nicolas M.Perrone, "The International

The international law provides several options for treaty partners to influence treaty interpretation.[404] This means States can have interpretation notes for its treaty, or a details language of treaty that make it easy to interpret it. However, most investment parties have allowed tribunals to interpret a treaty. In other words, investment tribunals have been given power through IIAs to make final decisions on investment disputes.[405] For this reason, before examining different approach of interpretation, and application of FET it is worth discussing mechanisms that interpret treaties and method used to interpret them. This will help to understand whether the vague interpretation of the current form of treaty that Tanzania have (more specific FET provision) is due to its wording or bias that ISDS is claimed to have against host States.

4.4.1 Mechanism of resolving investor – State disputes

Despite the availability different mechanism of resolving investor State disputes, the interpretation IIAs, (mostly FET clause) have challenged host States interest and tribunals have often been criticised for not considering host States sovereign power to regulate on public interest. This section will examine different mechanism that used by foreign investors and host States to resolve their disputes and reason why the ISDS often decide in favour of foreign investors.

4.4.2 The interpretation of FET by Tribunals

It is obvious that investment tribunals have a task of finding the meaning, scope, and sometimes standard of FET (where it is not mentioned) to determine whether the host state is responsible for breach of FET as claimed by investors. This is done through different tactics to decide whether host state is in breach of FET, for example tribunals might look at the positive treatment that state supposed to provide, but for some reasons did not[406] or look at negative measures that state tool and negatively affects foreign investors,[407] or treatment that fall under

Investment Regime and Foreign Investors Rights: Another view of a popular story"(2013) PhD Research , at London school of Economic; Rudolf Dolzer, "Fair and Equitable Treatment: A Key Standard in Investment Treaties",(2005) 39 INT'L LAW 87, 90-94.

[404] James R. Crawford, *Brownlie's Principles of Public International Law*; 8th edition (Oxford 2008)

[405] Anthea Roberts, "Power and Persuasion in Investment Treaty Interpretation: The dual role of States" (2010) The American Journal of International Law. Vol. 104, No. 2

[406] S.D. Myers, Inc. v. Government of Canada, UNCITRAL

[407] Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2

the standard promised for example international minimum standard.[408]As a result, the meaning of FET often vary from case to case.[409]

4.4.3 Case by case approach

The 'case-by-case' approach is an interpretative approach; one that actually leaves discretion to a tribunal to adopt the (applicable) standard to the specific circumstances of each case. Since there is no universal definition of FET, often tribunals interpret it based on the fact of the case. As claimed in *Mondev International Ltd. v. United States of America,*[410] "judgement of what Fair and equitable treatment cannot be reached in abstract: it must depend on the fact of the particular case."[411] Accordingly, FET is depending on the circumstances of a case. The Tribunal in *Waste Management II,*[412] added "evidently the standard is to some extent a flexible one which must be adopted to the circumstances of each case."[413] It came to the conclusion that if FET standard is not reliant on previous case decisions or investment tribunal but depends on the fact of the case thus it changes from time to time and case by case.

A Case to case approach however has been criticised as follows; if the tribunals take account of the surrounding circumstances of the case in order to make decisions such as determining what FET is.[414] Then it is unfair for tribunals not to consider States actions from case to case, meaning tribunals need to examine if the protection standard violated was reasonable to be a

[408] MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7
[409] Nida Usman Chaudhary, "Implications of Key BIT Provisions (Bilateral Investment Treaties)" (2015) Available at https://courtingthelaw.com/2015/08/19/commentary/implications-of-key-bit-provisions/
[410] ICSID Case No. ARB(AF)/99/2
[411] Alexander Orakhelashvili , "The Normative Basis of "Fair and Equitable Treatment": General International Law on Foreign Investment?" (2008); OECD, "Fair and Equitable Treatment Standard in International Investment Law", (2004) OECD Working Papers on International Investment, 2004/03, OECD Publishing. http://dx.doi.org/10.1787/675702255435 ;Yulia Levashova, "Fair and Equitable Treatment and Investor's Due Diligence Under International Investment Law" (2020) Netherlands International Law Review volume 67, pages233–255
[412] Case No ARB(AF)/00/3 at https://www.italaw.com/sites/default/files/case-documents/ita0900.pdf
[413] See in Federico Ortino, "Investment Tribunals' Case-by-Case Approach: A Response to Martins Paparinskis" (2013) Available at https://www.ejiltalk.org/investment-tribunals-case-by-case-approach-a-response-to-martins-paparinskis/ accessed 12 June 2020
[414] Denning Jin King and Wood Mallesons, "Fair and Equitable Treatment – Should the Standard be Differentiated According to Level of Development, Government Capacity and Resources of Host Countries?" (2013) Available at https://www.chinalawinsight.com/2013/02/articles/intellectual-property/fair-and-equitable-treatment-should-the-standard-be-differentiated-according-to-level-of-development-government-capacity-and-resources-of-host-countries/; Tanaya Thakur, "Reforming the investor-state dispute settlement mechanism and the host state's right to regulate: a critical assessment" (2021) Indian Journal of International Law volume 59, pages173–208; Doug Jones, "Investor-State Arbitration in Times of Crisis" (2013) National Law School of India Review Vol. 25, No. 1.; OECD, "Business Responsibilities and Investment Treaties"(2020) Available at https://www.oecd.org/investment/OECD-Investment-treaties-Public-consultation-2020.pdf ; Lorenzo Cotula, "Rethinking investment law from the ground up: extractivism, human rights, and investment treaties" (2021) Available at https://www.iisd.org/itn/en/2021/03/23/rethinking-investment-law-from-the-ground-up-extractivism-human-rights-and-investment-treaties-lorenzo-cotula/

claim (unfair treatment to foreign investors) meaning States could be violating its on law, and not FET standard. As much as the interpretation of FET depends on the fact of the case, it is suggested that tribunals might need to consider States circumstances that lead to breach of FET, and while reasoning they should pay attention to the capacity, and resources of the host country accused for that breach of FET.[415] In other words, when tribunals interpret FET standard, they should as well be able to consider the standard of treatment asked based on the development level of a host state, and its capacity of providing a standard position.

On the other hand, a case-by-case approach creates inconsistency, and unpredictability which will destroy the purpose of FET.[416] The reason is that a case approach causes a non-uniform interpretation, which has become a challenge on balancing the interest of foreign investors and host States, and with the absence of precedent in international arbitration law,[417] which makes it difficult to predict the outcome of the results to a breach of FET. Which come to a conclusion that to avoid inconsistency and unpredictability, reform of FET is needed.

4.4.3.1 Literal interpretation

Sometimes tribunals do look at the text or wording of FET clause, and provide ordinary meaning of it."[418] For example in *MTD v Chile*[419] *the* tribunal concluded that term fair and equitable treatment mean 'just', 'even-handed', 'unbiased', 'legitimate'.[420] While in *Azurix v Argentina*, [421] the tribunal found the ordinary meaning of FET to be 'an even-handed and just manner, conducive to fostering the promotion of foreign investment.'[422] The approach of looking at the ordinary meaning of FET is done in respect of the Vienna Convection Law of

[415] Denning Jin King and Wood Mallesons, "Fair and Equitable Treatment – Should the Standard Be Differentiated According to Level of Development, Government Capacity and Resources of Host Countries?" (2013) Available at https://www.chinalawinsight.com/2013/02/articles/intellectual-property/fair-and-equitable-treatment-should-the-standard-be-differentiated-according-to-level-of-development-government-capacity-and-resources-of-host-countries/ accessed 23 June 2021

[416] Rumana Islam, *The Fair and Equitable Treatment (FET) Standard in International Investment Arbitration: Developing Countries in Context*. (2018)

[417] Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment (2008)*, Oxford Scholarship Online

[418] Ioana Tudor, The Fair and Equitable Treatment Standard in the International Law of Foreign Investment (2008), Oxford Scholarship Online; Nicolette Butler & Surya Subedi, "The Future of International Investment Regulation: Towards a World Investment Organisation?" (2017) Netherlands International Law Review volume 64, pages43–72(2017) Available at https://link.springer.com/article/10.1007/s40802-017-0082-5

[419] *MTD v. Republic of Chile*, Award, 25 May 2004, paras. 110–112.Available at https://jusmundi.com/en/document/decision/en-mtd-equity-sdn-bhd-and-mtd-chile-s-a-v-chile-award-tuesday-25th-may-2004 accessed 132 June 2020

[420] At para. 113.

[421] Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12

[422] Ibid

Treaties (VCLT)[423] which States that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[424] However, it was argued that the ordinary meaning of FET in different agreements could reasonably be understood to have different meaning,[425] which makes it hard to find an accurate meaning.

On other the hand, literal interpretation has also been criticised as follows; there is new meaning of terms is added daily as language develop, with this particular reason one can argue that a literal rule approach through the VCLT can result in unjust decisions. Furthermore, the interpretation of FET extends to other existing standards of treatment, such as full protection and security, non-discrimination, and most favoured nation clause under FET or have a direct influence on the meaning of FET.[426]

Similarly, Dumberry suggested the interpretation of FET should not just follow the ordinary meaning of it but look at the treaty context, negotiating history, and the intent of the parties when interpreting it even if the notion is just to ensure 'equity, fairness and justice.'[427] However, I argue that even if tribunals look at external aid while interpreting FET, it is possible for the ruling to be in favour of foreign investors because naturally, the purpose and intention of FET clause presupposed to protect and favour the interests of foreign investments which is identified as a 'proactive behaviour' of host States to encourage and protect foreign investors and their investments as it is the purpose of BITs.[428] Thus most of FET interpretation influenced by the purpose of BIT hence most of outcomes result in one side of protecting foreign investors. However, some tribunals hold a different view, for example in *Saluka case,*[429] and *Continental Casualty Company* case, [430] the tribunal reasoned differently saying the purpose of BIT should balance the interest of two contracting parties, meaning it should

[423] The VCLT is a convention has which has a total of 116 parties and Tanzania is one of them (signed in 1976 Tanzania). The VCLT require all laws originated from treaties (Bilateral or multilateral) to be interpreted and applied according to it
[424] Article 31(1) https://iilj.org/wp-content/uploads/2016/08/VCLT-Art.-31-33.pdf
[425] Tyson Wanjura, "Azurix Corp. v zurix Corp. v. Argentine Republic: Azurix Corp. v. Argentine Republic: Tribunal Ruling in Favour of Foreign Investor Requires Pro-Active Behaviour by the Host State to Encourage and Protect Foreign Investment under the Fair and Equitable Treatment Standard of U.S.-Argentine BIT" (2014) *Law and Business Review of Americas Volume* 13(4)
[426] Ioana Tudor, The Fair and Equitable Treatment Standard in the International Law of Foreign Investment (2008), Oxford Scholarship Online
[427] Patrick Dumberry, "The importation of the FET standard through MFN clauses: An empirical study of BITs" (2016); Kendra Leite, "The Fair and Equitable Treatment Standard: A Search for A Better Balance in International Investment Agreements" (2016) American University International Law Review. Volume 32(1)
[428] Ibid
[429] Saluka Investments B.V. v. The Czech Republic, UNCITRAL (1976) Partial award (300- 309)
[430] Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9. Award 258

protect the legitimate expectations of foreign investors but also allow States to regulate it. It can be said an *ex aequo et bono*,[431] seems to fit the purpose of interpretation for now until there is a clear and exact FET meaning offered by BITs.

4.4.3.2 Tribunals View

The arbitration tribunals have a role of balancing the interests of the contracting parties in investment treaties when they interpret and apply the FET standard. However, the approach used to apply FET clause one sided. This is because even when tribunal try to acknowledge the state's right to regulate in favour of public, the ambiguity of FET disciplines States actions and favours foreign investors. To help achieve a balance, arbitration tribunals have, when interpreted FET protection standard used a restrictive approach, while some have used a broad approach. For example, in Genin *case,* [432] the tribunal followed the historical intent of FET (restricted view) where breach of FET was reflected as "a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith".[433] Similarly, in *Neer Case,*[434] the tribunal ruled according to an international minimum standard mentioning "to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[435]

However, in recent years the broad interpretation has taken over and extended the scope of FET standard and cause States to believe that tribunals care more on the interests of foreign investors and disregard ones with host States. For example, in *Mondev case,*[436] tribunal said "what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith".[437] With this interpretation States do not necessary have to act in bad faith to be in breach of FET as was believed before.[438] *Similarly, in GAMI vs. Mexico (2004)* 'the tribunal rejected Mexico's argument and stated that, a government's failure to comply with its

[431] Barnali Choudhury, "Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law" (2005) The Journal of World Investment & Trade Volume 6: Issue 2; Christoph Schreuer, & August Reinisch, International *Protection of Investments – The Substantive Standards*" (2020)
[432] Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2
[433] Ibid
[434] L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States (1926)
[435] Ibid
[436] Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2
[437] Ibid
[438] Ibid

own law may violate the FET standards.'[439] This means States can also be accused for breach of FET even by not complying with its own law. On other hand, in the *GAMI* case, the tribunal was accused of prioritising foreign investors interests without considering the circumstances, interests, and the power of sovereign States. However, this is not the only case that claimed to prioritise investment interest.[440] States for example, in AWG case[441] and *Impregilo v Argentina*[442] legitimate rights of state to protect the citizens to access water were disregarded and tribunal favoured foreign investors legitimate expectations.[443]

the interpretation of FET following tribunal's view has been criticised to favour foreign investors without considering the economic position of the host States. It is written, "the interpretation of the FET standard by arbitrators has given primacy to the protection of the interest of the foreign investors over the economic interests of developing States,".[444]

For example, in the *tecmed* case, [445] Mexico was claimed to be in breach of FET for government decision of denying renewing licence to protect environment and public health. Tribunals did not consider the interests of host state and claim that there was lack of transparency and violation of basic expectation. Basically, foreign investors through FET expecting the host States to provide stable and transparent legal framework for the time of their investments.

Similarly, in *Azurix case,*[446] tribunal disregarded public interests and decided that State(s) were in breach of FET for taking measures that affected foreign investors and their investment. It is with no doubt that the interpretation of FET does not consider the interests of host States and its sovereign power.[447]

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[439] Rumana Islam (Ibid)
[440] Public Citizen, "Case studies: Investor –State attacks on public interest policies" (u.n) Available at https://www.citizen.org/wp-content/uploads/egregious-investor-state-attacks-case-studies_4.pdf
[441] AWG Group Ltd. v. The Argentine Republic, UNCITRAL
[442] Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17
[443] Caroline Henckels, "Balancing investment protection and sustainable development in investor-state arbitration: the role of deference," In A. K. Bjorklund (Ed.), *Yearbook on International Investment Law & Policy 2012-2013* (1st ed., pp. 305 - 326). Oxford University Press.
[444] Rizwanul Islam, "Review of The Fair and Equitable Treatment (FET) Standard in International Investment Arbitration: Developing Countries in Context" (2021) Available at https://www.afronomicslaw.org/category/analysis/review-fair-and-equitable-treatment-fet-standard-international-investment accessed 12 June 2020
[445] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2
[446] Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12
[447]Jack Biggs, "The Scope of Investors' Legitimate Expectations under the FET Standard in the European Renewable Energy Cases" (2021) ICSID Review - Foreign Investment Law Journal, siaa047, Available at https://doi.org/10.1093/icsidreview/siaa047 ; Rumana Islam, *The Fair and Equitable Treatment (FET) Standard*

In summary, FET is a one-sided standard, and the current approaches of the interpretation of the FET standard will always prioritises the interests of foreign investors and neglects the perspectives of host countries.[448] On other hand, tribunals as much as tribunals are accused of prioritise investors interest, it is reminded that tribunals have been empowered by IIAs to interpret investment treaties which aims to protect the interests of foreign investors. As Laird reasoned, a careful interpreter would always pay attention to the language of provision which reflect the intention of the parties, while reflecting the purpose of BIT which is to promote and protect foreign investors.[449] This explains why most of the case decisions favours investors and suggesting a reform, because without having an exhaustive list of what constitute to FET tribunals will forever use their view to determine what States action amount to breach of FET.[450]

It is worth knowing that ISDS function outside domestic mechanism of host States, the ISDS allows foreign investors to make claims against host States to a chosen or agreed national or international dispute resolution mechanism for financial compensation, which can be ICSID[451] or UNICITRAL[452] arbitration.[453] The investors - State Dispute Settlement is faced with a task of balancing the interest of host States, and foreign investors under IIAs.[454] over 95 per cent of investment treaties contains an ISDS mechanism, and over 80 per cent of known ISDS cases claimed for breach of FET, and the decisions of these cases were in favour of foreign investors. Statistics as such make me ISDS favour one contracting party when interpreting FET provision.

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in International Investment Arbitration (2018) the International Law and the Global South book series; Denning Jin King and Wood Mallesons, "Fair and Equitable Treatment – Should the Standard be Differentiated According to Level of Development, Government Capacity and Resources of Host Countries?" (2013) Available at https://www.chinalawinsight.com/2013/02/articles/intellectual-property/fair-and-equitable-treatment-should-the-standard-be-differentiated-according-to-level-of-development-government-capacity-and-resources-of-host-countries/ accessed 12 June 2020

[448] Rumana Islam, *Key Problems in the Interpretation of the FET Standard by Current Investment Tribunals* (2018)

[449]Ian A. Laird,Borzu Sabahi,Frédéric G. Sourgens, and Todd J. Weiler, *Investment Treaty Arbitration and International Law* (2014) Volume 7; Lori Wallach, "Fair and Equitable Treatment and Investors' Reasonable Expectations: Rulings in U.S. FTAs & BITs Demonstrate FET Definition Must be Narrowed," (2012). Available at: http://www.citizen.org/documents/MST-Memo.pdfhttp://www.citizen.org/documents/MST-Memo.pdf accessed 12 June 2020

[450] Ibid

[451] A fair, neutral and impartial forum for the settlement of disputes between foreign investors and States. See in Stephan W. Schill, Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward. (2015) *Available at http://e15initiative.org/publications/reforming-investor-state-dispute-settlement-isds-conceptual-framework-and-options-for-the-way-forward/*

[452] Thomas Roe, Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011).

[453] Traidcraft,"International Investment Agreements: An advocacy guide for CSOs" (2015)Available at https://www.tjm.org.uk/documents/reports/Traidcraft-SEATINI_BITs_Advocacy_Guide_Complete-1.pdf

[454] Ibid

I also doubt whether host States did foresee the investment protections such as FET would limit most of government decisions. In different words, host States did not foresee that FET will extend to reach even investors basic expectations. Following the doubt above, some countries have denounced the dispute resolution mechanisms offered in their treaties while some seek to change all of their investment treaties. [455] I argue that issues are not from tribunals because the job of arbitrators is to do interpretation of specific clause of BIT in general with an appropriate caution to fit the purpose of or intention of the author of the clause of BIT in general.

Lastly even though a majority of scholars blamed tribunals for bad practice of issuing unfair awards (being in favour of foreign investors), the tribunal might not be at fault. Because decisions made by tribunals are affected by the provisions offered in IIAs which is to protect (favours) foreign investors and not States. Tribunals maintain the object and purpose of investment treaties are indeed to essentially provide protection for investors,[456] and therefore to protect host States interest States and reform FET protection standards.

4.5 Application of FET

According to Karl, the FET standard is like a 'black box full of surprises,' the scope and obligation of it is difficult to predict.[457]Thus tribunal have a role of evaluating carefully different factors of case (individually) to interpret and apply FET in a case. Though it is revealed that the application of FET by tribunals value the interests of foreign investors more than ones of the host States and exposed States into a number of uncertainties and risks.[458] Hailes argued that foreign investor could as well claim that a measure in response to COVID-19, even the temporary measures States issued over COVID -19, could give sufficient weight to claim for breach of FET.[459]

[455] Lauge N. Skovgaard Poulsen and Geoffrey Gertz, "Reforming the investment treaty regime A 'backward-looking' approach" (2021). Available at https://www.brookings.edu/research/reforming-the-investment-treaty-regime/ (accessed 03/01/2022. Mr Manuel Casas, "Denunciation of ICSID Convention" (2021) Available at https://jusmundi.com/en/document/wiki/en-denunciation-of-icsid-convention (accessed 02/01/2021)

[456]Ibid

[457] Joachim Karl, 'International Investment Arbitration: A Threat to State Sovereignty' in Wenhua Shan Penelope Simons and Dalvinder Singh (eds), Redefining Sovereignty in International Economic Law (Hart Publishing, 2008)

[458] Ibid

[459] Oliver Hailes, "Epidemic Sovereignty? Contesting investment treaty claims arising from coronavirus measures" (2020) Available at https://www.ejiltalk.org/epidemic-sovereignty-contesting-investment-treaty-claims-arising-from-coronavirus-measures/ accessed 12 June 2020

This issue has not been addressed much by scholars. However, this research chose to argue that there are some issues on the level of application when analysing FET,[460] if the application of FET follow the plain meaning of FET ' fair and equitable' one would expect the interpretation of FET provision to consider the interest of both contracting parties (investors and host States). But since IIAs have failed to provide a clear definition of FET to guide the interpretation and application of FET, tribunals chose to do it based on the purpose of IIAs which is to protect the interest of foreign investors. To avoid the protection of one side interest it is advised by this research a moderation of FET clause.

Furthermore, ISDS function outside domestic mechanism of host States, the ISDS allows foreign investors to make claims against the host States to a chosen or agreed national or international dispute resolution mechanism for financial compensation, which can be ICSID[461] or UNICITRAL[462] arbitration.[463] The investors - State Dispute Settlement is faced with a task of balancing the interest of host States, and foreign investors under IIAs.[464] over 95 per cent of investment treaties contains an ISDS mechanism, and over 80 per cent of known ISDS cases claimed for breach of FET, and the decisions of these cases were in favour of foreign investors.

4.6 Constitutive elements of FET standard

The FET provision has been applied in almost every host state misconduct.[465] This section will discuss the core component of it from case laws to establish its broadness and propose the need of limiting its interpretation and application.

In the *Rumeli Telekom v Kazakhstan*[466], the arbitral tribunal held that:

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[460] Richard H. Kreinder , "Fair and Equitable treatment – A comparative International Law Approach, Transnational Dispute Management" (2006) Vol 3, issue 3.
[461] A fair, neutral and impartial forum for the settlement of disputes between foreign investors and States. See in Stephan W. Schill, Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward. (2015) *Available at http://e15initiative.org/publications/reforming-investor-state-dispute-settlement-isds-conceptual-framework-and-options-for-the-way-forward/* accessed 12 June 2020
[462] Thomas Roe, Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011).
[463] Traidcraft,"International Investment Agreements: An advocacy guide for CSOs" (2015)Available at https://www.tjm.org.uk/documents/reports/Traidcraft-SEATINI_BITs_Advocacy_Guide_Complete-1.pdf accessed 12 June 2020
[464] Ibid
[465] Elodie Dulac and Jia Lin Hoe, "Substantive Protections: Fairness" (2022) Available at https://globalarbitrationreview.com/guide/the-guide-investment-treaty-protection-and-enforcement/first-edition/article/substantive-protections-fairness#:~:text=The%20core%20components%20of%20FET,protection%20against%20denials%20of%20justice.accessed 02/05/2022)
[466] ICSID Case No. ARB/05/16

…[T]he fair and equitable treatment standard encompasses inter alia the following concrete principles: The State must act in a transparent manner; the State is obliged to act in good faith; the State's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process; the State must respect procedural propriety and due process. The case law also confirms that with the standard, the State must respect the investor's reasonable and legitimate expectations...[467]

Due the flexible nature of FET provision, its interpretation and application of FET has been associated with States action such as the denial of justice, failure to act transparency towards foreign investors,[468] due process of law, nationalisation without compensation, frustration of investor and their legitimate expectation,[469] poor business environment, and consistency of legislation and administrative proceedings,[470] lack of respect for the obligation of vigilance and protection, unjust enrichment, evidence of bad faith, absence of transparency, arbitrary[471] and discriminatory treatment,[472] coercion and harassment by state, failure to provide full protection and security and failure to offer a stable and predictable legal framework.[473] And arbitral tribunals have reasoned that such elements (mentioned above) breach FET and provide an award in favour of foreign considering the interests of host States. Below is a discussion of selected elements, and arbitral awards to provide evidence of the need of change in existing FET provision.

4.6.1 Denial of Justice, Due Process, and abusive treatment

The FET provision has placed the obligation on host States not to deny foreign investors justice, and provide a due process in all administration, civil, criminal adjudicatory proceeding.[474] The term denial of justice is defined in *Jan de Nul v Egypt* case as "manifest injustice in the sense of a lack of due process leading to outcome which offends a sense of judicial propriety."[475] Any gross misadministration of justice by national courts of the host States particularly due to

[467] Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16
[468] See in Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1
[469] See in South American Silver Limited v. Bolivia, PCA Case No. 2013-15
[470] Ibid
[471] Saluka v. Czech Republic, Partial Award of 17 March 2006, para. 164
[472] See in LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc.v. Argentine Republic, ICSID Case No. ARB/02/1
[473] Dr Ioana Knoll-Tudor, "Fair and Equitable Treatment" (2020). Available at https://jusmundi.com/en/document/wiki/en-fair-and-equitable-treatment accessed 23 June 2020
[474] Francioni, "Access to Justice, Denial of Justice and International Investment Law" (2009) 20 EJIL 729
[475] an de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13

the ill-functioning of the judicial system in the state is also captured. Although it is difficult to accurately define the forms of denial of justice but, the lack of access to national courts of the host States and failure to pronounce judgement within a practicable timeframe are forms of denial of justice. Furthermore, improper administration of civil and criminal justice and "inadequate procedures and unjust decisions"[476] also constitute denial of justice. It is generally recognised that only gross or manifest instances of injustice are considered a denial of justice. On a contrary, a simple error, misinterpretation, and or misapplication of domestic law is not per se a denial of justice.

Following the decision of the tribunal in *Jan de Nul* case, element of the denial-of-justice can be categorised into procedural and substantive.[477] The procedural element involves delay, *ultra vires* findings, dilatory consolidation, and espousal of an expert's report with no independent analysis. On other hand, substantive element involves, failure to account for fraud in the proceedings, and need to exhaust local remedies as entire system of justice is on trial.[478] The most significant element of denial of justice is the exhaustion of local remedies. This is so because, when local remedies are still effectively available, the judicial ill-treatment may still be corrected by higher courts. It is well established that "an aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not of itself amount to an unlawful act [under international law]".[479] The denial of justice is an element of FET also challenge the interest of the host States. The reason is that there is no clarity or detail in FET provision that clarify how many years of delay can constitute to a delay or denial of justice and qualify and violate FET (no limitation). However, tribunals decide based on a case-by-case basis which cause different results for example in *Chevron case.*[480] the Tribunal held a delay of 15 years to be a breach of FET while in *Jan de Nul case,*[481]tribunal reasoned the delay of 10 years to be 'unsatisfactory' to qualify as a breach of FET. The absence of clarity to FET such as mentioning how long claim staying in domestic court amount to delay of justice is what

[476] *Garcia – Amador et al., Recent Codification of the Law of State Responsibility for Injuries to Aliens* (1974)
[477] Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt
(ICSID Case No. ARB/04/13)
[478] Ibid
[479] Zachary Douglas, "International Responsibility for Domestic adjudication: denial of justice deconstructed" (2014) *The International and Comparative Law Quarterly* Vol. 63, No. 4, pp. 867-900 (34 pages)
[480] Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador, UNCITRAL, PCA Case No. 34877
[481] Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt (ICSID Case No. ARB/04/13)

cause foreign investors to claim for breach of FET in reference to denial of justice even if it is simple or reasonable delay in time.

4.6.1.1 Analysis of denial of justice

The length of the delay required for a denial of justice to arise is unclear. It was held in *Jan de Nul v. Egypt* that although the period of 10 years to obtain a first instance judgement was unsatisfactory however, such delay did not constitute denial of justice. According to the tribunal, "the issues were complex and highly technical, that two cases were involved, that the parties were especially productive in terms of submissions and filed extensive expert reports".[482]

While the classic concept of denial of justice is confined to courts, some investment treaties refer to all types of "legal or administrative proceedings". Indeed, most modern-day FET claims relate to measures taken by the executive, and sometimes legislative, branches of a government.[483] The fundamental requirements of due process are applicable there, too. As previously noted, States retain the right to regulate in the public interest, but they must do so without violating the due process of law. The latter effectively requires governments to implement their decisions in a non-abusive manner. 'Procedural deficiencies of non-fundamental and non-abusive nature can contribute to a finding a violation,'[484] but they will not be sufficient for establishing a breach if the measure itself is legitimate.

In the *TECMED S.A. v. The United Mexican States*[485] case, the Tribunal interpreted FET as resulting from the good faith principle. It is not clear however, whether the Tribunal considered good faith as a source of obligation per se, i.e., a general obligation or as a principle which governs the creation of the obligation to accord "fair and equitable treatment". [486]The Tribunal found that the obligation of FET is an expression and part of the "bona fide principle recognised in international law", although –citing the Mondev case[487] bad faith from the State is not required for its violation. This principle encompasses the basic expectations that were taken into account when foreign investor made investments. Investors expect to be treated by

[482] Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13
[483] UNCTAD, "Fair and Equitable Treatment UNCTAD Series on Issues in International Investment Agreements II" (2011) Available at https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf
[484]Ibid
[485] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2
[486] See in Rumana Islam, "Role of Good Faith in Interpreting Fair and Equitable Treatment (FET) Standard in Arbitral Practice" (2012) *Bangladesh Journal of Law*
[487] Mondev International Ltd v. United States of America ICSID (Arbitration Tribunal). 25 September 2000

the host State in a transparent, consistent, i.e., non-arbitrary manner which would not conflict with what a reasonable and unbiased observer would consider fair and equitable".

The tribunal elaborated its view by reference to the findings of the *Neer & ELSI* cases: "The arbitral tribunal considers that this provision of the agreement, in light of the good faith principle established by international law. It requires the Contracting Parties to provide basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor …. The foreign investor also expects the host State to act consistently, i.e., without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.

The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation. In fact, failure by the host State to comply with such pattern of conduct with respect to the foreign investor or its investments affects the investor's ability to measure the treatment and protection awarded by the host State and to determine whether the actions of the host State conform to the fair and equitable treatment principle.

Therefore, "compliance by the host State with such pattern of conduct is closely related to the above-mentioned principle, to the actual chances of enforcing such principle, and excluding the possibility that state action be characterized as arbitrary; i.e. as presenting insufficiencies that would be recognized "…by any reasonable and impartial man," [488]or, although not in violation of specific regulations, as being contrary to the law because: "...(it) shocks, or at least surprises a sense of juridical propriety."[489] The tribunal ruled that Mexico's behaviour as well as the "deficiencies" drawn from this behaviour, amounted to a violation of the BIT guarantees to provide FET.

[488] Federico Ortino, Gabrielle Marceau, Gregory Shaffer, Krista Nadakavukaren, *International Investment Law An Analysis of the Major Decisions* (Bloomsbury Academic 2022)
[489] Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment (*OUP Oxford 2008)

4.6.2 Abusive Treatment

Coercion, duress, and harassment that involves unjustified and improper pressure, abuse of authority, persecution, threats, intimidation, and use of force with the potential to interfere with the property of foreign investors in the host States are all examples of abusive treatment. For instance, it was determined in the *Saluka* decision that FET P mandates that the host State "give the investor freedom from intimidation or harassment by its own regulatory authorities."[490] In addition, in *Desert Line Projects*, The tribunal concluded that the respondent State was to blame for the "threats and attacks" the claimant had experienced, including the detention of the claimant's family members and employees as well as armed interference with the claimant's property. The tribunal also determined that the Settlement Agreement's provisions, which were severely unfavourable to the investor, were "forced upon the Claimant under physical and financial hardship" and that "coercion" and "inadmissible pressure" were to blame for their imposition."[491]

Abuse may take many different forms, including the detention or imprisonment of executives or staff, the threat of or actual commencement of legal action, the wilful imposition of erroneous tax assessments, fines, or other penalties, the seizure or arrest of tangible property, money, or equity, interference with or obstruction of regular business operations, deportation from the host country, or the denial of extending documents that permit a foreigner to live and work there. This rule is only supposed to be broken when there are clearly illegal reasons for taking the action or when it is done for improper motives, but for some reason it doesn't always happen that way.

Given this context, it is possible to argue that the State is acting abusively when there are clearly no legal justifications for the related measures and the harm is done to the investment for improper motives, such as political retaliation or national prejudice. If harassment and coercion episodes are "repeated and sustained," constitute a "deliberate conspiracy [...] to destroy or frustrate the investment," or "conspiracy to take away legitimately acquired rights," there is a high likelihood that a FET breach resulting from abusive treatment will be discovered."[492]for this manner a change is needed.

[490] Saluka v. Czech Republic Saluka Investments BV v. The Czech Republic, PCA Case No. 2001-04
[491] Saluka v. Czech Republic Saluka Investments BV v. The Czech Republic (2001)
[492] Yves Derains, Josefa Sicard-Mirabal, Introduction to Investor-State Arbitration (Wolters Kluwer 2018)

4.6.3 Arbitrary conduct and discrimination treatment

While the prohibition of arbitrary conduct, and discrimination treatment expected to count or stand as term (protection standard) of their own, the drafting of some FET(s) include these two as obligation as part of FET.[493] This has been acknowledged by a number of tribunals that the standard of FET prohibits arbitral and discrimination conduct to foreign investors and at the same time agree that the principle of arbitrarily conduct and discrimination treatment are connected in the context of FET.[494]

For example, in *CMS v Argentina* case,[495] the tribunal held that "arbitrariness and discriminatory measures that is contrary to fair and equitable treatment". Article 3(1) of the Argentina – Netherlands BIT which provides that: "…[E]ach Contracting Party shall ensure fair and equitable treatment to investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors..."

However, some critics have examined arbitrariness in relation to BIT obligations that forbid taking arbitrary action..[496]. However, numerous tribunals have highlighted that the FET standard's limitation on arbitrariness is an integral aspect of that standard. [497] In its ordinary meaning, "arbitrary" means "derived from mere opinion", "capricious", "unrestrained", "despotic".[498] Arbitral conduct has been described as "founded on prejudice or preference rather than on reason or fact".[499] The intentions and goals that underlie the behaviour in question have something to do with the decision-making process' arbitrariness. A measure

[493] See Article 4(1) of Switzerland - United Republic of Tanzania BIT (2004), and Article 5(1) of China - United Republic of Tanzania BIT (2013)
[494] U. Kriebaum, Arbitrary/Unreasonable or Discriminatory Measures, in M. Bungenberg et al. (eds.) International Investment Law (Nomos, 2015), 795.
[495] CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8
[496] Jacob Stone, "Arbitrariness, the Fair and Equitable Treatment Standard, and the International Law of Investment" (2012) Leiden Journal of International Law, Volume 25 Issue 1. ; Mr Pablo Nilo Donoso, "Discrimination in FET" (2021) Available at https://jusmundi.com/en/document/wiki/en-discrimination-in-fet (accessed 12/1/2022); Kläger, R., Fair and Equitable Treatment: A Look at the Theoretical Underpinnings of Legitimacy and Fairness, Journal of World Investment & Trade, 2010, pp. 435-455.
[497] Ibid
[498] August Reinisch and Christoph Schreuer, "Chapter 6: Protection against Arbitrary or Discriminatory Measures"in *International Protection of Investments the Substantive Standards* (Published online by Cambridge University Press 2020)
[499] Jacob Stone, "Arbitrariness, the Fair and Equitable Treatment Standard, and the International Law of Investment" (2012) *Leiden Journal of International Law*, Volume 25, Issue 1, pp. 77 - 107

would be deemed arbitrary if it causes harm to the investor without having any justifiable purpose or logical justification and instead is based on bias or prejudice.

While discrimination is defined as "unequal treatment of equal or like circumstances (see further Similarity/in like circumstances) without any justified motive,"[500] Conduct of discrimination are also referred as arbitrarily conducts, unfair treatment or unjust. All other elements of FET discussed such as undue process of law and procedure, distraction of legitimate expectations and passing government measures targeted to foreign investors without communications count as discrimination of which constitute to a singular treatment 'Fair and equitable'.[501] Majority of investment tribunals have considered arbitral conduct, discrimination and FET to be closely related,[502] hence interpreted as FET.

The International Court of Justice ruled in the *ELSI case* that anything that is unlawful under domestic law is not necessarily arbitrary under international law.[503] The decision hints at a deferential standard of review. Even if a measure is imprudent, ineffective, or not the best course of action in the given circumstances, demonstrating some reasonable connection to the purported objective of the policy should be sufficient to qualify it as non-arbitrary. In Enron v. Argentina, the tribunal determined the following after considering Argentina's actions during the 2000–2002 financial crisis:

> "The measures adopted might have been good or bad, a matter which is not for the Tribunal to judge, and as concluded they were not consistent with the domestic and the Treaty legal framework, but they were not arbitrary in that they were what the Government believed and understood was the best response to the unfolding crisis. Irrespective of the question of intention, a finding of arbitrariness requires that some important measure of impropriety is manifest, and this is not found in a process which although far from desirable is nonetheless not entirely surprising in the context it took place."[504]

[500] Mr Pablo Nilo Donoso, "Discrimination in FET" (2021) Available at https://jusmundi.com/en/document/wiki/en-discrimination-in-fet (accessed on 13/01/2022)
[501] Ibid (476)
[502] Weiler, Todd., "Chapter Seven Fair and Equitable Treatment and Arbitrary or Discriminatory Measures, in *The Interpretation of International Investment Law: Equality, Discrimination, and Minimum Standards of Treatment in Historical Context*" (2013), pp. 287-332.
[503] Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy) (1986)
[504] Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3

The tribunal in *LG&E v. Argentina*, in a similar crisis instance, it was determined that "[even if Argentina's policies may not have been the best, they were not taken casually, without thorough study."[505] In addition to the frequently recognised objectives of protecting the environment, the public's health, and consumers, there is a potentially wide range of legitimate policies. For instance, a recent ruling determined that the State's intention to minimise excessive profits earned by the generators was the driving force behind the adoption of administrative pricing on energy (investors). A government's policy purpose to address luxury earnings, according to the panel, is "absolutely valid and rational."

Another aspect of arbitrariness is that it speaks of actions that are intentional disregards of the rule of law.[506] For instance, it was deemed arbitrary when there was a flagrant disregard for the rules that applied to the tender, which affected how fairly the participants competed. [507] It must be evident or obvious that there has been a breach.[508] Notably, in *Enron, LG&*E and a number of other cases. In this case, it was determined that the State behaviour in question violated the FET norm but was nevertheless not arbitrary. This shows that the arbitrariness criteria are more restrictive than the FET obligation. It is also evident that States may still regulate in the public interest despite the restriction on arbitrary behaviour.

4.6.4 Transparency and Legitimate expectations

Transparency indeed is a good character to any state as prevent the abuse of power, and promote good governance and accountability.[509]In assessing transparency as an element of FET tribunal use adequate and open communication as a criteria to measure States action to foreign investors.[510] As mentioned in Tecmed, "[t]totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or

[505] LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc.. v. Argentine Republic, ICSID Case No. ARB/02/1
[506] Ms Anna Chuwen Dai, "Protection from Arbitrary or Discriminatory Treatment" (2020) Available at https://jusmundi.com/en/document/wiki/en-protection-from-arbitrary-or-discriminatory-treatment (accessed 12/1/2022)
[507] Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (Oxford University Press, 2017)
[508] See section III. B.7
[509] Carl-Sebastian Zoellner, "Transparency: Analysis of an Evolving Fundamental Principle Fundamental Principle in International Economic Law" (2006) 27 MJIL 569; David Held, *Democracy and the global order: From modern state to cosmopolitan governance* (1965); Kim, Pan Suk Halligan, John Cho, Namshin Oh, Cheol H. Eikenberry, Angela M., "Toward Participatory and Transparent Governance: Report on the Sixth Global Forum on Reinventing Government." (2005) 65(6) Pub. Admin. Rev. 646, 649.
[510] See in Ioan Micula v. Romania, ICSID Case No. ARB/05/20 Final Award (11 December 2013) para. 870; Saluka Investments BV v. Czech Republic [2006] UNCITRAL Arbitration Partial Award (17 March 2006) para. 499.

directives, to be able to plan its investment and comply with such regulations."[511] It is therefore expected that host States to share governing strategy with foreign investors and give reasonable notice in case of any change will constitute breach of FET.

Tribunal have linked the obligation of transparency with legitimate expectation of investors[512]The reason is that in the concept of legitimate expectations, foreign investors expect host not to make changes of the legal framework after signing expectations.[513] For example, in *Tecmed*, *the* tribunal held ".. foreign investor expects the host State to act consistently, i.e. without arbitrarily revoking any *pre-existing* decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities."[514] In other words transparency work in line with the doctrine of legitimate expectation in international investment law require host States to maintain their investment law and policy from the time of investments , not to affect investors interests, and whenever host state change its law without informing foreign investors unpredictable or foreseeable when making investments, then host States would be accused of not being transparent, and being unable to protect foreign investors. Therefore, they are supposed to compensate foreign investors for complying with such changes.[515] If not, to protect investors interests, investment tribunals will consider host States to be in breach of FET whenever state affect legitimate expectations.[516]

Furthermore, in *Biwater case*, tribunal explained "the purpose of the fair and equitable treatment standard is to provide to international investments treatment that does not affect the

[511] Tecmed v. Mexico, ICSID Case No. ARB(AF)/00/2 Award (29 May 2003) para. 154. Also see Ioan Micula v. Romania, ICSID Case No. ARB/05/20 Final Award (11 December 2013), and in Parkerings v. Lithuania, ICSID Case No. ARB/05/8 Award (11 September 2007) para. 295.
[512] R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd edition, Oxford University Press, 2012) 171
[513] Yulia Levashova, "Fair and Equitable Treatment and Investor's Due Diligence Under International Investment Law" (2020) *Netherlands International Law Review* volume 67, pages233–255; R. Dolzer, 'Fair and Equitable Treatment: Today's Contours' [2014] 12(1) Santa Clara Journal of International Law, 30.
[514] See in Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2. Para 154.
[515] Lise Johnson and Oleksandr Volkov, "State Liability for Regulatory Change: How International Investment Rules are Overriding Domestic Law" (2014) Available on https://www.iisd.org/itn/en/2014/01/06/state-liability-for-regulatory-change-how-international-investment-rules-are-overriding-domestic-law/#_ftn3 (Accessed 19/11/2021)
[516] Denning Jin King and Wood Mallesons, "Fair and Equitable Treatment – Should the Standard Be Differentiated According to Level of Development, Government Capacity and Resources of Host Countries?" (2013). Available at https://www.chinalawinsight.com/2013/02/articles/intellectual-property/fair-and-equitable-treatment-should-the-standard-be-differentiated-according-to-level-of-development-government-capacity-and-resources-of-host-countries/ (accessed 22/07/2021)

basic expectations that were taken into account by the foreign investor to make the investment"[517] The interpretation of FET under the principle of international investment law presently promote transparency and protects the legitimate expectations of foreign investors.[518]In this respect, foreign investors expect a stable, predictable, and secure environment for them and their investments.[519] This means States are not expected to change any representation made in relation to investments during negotiations, and not to change the legal framework for the time of investment as agreed.[520]

In *thunderbird case*,[521] tribunal explained the concept of legitimate expectation create reasonable and justifiable expectations on foreign investors to rely and act on, thus a failure of fulfilling such expectations can cause damage in business. Similar in *CME v Czech Republic*,[522] the tribunal held "the Media Council breached its obligations of fair and equitable treatment by evisceration of the arrangements in reliance upon which the foreign investor was induced to invest." Thus, d, foreign investors require full transparency which comes with communications and negotiations of terms before arrangement of any state measure that could possibly affect their business and expectations.[523]

Furthermore, in AES *v. Hungary*,[524] the tribunal limited the protection of investors legitimate expectation by clarifying the rule of legitimate expectations that, investment agreements do not necessary require States to freeze their law. This means foreign investors do not propose fixed legal system to host States but claim when state assure them of something let say a 'safe and fair working environment' they expect State not to reverse its promise and if it does that will constitute to breach of FET understanding that the promise they relied on to invest.[525] Similar

[517] Biwater v. Tanzania (2008), ICSID Case No. ARB/05/22, Final Award, 24 July 2008, para. 602.

[518] Yulia Levashova, "The Role of Investor's Due Diligence in International Investment Law: Legitimate Expectations of Investors" (2020) Available on http://arbitrationblog.kluwerarbitration.com/2020/04/22/the-role-of-investors-due-diligence-in-international-investment-law-legitimate-expectations-of-investors/ (accessed 18/12/2021); Dr Ioana Knoll-Tudor, "Legitimate Expectations" (2021) Available at https://jusmundi.com/en/document/wiki/en-legitimate-expectations (accessed 24/11/2021); Alan Franklin," Legitimate Expectations - Lessons from Recent Energy Arbitration Cases on Renewable Energy Relationship of Fair and Equitable Treatment Standard to Indirect Expropriation." (2018)

[519] OECD, "Public Sector Transparency and the International Investor" (2003).

[520] See Para 222 of Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010.

[521] International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL (1976)

[522] Partial award, 2001, 9 ICSID Reports 121

[523] These are promised offered oral or in written forms.

[524] ICSID Case No. ARB/07/22, Award, Sept. 23, 2010.

[525] See para 147 in International Thunderbird Gaming Corporation v. Mexico, NAFTA/ UNCITRAL (Award, 26 January 2006)

in *Saluka case*[526] it was stated "no investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. However, whenever host States make changes, they have to consider the commitments made by themselves through IIAs (which is to protect investors interests), then they need to apply the concept of compensation.

Even though legitimate expectations have become a central element of FET claims , not every claim for breach of FET in reference to legitimate expectation is successful.[527] To win legitimate expectation claim, investors have to prove that they have exercised a due diligence for its legitimate expectation to be protected under FET.[528] For example in *Isolux v. Spain,*[529] tribunal made it clear that "in order for an investor to rely on legitimate expectations, investors should have conducted a proper due diligence investigation into the regulatory framework before making an investment."[530] The only non-foreseeable regulatory changes can count as breach of legitimate expectation through FET. A reasonable assessment is done by looking at different circumstances before issuing the host state being reliable for breach of FET, if not the claim would be rejected.[531] Similarly, in *Saluka case,*[532] the tribunal stated that "the scope of the Treaty's protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors' subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances."[533] Similar in *Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain* (2019),[534] the tribunal mentioned, for investors' expectations to be reasonable, they have to prove that they have carried out due diligence.

The tribunals expect to reason that there is a breach of FET in reference to litigate expectations when foreign investors prove that there is a due diligence done. In some cases, tribunals explain

[526] See para 304
[527] See in Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic (2018) PCA Case No. 2014-01
[528] Yulia Levashova, "The Role of Investor's Due Diligence in International Investment Law: Legitimate Expectations of Investors" (2021) Available at http://arbitrationblog.kluwerarbitration.com/2020/04/22/the-role-of-investors-due-diligence-in-international-investment-law-legitimate-expectations-of-investors/ accessed 19 November 2019
[529] IsoluxLEGITI Netherlands, BV v. Kingdom of Spain, SCC Case V2013/153
[530] Yulia Levosha, "The Right of Access to Water in the Context of Investment Disputes in Argentina: Urbaser and Beyond" (2020) *Utrecht Law Review*, 16(2), pp.110–124. DOI: http://doi.org/10.36633/ulr.572
[531] See Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22
[532] Saluka v.Czech Republic (1976)
[533] supra note 213, ¶ 304
[534] ICSID Case No. ARB/15/1

that investor should not expect the State to act normal in all circumstances and that there are times that the state have to reverse its words or law to protect the interests of the public.[535]

Thus, while foreign investors research to know the legal structure and infrastructure of the host and see the capacity of it, reasonably they supposed to lower their legitimate expectation.[536] Tribunals might also need to consider ordinary regulatory change that would amount to breach of FET standard even if foreign investors' interests or expectations are affected.[537] As it was in *Mamidoil* case,[538] tribunals rejected investors FET claim. But the question is for how long will host States have to respond over FET claims and defend or explain its conducts?

Following the discussion, a change in FET clause will help to avoid the interpretation of FET in a level of affecting States regulatory power and that the use of ISDS is still a preferred method of resolving investment disputes and that the 'arbitration' mind that most of African States have that its favour foreign investors interests is not correct.[539] Since almost all interpretation approach position the interests of foreign investors beyond States interests and regulatory power. Then it is clear that issue is the wording of FET wish lead to broad interpretations and application it and just because investment tribunals have authority of issuing awards FET has become a source of increasing controversy.[540]

The lack of a clear meaning of FET and so has put tribunals host States into the unknown position and worry of how the interpretation can affect the sovereign power and public interests. As a result, different countries have adopted increasingly cautious approaches towards their IIAs, which includes the removal of FET clause, while other countries have decided to re write (amending to have clarity of what exactly the clause meant to protect) FET

[535] Yulia Levashova, "The Role of Investor's Due Diligence in International Investment Law: Legitimate Expectations of Investors" (2021) Available at http://arbitrationblog.kluwerarbitration.com/2020/04/22/the-role-of-investors-due-diligence-in-international-investment-law-legitimate-expectations-of-investors/ (accessed 19/11/2021)
[536] Matthew Levine, "Majority of ICSID tribunal finds no fair and equitable treatment violation by Albania in petroleum dispute" (2015) Available at https://www.iisd.org/itn/en/2015/08/04/mamidoil-jetoil-greek-petroleum-products-societe-s-a-v-the-republic-of-albania-icsid-case-no-arb-11-24/ accessed 12 June 2020
[537] Rumana Islam, *The fair and equitable treatments standard on international investment arbitration: Developing countries context*. (2018)
[538] Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. The Republic of Albania, ICSID Case No. ARB/11/24
[539] Dilini Pathirana, "Sovereign Rights to Natural Resources as a Basis for Denouncing International Adjudication of Investment Disputes: A Reflection on the Tanzanian Approach" (2020)
[540] UNCTAD, "World Investment Report 2012: Towards a New Generation of Investment Policies", (2012) available at http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf accessed 12 June 2020

provision for the purpose of limiting it to avoiding a wide application of it,[541] while other countries have decided to completely terminate all existing IIAs.[542] This research however, will compare and analyse options and propose one in chapter seven.

4.7 Fair and Equitable Treatment challenging States sovereign power

This section will examine how IIAs through FET provision restrain host States to exercise its sovereign power, such as regulating in favour of public. The principle of State sovereignty can be traced from the treaty of Westphalia in late 1940s which simply established that States could regulate its affair without an interference of the outsiders or external powers.[543] In other words, it can be said that Sovereign States have rights and capacity to regulate domestic affairs in its territory without being questioned.[544] This principle is recognised by customary international law.

States pass policy and protects the interest of its citizen freely.[545] In other words a sovereign state can freely determine what she wants for its citizens, and achieve its objectives in any essential matters, this can either be economic, health, political, environmental, human rights, and social. On the other hand, the freedom to make decisions or passing law is not unlimited, there are responsibilities State signed for which affects its sovereign power. For example, there are obligations imposed by IIAs which make it difficult for most of host States such as Tanzania, to regulate and achieve some of their public policy and development goals.[546]

In the context of IIAs, host States and foreign investors nations) assumed to have an agreement that explain how foreign investors and their investments should be treated in the host state.

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[541] See in Enrique Boone Barrera, "The Case for Removing the Fair and Equitable Treatment Standard from NAFTA" (2017) CIGI Papers No. 128. Jesse Coleman, "India's Revised Model BIT: Two Steps Forward, One Step Back?" (2017) Available at https://oxia.ouplaw.com/page/631. Tarcisio Gazzini, "The 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties" (2017) Investment Treaty News

[542] Public Citizen Research Brief, "Termination of Bilateral Investment Treaties Has Not Negatively Affected Countries' Foreign Direct Investment Inflows" (2018). Nathalie Bernasconi-Osterwalder, Sarah Brewin, Martin Dietrich Brauch & Suzy Nikièma, "Terminating a Bilateral Investment Treaty" (2020) IISD BEST PRACTICES SERIES

[543] Derek Croxton, "The Peace of Westphalia of 1648 and the Origins of Sovereignty*" The International History Review Vol. 21, No. 3 (Sep. 1999), p. 569*

[544] International Development Research Center (IDRC), The Responsibility to Protect: Research, Bibliography, Background; Supplementary Volume (International Commission on Intervention and State Sovereignty 2001).

[545] Ersun N.Kurtulus, *State Sovereignty: Concept, phenomenon and Ramifications* (Palgrave Macmillan 2005).

[546]Qalo Veniano, The *Acting Head of International Trade Commonwealth Secretariat. (2013)* See in Trade Justice Movement, "About Bilateral Investment Treaties and ISDS" Available at www.tmj.org.uk

This argued to establish a limitation on the usual state sovereign power. In finding a means of States to regain its sovereign power under IIAs this research chose to pay attention to FET protection standard offered in majority of IIAs by examining how FET provision challenges host States because most of government decisions claimed to trigger investment claims in reference to violation of FET and because of vagueness of FET provision as most of the interpretation fall in favour of foreign investors which makes IIAs unbalanced.

According to the World Investment and Political Risk claim, "in the word of foreign investment, the risk of adverse regulatory change in host state is one of foreign investors."[547] FET t ensure foreign investors are provided a stable environment for their investments and protect them from the unfair government actions.[548] Compared to other protection standard, the FET clause provides an obligation to the host state to maintain its legal framework which puts a boundary to the host States from exercising sovereign power such as policing foreign investors in act of protecting public interests .[549]

The Customary International Law recognise the need of investment protection in host States,[550] but also recognises that sovereign States have right to use its regulatory power to regulate in favour of public.[551] This is because the investment protection regime has affected the right of sovereign state to regulate,[552] by creating a 'regulatory chill',[553] to regulate public interests. But this come as no surprise said Montt, because States themselves voluntary 'traded their sovereignty for credibility' through IIAs.[554]

[547] World Investment and Political Risk 2013 (Washington, DC: MIGA, World Bank Group), at 19-22 and 41 ("58 percent named adverse regulatory changes as the most important political risks they face in the next three years") in Dr Federico Ortino, "The Obligation of Regulatory Stability in the Fair and Equitable Treatment Standard: How Far Have We Come?" (2017) King's College London.
[548] Yenkong Ngangjoh Hodu, "A Critique of the Legitimate Expectations Doctrine in Investment Treaty Arbitration" (2013). *European Journal of International Law*
[549] Stephen M. Schwebel, On Whether the Breach by a State of a Contract with an Alien Is a Breach of International Law, in Justice in International Law: selected writings 425 (1994)
[550] Graham Mayeda. "Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties" (2007) Journal of World Trade 41(2)
[551] Mohamed Sweify, "State Regulatory Power" (2021) Available at https://jusmundi.com/en/document/wiki/en-state-regulatory-power accessed 12 June 2020
[552] Ying Zhu, "Fair and Equitable Treatment of Foreign Investors in an era of Sustainable Development" (2018) *Renmin University of China Law School*, Available at https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=4009&context=nrj accessed 12 June 2020
[553] A situation whereby host State are reluctant to enact certain regulatory or policies that would benefits the general public's largely due to fear of arbitration claims from foreign investors.
[554] Santiago Montt, *State Liability in Investment Treaty Arbitration Global Constitutional and Administrative Law in the BIT Generation* (2009) Bloomsbury Publishing.

Even though Trackman argues that "though the conflict between state and investor interests appears significant, these interests are often compatible."[555] Foreign investors are not demanding protections for the time agreed in IIAs but establishing a good and long relationship between them and host States. The host States are not after sovereignty power or right to regulate only, but also creating clear, good, and friendly environment to foreign investors.

Dolzer wrote, "an investment treaty will limit the sovereign right of a state to subject foreign investors to its domestic administrative legal system. All the main clauses typically included in an investment treaty operate in various ways to define and narrow the types of domestic administrative regulation to which foreign investors must subject themselves."[556] The theory behind this is that by signing investment agreements host States become bound promises under them which the law requires the state to honour them.[557] This means the protection standards particularly FET set obligations (treatment requirements) that limit the sovereign power of state which is to regulate freely in its territory.

FET has been used as a tool to 'restrict the exercise of sovereign power', in their words Jin and Mallesons wrote, "..the scope given to FET in recent jurisprudence is increasingly wide, covering restrictions of domestic courts, domestic administrative bodies, and even national legislator."[558] The source of this goes back to wording of FET provision in most of treaties, a FET clause which does not set boundaries or clearly define what constitute a breach of it, but leave the interpretation to tribunals. For example, the Article 2.2 Morocco – Pakistan (2001) state "Each Contracting Party shall at all limes ensure fair and equitable treatment and subject strictly necessary measures to maintain the public order,"[559] A clause as such could somehow limit the interpretation of FET when investors claim public order as unfair.

Following the principle of state sovereignty, one could think it is okay for States to make policy or decision as they wish as long as decisions that States are making are for the benefit of public

[555] Trakman, Leon, Foreign Direct Investment: Hazard or Opportunity? (2009). George Washington International Law Review, Vol. 41, p. 1, 2009, UNSW Law Research Paper No. 2010-32, Available at SSRN: https://ssrn.com/abstract=1663088 accessed 12 June 2020
[556] Rudolf Dolzer, "The Impact of International Investment Treaties on Domestic Administrative Law" (2005) 37 NYU Journal of International Law and Politic, available at https://www.iilj.org/publications/the-impact-of-international-investment-treaties-on-domestic-administrative-law/ Accessed 12/07/2021
[557] ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16 (para 372).
[558] Denning Jin, and Wood Mallesons, "Fair and Equitable Treatment – Should the Standard be differentiated According to the level of Development, Government Capacity and Resources of host countries? (2013). China Law insight
[559] Morocco - Pakistan BIT (2001)

(domestic) and that whoever is in its territory such as foreign investors should be able to fit in. However, this is not as so, now days, as much as States wish to practice their sovereign rights by adopt and change their laws for public interests. The sovereign power interacts with investors rights offered in IIAs, and so any regulatory changes and triggers investment claims. States like Argentina,[560]Spain,[561] Ecuador, [562]Italy,[563] and the Czech Republic.[564] Hence, it is claimed that "the growth of arbitration cases has resulted in limitations being placed on state sovereignty,"[565]

Moreover, the increasing number of cases on the basis of FET has led to concerns and criticism that a far-reaching concept of that form would threaten the host States' sovereignty and their right to regulate.[566] Following different investment claims and awards, it is argued that the IIAs have negatively affected States sovereign power. Meaning state are limited on what to decide on its public in fear of affecting foreign investors interest.

Currently most of the host States have faced uncertainty when it comes to the application of FET resulting in doubts on practice or measures that can result in breach of it. For example, King and Mallesons wrote, "the scope given to FET in recent jurisprudence is increasingly wide, covering restrictions of domestic courts, domestic administrative bodies, and even the national legislator."[567]

Furthermore, Levosha argued that "the investor's due diligence in the context of the FET standard goes beyond the risk-based business due diligence performed by a foreign investor for its own benefit. It has implications for a state's right to regulate in the public interest and a broader notion of business responsibilities."[568]

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[560] Enron v. Argentina, ICSID Case No. ARB/01/3
[561] See in SolEs Badajoz GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/38
[562] Occidental Exploration and Production Company v. Ecuador, LCIA Case No. UN 3467
[563] See in Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40
[564] See in Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic, PCA Case No. 2014-01
[565] Joachim Karl, 'International Investment Arbitration: A Threat to State Sovereignty' in Wenhua Shan Penelope Simons and Dalvinder Singh (eds), Redefining Sovereignty in International Economic Law (Hart Publishing, 2008)
[566] Roland Kläger, (2017) Fair and Equitable Treatment in International Investment Agreements
[567]Jin King and Wood Mallesons, "Fair and Equitable Treatment – Should the Standard Be Differentiated According to Level of Development, Government Capacity and Resources of Host Countries?" (2013) Available athttps://www.chinalawinsight.com/2013/02/articles/intellectual-property/fair-and-equitable-treatment-should-the-standard-be-differentiated-according-to-level-of-development-government-capacity-and-resources-of-host-countries/ accessed 12 June 2021
[568] Yulia Levashova, "The Role of Investor's Due Diligence in International Investment Law: Legitimate Expectations of Investors" (2020) Kluwer Arbitration Blog

Most of host States incorporated FET as a promise of treating foreign investors fair with a reasonable standard as agreed per BIT. However, the interpretation of it now threating States from changing or adopting new laws which is not good for a sovereign state. Nevertheless, not only the interpretation, different international organisations such as the Pacific Basic Charter and the International Chamber of Commerce (ICC) guideline for international investment advised host States to respect and recognise international law in reference to FET and also be reasonable on domestic law not to affect foreign investors, and that any legislation that could possibly affect foreign investments should be fair and reasonable.[569]

State regulating in favour of public is part of practising is sovereign power. States can make law and pass measures for the interest of the nation, and the public in general.[570] However, even non-discriminatory measures taken by a state such as to promote nation interests and public welfare may be deemed to violate a FET obligation under an investment agreement which is alarming.

This concern has been expressed by number of States who made decisions in health issues,[571] water,[572] natural resources,[573]waste management,[574] and environment yet tribunals ruled for breach of FET.[575] For that reason, FET interact with most of the state's administrative activities as part of governing power in most of host States because whenever a government passes new measures that affect investors interests, investors will make a successful claim for breach of FET.[576] This approach poses a challenge to host States especially developing countries such as Tanzania which need to use its sovereign power to regulate in favour of the nation.[577]

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[569] Article 3(a)(i) of the ICC Guidelines for International Investment.
[570] Richard H. Fallon, Jr., ""The Rule of Law" as a Concept in Constitutional Discourse" (1997) Columbia Law Review
[571] See in *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*
(ICSID Case No. ARB/10/7)
[572] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22
[573] Charanne Construction v. Spain, SCC Case No. 062/2012
[574] Tecmed v. Mexico, ICSID Case No. ARB(AF)/00/2
[575] Antoine Duval, "Towards reforming the fair and equitable treatment standard in International Investment Agreements" (2019) Available at https://www.asser.nl/DoingBusinessRight/Blog/post/towards-reforming-the-fair-and-equitable-treatment-standard-in-international-investment-agreements-by-dr-yulia-levashova-and-prof-tineke-lambooy-nyenrode-business-university accessed 12 June 2020
[576] Antoine Duval, "Towards reforming the fair and equitable treatment standard in International Investment Agreements" (2019) Available at https://www.asser.nl/DoingBusinessRight/Blog/post/towards-reforming-the-fair-and-equitable-treatment-standard-in-international-investment-agreements-by-dr-yulia-levashova-and-prof-tineke-lambooy-nyenrode-business-university accessed 12 June 2020
[577] Malta Law Guide, "Fair and Equitable Treatment standard in International Investment Law" (2018) Available at https://maltalawguide.com/international-investment-law/fair-and-equitable-treatment/ accessed 12 June 2020

FET is purposely protecting investors by making sure host States proprieties the interest of foreign investors, for example by not changing regulatory policies for the time being of foreign investors.[578]However, as much as FET is important to foreign investors, the right to regulate is equally important to a developing country like Tanzania. However, FET requirement also poses challenge to the host state too when it comes to fulfilling other international obligation. For example, an obligation to achieve human rights or environmental protection, by taking measures foreign investors could be affected negatively and it is uncertain if arbitral tribunal would rule out of this claim because of how FET has broad interpretation.

There is a major concern whether States have a right to adopt and change laws for public interest, because by doing so most investors triggered investment claims.[579] However it was clarified in *ADC v Hungary*,[580] that "..while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. As rightly pointed out by the Claimants, the rule of law, which includes treaty obligations, provides such boundaries. Therefore, when a State enters into a bilateral investment treaty like the one in this case, it becomes bound by it and the investment- protection obligations it undertook therein must be honoured rather than be ignored by a later argument of the State's right to regulate."[581] States have a right to pass new laws, take measures, and react to any crisis that it may face.[582] However, in ADC v Hungary, it was argued there must be a limit to what host States can do in the name of practicing States sovereignty. This means States can regulate but BITs as part of international law require States to be respected even if it means changing national law and neglect public needs, but foreign investors interest have to be protected.[583] It is therefore argued that unlimited power can be misused by States however the way FET has been interpreted and applied has focused attention to profit and loss more than public interest such as social, human rights, and environmental aspect. According to

[578] Lori Wallach, "Fair and Equitable Treatment and Investors' Reasonable Expectations: Rulings in U.S. FTAs & BITs Demonstrate FET Definition Must be Narrowed," (2012). Available at: http://www.citizen.org/documents/MST-Memo.pdfhttp://www.citizen.org/documents/MST-Memo.pdf

[579] Mara Valenti "The Protection of General Interests of Host States in the Application of the Fair and Equitable Treatment Standard" in Giorogio sorSacerdoti and others (eds.) General Interests of Host States in International Investment Law (Cambridge University Press, 2014)

[580] ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16

[581] ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16 (Para 163)

[582] For example, see how different Government have reacted on COVID 19. See in Massimo Benedettelli, (2020), "Could crisis measures encourage foreign investment claims?" Available at https://www.fdiintelligence.com/article/77393 accessed 12 June 2020

[583] Judy Obitre-Gama, "The Application of International Law into National Law, Policy and Practice" (200) Available at https://www.who.int/tobacco/media/en/JUDY2000X.pdf

Haynes States are no longer concerned whose interests in more protected but rather "whether, at a conceptual level, the FET standard effectively balances competing interests."[584] In other language States needs a FET that will protect investors interests but also allowing them to regulate.

Thus, both developed and developing countries are now concerned about the real effects that the FET standard has on their sovereign power.[585] This is due to its role which is controversial, and its unclear application. Thus, a new approach of writing FET and guidance of interpretation is needed in order to balance investors, and States interest.

A number of countries such as South Africa, India, US, Hungary, Colombia, Canada and other Latin America countries have reviewed their BITs, and reformed FET for the purpose of balancing investors interest with State's interest. I submit that a change in FET provision has a better chance of achieving the goal of rebalancing IIAs in favour of host States. The next section will explore different options of modifying to favour the interest of host state.

4.8 Reforming the Fair and Equitable Treatment Protection

This section evaluates available solution for existing FET(s) standard. The possible solution discussed are ones that aimed to help contracting parties, and tribunals to interpret FET clause with respect to sovereign power as it is the purpose of this research.

The literature confirms that FET would continue to be a prominent cause of action in investor-state arbitration proceedings if reform is not done.[586] Since that, different scholars, academic and politicians have been researching and proposing different means of reforming the FET clause.[587] As a result, this research joins the movement of reforming FET provision to avoid more disputes in future. The research argue that a change of FET provision is needed to help rebalance investment treaties in favour of host state.

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[584] Jason Haynes, "The Evolving Nature of the Fair and Equitable Treatment (FET) Standard: Challenging Its Increasing Pervasiveness in Light of Developing Countries' Concerns - The Case for Regulatory Rebalancing" (2013) The Journal of World Investment & Trade.

[585] Andrew Newcombe and Lluis Paradell, "Law and Practice of Investment Treaties: Standards of Treatment" (2009) Kluwer Law International.

[586] Fred Nkusi,"Rwanda needs its own Bilateral Investment Treaty model" (2017) Available at https://www.newtimes.co.rw/section/read/215523 accessed 12 June 2020

[587] Gamze Öztürk, "The Role of Legitimate Expectations Balancing the Investment Protection and State's Regulations Can States Have Legitimate Expectations?" (2017) Master Programme in Investment Treaty Arbitration Master's Research 15 ECTS. Shirley Ayangbah, Liu Sun, and John Chamberlain, "Comparative study of foreign investment laws: The case of China and Ghana" (2017) Cogent Social Science Volume 3 Issue 1.

According to Levosha "the FET's standard provision in the text of an international investment agreements has become a detailed clause clarifying the specific obligations of a state towards an investor under the FET standard. However, striking the right balance in these new treaty formulations has proved to be challenging."[588] A number of States have reformed FET by developing a new model of BIT, with these options; (i) Omit FET,[589] while some have retained it but (ii) replaced FET by either having a precise language (clarify what FET is),[590] and some (iii) replaced FET with an exhaustive list of state obligation.[591]

The next subsections will look at different options (from literature) of how FET challenges has or can be resolved through a reform. The next subsections will discuss available solution (s) believing the discussion could benefit the proposal in this research.

4.8.1 Omission of FET entirely in future BITs

There are number of States who have terminated their BIT,[592] while some decided not to exit the BIT system but denounce some provisions under BIT, and promise not to include them in future BITs.[593] This option align with the UNICTAD and the Southern African Development Community (SADC) Model Bilateral Investment Treaty Template suggested FET to be omitted meaning FET provision should be excluded from future investment agreements to avoid a broad interpretation in several arbitral decisions.[594] Currently there is a total of 125 BITs

[588] Yulia Levashova, "The Right of States to Regulate in International Investment Law: The Search for Balance between Public Interest and Fair and Equitable Treatment" (2019) *Kluwer Law International*
[589]See SADC model BIT template 2012
[590] A FET that specifies what action of state count as valuation of FET and the standard such a customary international law to avoid opinio juris. See UNCTAD, "World Investment Report 2012: Towards a New Generation of Investment Policies", available at http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf at 139. And UNCTAD, "INTERNATIONAL INVESTMENT AGREEMENTS REFORM ACCELERATOR" (2020) Available at https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf
[591] UNICTAD, "International Investment Agreements Reform Accelerator" (2020) Available at https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf , and SADC Model Bilateral Investment Treaty Template with Commentary (2012)
[592] Such as South Africa, and Ecuador
[593] Australian gov't, dep't of foreign affairs & trade, Gillard government trade policy statement: trading our way to more jobs and prosperity 14 (2011).
[594] SADC model BIT template 2012

recorded not to have FET provision,[595] this includes Singapore, Australia[596] and Brazil , who normally do not include FET clauses in their IIAs, respectively, the fifth- and sixth-largest recipients of FDI inflows in the world.[597]

This statistic proves the possibility of a host country to have a BIT without FET provision and still have foreign investors in the state. Having a model BIT without FET provision is proved to be normal and acceptable. Thus, to avoid complications that FET has caused to most of States, it is suggested that States such as Tanzania consider omitting FET in their future BITs.

Omission of FET aligns with the SADC Model Bilateral Investment Treaty Template, which omits FET entirely, as mentioned in article 5 that: "The fair and equitable treatment provision is, again, a highly controversial provision. The Drafting Committee recommended against its inclusion in a treaty due to very broad interpretations in a number of arbitral decisions.[598] Member of States, of which Tanzania is, can adopt FET provisions suggested as a basis for developing its own specific Model Investment Treaty.[599]Although SADC allowed each Member State to ultimately be responsible for its choice of FET clauses and the result of any BIT negotiation. Some of investment agreements have put the omission of FET in practice already for example Intra-MERCOSUR Investment Facilitation Protocol (2017) have not included FET.

Countries such as Turkey, Japan, New Zealand, Romania, Greek, Senegal, and Albania do not incorporate FET provisions to both developed and developing countries.[600] India has recently omitted FET clause in their BIT model.[601]

On other hand, as much as FET clause has interfered with host States freedom to regulate, the clause has been in controversial debate whether keep it or remove it. Meanwhile to avoid the possibility of expensive interpretation of FET clause, and subjecting their sovereign regulatory

[595] See UNICTAD, UNCTAD, Mapping of IIA Content, available at https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping , (accessed on 02 September 2021). See also P Dumberry, "The Formation and Identification of Rules of Customary International Law in International Investment Law" (Cambridge University Press, 2016), p. 145 (noting that in 2014, only 50 out of a total of 1,964 BITs did not contain an FET provision).
[596] Australia–China FTA (2015
[597] Ibid
[598] SADC Model Bilateral Investment Treaty Template with Commentary (2012)
[599] https://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf
[600] See, Libya - Turkey BIT (2009) and Cambodia - Japan BIT (2007); Patrick Dumberry, *The Formation and Identification of Rules of Customary International Law in international investment Law* (Cambridge university Press, 2016).
[601] See India BIT model 2015.

power over FET clause, some States willingly agreed not to include FET standard in their investment agreements.[602] However, for the purpose of this research not to include FET clause in IIA option argued not to be the reasonable action to a developing state like Tanzania because, not having FET clause in IIAs does not guarantee that they will be no obligation of FET in treaty nor claim against FET. On other hand is argued that negotiators from developing countries are lack experience compare to ones in developing countries of which Tanzania sign more agreements with.

Furthermore, the international law doctrine of state responsibility insists on fair and equitable treatment as a minimum standard of treatment of protecting aliens abroad.[603] Thus by signing IIAs automatic host States are bound to treat foreign investors(aliens) and their investment 'fairly'.[604] So following the customarily international law foreign investors (aliens) can still decide to make a claim if their treated unfairly by host States and it is up to the ISDS to determine whether the minimum treatment standard has been breached in absence of FET breach clause. Furthermore, in *Bayindir v Pakistan*[605] tribunal had power to decide whether the Turkish contraction company breached FET standard even though the Pakistan - Turkey BIT did not express FET obligation.[606] Tribunal found that the preamble that referenced FET

[602] See Australia-Singapore FTA (2003), Zealand-Singapore FTA (2001), Albania-Croatia BIT (1993), the Croatia-Ukraine BIT (1997) and number of BIT signed by Turkey signed before 2011. see in UNCTAD," FAIR AND EQUITABLE TREATMENT UNCTAD Series on Issues in International Investment Agreements II" (2012). Also see
in IISD, "A Sustainability Toolkit for Trade Negotiators: Trade and investment as vehicles for achieving the 2030 Sustainable Development Agenda" (u.n) Available at https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/5-investment-provisions/5-4-safeguarding-policy-space/5-4-5-fair-and-equitable-treatment-fet-or-minimum-standard-of-treatment-mst/. Değer Boden Akalın and Nazlı Aytu Özcan, "Investment Treaty Arbitration: Turkey" (2021)Available at https://globalarbitrationreview.com/insight/know-how/investment-treaty-arbitration/report/turkey#615B2BE62E282C5F56454F81FB136FABEE1ED9D8 (accessed 18/01/2022)
See Australia-Singapore FTA (2003), Zealand-Singapore

[603] CIEL, "A centre for International Environmental Law issue brief International Law on Investment: The Minimum Standard of Treatment (MST)" (2003) Available at https://www.ciel.org/Publications/investment_10Nov03.pdf (accessed 17/02/2022)

[604] Kluwer Arbitration, "Chapter 1: The Emergence of the Concepts of the Minimum Standard of Treatment and the Fair and Equitable Treatment" (2015) in Patrick Dumberry, "The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105" Kluwer Law International (2013) pp. 13 – 46; Also, Edwin Borchard, The "Minimum Standard of the Treatment of Aliens" (1939), American Society of International Law at Its Annual Meeting (1921-1969)Vol. 33 (APRIL 27-29, 1939), pp. 51-74.

[605] Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29. See in Patrick Dumberry, "The importation of the FET standard through MFN clauses: An empirical study of BITs" (2016) Available at https://www.researchgate.net/publication/304715453_The_importation_of_the_FET_standard_through_MFN_clauses_An_empirical_study_of_BITs (accessed 18/01/2022)

[606] See Pakistan - Turkey BIT 1995.

in Pakistan – Turkish could not have interpreted to impose FET; they chose to import it through the Most Favoured Nation (MFN) clause.[607]

Tribunal held " it is true that the reference to FET in the preamble together with the absence of a FET clause in the Treaty might suggest that Turkey and Pakistan intended not to include an FET obligation in the Treaty. The Tribunal is, however, not persuaded that this suggestion rules out the possibility of importing an FET obligation through the MFN clause expressly included in the Treaty."[608] As reasoned in *Bayindir v Pakistan*, even though Pakistan and its contracting party (turkey) intended 'not to include FET' in BIT,[609] tribunal found its way to enforce the fair and equitable treatment. Similar in *Rumeli Telekom v Kazakhstan,*[610] ATA Construction v Jordan,[611] *LESI v Algeria,*[612] and *Al-Warraq v Indonesia.*[613] This explain as much as States would wish to avoid FET provision in its investment agreements the exclusion of it not guarantee to limit its use in investment agreements.

On the other hand, the research advice the first step that Tanzania need to take in negotiating future an investment treaty is to ensure that the treaty's wording is consistent with the state's interests and the level of protection it can offer foreign investors. It's critical that government agencies or negotiators are aware of the state's commitments to treaty partners, that required policy space is preserved, and that the state hasn't made any promises it can't keep. Compliance will be more difficult if the state does not carefully assess what it is actually willing to commit to.

Thus, the research advice would be ideal for Tanzania negotiating an investment treaty taking account to foreign direct investments while reflecting the balance struck between all of its relevant state interests and those of citizens.

[607] Para 148.
[608] Para 167.
[609] See para 138.
[610] Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Republic of Kazakhstan, ICSID Case NoARB/05/16, Award (2008). No FET clause in Turkey–Kazakhstan BIT (1992) but FET was imposed.
[611] ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2.Award (2010). Jordan - Turkey BIT (1993) did not have FET provision.
[612] LESI SpA and ASTALDI SpA v People's Democratic Republic of Algeria, ICSID Case No ARB/05/3, Award (2008) para 150. Algeria - Italy BIT (1991) did not contain FET provision.
[613] Hesham Talaat M Al-Warraq v Republic of Indonesia, UNCITRAL, Final Award (2014) para 10

4.8.2 Replace FET with clarified language

Second option moderating FET provision is suggested by additional language clarifying what FET means would help narrowing the scope and application of it.[614] A FET provision that provide that breach of FET can be referred to and what denial of justice is referenced to. For example, a FET provision in Morocco – Nigeria (2016) States "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of a Party"[615] or looking at China–Republic of Korea FTA (2015), state "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process of law.[616] The India model BIT 2016 specifies that FET " protects foreign investments from denial of justice, fundamental breach of due process, targeted discrimination on manifestly unjustified grounds, and manifestly abusive treatment (such as coercion, duress and harassment)."[617] The article tried to clarify FET similar to the Tanzanian approach in the BIT with South Africa that: "Neither Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Party.[618] An article which limits FET can be applied.

For the purpose of rebalancing IIAs in favour of host state, this research opine a change of FET clause, from a simple and general form of FET provision that most of Tanzania IIAs have to a clearer, qualified and detailed wording since the meaning and interpretation of FET depends on the wording of it in specific treaty. Even though a developing country like Tanzania has a limited bargaining power,[619] however the state can take courage from Morocco – Nigeria BIT (2016) and India Model BIT 2016 who have modified their FET a provision that elucidates that FET includes "the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the

[614] Ibid https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf accessed 12 June 2020
[615] Article 7.2(a)
[616] Article 12:5.2(a)
[617] See Article 7 of the India Model BIT 2016, Ibid
[618] South Africa – Tanzania (2005)
[619] Andrew T. Guzman, "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties" (1997) 38 Va. International Law. 639.

principal legal systems of a Party," [620]This BIT mentioned to be the most innovative and balanced BITs ever concluded.[621]

4.8.3 Replace FET with an exhaustive list of state obligation.

Since FET has been described as a core protection standard of international investment law. Some States which wish to retain FET provision as a reform option to replace FET with specific list of state obligations.[622] Having specific list of obligation means if done, the state would have breached FET. A number of States such as India, Netherland and Morocco have already incorporated it.

For example, the Brazil – India (2020) States 4.1 "Based on the applicable rules and customs of international law as recognized by each of the Parties and their respective national law, no Party shall subject investments made by investors of the other Party to measures which constitute: a) denial of justice in any judicial or administrative proceedings; b) fundamental breach of due process; c) targeted discrimination, such as gender, race or religious belief; d) manifestly abusive treatment, such as coercion, duress and harassment; or e) discrimination in matters of law enforcement, including the provision of physical security."[623] Having a FET provision as such might help limit the interpretation and application of it. As Brower and Schill said "a clearer delineation between investors' rights and state sovereignty is urgently needed"[624]

The Comprehensive Economic and Trade Agreement (CETA) also under Article 8.10(2) CETA,[625] implemented the approach of listing States obligation that qualify a breach of FET stating, "A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:(a) denial of justice in criminal, civil or administrative proceedings;(b) fundamental breach of due process, including a fundamental

[620] Article 7
[621] Tarcisio Gazzini, "The 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties" (2017)
[622] UNICTAD, "International Investment Agreements Reform Accelerator" (2020) Available at https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf accessed 12 June 2022
[623] Article 4.1. Also see article 8.10.2 of Canada – EU CETA (2016); See in F. Jadeau and F. Gelinas, "CETA's Definition of the Fair and Equitable Treatment Standard: Toward a Guided and Constrained Interpretation" (2016), Transnational Dispute Management, Vol. 13, Issue 1 Available at https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp-content/uploads/2016/06/tradoc_154329.pdf#page=47 accessed 12 June 2020
[624] Charles Brower & Stephan Schill, 'Is arbitration a threat or a boon to the legitimacy of inter-national investment law?' (2009) 9 Chi. J. Int'l L. 471, 474.
[625] "Enumerating the categories of governmental misconduct that are likely to be regarded as unfair and inequitable."

breach of transparency, in judicial and administrative proceedings;(c) manifest arbitrariness;(d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;(e) abusive treatment of investors, such as coercion, duress and harassment; or (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article."[626] This Approach has a possibility of limiting a broad interpretation of FET and allows state to change laws without the worry of affecting investors legitimate expectations and being sued.[627] I recommend Tanzania to rewrite FET provision by listing, and clarifying what States conduct that qualify to be in breach of FET as India and Morocco = did.[628]

Having explored the challenges posed by FET, I propose that having a clear definition of what States action constitute to FET, and a uniform standard such as international minimum standard, would help to preserve the rights of host States and reduce States from the exposure of ISDS claims and allow state to regulate in peace.[629]

4.7 Summary of the chapter

This chapter analysed the legal system governing IIAs in Tanzania paying attention to FET protection standard. The chapter has proved that the formulation and interpretation of FET has affected the rights of state to regulate in favour of its Public. Most of tribunals 'lack an appreciation of the rationale and purpose behind host States policy' when interpreting FET. But also exposed that FET is a one-sided clause (protecting the interests of foreign investors fulfilling the purpose of BITs).

However, variation of FET standards has resulted in diverse interpretation and application of FET. Moreover, through FET, Tanzania has not faced a many claims as other States, the research reasoned, to mitigate the risks and liability that other States has incurred through FET standard there is a need for the Tanzanian government to review its IIAs policy paying attention to the FET provision. Different option of reforming FET is also discussed; however this research paper is yet to analyse a possible solution or means of reforming FET that can balance

[626] See Article 8(10) of CETA at https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/index_en.htm accessed 12 June 2022
[627] See Article 8(10) of CETA at https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/index_en.htm accessed 12 June 2022
[628] Chapter 7 will explore this more.
[629] Ibid

the contracting parties' interests by limiting FET interpretations while protecting foreign investors interests.

CHAPTER FIVE: CASE STUDY

5. Introduction

This chapter will assess how Tanzania's efforts to protect public interests interacts with the core protection standard (FET) in Tanzania's existing IIAs. To explore the validity of issue mentioned, this chapter will focus on foreign investors in mining industry as a case study discussing how foreign investors are protected to the extent of challenging or undermining States' sovereign power which is States' rights to regulate to meets public interests. The chapter will explain the effort of Tanzania in protecting foreign investors through a case study while pointing out the implications of IIAs in promoting and protecting sustainable development by discussing the impacts of FDI.

The chapter is divided into several sections; in no specific arrangements the chapter will provide brief overview of Tanzania mining industry of which the case study will be explored under, here the chapter will explore the mining industry in Tanzania and selected foreign investment company and the laws and policy that protects the interests of foreign investors in mining industry and evaluate how the domestic efforts of protecting foreign investments impacts on States interests. Then second section will analyse how Tanzania's measures taken to protect public interest do not protect the States interests fully but rather increase its chance of being sued and affect FDI inflow. Then fourth section will provide a summary of the whole chapter.

5.1 Tanzania Mining Industry and its Challenges

Tanzania is rich and endowed with different types of natural resources.[630] A disproportionate amount of the country's total FDI inflows originate from the mining industry,[631] and the extraction of which has been critical to the country's economic growth.[632] Minerals explored in Tanzania includes Gold (major production), uranium, coal, tin, Cobalt, Nickel, limestone ruby, soda ash, copper, iron ore, gemstone, salt, gravel, gypsum, natural gas, silver, diamonds and Tanzanite.[633]

The implementation of a more liberalised and open economic policy regime in Tanzania has claimed to be the main factor accounting for higher FDI inflows into the extractive industry[634]. And now the mining operation is one of the most growing, and leading industries in Tanzania.[635] As part of natural resource category mining has been the most attractive, and important investment industry with the potential to contribute to state development by playing the role of an engine for growth and diversification, and reducing Tanzania's traditional dependence on agriculture.[636] For example in the first quarter of 2021, it is reported the industry generated 10.2% of the country Gross Domestic Product(GDP), equal to 1,473,804 million Tanzania shillings (TZS).[637] And according to President Samia Suluhu, it is the goal to increase the mining sector's contribution to the nation's GDP to 10 percent by 2025.[638]Simply, it can be

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[630] Msafiri Mkonda and Xinhua He, 'Tanzanian Controversy on Resources Endowments and Poverty' (2017) *Environment and Ecology Research* 5(1): 30-38

[631] Josaphat Kweka, 'The role of TNCs in the extractive industry of the United Republic of Tanzania' (2009) *Transnational Corporations*

[632] International Trade administration, "Tanzania - Country Commercial Guide" (2021) Available at https://development.trade.gov/country-commercial-guides/tanzania-mining accessed 13 July 2022, Mia Ellis Margaret McMillan, *mining for Change: Natural Resources and Industry in Africa* (Published to Oxford Scholarship Online: March 2020)

[633] Ibid

[634] Ibid

[635] Empirical findings by Nicodemac Rema (2011) suggest that Tanzania Foreign Direct Investment inflows have led to economic growth and similarly GDP growth in Tanzania has been attracting FDI inflows. See, Nicodemas Lema in "Foreign Direct Investment and Economic Growth in Tanzania: The Granger-Causality Analysis" (2011) Albert H. De Wet & Reneé Van Eyden, Capital Mobility in Sub-Saharan Africa: A Panel Data Approach, 73 S. AFR. J. ECON. 22, 22 (2005) (noting that foreign investment and foreign aid are often the only sources of financing in Africa). Moosa, I. A. "The Determinants of Foreign Direct Investment in Mena Countries: An Extreme Bounds Analysis" (2002). Research Report, 1-13. Also see in https://www.trade.gov/country-commercial-guides/tanzania-mining and https://opentoexport.com/article/mining-Industry -in-tanzania-1/

[636] https://unctad.org/en/Docs/iteipcmisc9_en.pdf accessed 12 June 2020

[637] International Trade Administration, "Tanzania - Country Commercial Guide" (2021) Available at https://www.trade.gov/country-commercial-guides/tanzania-mining Accessed 15 July 2022 https://development.trade.gov/country-commercial-guides/tanzania-mining accessed 12 July 2022

[638] United Nations, "Report on the implementation of the Istanbul programme of action for LDCS for the decade 2011-2020 Tanzania country report" (2021) Available at https://www.un.org/ldc5/sites/www.un.org.ldc5/files/tanzania.pdf accessed 20 July 2022

said that by mining and quarrying activities is influencing the Tanzania's GDP growth significantly.

But then as profitable as the mining industry is or have contributed to the country GDP, the public and scholars argues with countless explanations that the mining industry has failed to benefit (the nation and public) to the expected level.[639]This trigger a debatable question of how "blessing of mineral resources turning to a curse",[640] which reflect Adam Smith notion that the economic performance of nations with extensive natural resources is inferior to those without,[641]because of the negative impacts and challenges that investments in this industry has cause. The mining sector is one considerable public debate over how the industry has great potential to help the country for its sustainable development goals, yet it has been a cause of negative impacts on environments, society, and human rights violations.[642]

Number of scholars claimed that Tanzanians are not benefiting from the mining industry because of the investment laws that are excessively favourable to international mining companies, and the business practises of foreign companies and deprives the country of potential benefits from the industry.[643]For example, Kurtis and Lissu claimed, investment agreements commits the Government to maintain the same term or treatment (referred to tax

[639] Mark Henstridge, Nils Riemenschneider, Simon BrookZoë Scott, "Mining benefits study, Tanzania" (un), Available at https://www.opml.co.uk/projects/mining-benefits-study-tanzania Accessed 12 July 2022. Damon Vis-Dunbar, "Report says Tanzania is signing bad deals with foreign mining companies" (2008). M. Curtis, T. Lissu, "A golden opportunity? how Tanzania is failing to benefit from gold mining" (2008) Available at https://www.eldis.org/document/A43472 accessed 13 July 2022

[640] Faustin Maganga and Thabit Jacob, "Defying the Looming Resource Curse with Indigenization? Insights from two Coal Mines in Tanzania" (2016) *The African Review: A Journal of African Politics, Development and International Affairs*Vol. 43, no. 2, special issue: Avoiding the resource curse in east Africa, Jacques Morisset and Waly Wane, "Mountains of gold: A blessing or a curse for Tanzania?" (2012) Available at https://blogs.worldbank.org/africacan/mountains-of-gold-a-blessing-or-a-curse-for-tanzania Accessed 12 July 2022

[641] See in Naazneen H. Barma , Kai Kaiser Tuan Minh Le , Lorena Viñuela, "Rents to Riches: The Political Economy of Natural Resource–led Development" (2012) Available at https://www.imf.org/external/np/seminars/eng/2013/fiscalpolicy/pdf/rajaram.pdf , Mark Tran, Are natural resources a blessing or a curse for developing countries?" (2012) https://www.theguardian.com/global-development/

[642] Subhabrata Bobby Banerjee, "Corporate Social Responsibility: The Good, the Bad and the Ugly" (2008) Critical Sociology, 34, 51–79. Sarah Lauwo and Olatunde Julius Otusanya "Corporate accountability and human rights disclosures: A case study of Barrick Gold Mine in Tanzania" (2019) Volume 38, 2014 - Issue 2

[643] M. Curtis, Tundu Lissu, "A golden opportunity? how Tanzania is failing to benefit from gold mining" (2008) Available at https://www.eldis.org/document/A43472 , Damon Vis-Dunbar, "Report says Tanzania is signing bad deals with foreign mining companies" (2008) Available at https://www.iisd.org/itn/en/2008/11/21/report-says-tanzania-is-signing-bad-deals-with-foreign-mining-companies/ accessed 15 July 2022, Faustin Maganga and Thabit Jacob, "Defying the Looming Resource Curse with Indigenization? Insights from two Coal Mines in Tanzania" (2016) *The African Review: A Journal of African Politics, Development and International Affairs* Vol. 43, no. 2, special issue: Avoiding the resource curse in east Africa

specifically) with the option of investors to renew the same term for another 25 years with a guarantee of compensation if the government changes the terms in such a way that the company is "worse off."[644] This explains how IIAs failed to allow the nation to benefit from foreign investors in mining industry accordingly especially my creating regulatory chill. On other hand Vis-Dunbar, reasoned for Tanzania to benefit from mining industry, the country might need to go through the agreements negotiated by investors in this sector.[645] Moreover Kweka in his article points out the necessity for policies to improve the extractive industry's sustainability and benefits to the entire United Republic of Tanzanian economy and suggested workable solution to this issue is to expedite the ongoing revision of mining policy and laws to ensure a more just and equal distribution of mining profits among investors, the government, and local populations. [646]

Magai, and Velázqueza added that Tanzania has lot a significant amount of money that could have been used to promote economic development and benefits the public, and that the loss is caused by the poor contracts that allow tax breaks and many other government protection standards offered to mining firms.[647] Some of issues cause by foreign investors that disfavour states interests are influenced by Tanzanian government by failing to establish sufficient regulations and institutional frameworks that will protect its interest and hold foreign investments responsible.[648]

In a nutshell is claimed that a number of developing nations such as Tanzania encounter considerable obstacles in their efforts to attract and foreign investments while promoting

[644] Mark Curtis and Tundu Lissu, 'A Golden Opportunity: How Tanzania is Failing to Benefit from Gold Mining' (2008) Available at https://republicofmining.com/2011/05/19/a-golden-opportunity-how-tanzania-is-failing-to-benefit-from-gold-mining-by-mark-curtis-and-tundu-lissu-october-2008/ Accessed 12 July 2022

[645] Damon Vis-Dunbar, 'Report says Tanzania is signing bad deals with foreign mining companies' (2008) Available at https://www.iisd.org/itn/en/2008/11/21/report-says-tanzania-is-signing-bad-deals-with-foreign-mining-companies/ accessed 12 July 2022

[646] Josaphat Kweka, 'The role of TNCs in the extractive industry of the United Republic of Tanzania' (2009) *Transnational Corporations*

[647] Petro Magai and Alejandro Márquez-Velázquez, 'Tanzania's Mining Industry and Its Implications for the Country's Development' (2011) Working Paper No. 04/2011 Berlin Working Papers on Money, Finance, Trade and Development, Available at https://www.lai.fu-berlin.de/homepages/Alejandro_Marquez/Publikationen/Tanzania_s-Mining-Sector-and-Its-Implications-for-the-Country_s-Development.pdf accessed 10 June 2022

[648] Mboya Bagachwa, Ammon Mbelle, and Brian Van Arkadie, "Market reforms and parastatal restructuring in Tanzania" (1992) *Economics Research Bureau University of Dar es Salaam* available at https://www.worldcat.org/title/market-reforms-and-parastatal-restructuring-in-tanzania/oclc/30438696 accessed 12 July 2022

sustainable developments.[649] It was added that the obstacles or challenges of balancing such (investors and States interest) is caused by the history and regulatory framework that favours investors interest (developed countries).[650]These arguments proves that the government efforts of prioritizing investors interests as a strategy of attracting FDI to fuel economic development has not benefit the State is some perspectives (sustainable development) and for this reason this research call for a reform.

The mining sector in Tanzania has a major chance to accelerate economic development in if the Government implement measures that create favourable environment for the mining sector to operate while allowing State to regulate in favour of public fairly.[651] This means despite IIAs commitment the State should be allowed to regulate all its matters without being challenged. On other hand this research argues that the domestic legal framework itself sometimes does contradict with its IIAs obligations, for example the Mining Act and environmental regulations 1999 declares some restriction to some areas in relation to mining activities and give power Minister who is responsible for mining to make regulations to protect the environments,(such as pollution of which mining investors cause a lot) even is such measures can affect investors and their investments.[652] of which this research argue that such power is deprived by IIAs as any measures that affects investors interests count to be in breach of investors protection standard (FET)

In summary it can be said that, although scholar(s) mentioned reasoned more on how bad the law protecting foreign investments affects the potential income or economic benefit that Tanzania could gain, and one that considered environment did not consider the impact of changing domestic law in lifetime of investment in State. Through this chapter the research is examining the law protecting foreign investment in different view or to say a bigger picture. The research through this chapter is explaining how the law protecting foreign investors paying

[649] Sarah George Lauwo, Olatunde Julius Otusanya, Owolabi Bakre, "Corporate social responsibility reporting in the mining sector of Tanzania: (Lack of) government regulatory controls and NGO activism" (2016) Accounting, Auditing & Accountability Journal Volume 29 Issue 6
[650] Ibid
[651] Wilson Mutagwaba, "Analysis of the benefits and challenges of implementing environmental regulatory programmes for mining: Tanzania case study" (2006) *Journal of Cleaner Production* Volume 14, Issues 3–4, Pages 397-404
[652] Wilson Mutagwaba, "Analysis of the benefits and challenges of implementing environmental regulatory programmes for mining: Tanzania case study" (2006) *Journal of Cleaner Production* Volume 14, Issues 3–4, Pages 397-404

attention to IIAs, effects the sustainable development of the State and its sovereign power in protecting or managing the available minerals.

5.2 Tanzania's Legal framework to promote and Protect Foreign Investments

This section explained how foreign investors in mining industry in Tanzania has been favoured by domestic law and the law reform undergone through mining industry but also explain why this sector needs to be better regulated by the state for the benefit of the public and nation.

It is presumed that IIAs protect foreign investors against domestic legal system. However, this research argues that the national legal system has been in favour of foreign investors by creating and enforcing laws and policies that protects foreign investors as a mean attracting them. Thus, treaties just make addition protections to foreign investors rather than protecting foreign investors against domestic legal system.[653] Most of developing countries (Tanzania as example) create good and friendly environment to attract foreign investors as a competitive advantage. This means they avoid negative climate at all costs including scarifying sovereignty.

Tanzania enacted its first Foreign Investment Protection Act in 1963,[654] aiming to attract and protect foreign investors. However, the mineral exploration, and mining activities were at state monopoly from until the late 1980s, when the government began to liberalise the mineral sector along with the rest of the economy.[655] The government of Tanzania started to rely heavily on domestic law, and investment agreements to attract foreign investors.[656] In the 1990s, the Tanzanian government decided to increase awareness of the economic potential of Tanzania's mining industry. Thus, the government of Tanzania also reformed its policies, and law

[653] Rudolf Dolzer, "The impact of international investment treaties on domestic administrative Law" (2005) 37 *NYU Journal of International Law and Politics*

[654] Foreign Investment Protection Act (1963), Also see in Chris Peter and Saudin Mwakaje, *Investments in Tanzania: some comments, some issues* (2004)

[655] Deborah Fahy Bryceson, Jesper Bosse Jønsson,Crispin Kinabo &Mike Shand "Unearthing treasure and trouble: mining as an impetus to urbanisation in Tanzania" (2012) *Journal of Contemporary African Studies* Volume 30, 2012 - Issue 4: Mining and Urbanisation in Africa: Population, Settlement and Welfare.

[656] The government of Tanzania introduced investment law and signed most of IIAs for the purpose of improving foreign investment climate and hence attract more FDI. See, Aisha Ally, "Foreign direct investment in Tanzania: implications of bilateral investment treaties in promoting sustainable development in Tanzania" (2010) http://hdl.handle.net/2263/28452. Also Sujata Jaffer, "investing in Tanzania: Initiatives by the Tanzanian Government to boost foreign investment in the country have reaped rewards, but the country continues to face a number of challenges."(2019) Available at 11 May 2022https://nexia.com/insights/global-insight/investing-in-tanzania/.accessed Victor Mosoti, "Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between?" (2005) *International Law and Business* 95. Folasade Bosede Adegboye, Romanus Osabohien, Felicia Olokoyo, Oluwatoyin Matthew and Oluwasogo Adediran, "Institutional quality, foreign direct investment, and economic development in sub-Saharan Africa" (2020) *Humanities and Social Sciences Communications volume 7 (38)*

governing the mining industry for the purpose of attracting FDI with expectation that the country would benefit.[657] One of the policies introduced was the Mineral Policy, 1997 which created good environment for FDI. It was passed with a vision of improving mining sector by making it effective with a purpose of accelerating social economic development by 2025.[658]

Likewise in 1998 a Mineral Act (1998), it was introduced to support 1997 mineral policy, then in 2009 the government though the ministry of Energy and Mineral programmed mineral policy. All these legislations and policy were introduced to develop mining sector and meet the requirements imposed by the global political economy such as the World Bank which emphasised that " lack of an attractive enabling environment in developing countries (and Tanzania in particular) for private sector mining investment, a paucity of accurate up-to-date geological information and the system to manage the information, inadequate or non-existent environment regulation and standards, and insufficient human skills and capacity to effectively administer the sector."[659]

Tanzania did this hoping the industry would contributes to socio and economic development and strengthen regional and international relationship.[660] Mining Act of 1998, allowed foreign investors to have 100% foreign ownership, provided investors with guarantees against nationalization and expropriation, and also offered unrestricted repatriation of profits and capital. Also, the 'revised mining code offered a low royalty rate of 3%, as well as a variety of incentives such as waived import duties and tax exemptions.[661] In 2010 a Mining Act was introduced with amendments(includes renewal and termination of mineral rights and other charges) which was still favourable to foreign mining companies,[662] as it aimed to incentivize

[657] Petro Magai, Alejandro Márquez-Velázquez, "Tanzania's Mining Sector and Its Implications for the Country's Development" (2011) Working Paper No. 04/2011
[658] Thomas Mihayo Sipemba. The Mining Law Review: Tanzania" (2019) Available https://thelawreviews.co.uk/edition/the-mining-law-review-edition-8/1209375/tanzania accessed 12 May 2022, Raphael Mwalyosi, "Impact assessment and the mining industry: perspectives from Tanzania" (2004) *Institute of resource assessment university of Dar es salaam*
[659] World Bank "Strategy for African mining industry and energy division", (1992) World Bank, Geneva Technical paper no. 181,
[660] See page 7 of 2009 mining policy
[661]Jody Emel and Matthew "A risky business: Mining, rent and the neo liberalization of risk" (2008) *science direct* Volume 39, Issue , Pages 1393-1407 Available at https://doi.org/10.1016/j.geoforum.2008.01.010 Geoforum 2008, 39, 1393–1407, Bonnie Campbell, "Factoring in governance is not enough. Mining codes in Africa, policy reform and corporate responsibility" (2010) https://doi.org/10.1080/14041040310019129 accessed 12 June 2022, Jody Emela, Matthew Huberb, Madoshi Makenea, "Extracting sovereignty: Capital, territory, and gold mining in Tanzania" (2011) *Political Geography* Volume 30, Issue 2, Pages 70-79
[662] ibid

private investment into mining.[663] The 2010 act was amended, however the objectives did not limit improvement of the economic environment for the purposes of attracting, and sustaining local and international private investment in the mineral Industry.[664] The 1998 act, and 2010 mining law created investment and procurement procedures that favoured foreign investors over communities.[665] Investment law are overly favourable to multinational (foreign) mining companies,[666] without considering the States interests as discussed above.

In summary it can be argued that in a view of attracting foreign investors, this study finds that the government of Tanzania face challenges of scarifying its interests such as considering economic growth, protecting environment and human rights this is done by both national and international commitments that has agreed or enforced to protect foreign investors which easy said the 'government locked itself into bad deals.'[667] As much as investors in mining industry has a chance of benefiting the country with sustainable development the drafting of poor exiting investment agreements, contracts and law has limit such benefits.

5.2.1 Foreign investors in mining industry

This section will discuss the evolution of domestic law protecting foreign investors with aim attracting them and increase FDI inflow to the country and reason why State changed and how well the current situation could be resolved without and investment claims in relation to FET that protects rights and interests of exiting foreign investors and their investments. To start the next subsection will provide the background history of Mining activities and the law protecting it in Tanzania to connect with the point that the research is aiming to prove.

The record shows, mineral exploration, and mining activities were a State monopoly from 1972 until the late 1980s.[668] In 1990s, the Government of Tanzania decided to increase awareness

[663] Thomas Mihayo Sipemba. The Mining Law Review Tanzania" (2019) Available https://thelawreviews.co.uk/edition/the-mining-law-review-edition-8/1209375/tanzania accessed 10 June 2022
[664] Thomas Mihayo Sipemba, "The Mining Law Review: Tanzania" (2019) Available https://thelawreviews.co.uk/edition/the-mining-law-review-edition-8/1209375/tanzania accessed 10 May 2022
[665] Madoshi H. Makene, Jody Emel, and James T. Murphy, "Calling for Justice in the Goldfields of Tanzania" (2012)
[666] Muhanga Mikidadi, "An Examination of Some Key Issues on Legal and Policy Environment in the Mining Industry After the Economic Reforms in Tanzania" 2019; 3(2): 33-42

[667] Damon Vis-Dunbar, Report says Tanzania is signing bad deals with foreign mining companies. (2008) Available at https://cf.iisd.net/itn/2008/11/21/report-says-tanzania-is-signing-bad-deals-with-foreign-mining-companies/
[668] Deborah Fahy Bryceson, Jesper Bosse Jønsson,Crispin Kinabo &Mike Shand "Unearthing treasure and trouble: mining as an impetus to urbanisation in Tanzania" (2012) Journal of Contemporary African Studies Volume 30, 2012 - Issue 4: Mining & Urbanisation in Africa: Population, Settlement and Welfare.

of the economic potential of the mining industry and therefore, liberalise the mineral industry along with the rest of the economy by reforming most of its policies, and law governing the mining industry for the purposes of attracting FDI with the expectation that the country would benefit more from it.[669] Since then, most of mines and mining activities have been owned by foreign investors who come from different States such United Kingdom, China, India, Kenya, South Africa, Oman, Canada, Germany, Netherlands, USA, and Germany (see table 1 below).

Table 1 Current Active mines, owned by foreign investors in Tanzania

Name of Mine	**Mineral**	**Owner**	**Ownership country**
Buzwagi	Gold	Barrick Gold Corporation 100%	Canada
Bulyabhuku	Gold	Barrick Gold Corporation 100%	Canada
North Mara	Gold	Barrick Gold Corporation 100%	Canada
Geita	Gold	Anglo Gold Ashanti	South Africa
New Luika (Mbeya)	Gold	Shanta Gold	Guernsey

[669] Petro S Magai, Alejandro Márquez-Velázquez, "Tanzania's Mining Industry and Its Implications for the Country's Development" (2011) Working Paper No. 04/2011

Biharamulo	Gold	Stamigold	South Africa
Ngaka	Coal	TanCoal	Tanzania and Australia
Mchuchuma	Coal	Tanzania China International Mineral Resources Ltd (TCIMRL)	Tanzania and China (Joint venture)
Golden Pride	Gold	Resolute mining	Australia
New luika	Gold	Petra Diamonds	United Kingdom
Liganga	iron ore, Iron and Steel	Tanzania China International Mineral Resources Ltd (TCIMRL)	Tanzania and China (Joint venture)

Source: Tanzania Ministry of Energy & Minerals.[670]

The mining industry has value to Tanzania and its development goals and as shown in table 1 above that the industry is dominated by foreign investors whose interests are protected by IIAs. This draws attention to the need of assessing the exiting legal framework mostly IIAs making sure the investments in this industry and others do not cause harm to the environment, public and economy of the State, of which The Tanzania Government has failed to do in its current IIAs. This research argues that, for the State to understand weather it is benefiting from foreign

[670] Also see Marcko Gombac, "Canadian Mining companies operating in Tanzania" (2017)

investors in mining industry it is necessary to consider its general impacts in both economic, social and environmental,[671] and this can be done through reforming IIAs.

To prove the theory reasoned above, the next section will analyse one of the largest mining industries in Tanzania 'Barrick Gold Corporation' and draw attention to the government, non-government organisation and academia's that the current legal framework protecting investors specifically IIAs is not sufficient to bring sustainable development to Tanzania. This is done by discussing the social, environmental and economical negative impacts caused by foreign investors in mining industry. This is done to influence the need of reforming IIAs to allow State to pass measures protecting affected areas but also hold investors responsible in international level for their actions or activities that negatively affect the government and its public as for correcting investors way of doing business through domestic measures count to breach of IIA mostly FET provision.[672]

5.3 Case Study: Barrick Gold Corporation.

Barrick Gold Corporation is a reasonable choice to be used as a case study because of the ongoing litigations that the company has had with the Government of Tanzania, but also as one of the companies has posed major challenges on Tanzania achieving its sustainable development goals due to its negative impacts to the State. To start the research will provide a background information of Barrick then discuss how negatively the company has affected Tanzania.

5.3.1 Background of a Selected Case Study

Barrick Gold Corporation (former known as ACACIA) is a multi-national corporation owned by a Canadian Company called Barrick Gold Corporation. [673] This company is the second

[671] The balance of these three forms sustainable development

[672] Lise Johnson and Oleksandr Volkov, "State Liability for Regulatory Change: How International Investment Rules are Overriding Domestic Law" (2014) available at https://www.iisd.org/itn/en/2014/01/06/state-liability-for-regulatory-change-how-international-investment-rules-are-overriding-domestic-law/ accessed 12 June 202, Lorenzo Cotula, "Do investment treaties unduly constrain regulatory space?" (2014) Available at http://www.qil-qdi.org/investment-treaties-unduly-constrain-regulatory-space/ accessed 11 June 2022

[673]ACACIA MINING PLC De-listing & cancellation of trading of Acacia Shares in https://www.investegate.co.uk/acacia-mining-plc--aca-/prn/de-listing--amp--cancellation-of-trading-of-acacia-shares/20190918083000PDECB/ accessed 12 July 2022

largest gold mining company in the world with number of headquarters such as Chile, Peru, Saud Arabia, Zambia and Tanzania (where it has dominated most of mines). Barrick operates in three (out of five) gold mines in Tanzania which are Bulyanhulu, Buzwagi and North Mara,[674] with licenses covering 7200 km^2 in the country.[675]

Barrick purchased its first Tanzania mine (Bulyanhulu, Tanzania) in 1999 from Kahama Mining Corporation Limited (KMCL) which was owned by a Canadian company called Sutton resources ltd, and started its operation in 2001.[676] In 2014, Barrick incorporated a company named Acacia mining PLC, as a separate holding company to manage its African assets (African Barrick Gold).[677]In 2017 Acacia had conflicts with the government of Tanzania and September 2019, Barrick who was the major shareholder (63.9%) of Acacia bought the minority share back as part of resolving disputes that Acacia had with the Government of Tanzania in 2017.[678]

There were several expectations that Tanzania had while attracting foreign investors (in this case Barrick) in the country. This includes availability jobs, improvement of living condition, infrastructure, technology, education, health, and country economy. However, it is debatable of weather Barrick has achieved some of expectation that Tanzania had on foreign investors for example providing employment and adding revenue to Tanzania.

Barrick and other foreign investors in mining industry have receive a number of benefits from government. For example, the companies we given a total discretion to dispose their investments if they wish and the ability to transfer their business rights to other companies without being subject to capital gains tax. [679] Also, the investment contract allowed the

[674] https://www.bbc.co.uk/news/business-40714086

[675] Hilson Gavin "Why is there a large-scale mining 'bias' in sub-Saharan Africa?" (2018) Land Use Policy, Elsevier, vol. 81(C), pages 852-861, Available at https://doi.org/10.1016/j.landusepol.2017.02.013. accessed 12 June 2020

[676] Dow Jones, "company news; Barrick Gold to buy Sutton resources for $350 million" (1999) The *New York Times*.Available at https://www.nytimes.com/1999/02/19/business/company-news-barrick-gold-to-buy-sutton-resources-for-350-million.html. David Reyes, "Field Case Study: bulyanhulu, Tanzania" (2015)

[677] "African Barrick Gold is an independent company listed on the London Stock Exchange, which Barrick retained the majority of the shares." David Reyes, "Field Case Study 2: bulyanhulu, Tanzania" (2015). Available at https://cirdi.ca/wp-content/uploads/2017/06/Case-Study-2-Bulyanhulu-Tanzania-060517.pdf

[678] In its new Operation Barrick agreed work as joint venture with the government as the new law demanded (84% by Barrick and 16% by the government) and promised to share economic benefits from Bulyanhulu, Buzwagi, and North Mara would be distributed on a 50/50 basis between a new operating company and the government. See in, Cecilia Jamasmie, "Barrick takes Acacia Mining back as buyout deal sealed" (2019) Available at https://www.mining.com/barrick-takes-acacia-mining-back-as-buyout-deal-sealed/ accessed 101 June 2020 . Zandi Shabalala, Nichola Saminather, "Barrick's offer for Acacia Mining reflects Tanzania risk: CEO" (2019)

[679] Curtis, M and Lissu, Tundu "A Golden Opportunity: How Tanzania is failing to Benefit from Gold Mining" (2008) Published by the Christian Council of Tanzania and National Council of Muslims in Tanzania, Dar es

company (ACACIA particularly) to maintain the tax levels they were given in time of agreements throughout the 'life of the project' of which valued a total of 25 years, with an option to renew the same terms for a further 25 years. Not to forget a "VAT exemption of US$200,000 in taxes per annum was offered, the right to repatriate 100 per cent of profits; deduct 80 per cent of capital expenditure from tax payable, right of access and acquisition of water and land and the right to pursue arbitration in London, or alternatively, via the 1998 code, the World Bank's International Centre for the Settlement of Investment Disputes."[680] These mentioned privileges offered to foreign investors such as Barrick explains how the legal framework protects or favour foreign investors.

On other hand, Barrick is reported to have investments worth billions of USA dollars in the country over the past few years, which has brought around 3.6% growth in to mining industry and contributed around 2% of total Tanzanian gross domestic product (GDP) in 2015.[681] Barrick investment has predominantly been in infrastructure projects to improve road networks, environment, access to electricity and access to clean water. For example, as part of its new operation (from Acacia) Barrick Gold Corporation committed up to $40 million to upgrade infrastructure such as building a road between Bulyanhulu and Mwanza and construct housing compound. [682]

Despite the contribution that Acacia (now Barrick) has made in Tanzania, the company has been involved in a number of conflicts with Tanzania (both government, and local citizen) for years, and has been receiving a lot of criticism for not being responsible for society. Series of accusation includes child labour, illegal operation, corruption, environmental pollution (of which they were fines fined $2.4 million for pollution in North Mara), and tax evasion (of which the company was charged $190bn tax bill).[683]

Following criticism, a government of Tanzania review found that Acacia was underpaying the government, and that most of its operation was illegal. For that reason the government of

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Salaam, Tanzania. ttp://www.businesshumanrights.org/Search/SearchResults?SearchableText=Lissu+Curtis&x=0&y=0 accessed 12 June 2020

[680] SHARIFE, K., "Tanzania's pot of gold: "Not much revenue at the end of the rainbow." (2009) In Pambazuko news, issue 450, October 1. Tanzania. http://www.protestbarrick.net/article.php?id=523 accessed 12 June 2020

[681] Ibid

[682] Barrick, "Barrick Back in Business in Tanzania" (2020) Available at https://www.barrick.com/English/news/news-details/2020/Barrick-Back-in-Business-in-Tanzania/default.aspx accessed 12 June 2020

[683] Ibid

Tanzania stopped Acacia exporting Gold, and imposed a fine of $190 billion (tax bill), then requested to take part of ownership of the company.[684] However, Tanzania allegation against Acacia were rebutted by the interim chief executive for Acacia Mining Plc (Mr Geleta) stating that the Government of Tanzania was putting the business of Acacia at risk (affecting business) for the ban of exportation and so Acacia Mining PLC filed a claim against Tanzania[685] for breach of terms in the BIT between the UK and Tanzania.[686] This is a good example that explains how state's rights can be subjugated for the sake of protecting investors interest through IIAs.

Despite the efforts showed by Barrick's to take care of envelopment and contribute to the nation economy. As kweka argued, that the impacts of FDI on local communities is significant, however the scale of these contributions is greatly out of proportion to the money going to TNCs and the social cost of the environmental damage caused by the mining operations.[687] Following this argument, majority Barricks operations in Tanzania have long been criticised by media and other NGOs for environment pollution, creating major health problems, and practising against human rights which may have had a negative effect on the business's performance, reputation, and identity.[688] Many assertions have been made regarding the text of the investment treaties, and there is a widespread consensus among Tanzanian scholars that the BITs are too friendly to investors at the expense of domestic businesses and legitimate policy objectives of the host state.[689]

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[684] John Aglionby and Henry Sanderson, "Acacia Mining accused of operating illegally in Tanzania" (2017). Available at https://www.ft.com/content/7f53064e-4f7d-11e7-bfb8-997009366969 .

[685] Acacia Mining PLC, Bulyanhulu Gold Mine Ltd and Pangea Minerals Ltd v. Government of Tanzania (2017)

[686] David Sheppard and Neil Hume "Acacia Mining threatens to sue over export dispute" (2018) *Acacia Mining*

[687] Josaphat Kweka, 'The role of TNCs in the extractive industry of the United Republic of Tanzania' (2019) Transnational *Corporations*. Available at https://www.researchgate.net/publication/228622637 accessed 22 July 2022

[688] Geoffrey York "Tanzania deaths spark criticism of grievance process at Barrick subsidiary" (2018) Available at https://www.theglobeandmail.com/business/article-tanzania-deaths-spark-criticism-of-grievance-process-at-barrick/ accessed 12 July 2022, Fumbuka Ng'wanakilala, "Tanzania fines Acacia Mining $2.4 million over alleged pollution" (2019) Available at https://www.reuters.com/article/us-tanzania-acacia-idUKKCN1SQ0RA accessed 22 July 2022, SarahLauwoa Olatunde and Julius Otusanya, "Corporate accountability and human rights disclosures: A case study of Barrick Gold Mine in Tanzania" (2014) *Accounting Forum* Volume 38, Issue 2, Pages 91-108

[689] Tomasz Milej, "Striking the Right Balance Between the Interests of the Foreign Investors and the Host State – A Case Study of the Tanzania-Germany BIT 50 Years After Its Conclusion" (2017) African Journal of International and Comparative Law 25(1):1-19 DOI:10.3366/ajicl.2017.0179

Below are negative impacts associated by Barricks's mining activities which are not supporting Tanzania sustainable development goals(this includes, reduction of poverty, protecting the land, water and forests, promoting good health and wellbeing, peace and justice *etc*)[690] yet Tanzania exiting IIAs limits to archive them .

5.3.2 Evidence of how IIAs Fails to protect Tanzania Sustainable Developments Goals

In no particular order Barricks have negatively affected Tanzania's working class by having poor working conditions and promoting child labour.[691] Not to forget the company has cause an increase unemployment by affecting the effort of small-scale miners.[692] In other words, the Gold and other minerals extraction done by Barrikcs has contributed to the increase of unemployment rate in Tanzania. The reason in those hundreds of thousands of artisanal and small-scale miners in Tanzania, which makes two third of civilian's lives around mines areas were involved in gold and diamond extraction as a source of wealth,[693] thus the relaxation and measures to foreign investors such as Barricks has made it easier for foreign companies to affects local investors. More reasons that explain how foreign investors affected local investors (small scale miners also called Artisanal) is lack of labour, heavy machines, and good technology like Barrick, making it difficult to compete and therefore closing down. This is why in 2016, the Government of Tanzania started a campaign to raise revenue, by encourage the foreign investors to hire Tanzanian citizens over foreigners and protect or grow local

[690] Sustainable Development Report, "Tanzania Sub-Saharan Africa" in Sachs et al. (2022): From Crisis to Sustainable Development: the SDGs as Roadmap to 2030 and beyond. Sustainable Development Report 2022. Cambridge: Cambridge University Press. Manjiao Chi, "Chapter Filling the compatibility gap between IIAs and sustainable development" in *Integrating Sustainable Development in International Investment Law* (Routledge , 2017)

[691] Dylan O'Driscoll, "Overview of child labour in the artisanal and small-scale mining sector in Asia and Africa" (2017)

[692] Chachage Seithy "The meek shall inherit the earth but not the mining rights", In Peter. Gibbon *Liberalised development in Tanzania: Studies on accumulation processes* (1995) pp. 37–108, Uppsala, Sweden: Nordic Africa Institute.

[693] Willison Mutagwaba, John Bosco Tindyebwa, Veronica Makanta, Delphinus Kaballega and Graham Maeda, "Artisanal and small-scale mining in Tanzania – Evidence to inform an 'action dialogue'" (2018)

industry.[694] This research argue that majority of the negative impacts caused by foreign investors is influenced by IIAs which failed to hold States responsible and limit State to change measures that will favour local investors as would affect foreign investors profits and qualify to be a breach of FET.

Furthermore, even though Barrick claimed to pay most of its employees better (claimed to more than 10 times the average wage in Tanzania), and that has created a number of employments which make them "directly and indirectly responsible for the livelihoods of over 45,000 people."[695] Palat and his fellow,[696] argued that most of men are not benefiting from mining companies as mentioned, and that multinational companies such Barricks always depends on specialised knowledge that is typically most of the expertise are not supplied locally.[697] It is asserted that the only beneficial influence on employment often occurs during the construction period which need cheap labour and it is of short time. For this reason, one can say FDI benefits a not long lasting or sustainable.

Another major impact caused by this investor in mining industry such as Barricks is environment pollution starting with land degradation due to mining activities.[698] It is well known that mining activities includes the removal of topsoil, tree, rocks, and other vegetation, which is done by heavy machines, such atrocities have resulted to a land degradation in number of areas that have mines such as Kahama, and north Mara.

The Mining activities done by Barricks have also left open pits, sand bars, and waste piles which most of them tend to be permanent. This has left mine cities with a limited land social or economic activity, [699] and the land left has less nutrient available for social local food production, and other agricultural purposes which results to food insecurity, worse children, and household nutrition of which is against sustainable development. Following impacts as such the government of Tanzania has not really taken and measures to hold these investors

[694] https://www.state.gov/reports/2018-investment-climate-statements/tanzania/
[695] Barrick Website in https://www.barrick.com/English/home/default.aspx Found in Ejatlas, "Acacia Mining North Mara Gold Mine (former Barrick Gold), Tanzania" (2017)
[696] Beyza Polat, Nazlı Aktakke, Meltem Aran, Andrew Dabalen,Punam Chuhan-Pole, Aly Sanoh
[697] Jacques Morisset and Waly Wane, (Ibid)
[698] David Hill, "Canadian mining doing serious environmental harm" (2014) Available https://www.theguardian.com/environment/andes-to-the-amazon/2014/may/14/canadian-mining-serious-environmental-harm-iachr accessed 10 July 2022
[699] Martha Leah Nangalama,"Tanzania villagers invade Acacia Mining (BarickGold) demanding #Landgrab compensation"(2017) Available at https://nangalama.blogspot.com/2017/06/tanzania-villagers-invade-acacia-mining.html?m=0?pr=95670&lang=fr ."Victoria Schneider, Tanzania's gold rush and housing crush"(2014) Available at https://www.aljazeera.com/indepth/features/2014/01/tanzania-gold-rush-housing-crush-201412011841529140.html accessed 12 June 2020

accountable and this argued by this research that it is because of the poor existing IIAs negotiated at past that limit State to hold investors responsible for event of such.

The Barricks is accused by the locals for endangering the lives of people, cattle, and the area where it is located,[700] by leaving some people homeless. People who lived round mines lost their homes because the land was needed for mining activities. Not only that, the land was taken, but also the drilling activities have affected the land and caused a number of houses to fall, for example, Schneider in his research interviewed a local representative in Kahama who reported that about 200 mud houses collapsed since the mine started operations in 2009.[701] Below are few pictures which shows how bad the land and living areas has been affected by mining activities.

[700] This Day, "Tanzania: The human cost of gold – and a deadly price to pay" (2009). Available at http://www.corpwatch.org/article.php?id=15402, accessed 19.05.17

[701] Victoria Schneider, "Tanzania's gold rush and housing crush"(2014) Available at https://www.aljazeera.com/indepth/features/2014/01/tanzania-gold-rush-housing-crush-20141201184152914O.html accessed 12 June 2020

In addition, mineral extraction activities have caused noise pollution due to vibration of mobile equipment, vibration from blasting, and other machinery, which is not fair, and safe for people who lives in mining cities as it can cause poor schooling environments due to students around mines and affect academic performance. Also, health problems such as heart disease, and even death.[702] Also mining activities cause 'Air pollution; the quality of air in mining cities is impacted by gaseous emissions from smelters, processing plants, machinery, or power plants. It is claimed that the air contains heavy metals or acid solutions which can be harmful to the environment.[703]

Furthermore, is argued that "instead of bringing wealth for locals, the presence of the firm has provoked water contamination and human rights abuses."[704] The mining industry is accused of polluting water sources which makes it a disadvantage of FDI.[705] The drinking water that was available for the households around the mines has been replaced by "40,000 square metres (430,000 sq. ft) of liner within their effluent pond, which they claim was destroyed by vandalism.[706]Cyanide and mercury explained the leakage or spillage, and improper disposal of mine wastes has poisoned water sources in mining cities and other villages around are affected.[707] Adding to that the environmental justice reports. In 2009 it was reported the North Mara mine which is under Barrick contaminated the Tigithe River which over 250,000 local households depending on, and as the result of contamination caused by mining activities now there is increase of illness, and death to people and their livestock. [708]

Tundu Lissu,[709] wrote, "the pollution of rivers and grasslands where villagers are taking the water from and raise their animals" as well as "serious health problems associated with

[702] It is reported that thousands of villagers around mining operations are exposed to serious health hazards emanating from the mining activities. Ma0doshi Makene, Jody Emel , and James Murphy, "Calling for Justice in the Goldfields of Tanzania" (2012)
[703] Ibid
[704] Environmental Justice Atlas, "Acacia Mining North Mara Gold Mine (former Barrick Gold), Tanzania" (2014) Available at https://ejatlas.org/conflict/acacia-mining-north-mara-gold-mine-former-barrick-gold-tanzania
[705] Victoria Schneider, Tanzania's gold rush and housing crush"(2014) Available at https://www.aljazeera.com/indepth/features/2014/01/tanzania-gold-rush-housing-crush-20141201184152914O.html accessed 12 June 2020
[706] Bariyo, N. "Tanzania clears North Mara gold mine over river pollution" (2010) Morning Star, in Sarah Lauwo, "When sorry is not an option: CSR reporting and 'face work' in a stigmatised industry – A case study of Barrick (Acacia) gold mine in Tanzania" (2019) *Critical Perspectives on Accounting* 71
[707] A.G.N. Kitula, The environmental and socio-economic impacts of mining on local livelihoods in Tanzania: A case study of Geita District. (2005)
[708] Ibid
[709] One of the opposition politicians wrote on the environmental aspects of the mining industry in Tanzania

pollution."[710] Until now household around North Mara mine are facing problem accessing clean drinking water.[711] However, in defence, mining companies argue that people were compensated for their water sources and Land. Though, a lot of civilians claims that compensation was promised but not offered as agreed and were not provided with alternative of places to live or clean water sources (except in few places).[712] Generally it can be said that due to poor drafting of exiting law that protects the interests of foreign investors the public of Tanzania is now facing a series of issues related to their health linked to carelessness mining activities.

Barrick has also been accused of violating human rights by activities such as forcefully evicting small-scale miners in their inherited land and being involving in killing 54 small scale miners were buried alive when the bulldozers was in process of filling in the pits of small-scale miners.[713] Tanzanian Ministry of Energy and Minerals confirmed receiving claims that at least 65 people have been killed and 270 people injured by police responsible for mine security (in North Mara 2016). Moreover, security guards have also been accused of killing and injuring a lot of civilians in the name of protecting foreign investors and their investment and none of the officers have been subject to justice over this claim. For example, in May 2019, a man was almost killed by Acacia security guards while chasing so-called "intruders." All this abuse of human rights is done to protect the interest of foreign investors, yet government would be held accountable for taking any measures to protect its citizens.[714]

Anneke Van Woudenberg, said, Mining appears to have transformed parts of the Tanzanian police into a brutal and unaccountable.[715] Also, There is proof that the high concentrations of toxic heavy metals and cyanide around the mines which have had a significant negative impact

[710] https://forbiddenstories.org/silence-is-golden-for-a-tanzanian-mine/ accessed 12 June 2020
[711] Ibid
[712] Madoshi H. Makene, Jody Emel , and James T. Murphy, "Calling for Justice in the Goldfields of Tanzania" (2012)
[713] Lange, R. , Land Tenure and Mining in Tanzania, Michelsen Institute, Bergen Norway.(2008), LEAT (Lawyers Environmental Action Team), "Robbing the Poor to Give the Rich: Human Rights Abuses and Impoverishment at the MIGA Backed Bulyanhulu Gold Mine, Tanzania"(2003), Submission to the Extractive Industries Review of the World Bank, Maputo Mozambique, January 13- 17, 2003.Also see Tracy Glynn, ""There is Death in them thar' Pits": Canada's Barrick Gold in Tanzania," The Dominion Paper, posted by ProtestBarrick.net, a mining industry advocacy site dedicated "as a portal to groups researching and organizing around mining issues, particularly involving Barrick Gold." http://protestbarrick.net/article.php?id=95 . Also RAID, "Acacia Mining Faces New Human Rights Problems in Tanzania" (2019) Available at https://www.raid-uk.org/blog/acacia-mining-faces-new-human-rights-problems-tanzania.Also Saunders, S. ,"Thousands Raid Barrick's North Mara Mine" (2008) http://www.protestbarrick.net/article.hph?id=358 accessed 12 June 2020
[714] By doing this state would he held responsible for breach of FET.
[715] Ibid

on the health of the neighbouring local communities,[716]abusing of human rights and other basic needs confirmed to be land acquisition, and inadequate compensation where needed and rape.[717] The working group of business and human rights discussed the implication of protecting investors interest through IIAs and suggested a reformation, that States should renegotiate new IIAs to reflect the balance between rights and obligation of investors because the current one is imbalanced, and it does challenge the government to regulate in favour of its self. [718]The UN working group on business and human rights added, the current IIAs might be the cause of such (imbalance rights and responsibility) unintended. Thus, propose to state to invoke existing IIAs and renegotiate with ones that are compactable with international human rights obligations and encourage foreign investors to be responsible and accountable when they breach human rights,[719] and States sovereignty.

On other hand, the United Nations made an investment of between US$ 5-7 trillion were invested in 2015 expecting to achieve the Sustainable Development Goals (SDGs), which were set in 2015 the goal included protection of necessity things such as infrastructure, clean energy, water and sanitation, and agriculture. This is done with the efforts that will help have IIAs that attract and promote the capital required for nations to make the transition to inclusive green economy pathways.[720] However, following the discussion in this chapter it is argued that investments are still being made in a way of polluting environments and create environment's problems.

It can be said IIAs s (bilateral, regional, or Multilateral treaties) have impact on the lives of host States and its citizens. These agreements offer protection to foreign investor however they deprive power to States regulate. Majority of countries have signed multiple investment

[716] Åsgeir R. Almås and Mkabwa Manoko, "Trace Element Concentrations in Soil, Sediments, and Waters in the Vicinity of Geita Gold Mines and North Mara Gold Mines in Northwest Tanzania" (2012) Soil and Sediment Contamination: *An International Journal* Volume 21, Issue 2
[717] Prof. Raphael B.B. Mwalyosi (Ibid)
https://www.iaia.org/pdf/ConferenceDocuments/IAIA04/OP%20Raphael%20Mwalyosi%20Impact%20Assessment%20and%20Mining.pdf
[718] United Nations, "International Investment Agreements and Human Rights: Report on human rights–compatible international investment agreements. (2021). The Un General Assembly at its 76th session Available on www.ohchr.org
[719] ibid
[720] UNICTAD, "International Investment Agreements and Sustainable Development: Safeguarding policy space and Mobilizing Investment for a Green Economy" (2018) Available at https://www.un-page.org/files/public/international_investment_agreements_sustainable_development_1.pdf Accessed 19 July 2022

agreements with different States (both developed and developing countries),[721] for the purpose of encouraging foreign investments (by providing investors and their investment with certain protection)[722] so would contribute to economic growth but as a result IIAs undermined States ability to hold foreign investors responsible and accountable when even when the activities of these investors abuse or affect the community negatively.

There has been a call for state sovereignty where most of developing States chose to free themselves from responsibilities that did not benefit them as expected, as much as Tanzania promoted FDI by offering foreign investors protection through IIAs but also more advantage through national law which also gave foreign investors' rights to use it against them even with no obligation in return (such as protecting public basic needs).[723] The negative impacts caused by FDI in natural resource are not to be good for this generation and the future generation, as they have impacted the nation with lot of negative impacts to Tanzania. Since the aim of IIAs is to benefit both contracting parties protecting foreign investors and promoting development.

IIAs under international legal system were introduced for the purposes of protecting foreign investors against political risk in host States, mostly in developing countries such as Tanzania. However, a majority of foreign investors have now been using the system to sue for compensation not only for political risks (such as expropriation) as expected, but for any government measures (including social, economic, or environmental). Investors have been claiming against any government measure that favours public interests arguing to be unfair to them, and that measures that favours public interest infringes their rights and threatens their profits hence the desired need for change. The public have already expressed their worry over the role government rules reducing the social and environmental effects of mining activities in Tanzania and the failure that results in the promotion and protection of their fundamental human rights.[724] However, the Government of Tanzania has done very little to look into the worries of local residents by passing some measures in 2017. This is partly because the

[721] Tradecraft, "International Investment Agreements: An advocacy guide for CSOs" (2015) Available at https://www.tjm.org.uk/documents/reports/Traidcraft-SEATINI_BITs_Advocacy_Guide_Complete-1.pdf accessed 12 June 2020

[722] These includes, Full protection and security, Fair and Equitable treatment, protection against discrimination, expropriation, and permit investors to directly sue States to ISDS

[723] Munu Martin, "International Investment Agreements: An advocacy guide for CSOs" (2015) Available at https://www.tjm.org.uk/documents/reports/Traidcraft-SEATINI_BITs_Advocacy_Guide_Complete-1.pdf accessed 12 June 2020

[724] The citizens (2009) bid

agreements which the government has signed with the mining companies, that limit Tanzania's ability to improve the current social and environmental standards in the mining industry in order to promote the social welfare of its citizens and to fulfil its Universal Declaration of Human Rights commitments.[725] Furthermore, it is claimed that "the way many IIAs are designed at present overlook the importance of environmental and social considerations hence the increase of the impacts discussed with no limitation. Moreover, in their present form and operation, IIAs may restrict the ability of States to implement enabling policies for inclusive green economy pathways, particularly in the energy, transportation, agricultural, industrial, water, and waste industry".[726] This research on other hand propose to the Government of Tanzania to assess and review its IIAs which is the major source of majority of existing challenges caused by foreign investors and their investments.

In same line of argument, Perez, Gistelinck, and Karbala confirm that the current international investment legal framework prioritises foreign investors interest over any other and prove that as the volume and value of foreign investments in land, water, and other natural resources increases, the international investment treaties are becoming more and more important. For that reason, it is the role of host governments and international institutions to create environment that the investments mentioned sectors benefits the people and not investors only.[727] Perez, Gistelinck, and Karbala added that exiting international legal framework weaken developing States sovereign power to regulate in important issues such as water, land use, environmental and social standard of which this research amount them as sustainable development. It is argued that it will be nearly impossible for developing states (such as Tanzania) to achieve any results that reflect a noticeable and sustainable improvement in terms of poverty reduction and food security without the use of national or sovereign powers to accomplishing these goals.[728]

[725] Ibid
[726] Policy Note on International Investment Agreements.
[727] Javier Perez, Myriam Gistelinck, Dima Karbala, "Sleeping Lions International investment treaties, stateinvestor disputes and access to food, land and water" (2011) *Oxfam Discussion Papers* Available at http://rrojasdatabank.info/oxfamsleeping2011.pdf Accessed 15 July 2022
[728] Javier Perez, Myriam Gistelinck, Dima Karbala, "Sleeping Lions International investment treaties, stateinvestor disputes and access to food, land and water" (2011) Oxfam Discussion Papers Available at http://rrojasdatabank.info/oxfamsleeping2011.pdf Accessed 15 July 2022

This section provided evidence of how the protection granted by IIAs, unintentionally failed to protect the interests of host States mostly sustainable development. To achieve the purpose of this chapter, the section discussed negative impacts caused by foreign investors in mining industry have which significantly affected States interests and its public and because of IIAs commitments the state failed to take action to correct the negative impacts with fear of breaching FET and in place where Tanzania did investors initiated an investment claim for unfair treatment.

This research acknowledged that foreign investors did contribute to economic development of Tanzania as report shows FDI inflows has been increasing and reached USD 1.1 billion in 2019.[729] However, the impacts caused by foreign investors are not sustainable. This is because of their activities which have destroyed the culture, society, and environment. Therefore, it is concluded that Even though FDI have positively contributed to improve the living standard and economy of Tanzania, the development contributed is not sustainable (meaning there is not balance between economy, equity and ecology), and cost that the country has to go through attracting FDI and benefit from FDI does not worth doing that (attracting them by using IIAs, which offer excessive rights such as FET). The next section will explain more of what sustainable development is about and how Tanzania IIAs fails to promote such.

5.3.3 Sustainable development

The significance of environmental and social factors is often overlooked while designing Tanzania IIAs. The reason is that existing Tanzania IIAs limit States' ability to enact supporting policies for inclusive green economy pathways in their current shape and operation, particularly in the energy, transportation, agricultural, industrial, water, and waste sectors.[730] Supporting UNCTAD argument this research in aspect of rights with no responsibility has noticed that neither Tanzania IIAs are specifically designed to promote development, nor do

[729] https://www.tanzaniainvest.com/fdi accessed 12 June 2020
[730] UNCTAD, "International Investment Agreements and Sustainable Development: Safeguarding Policy Space and Mobilizing Investment for a Green Economy" (2018) Available at https://www.un-page.org/files/public/international_investment_agreements_sustainable_development_1.pdf accessed 19 July 2022

they contain any meaningful provisions as to the promotion of development objectives (mostly sustainable ones). It argued in previous chapter that Investment Agreements inspire to protect, promote Foreign Direct Investment (FDI) without looking at their implications on 'sustainable development'.[731]

Sustainable development explained as the "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." The four dimensions that supports sustainable development are intertwined (cannot be separated) these are society, environment, culture, and economy.[732] However, the case is different with the impacts of foreign investors in Tanzania. Majority of existing Tanzania IIAs do not support or commit to sustainable development, and it is acknowledged that foreign investments are essential for economic development. Except for few such as a commitment of taking measures to restructure Investment agreements in favor of the Government of Tanzania, which has been going on for some time now. For example, sustainable development was enshrined in the preamble to the Tanzania-Canada BIT of 2013,[733] which has listed some objections regarding various protective measures, and they seem justified, as Article 15 of Health, Safety and Environmental Measures states "*The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures…"*[734] however it this research paper argue that there is a need of more details in provision as such, mentioning to recognize only does not limit investors making claims for measures that affect their investments as unfair.

A paper published in 2019 by CCSI examined how IIAs align with the 2030 Sustainable Development Agenda(SDGs), claiming that FDI will be crucial in advancing development outcomes, if existing treaties are amended and future IIAs thus, States to achieve profound alignment of IIAs with the sustainable development goals they should encourage investments that contribute to the advancement of sustainable development goals while discouraging

[731] Sustainable development is referred to meet today's needs without compromising the future generation needs.
[732] Bruntland Commission https://en.unesco.org/themes/education-sustainable-development/what-is-esd/sd
[733] "The Government of Canada and the Government of the United Republic of Tanzania, hereinafter referred to as the "Parties", desiring to intensify economic co-operation and promote sustainable development for the mutual benefit of both countries and to create and maintain favourable conditions for investments by investors of one Party in the territory of the other Party, recognizing that the promotion and reciprocal protection of such investments favour the economic prosperity and sustainable development of the two Parties by stimulating investment initiatives,.."
[734] Tanzania- Canada BIT (2013). Also see Article 16 Reservations and Exceptions, and 17 - General Exceptions.

investments that work against these goals and this can be done by creating new model of investment agreements that promote sustainable development.[735] In same line of arguments the scholar suggested five principles that could be used to guide IIAs to align with sustainable development of which one is 'maintain legitimate policy space and allow legal regulatory frameworks to evolve over time to address new challenges and circumstances"[736] This supports Host states practising its sovereign power by making fair and reasonable measures by saying "Governments need policy space to be able to enact, implement, revise, and refine their policies, laws, and regulations in order to achieve sustainable development objectives. While international law, to some degree, inherently constrains domestic policy space".[737] Thus, there is a great need for Tanzania to consider redesigning its IIAs light of the SDGs necessitates and this can be done thorough the assessment and retooling of investment governance, with countries conducting thorough evaluations of the domestic and international goals and effects of investment treaties and taking necessary actions to bring treaties more in line with 21st-century goals.[738]

Unfortunately, many of Tanzania investment treaty obligations are fairly ambiguous, and chapter four of this research provide evidence of such using FET provision which proves to be a concern regarding the effects of investment treaties based on the possibility that states could face claims or liability, and that possibility could lead to governments abandoning or weakening valid public interest measures, particularly but not exclusively in developing countries.[739] UNICTAD suggest that by providing the right incentives, IIAs have the potential to support investments that promote sustainable development and aid a nation's transition to an inclusive green economy that increases social equity and human well-being while drastically lowering environmental risks and ecological footprint.[740]

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[735] Lise Johnson, Lisa Sachs, and Nathan Lobel, "Briefing Note: Aligning International Investment Agreements with the Sustainable Development Goals" (2020) Available at https://ccsi.columbia.edu/sites/default/files/content/docs/publications/Briefing-Aligning-International-Investment-Agreements-with-the-Sustainable-Development-Goals.pdf accessed 12 June 2020. Also see Andrew Newcombe "Sustainable Development and Investment Treaty Law" (2007) 8 *Journal of World Investment & Trade* 357.
[736] Page 3- 5.
[737] Page 5
[738] Ibid
[739] Lise Johnson, Lisa Sachs, and Nathan Lobel, "Briefing Note: Aligning International Investment Agreements with the Sustainable Development Goals" (2020) Available at https://ccsi.columbia.edu/sites/default/files/content/docs/publications/Briefing-Aligning-International-Investment-Agreements-with-the-Sustainable-Development-Goals.pdf accessed 12 June 2020
[740] Ibid

Thus, it is crucial advised by this research Tanzania to carefully write clearly its substantive obligations (FET to be precisely) in accordance with the public interest and make sure that the treaty's dispute resolution provisions are consistent with accepted rule of law principles of transparency, certainty, and accountability in order to make sure that IIAs do not thwart states' efforts to develop and implement laws and policies in the public interest.[741]Following the suggestion above this research proposes Tanzania to review her investment agreements then create of adopt model BIT that incorporates the sustainable development of society, economy, and environment. This means Tanzania must have a BIT model that has a provision that will promote sustainable development in investment treaties. By having sustainable development provision or preamble, this research believes such provision could possibly allow the government to argue against foreign investors for taking measures that will allow sustainable development. Likewise, by proposing IIAs that promote sustainable development, Tanzania will also be in support with United Nations who has realised that investment policy does not support sustainable development. Therefore, they have framed a set of sustainable development goals (SDGs) with precise targets for the period of 2015-2030.[742]

On other hand there are lot of arguments that are against imposing such responsibility of protecting the environment and social needs as sustainable development demand. For example, Levitt argued that "Government's job is not business, and business's job is not government."[743] This means the role of protecting environment and other industry s that promote sustainable development should be voluntary and not a responsibility to foreign investors. Levitt (1958) to be precisely captured this perspective succinctly when he wrote, "the business of business is profits." In addition, Milton Friedman (1970) famously argued that the only social responsibility of business was to maximize profits.[744] In support with this quote, I the interest of investors as business is to use any opportunity, they have to save cost and increase profit and not otherwise. Thus, any money used out of the aim of maximizing profit is a waste of resources. This explains why most of foreign investors such as Barrick do not pay much attention on issues such as taking care of the environment, treating employees fair or even

[741] Ibid
[742] https://developmentfinance.un.org/sites/developmentfinance.un.org/files/FSDR2020_ChptIII.D.pdf accessed 12 June 2020
[743] Levitt, T. "The dangers of social responsibility". (1979). In T. L. Beauchamp & N. E.
[744] Andreas Nilsson, Sonanz GmbH and David Robinson, What Is the Business of Business? (2017) Available at https://corpgov.law.harvard.edu/2017/06/23/what-is-the-business-of-business/ accessed 12 June 2020

paying the right tax (case study chapter 5 proves this), such things are not part of business interests. Since the bear ultimate responsibility of ensuring sustainable development is left to State. On other hand States are allowed to design their model of investment agreements such as Model BIT by either adding new clauses, omit traditional clauses, from future accords. Thus Contrarily, it may be necessary to terminate, renegotiate, or clarify the meaning of old treaties through the exchange of diplomatic notes or through other channels in order to bring them into compliance with current goals to avoid investment claims from passing development measures.

To conclude, while this section acknowledging developing countries such as Tanzania require International Investment agreements to attract and promote foreign direct investments. However, it contends that the country cannot tackle poverty without sustained economic growth, and to achieve sustainable growth the government need to have full power in making such decision. This means should be allowed to pass measures that protect the social, environmental, and economic interest of the country even if such law can possibility affect profits of foreign investors. If this is done the balance between the two contracting parties would be achieved possibly and to achieve such Tanzania need to revise its existing treaties and renegotiate with provisions that does not limit them practising its sovereign power and regulate in favour of public and sustainable development.

5.4 Tanzania Legal Reform in Mining Industry

In 2017, the government of Tanzania started revising its law over natural resources particularly in mining operation to ensure the nation and public benefits from it.[745] Under the late President John P. Magufuli, Tanzania made regulatory reform in natural resource sector for the benefit the general public.[746] The law reformed the 2010 Mining Act on provision related to terms and conditions of mining activities, mineral rights, renewal and termination of mining contracts,

[745] Dilini Pathirana, "Sovereign Rights to Natural Resources as a Basis for Denouncing International Adjudication of Investment Disputes: A Reflection on the Tanzanian Approach" (2020) Available at https://www.afronomicslaw.org/2020/09/11/sovereign-rights-to-natural-resources-as-a-basis-for-denouncing-international-adjudication-of-investment-disputes-a-reflection-on-the-tanzanian-approach accessed 12 June 2022, Richard Fallon, "The Rule of Law" as a Concept in Constitutional Discourse" (1997) *Columbia Law Review*

[746] Magalie Masamba, "Government Regulatory Space in the Shadow of BITs: The Case of Tanzania's Natural Resource Regulatory Reform" (2017) Investment Treaty News, Available at https://www.iisd.org/itn/en/2017/12/21/governmentregulatory-space-in-the-shadow-of-bits-the-case-of-tanzanias-natural-resource-regulatory-reform-magalie-masamba/ accessed 12 June 2020

fee, duties and payment of different taxes.[747] Furthermore, during reform, additional changes were made which can be found in Miscellaneous Amendment Act,[748] requiring mining companies to train, and employ Tanzanian citizens (see 28), companies to be ethical and support nation complain against corruption (see section 4), "redress damage caused by environmental pollution resulting from mining activities (see section 28), and also conclude corporate social responsibility agreements with local government authorities (see section 28)."[749]

In addition, the government introduced three new laws which includes (i) Written Laws (Miscellaneous Amendments) Act 2017,[750] (ii) the Natural Wealth and Resources (Permanent Sovereignty) Act 2017, which proclaimed sovereignty over all-natural resources and gave government full ownership and control of natural resources on behalf of public. (iii) the Natural Wealth and Resources (Review and Re-Negotiation of Unconscionable Terms) Act 2017 (Contract Review Act) which gives power to the national assembly to review investment agreements concluded by Government and provide the government power to renegotiate terms that are considered unacceptable to all agreements signed. [751]

In the same year (2017), the Government of Tanzania took a stake in the mining industry and have control over them. This included a claim for dividends on profit without negotiations, 16% of equity from exportation of unprocessed minerals of all existing, and future mining projects,[752] which might also increase to 50%.[753]Similarly the government increased royalty rate for most of minerals,[754] restricted some foreign insurance, and prohibited the use of foreign court and tribunal such as ICSID to resolve disputes over natural resources.[755]

Furthermore, the government reviewed and re-negotiated unconscionable terms. The law retained government power to re-negotiate terms in mining contracts that it considers 'unconscionable', including those relating to international dispute resolution mechanisms (which aims to cut unnecessary cost of litigating outside the country).[756] Additionally, during

[747] Thomas M, Sipemba, "The mining Law Review: Tanzania" (2021) African Law Review
[748] The written Laws (Miscellaneous Amendments) Act, 2017
[749] Africa Group, "Significant recent changes to Tanzania's mineral law regime" (2017)
[750] Amended mining act 2010
[751] ibid
[752] Jason Mitchell. "Mining overhaul fails to dent Tanzania's investment appeal" (2019) Available in https://www.fdiintelligence.com/article/74361 accessed 12 June 2020
[753] ibid
[754] From 4% to 6%.
[755] Ibid
[756] Natural Wealth and Resources (Permanent Sovereignty) Act, 2017 (No. 5 of 2017).

the reform, additional changes were made from Mining Act 2010 which can be found in miscellaneous Amendment act,[757] require mining companies to train, and employ Tanzanian citizens (see section 28), companies to be ethical and support nation complain against corruption (see section 4), "redress damage caused by environmental pollution resulting from mining activities (see section 28), and also conclude corporate social responsibility agreements with local government authorities (see section 28)."[758] Even though the change focused on natural resources, it was aimed at balancing investors protection with public interests.[759]

Thus, the same year (2017) the Government banned exportation of unprocessed minerals and gave itself "16% of the equity (non-dilutable free-carried interest shares) of all existing and future mining projects..."[760]Also restricted some foreign insurance, and law firm companies to do business with mining firm in Tanzania and prohibited the use of foreign court and tribunal such as ICSID to resolve disputes over natural resources. The late President J.P Magufuli revived the legacy of Mwalimu Nyerere 'doctrine of state succession of the 1960s' by reforming law in the energy sectors thereby ensuring Tanzania is benefiting from its natural resource where most of foreign investments are and making sure rules of international investment law are not used to control natural resources and gain full sovereignty. For example, the Renegotiation of Unconscionable Terms Act 2017 aims to " (a) restricting the right of the State to exercise full permanent sovereignty over its wealth, natural resources and economic activity; (b) are restricting the right of the State to exercise authority over foreign investment within the country and in accordance with the laws of Tanzania; (c) are inequitable and onerous to the state; (d) restricts periodic review of arrangement or agreement which purports to last for life time; (e) securing preferential treatment designed to create a separate legal regime to be applied discriminatorily for the benefit of a particular investor; (f) are restricting the right of the State to regulate activities of transnational corporations within the country and to take measures to ensure that such activities comply with the laws of the land; (g) are depriving the people of Tanzania of the economic benefits derived from subjecting natural wealth and resources to beneficiation in the country; (h) are by nature empowering transnational corporations to intervene in the internal affairs of Tanzania; (i) are subjecting the State to the jurisdiction of foreign laws and fora; (j) expressly or implicitly are undermining the

[757] The written laws (Miscellaneous Amendments) Act, 2017
[758] Africa Group, "Significant recent changes to Tanzania's mineral law regime" (2017)
[759] Madeline Kemei, "Good or Bad Deal: The rise in investment Treaty disputes – The case for Tanzania2 (2018)
[760] Jason Mitchell. "Mining overhaul fails to dent Tanzania's investment appeal" (2019) Available at https://www.fdiintelligence.com/article/74361 accessed 12 June 2020

effectiveness of State measures to protect the environment or the use of environment friendly technology; (k) aim at doing any other act the effect of which undermines or is injurious to welfare of the People or economic prosperity of the Nation."[761] Thus the legislation brought wholesale changes aimed at creating a balance between investors rights and those of the state.

Now, in the mining industry, the Ministry of Minerals is in charge of setting policy, the Mining Commission is in charge of regulating the industry, and the Presidency continues to have a significant role by selecting both the Minister and the Executive Secretary of the Commission.[762] This policy is guided by Tanzania 2025 vision, which aims to make the investment in natural resources is efficient and support the sustainable socioeconomic development goals.

5.4.1 A reason behind Tanzania legal reform in mining industry

The legal reform was a response to the government and citizens outcry,[763] but also work in line with a United Nation declaration which States that "peoples, and nations have right to permanent sovereignty over their natural wealth and resources and that they must be exercised in the interests of their national development and of the well- being of the people of the state concerned."[764] Meaning Government needed to put measures to ensure that they benefited from the mineral wealth for national development hence the need for reform.[765] In same line of argument Moyoul wrote it is the "affirmation of the sovereign right for States to choose their political, social and economic priorities within certain limits through the adoption of legislation and administrative practices without violating international rules protecting foreign

[761] James Thuo Gathii, "Understanding Tanzania's Termination of Its BIT with the Netherlands in Context" (2019), Available at https://www.afronomicslaw.org/2019/04/01/understanding-tanzanias-termination-of-its-bit-with-the-netherlands-in-context/ (Assessed 29/03/2021)

[762] Guest Contributor, "Tanzania: A new dawn" (2022) available at https://www.miningreview.com/base-metals/tanzania-a-new-dawn/ Accessed 19 July 2019

[763] https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/tanzania/ ; Also see Philippe Le Billon, Päivi Lujala and Siri Aas Rustad, "A Theory of Change for the Extractive Industries Transparency Initiative: Designing resource governance pathways to improve developmental outcomes(2020) Available at https://www.u4.no/publications/a-theory-of-change-for-the-extractive-industries-transparency-initiative

[764] OHCHR, "General Assembly resolution 1803 (XVII) of 14 December 1962, "Permanent sovereignty over natural resources" (1960) Available at https://www.ohchr.org/EN/ProfessionalInterest/pages/NaturalResources.aspx

[765] Kitula, A. G. N. "The environmental and socioeconomic impacts of mining on local livelihoods in Tanzania: A case of Geita District". (2006) Journal of Cleaner Production 14: 3- 4. Lange, S, "Benefit streams from mining in Tanzania. A case of Geita and Mererani. (2006) Journal of Cleaner Production 14 (22): 397-404. Roe, A. and Essex, M (2009). Mining in Tanzania – What future can we expect? The Challenge of Mineral wealth: Using resource endowments to foster sustainable development. Oxford Policy Management. London. Curtis, M., and Lissu, T. (2008). 'A Golden Opportunity: How Tanzania is failing to Benefit from Gold Mining'. Published by the Christian Council of Tanzania and National Council of Muslims in Tanzania, Dar es Salaam, Tanzania. http://www.businesshumanrights.org/Search/SearchResults?SearchableText=Lissu+Curtis&x=0&y=0 www.opml.co.uk/document.rm?id=1360

investments."[766] Tanzania as a sovereign state practices her duty to protect its citizens through legal frameworks, policy, and initiatives,[767] though by doing so the government a has breached its duty under IIAs. Besides host communities believing that investments are for the purpose of benefiting the country.[768]

The reform of legal structure in the mining industry is also exacerbated by a failure of achieving the goal that national mineral policy set (which was to ensure 'wealth generated from the mining supports sustainable economic and social development and minimizes adverse social and environmental impacts of mining activities).'[769]Thus, the new laws and regulations came to force aiming to ensure that the government, and its citizens are benefiting from mining industry, and activities done by investors are in favour the country considered legally justified under the international law even though they affected foreign investors interest. On other hand, the reform process work along the Article 2 of the UN charter of Economic Rights and duties of state 1974, which support host States to regulate and supervise foreign investors and their investments in its territory. However, it was argued that a change in measures has made an operating environment in mining industry to be "more restrictive, and denting investor sentiment in country",[770] which is not good for the economy of Tanzania.

Since her independency, Tanzania has continued to face significant economic difficulties, which have served as a catalyst for significant policy and institutional changes.[771]The initial goal was to thoroughly and clearly investigate whether Tanzanian government policies and laws could influence the flow of foreign direct investment. Tuns out this might not be the reason to affect FDI

[766] Lone Mouyal, *International Investment Law and the Right to Regulate: A human rights perspective* (2016) 8
[767] Bhrt - Chragg – Ipis, "Business & Human rights in Tanzania" – Briefing 2018 quarter 3: July – September" (2018). 'Rosalien, Diepeveen'.Yulia, Levashova. Tineke, Lambooy. "Bridging the Gap between International Investment Law and the Environment" 4th and 5th November The Hague the Netherlands" (2013) Conference report. Available at https://www.utrechtjournal.org/articles/10.5334/ujiel.cj/print/
[768] Global Business Report, "Mining in Tanzania Africa's Golden Child." (2012) https://www.gbreports.com/wp-content/uploads/2014/09/Tanzania_Mining2012.pdf
[769] Muhanga Mikidadi, "An Examination of Some Key Issues on Legal and Policy Environment in the Mining Industry After the Economic Reforms in Tanzania" (2019) Vol. 3, No. 2, 2019, pp. 33-42. doi: 10.11648/j.ipa.20190302.11

[770] Chantelle Kotze, "Mining in Tanzania – the good, the bad and the ugly" (2019) Available in miningreview.com
[771] Ibid

Lastly it is said that protecting national and public interests using domestic law is not a new phenomenon, it has been done by number of States.[772] However, this research argues that the case of Tanzania legal reform done in 2017 has not only changed the legal framework governing mining industry but made it possible for a breach protection standard mostly (FET) offered by IIAs which commit the state to protect investors interests.

5.5 Analysis of the 2017 domestic legal reform in natural resources

Despite of the country being endowed with vast quantities of natural resources but, it is still one of the countries that struggles with poverty in the world.[773] Hon H.Bakari Mwapachu once said, "the legal and moral duty of protecting commercial interests should not make us be passive to violation of human rights, violation of labour laws, environmental degradation, cultural erosion, tax evasion, indiscriminate harvest of our natural resources, poaching, money laundering, commercial fraud, smuggling of commercial produce, violation of immigration law, non- respect of the state sovereignty authorities and abuse of tax holidays*." [774]* Also, the adding to the outcry in reference to the negative impacts that public experienced from FDI, there is a significant expectation from its citizens to benefit more from Tanzania's vast mineral resources.

Following the fact above, this research acknowledges the efforts that Tanzania has made in mining industry and natural resource in general with the aim of protecting public interests and the nation in general. However, it is argued that measures taken to benefit Tanzania were not part of investors' expectations and therefore have negatively affected the interests of foreign investor in natural resource industry.[775] Even though tribunals have tried to protect States

[772] See UNICTAD, "Local Content Requirements and The Green Economy" (2014) Available on https://unctad.org/system/files/official-document/ditcted2013d7_en.pdf (accessed 12/12/2021)

[773]Country does not have full resource such as capital, knowledge, and technology to explore what it has BBC. "Tanzania country Profile" (2018) *BBC News.* Also see world Bank, "Tanzania recent development" (2019) http://pubdocs.worldbank.org/en/325071492188174978/mpo-tza.pdf accessed 12 June 2020

[774] See in Eric De Brabandere, Tarcisio Gazzini, Avidan Kent, *Public Participation and Foreign Investment Law From the Creation of Rights and Obligations to the Settlement of Disputes* (2021)

[775] FET assure safe, and stability working environment, thus a change of domestic law might qualify to be in breach of FET. See in See in CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8. It was mentioned by tribunal in para 144 that Argentina had ``profoundly altered the stability and predictability of the investment environment, an assurance that was key to its decision to invest"; Also in CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, tribunal made it clear in para 267 that The Szech Republic "breached its obligation of fair and equitable treatment by evisceration of the arrangements in reliance upon [which] the foreign investor was induced to invest."But also in Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2. Para 268 "[Fair and equitable treatment] requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations

reasonable measures taken to protect public interest by reducing investors legitimate expectation,[776] as it was in *Parkerings-Compagniet AS v. Republic of Lithuania*,[777] that it is each state undeniable right and privilege to exercise its sovereign power by regulating in favour of the public. And that "a state has right to enact, modify or cancel law at its own discretion unless there is the agreement, in form of stabilization clauses, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made investment." On other hand, countries like Tanzania to be safe would need to reduce liability of FET in future and clarify its intent in IIAs. Or use French proposal as an example as clarified that foreign investors cannot expect law to remain unchanged and that investor cannot rely on legitimate expectations to challenge a mere change of law even if a change of law affects their profit.[778] Similar CETA in article 8.9(2) specified that modification of law by state which can affect investors expectation negatively does not amount to a breach of FET.

Therefore, Tanzania as a sovereign state, the government act of updating its law, and policies mostly in natural resource area for the purpose of protecting the state and its citizens, the international law support such only if the decisions, policy, legislation made are reasonably not unfair to foreign investors. However, following the existing IIAs by passing new measures in natural resource sector Tanzania has failed to honour her duty of treating foreign investors fairly. In practice, a change in domestic law only might not achieve the objective of balancing interests between the two contracting parties fully. The reason is that most of foreign investors are protected by IIAs and other international law, meaning Tanzania will not gain full independence from IIAs until it reviews its IIAs and moderate some clause such as 'FET'. Furthermore, the change of law triggered reasonable investment claims (investment disputes) with will put Tanzania in risk when defending its measures.

On the other hand, Tanzania, and its citizens have benefited from these new laws and regulations in mining. For example, Barrick company (former was Acacia) has recently agreed to work together (joint venture) with Tanzania, also promised to partner with one of the top

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that were taken into account by the foreign investor to make the investment'". In Graham Mayeda, "Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties" (2007) Journal of World Trade 41(2).

[776] See Biwater v. Tanzania (2008), ICSID Case No. ARB/05/22, Final Award, 24 July 2008, para. 601.

[777] ICSID Case No. ARB/05/8

[778] Ameya Vikram Mishra, "Unqualified Fair & Equitable Treatment Clause: It's Time to Revamp" (2021) Available at https://indiacorplaw.in/2021/05/unqualified-fair-equitable-treatment-clause-its-time-to-revamp.html (accessed 03/01/2021)

universities in Tanzania (University of Dar es salaam) by funding training and skills development for over 10 years. Furthermore, Barrick is quoted arguing that 'since taking over the operatorship, they have been engaging with local communities to restore the mines', social license to operate and they promised to cooperate closely with the authorities to address the environmental issues at North Mara. They have also been working on a local supplier strategy as well as a community development plan to create sustainable economic opportunities for the people around our mines.[779] Additionally, "Barrick's committed itself to employ and advance locals at its mines, also began to recruit and train Tanzania citizens to replace expatriate employees at Barrick's other African operations. In addition, Acacia's offices outside the country have been closed, and company records and day-to-day decision-making and accountability have been moved back to the operations in Tanzania."[780]

A report from the Bank of Tanzania (BOT) is quoted in its monthly economic review for December that "country's gold export earnings increased from $1.51 billion as of November 2018 to $2.14 billion as of November 2019".[781] This report proved the new measures have benefited the public. However, concern remains to in Tanzania over investment contracts, and other investment agreements (such as BITs) signed by governments aimed to provide safe working environment for investors and profits without encountering unnecessary risks has been breached. And it is well known that any breach of term or change of law that will affect their investment will guarantee foreign investors compensation. Tanzania has not fulfilled all legal requirement which clearly puts the state in a risk position of being sued and ruin state reputation because the change of law has affected the legitimate expectations of foreign investors.

Most of natural resources companies choose to invest in Tanzania because of benefits that come under BIT such as FET which prevents unfair treatment without appropriate compensation.[782] Tanzania's new measures provide foreign investors a good reason to make claims for violation of FET because new laws have turned the table upside down, now favouring Tanzania and its

[779] Barrick, "Barrick Back in Business in Tanzania" (2020) Available at https://www.barrick.com/English/news/news-details/2020/Barrick-Back-in-Business-in-Tanzania/default.aspx accessed 12 June 2020
[780] Ibid
[781] Nuzulack Dausen, "Tanzania's gold export earnings up 42% in year to November" (2020). Also see https://www.africauptodate.com/post/tanzania-s-annual-gold-export-earnings-swell-by-42 accessed 12 June 2020
[782] Ibid

citizens,[783] and ignored the interest of foreign investors. Therefore, foreign companies in mining industry have rights to say their legitimate expectations are affected.[784]

However, this research reasons that Tanzania chose to use its sovereign power and take controlling natural resources. And this effort could be influenced by former and existing investment claims also from the analysis which proven that mining companies succeeding for many years without benefiting the country as expected. Just like any other State, Tanzania has a duty to protect its citizens through legal frameworks, policy, and initiatives,[785] passing new measures in natural resources in some level is justified. However, the research argues that for a state to have full sovereignty and right to its natural resource, Tanzania needs to review its IIAs and renegotiate with terms that will allow the state to pass reasonable measures that will benefit state and its public in international level but also to avoid investment claims in future.

Therefore, it is concluded that even though FDI (in mining industry) have positively contributed to the improvement in the living standard and economy of Tanzania, the development contributed is not sustainable (meaning there is not balance between economy, equity and ecology), and cost that the country has to go through attracting FDI and benefit from FDI does not worth doing that (attracting them by using IIAs, which offer excessive rights such as FET). By passing new laws, Tanzania has put natural resource industry at risk, and treatment such as FET are violated in IIAs. Thus, Tanzania putting herself at risk too as the country will have to go through cost again to resolve disputes or compensate affected investors. The reform in investment law (natural resource industry) done by Tanzania has left out the interest of foreign investors but also left renegotiation of investment treaties.

While foreign investors demanding protection rights under FET, host States are actively advocating for its sovereign right to regulate. This is because majority of States have undertaken efforts to rebalance their IIAs (mostly BITs) believing the former investment agreements did not give them space to regulate in favour of public and the nation in general.

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[783] UPTON, M., "The Golden Building Block: Gold mining and the transformation of developing economies. With an economic life-cycle assessment of Tanzanian gold production." (2009) http://www.members.gold.org/assets/file/pub_archive/pdf/WGC_Golden_Building_Block.pdf. accessed 12 June 2020

[784] Even where companies have failed to obey the laws and regulations, IIAs through FET will give them rights to sue and claim for damages as long as legitimate expectation is affected.

[785] BHRT - CHRAGG – IPIS, "Business & Human Rights in Tanzania" – Briefing 2018 quarter 3: July – September" (2018). 'Rosalien, Diepeveen'.Yulia, Levashova. Tineke, Lambooy. ""Bridging the Gap between International Investment Law and the Environment" 4th and 5th November The Hague The Netherlands" (2013) Conference report. Available at https://www.utrechtjournal.org/articles/10.5334/ujiel.cj/print/ accessed 12 June 2020

The research did not ignore the fact that the interest of foreign investors and host state are different. This means foreign investors are interested on protecting their investments(profit), while host state is interested on protecting the interest of the nation and its citizens through policies. It is recommended that, existing investment protections are vague and favour investors more even when it comes to interpretations and to have IIAs that allow governments the to regulate in favour of social and environmental goals, IIAs need to be reformed and protecting standards such as "fair and equitable treatment" need to be written in clear language and obligations in order to prevent investors from abusing FET clause. More generally, it is critical that the rights and obligations of investors and host governments are well balanced under investment treaty clauses.[786]

In summary it can be said that there has been a lot of efforts done by both host States and international institutions on proposing a means of rebalancing IIAs in favour of States. Proposing the interpretation of broad provision as FET to consider States sovereign power particularly when measures or law passed for the benefit of public health, environment or human rights. The FET provision in Tanzania's IIAs found to as suitable provision to balance the interest of two parties (foreign investors and host States) as for now it seems to be in favour of foreign investors. Lack of meaning and the wide interpretation FET provide a challenge to host States by worrying then when they pass measures because by doing so might trigger an ISDS action from a foreign investor.[787] Moreover, the increase of cases in international arbitration against government regulating[788]rise concerns that the FET goes beyond the risk-based business due diligence performed by a foreign investor for its own benefit.[789]This research argues that Tanzania needs to reform its IIAs and clarify the wordings of FET in doing regulating certain (named) in favour of public.

As a means of practicing its sovereign power, Tanzania proved new laws to protect the interest of public in 2017 which currently had led to number of investment claims.[790] The reason for

[786] Ibid

[787] Patrick S. Kenadjian, Klaus-Albert Bauer, Andreas Cahn, (2013) *Collective Action Clauses and the Restructuring of Sovereign Debt.* Series: Institute for Law and Finance Series, 12

[788] Angeline Welsh, (2015) The Current State and Future of International Arbitration: Regional Perspectives

[789] Yulia Levashova, "The Role of Investor's Due Diligence in International Investment Law: Legitimate Expectations of Investors" (2020)

[790] "The legislation aims at reasserting the State's permanent sovereignty over all-natural resources, at ensuring that natural resources are exploited for the greatest benefit and welfare of the People of Tanzania, and at establishing a tight institutional control over such exploitation. "The Act declares four basic principles: (1) ownership and control over natural resources is exercised by the government on behalf of the People of Tanzania (Section 4.2); (2) any arrangements related to the exploitation of natural resources is subject to approval by the

initiated claims is that the laws have significantly affected the protection for existing and future investments in the natural resource industry.[791] The laws did not only provide lack of protection to foreign investors but reasoned to be unfair to foreign investors profit as it affects their profit and legitimate expectation. For example, statistics shows Acacia Mining company (now known as Barrick), lost 30 per cent of its revenue as well as experienced a downward trend of its share price on the London Stock Exchange as a result of the ban of exportation.[792] Furthermore, due to change of laws Acacia claims to be concerned with the safety of its staff and the challenging operating environment in Tanzania that can possibly affect the business outlook, thus see a need to pursue claims under BITs .[793] But also ANGLOGOLD Ashanti , Ntaka Nickel, and Orecorp have joined Acacia (now Barrick) Mining in entering into arbitration over legislative changes in Tanzania which entitles government to renegotiate business agreements with mining firms.[794] IIAs have excessive rights that allow them (investors) to restrict government space to regulate the activities of companies in fear that by doing so it will affect investors profit.

The research argues that the act of Tanzania passing new laws in favour of public could not be a challenge if the exiting IIAs were clear on passing measures for foreign investors investing in state. There could be fewer claims if the exiting IIAs do not give foreign investors excessive rights that restrict government space to regulate the activities of companies in fear that by doing so it will affect investors profit. Tanzania has gone through investment claims for passing reasonable measures such as to protect health, safety, labour rights, human rights, and

National Assembly (Section 6.1); (3) for any such arrangement there must be guaranteed return into the Tanzanian economy; and (4) earning obtained from such arrangements must be retained in Tanzanian banks and institutions. Reminiscent of the Calvo clause, Section 11 establishes the exclusive competence of domestic judicial bodies and other organs to settle disputes related to the exploitation of natural resources". By Tarcisio Gazzini, (u.n) "A Legitimate but Risky Path: The New Tanzanian legislation on natural resource". International Law Spain, Italy and the Czech Republic are currently facing investment claims because of alterations to their regulatory frameworks for renewable energy.

[791] ibid

[792] Export Gov. "Tanzania – Mining" (2019) Available at https://www.export.gov/apex/article2?id=Tanzania-Mining accessed 12 June 2020

[793] Habel Chidawali.Sh426 billion cases filed against Tanzania in global courts" (2018) Available at https://www.thecitizen.co.tz/news/Sh426-billion-cases-filed-against-TZ-in-global-courts/1840340-4845142-urhmfd/index.html. accessed 12 June 2020 Even though laws are domestic, still if can possibly affect their legitimate expectat on and so have rights to claim for breach of FET under BIT. ; Chantelle Kotze, "Mining in Tanzania – the good, the bad and the ugly" (2019)

[794] David McKay, "AngloGold turns to UN arbitration as law changes threaten Geita" (2017) Available at https://www.miningmx.com/news/gold/30016-anglogold-turns-un-arbitration-law-changes-threaten-geita/ accessed 12 June 2020 ; Tarcisio Gazzini, "A Legitimate but Risky Path: The New Tanzanian legislation on natural resource" International Law. (u.d) Marc Bungenberg, Markus Krajewski, Christian J. Tams, Jörg Philipp Terhechte, Andreas R. Ziegler, (2018) European Yearbook of International Economic Law.: See in CMS Gas Transmission Company v. The Argentine Republic (ICSID Case No. ARB/01/8)

environment and can cost the government a lot money.[795] For example, in Bywater case,[796] Tanzania was sued for violation of FET for terminating a contract with Biwater Gauff due to its poor performance (as agreed in contract),797 the company sued arguing that Tanzania has violated the Investment treaty (Tanzania -UK BIT) by terminating the contract that contract even though Tanzania had a good reason to do so (protecting the interest of its citizen).

The research argues that foreign investors always search for gap on States legal system and make claim especially in reference to breach of FET and even though Tanzania has not experienced major number of claims for the change of law. For example, case laws such as LG*&E V Argentina,* it is justified foreign investors can claim for breach of FET (as their legitimate expectation being affected) and have a chance of winning because 'legitimate expectation ensure host state provides stable legal and business environment.'[798] It is a general principle for investors to claim for breach of legitimate expectation (which is under FET), if

[795] "Under the ISDS clauses, companies can sue governments on the vague grounds of `unfair treatment' or because a government regulation is considered to harm their profits." Munu Martin, "International Investment Agreements: An advocacy guide for CSOs" (2015.Available at https://www.tjm.org.uk/documents/reports/Traidcraft-SEATINI_BITs_Advocacy_Guide_Complete-1.pdf accessed 12 June 2020

[796] Case summary, see https://cf.iisd.net/itn/2018/10/18/biwater-v-tanzania/ Roland Kläger,(2017) "Fair and Equitable Treatment in International Investment Agreements" DOI: 10.1093/OBO/9780199796953-0158 *Biwater Gauff (Tanzania) Ltd* v. *United Republic of Tanzania* (2008), ICSID Case No. ARB/05/22. "Biwater Gauff was a company established to take part in a bid process initiated by the Tanzanian government to remedy the precarious water supply situation in Dar es Salaam. The company leased run-down water supply facilities which were by then owned by a state enterprise; Biwater Gauff was required to operate and upgrade them. However, due to an underestimation of this task, the company's performance was poor. After the attempts to re-negotiate the contract had failed, the government announced the termination of the contract on a press conference without giving a formal notice to the company representatives and held public rallies to mobilize support for this move. The media spectacle thus triggered coincided with the electoral campaign in which the minister in charge of water supply was running for the position of the prime minister. In addition, the Biwater Gauff's VAT relief certificate was revoked. After Biwater Gauff obtained an injunction from an English court barring the owner of the water facilities from terminating the contract, the company management was detained, kept in custody for the whole day and ultimately deported. The company assets and the water supply services were taken over by a newly created state enterprise DAWASCO. The tribunal examined the case under a BIT concluded between Tanzania and the UK. It concluded that the actions taken by the Tanzanian on a cumulative basis constituted an expropriation (para. 519) and the public announcement of terminating the contract also constituted a violation of the FET standard (para. 628). One point not adequately addressed by Tribunal's analysis is whether the expropriation could be justifiable in view of public policy concerns, such as ensuring a reliable water supply. As Allen rightly points out, the threshold established by the Tribunal – the risk of 'sabotage' (para. 514) to the water supply system – is too high. See. D. Allen, "'This Business Will Never Hold Water": International Investment Arbitration on Public-Private Water Service Provision – A Comment on *Biwater Gauff (Tanzania) Limited* v. *United Republic of Tanzania*', p. 25, available at SSRN: http://ssrn.com/abstract=1540256. On balance, the Tribunal stated that, the violations notwithstanding, no compensation was due, as the claimant suffered no economic losses (para. 806). However, the costs of the arbitration of which the Tribunal ordered to be shared between the parties (para. 814) constituted a considerable burden to the Tanzanian budget."

[797] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22. See more in https://www.business-humanrights.org/en/latest-news/biwater-tanzania-arbitration/ accessed 12 June 2020

[798] LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic (ICSID Case No. ARB/02/1) Para 124-125

business expectation they had before are or have been changed by the new government measures.[799] .

On other hand, there is still a doubt of whether the reform done in mining (mineral rights) regulation was introduced which cancelled 'all retention licences prior to that date'[800] this makes the uncertainty of the 2017 reform effectiveness. Above all, it is said that the 2018 mining regulation was done to 'hamper new investments and disrupt existing ones.[801] The research argues those new laws introduced in the wake of various concerns that have been raised against the investment law regime, specifically with regard to the way in which BITs limit a state's right to regulate, which could in turn, negatively impact on a state's right to development. However, same laws are allegedly said to have breached Tanzania's international investment obligations, which is to protect foreign investors interests.

The obligation within the new Acts interferes with the promises provided under investment agreements that Tanzania have with foreign investors in natural resource industry. Therefore, it is certain that the country breached the standard of protection to these investors by imposing these laws. Thus, investors such as Acacia (now Barrick), and Indiana Resource have threatened to sue the government for introducing new legislations. Acacia, and Indiana claimed that the new laws have affected the ownership, business environment, and business profit. Both companies have claimed that Tanzania has breached the obligations under BIT and international law by passing the new laws.

Indiana Resources quoted: "*It is now clear that Tanzania has removed the ownership of the project from investors, and in doing so has breached its obligations to the investors under the BIT [bilateral investment treaty] and international law."*[802] The FET clause covers several other aspects that are not covered in IIAs, and it often gives investors flexibility to invoke very broad circumstance as a breach of FET. [803]The broad concept FET offer to claims not only for unfair treatment but also for any treatment which will affect business such as one of legitimate

[799] See in Sornarajah, 356.
[800] See regulation 21 of mining regulation 2018
[801] Ibid
[802] Matthew Hall, "Second company files investment dispute with Tanzania government" (2020) Available at https://www.mining-technology.com/news/second-company-files-dispute-with-tanzania/
[803] Some BIT combines between FET and full protection and security.

expectation which allow tribunals to include the legal framework or undertakings and representations from the government.[804]

5.5.1 Arguments against Tanzania Law Reform in Natural Resources

Tanzania as a State has a duty under international law to prioritize the development of its nationals. However, the country also has responsibility under international law not to use domestic law as an excuse for the non-compliance with international obligations.[805] In other words. IIAs have the potential to hinder the implementation of this duty.[806]

International law has an established principle which does not allows States to change their domestic law because by doing so the law could undermine investor's legitimate expectations or stability of investment's legal environment, because by doing so state will be accused of the breach of FET standard.[807] There is evidence proving that Tanzania has violated investment agreements, and other contractual agreements by passing new laws, which have affected the legitimate expectations of foreign investors in mining Industry. This approach goes completely opposite with protection favours offered in IIAs, for example the law now demands for a shared ownership with foreign investors and shared profit. Even though some of the existing foreign companies such as Barrick have agreed to abide with new laws, this does not guarantee that the future is safe. The fact is still the same that Tanzania have created unfriendly environment for foreign investors, more specifically mining industry.

Furthermore, Robert Edel (Global Head of Mining) wrote, "amendments are actually carried into operation it is unlikely that Tanzania will be able to attract any significant investment in mining or the oil and gas industries in the foreseeable future. It is likely that many existing investors in the resources industry will have little alternative but to seek to withdraw their investments."[808] Other foreign companies in the mining industry have also shown the possibility of withdrawing their investment. For example, a representative of AngloGold said "there was potential to extend Geita beyond its current year life (closing 2025). There were

[804] Rudolf Dolzer, 'New Foundations of the Law of Expropriation of Alien Property', (1981) The American Journal of International Law 75 (3), p 585
[805] Article 32 of the Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission at its fifty- third session in 2001.
[806] Article 1(1) of the Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/RES/41/128 (Dec. 4, 1986)
[807] See in see PSEG vs. Turkey, Award, 19 January 2007, at Para 250
[808] Robert Edel, "Concerns for Tanzanian resources Industry amid legislative reforms" (2017) Available at https://www.kwm.com/en/au/knowledge/insights/tanzania-natural-resources-mining-legislative-reform-changes-20170710 accessed 12 June 2020

also plans to increase production this year."[809] But due to the changes in law, there is doubt whether that will be possible.

Drawing from discussion in this section, there is uncertainty whether foreign investors especially in mining industry have contributed to economic growth in Tanzania. However, investment activities have negatively affected the environment, and villages around mines and the nation as whole. However, due to some rights that foreign investors are offered foreign investors through IIAs (clauses which restrictions Tanzania sovereignty in protecting foreign investors from political, and other risks in host country, without looking at their implications on sustainable development). Foreign investors have rights to claim for unfair treatment and seek for compensation, because the laws have breached the terms agreed in investment contracts.

5.5.2 Tanzania liability for regulatory change

There has been tension whenever government pass law in favor of public, the reason is that any change of regulatory framework results to claim for breaching IIAs.[810] Majority of foreign investors claim a change of regulations effects the 'legitimate expectations' which are protected under FET protection standard. This means whenever state change its regulatory framework such action triggers investment claim. Given the aforementioned, it is clear that the 2017 Tanzania law reform in mining industry triggered a number of investment claims because the law has changed the expectations and affected their interest. Comparing to 1998 mineral policy and 2010 mining law, the 2017 law reform in mineral resource has made significant changes mining industry which are deemed unfair as it affects their interest (legitimate expectation). For example, the Natural Wealth and Resources (permanent sovereignty) Act 2017 proclaimed to have power over natural resources and benefit from them,[811] also has retained government power to re-negotiate and review terms in mining contracts and other investment agreements in mining sectors that it considers 'unconscionable', time to time including those relating to

[809] David McKay, "AngloGold turns to UN arbitration as law changes threaten Geita" (2017) Available at https://www.miningmx.com/news/gold/30016-anglogold-turns-un-arbitration-law-changes-threaten-geita/ accessed 12 June 2020

[810] Lise Johnson and Oleksandr Volkov, "State Liability for Regulatory Change: How International Investment Rules Are Overriding Domestic Law" (2014) Available on https://www.iisd.org/itn/en/2014/01/06/state-liability-for-regulatory-change-how-international-investment-rules-are-overriding-domestic-law/ (accessed 19/11/2021)

[811] Thomas M, Sipemba and Jacquline Matiko, "The mining Law Review: Tanzania" (2021) East African Law Chambers. Available at: thelawreviews.co.uk

international dispute resolution mechanisms (which aims to cut unnecessary cost of litigating outside the country).[812]

Thomas Franck, mentioned FET in the context of investment law requiring the government to consider the interests of the public it presents, and the interest of foreign investors when making changes to policy that could affect FDI.[813] He wrote, "[This] is the point at which international law is called upon to play a role: not to resolve the fairness discourse (for here as everywhere it cannot be `resolved'), but by promoting discourse as an end in itself with the object of creating a high degree of mutuality of expectations between the participants in an international investment transaction. And also, to create a legitimate framework within which future, unanticipated disputes can be addressed through further discourse or institutions and rules of process-legitimacy. Creating such a framework itself is the optimal institutionalized manifestation of fairness"[814]

Foreign investors in form of multinational corporation are powerful and politically influential over States (mostly developing ones like Tanzania). Foreign investors cannot change a law of host States to serve their interest thus take advantage of IIAs to win their interests even in a sovereign state.[815] Unfortunately, most of the recent tribunal awards did not clarify what exactly kind of regulatory change would qualify for a breach of FET provision. The selected investment claims against Tanzania in table 2 below prove how reasonable measures taken by Tanzania claimed to be in violation of IIAs mostly FET provision.

Table 2 Investment Claims Against Tanzania

No	Case Name	BIT	CLAIM	Result
1	Nachingwea U.K. Limited, Ntaka Nickel Holdings Limited and Nachingwea Nickel	Tanzania – UK (1994)	Alleged for breach of FET/minimum standard of treatment including denial of justice claim.	Pending

[812] Natural Wealth and Resources (Permanent Sovereignty) Act, 2017 (No. 5 of 2017).
[813] Thomas Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995), p. 440.
[814] Thomas Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995), p. 440
[815] John H. Dunning & Sarianna M. Lundan, *Multinational Enterprises and the Global Economy* (2008) p 696

	Limited v. United Republic of Tanzania (ICSID Case No. ARB/20/38)			
2	Winshear Gold Corp. v. United Republic of Tanzania (ICSID Case No. ARB/20/25)	Canada - United Republic of Tanzania BIT (2013)	Pending Alleged to be in breach of FET.	Pending
3	Michel Saab v. Tanzania Ayoub-Farid Michel Saab v. United Republic of Tanzania, ICSID Case No. ARB/19/8	Netherlands - United Republic of Tanzania BIT (2001)	Not available	Pending
4	Symbion Power and others v. Tanzania (ICSID Case No. ARB/19/17)	United Republic of Tanzania - United Kingdom BIT (1994)	Data not available	Pending
5	Sunlodges v. Tanzania (PCA Case No. 2018-09)	Italy - United Republic of Tanzania BIT (2001)	Direct expropriation	Pending

6	SCB v. Tanzania (ICSID Case No. ARB/10/12)	United Republic of Tanzania - United Kingdom BIT (1994)	Fair and equitable treatment/Minimum standard of treatment, including denial of justice claims	in favour of State.
7	Biwater v. Tanzania (ICSID Case No. ARB/05/22)	United Republic of Tanzania - United Kingdom BIT (1994)	Fair and equitable treatment/Minimum standard of treatment, including denial of justice claims	Decided in favour of neither party
8	Montero Mining v. Tanzania (2021)	Canada - United Republic of Tanzania BIT (2013)	Expropriation	Pending
9	Agro EcoEnergy and others v. Tanzania (ICSID Case No. ARB/17/33)	Sweden - United Republic of Tanzania BIT (1999)	Data not available	Pending

The list of cases mentioned in table above are results of Tanzania reasonable measures for example (summarised as numbered in the table 2 above), the *Nachingwea* claim resulted from the Government's termination of the claimants' retention licences for the Ntaka Hill Nickel Project and the ensuing public tender for the joint development of the territories encompassed

by those licences without providing the claimants with any kind of compensation. The *Winshear Gold Corp* claims was initiated from the Government's cancellation of retention licences for mineral rights issued prior to the 2018 mining regulations, as a result of changes to the Mining Act made in 2017, as well as the transfer of associated mining rights to the Government, including those held by the Claimant's local subsidiary for the SMP gold project.

On other hand the *Michel Saab v. Tanzania* case summary is not available publicly however is argued to be a result of Tanzania's central bank closed and terminated FBME's operations there in 2017 for facilitating money laundering and financing terrorism and organised crime charged in 2014.[816] The *Symbion Power and others v. Tanzania* case claim is stemming from the claimed 2016 unilateral suspension of a 15-year power purchase deal that Symbion Power Tanzania Limited and the state-owned Tanzania Electric Supply Company (Tanesco) allegedly signed in 2015. In *Sunlodges v. Tanzania* case resulted from the government's purported takeover of the claimants' cattle farming land so that a cement plant and a power plant may be built. Also, in *SCB v. Tanzania* claims resulted from unpaid invoices under a loan agreement reached by the claimant's subsidiary and a business that had a contract with a state-owned enterprise for the building and operation of an electricity generating facility, as well as claims resulting from the government's control over the power plant and Tanzanian courts' refusal to enforce an LCIA award in the investor's favour. In *Biwater v. Tanzania* claims raised from the disagreements over contracts between the investor's locally incorporated company and Tanzania's Water and Sewerage Authority, which were then allegedly followed by a string of events that resulted in the deportation of the investor's senior management, the seizure of its assets, and the takeover of its business. In *Agro EcoEnergy and others v. Tanzania* claims resulting from the government's 2016 decision to terminate the claimants' sugar cane and ethanol project on the grounds that it would negatively affect the area's wildlife.[817] And the most recent case *Montero Mining v. Tanzania* claim resulted from regal reform in 2017 specifically from the Mining (Local Content) Regulations 2018, released in 2018, which argued to revoke all previously issued investors retention licenses, from the law the government of Tanzania expropriated Montero's Wigu Hill Rare Earth Element Retention License in 2018

[816] Sadaff Habib, "Tanzania Faces a New ICSID Claim under the Terminated Netherlands BIT" (2019) Available at http://arbitrationblog.kluwerarbitration.com/2019/06/21/tanzania-faces-a-new-icsid-claim-under-the-terminated-netherlands-bit-2/ accessed 12 June 2022

[817] All the case summaries are adapted from the UNCTAD, "United Republic of Tanzania: Cases as Respondent State"(2021) Available at https://investmentpolicy.unctad.org/investment-dispute-settlement/country/222/tanzania-united-republic-of/respondent accessed 22 July 2022

before its deadline as they were granted a five-year retention licence for the property from 2015.[818]

The discussion above aimed to prove that most of claims above have claimed Tanzania to be in a breach of different standard mostly FET and even where FET is not mentioned from chapter four discussion breach FET standard is expected to be in almost each of the claim because a state may be accused of treating foreign investments unfairly and unequitable without necessarily doing so in bad faith.[819] All the claims are initiated from reasonable States measures however because of the broad FET provisions Tanzania the agreements have led to unnecessary claim thus, Tanzania need to clearly state and define what violation of FET is for its investors to a avoid such unnecessary claims and regulate without challenges in future.

5.6 Summary of the chapter

The chapter revealed, when Tanzania entered investment treaties in 1990s, they merely took it as a means of attracting investors, not knowing the country sacrificing her sovereignty until 2005 where the country realised the implications of investment treaties. It has acknowledged the need of foreign investments in developing country like Tanzania. However, it is argued that the damage caused by investors activities is more than the benefits they offer, and the few benefits offered are not sustainable and not affordable, for example IIAs have cost Tanzania millions of dollars that the country cannot afford them.

Therefore, even though foreign investors need protection in host States, this chapter argues the protection standards and rights offered in Tanzania IIAs goes beyond public rights and States sovereign power. In other words, the chapter argues that the country has compromise its sovereign power with the IIAs which protects the rights of foreign investors hence the need for a change. The chapter has expressed the concern over the side effects of foreign investors protection standards offered under IIAs which fails to protect the sustainable development (which includes environment, health, social and economic) in name of attracting FDI. This chapter has explored how foreign investors exploit public interests under the FET provision of

[818] Montero Mining and Exploration Ltd., "Montero's Compensation Claim for Damages for the Expropriation of the Wigu Hill Project Underway" (2021) Available at https://www.globenewswire.com/news-release/2021/11/29/2342290/0/en/Montero-s-Compensation-Claim-for-Damages-for-the-Expropriation-of-the-Wigu-Hill-Project-Underway.html accessed 12 July 2022

[819] Ibid

IIAs. The chapter has explored how both national and international law thought to favour foreign investors without considering States interests.

The chapter has also clarified that although Tanzania is rich and endowed with natural resource, making up to one of the top mineral exporters in Africa, the country has not benefited much from its status. This is partly because of the gaps in laws, and limitation caused by IIAs that seems to favour the interest of foreign investors and their investments and ignore the interest of host States and its public.[820] Thus ensuring States exercise its sovereign power by passing measures, that will protect the interests of public, new generation of IIAs have moderate FET. This chapter argues that the concept of rebalancing IIAs in favour of host state implying the right of States being able to regulate reasonably without being accused of a breach of FET.

This chapter evidence that Tanzania will not benefit from foreign investments to the expected level because of protection standard granted to foreign investor, which limits the State to regulate in favour of itself.[821] The reason is that whenever the state decides to legislate in favour of itself, such as protecting its profit, environment, good health, quality life, human rights and all other aspect of development, such decisions tend to affect foreign investors interests and because IIAs guarantee protection of investment interests, any decisions that limit or affect their interests are deemed to be unfair.[822] Thus host States can be found liable for passing measures to protect its interests, for such reason this research propose Tanzania to reform FET provision in IIAs by clarifying which States measures agreed to be unfair to allow state regulate in favour of its public while protecting foreign investors.[823]

As a way forward, the government is supposed to list the conducts that can result in violation of FET and have a uniform standard that will not allow broader interpretation from members of tribunals as there will be a specification of actions that counted to be unfairly foreign

[820] Petro S Magai, Alejandro Márquez-Velázquez. Tanzania's Mining Industry and Its Implications for the Country's Development (2011) Working Paper No. 04/2011

[821] Host state right to regulate Vis-à-vis investors right in C, Titi, *the right to regulate in International Investment Law* (Hart Publishing 2014);M,Bungenberg, J Griebel, S Hindelang (eds)"The crucial question of International future investment treaties: Balancing investors rights and regulatory interests of host States interests" (2011) European yearbook of International Economic Law, special issue: International Investment Law and EU law.

[822] Ibid

[823] P, Acconci, "L'inclusioone del "rights to regulate" negligence according to international in material in investment (2019) in Roberta Greco, "How can a treaty on business and human rights fit with international law? Assessing the development of international rules on Corporate Accountability zoom in The draft on business and human rights: what way forward for greater consistency between human rights and investment agreements" (2021)

investors and their investments and specifications of rights to regulate. For state to have full right to its natural resource, Tanzania needs to review its IIAs and renegotiate with terms that will allow state to pass reasonable measures that will benefit state and its public. This research argues that passing new laws in Tanzania has put foreign investors in natural resource industry will and has putting herself at risk too as the country will have to go through cost again to resolve disputes or compensate affected investors and that the reform in investment law (natural resource industry) done by Tanzania has left out the interest of foreign investors but also left or forgot one important agreement which is renegotiating investment treaties.

CHAPTER SIX: ANALYSIS OF FINDINGS AND ALTERNATIVE APPROACHES OF REFORMING EXITING IIAs

6. Introduction

This chapter analyse issues identified in Chapter Five and discuss possible solutions that Tanzania could use to tackle the problem being encountered currently.[824] To achieve the purpose, this chapter will also look at host States that have puts efforts to rebalancing their IIAs in favour of the state, and examine strategies used by other States (India and South Africa) to protect the interest of the nation and its public in IIAs, and examine other IIAs reform options done or suggested by developed States also ones that are suggested by international institutions of which Tanzania has access to such UNICTAD and UNCITRAL The chapter shall therefore begin by summarising and analysing the findings of the case study from chapter five and recommend possible remedies.

6.1 Findings

This research has proven that the exiting Tanzania IIA's are not balancing the interests of contracting parties equally in other words it can be said that most of international investment agreements signed by Tanzania are those of asymmetrical nature. These are IIAs which allow

[824] Investment agreements that do not protect the interest of State and limit Tanzania sovereign power (not to regulate in favour of public)

investors to have both substantive protections and rights to make claims but does not provide a platform for host State's to address rights or hold investors responsible for their misconduct in the time of investments. In summary it can be said that the existing IIA signed by Tanzania prove the notion that say international investment regime is a one-way street that only allows investors to use.[825] The findings are summarised in to two parts.

(i) First, the research proved that the FET provision in Tanzania existing BITs offers foreign investors rights to challenge States any measures done by the host States for the public interests, which has affected Tanzania sovereign power 'to control what is happening in its territory'. In other words, it reasons that the government cannot exercise its regulatory power, to regulate in favour of public or protect public interest and defend its other international obligations such as protecting Human Rights, and achieving other sustainable goals through protecting the environment , society and the country economy freely, in fear that by doing so (passing measures in favour of Public and States interest) the country may trigger investment claims for violating the IIAs mainly FET provision.

(ii) Second, the Case study in chapter five has shown that Tanzania's IIAs are not balancing the interest of the two contracting parties equally by looking at the rights and responsibility given or agreed. In the context of right and responsibility of the two contracting parties (using BITs as an example), this research found that the exiting IIAs signed by Tanzania offer foreign investors rights with no responsibilities. In simple words it is argued that most of Tanzania IIAs are old version of IIAs which focussing on protecting investors interest with no responsibility given such as taking care of the environment, respecting the Human rights declaration, conducting their business in ethical manner and taking care of the society.

The next section will analyse the two points mentioned above starting with the limitation of Tanzania's rights to regulate in favour of its public (6.2) where the issue of sustainable development will be addressed. Followed by (6.3) where the rights with no responsibility issue in Tanzania IIAs will be discussed.

[825] Alessandra Arcuri, Francesco Montanaro, and Federica Violi, "Proposal for a Human Rights-Compatible International Investment Agreement: Arbitration for all" (2018) Erasmus School of Law, Erasmus University Rotterdam

6.2 Analysis: IIAs limiting States sovereign power

The research argues that Tanzania's IIAs fails to balance the interest of foreign investors, and host States interests in the aspect of ensuring the rights of investors are fully protected, while States are able to regulate freely for the public interests. This finding has generated a view that investment treaties offer extensive legal rights to foreign investors and fail to secure States sovereign right to regulate in favour of public with fear that might breach IIAs commitments (mostly FET). But more importantly is proven from the Netherlands BIT termination which was deemed to be restricting the government's authority to control investments in the public interest, which is why they were terminated.[826]

Daza-Clark reasoned that the right of a State to adopt policies that may have an impact on public interest's and their expectations, is a 'key component of that State's sovereignty'. And that the "police power doctrine," gives states a presumption of legitimacy for their regulatory actions as long as they are somehow related to achieving the common good.[827] According to this perspective, 'the police power doctrine' State should be allowed to regulate the environment, health, and security, more other things, within their borders. This should not be contested as an illegal activity under both domestic and international law.[828] Conversely, Tanzania's IIAs prevents governments from passing measures or laws that favours the public interest (referred to as "regulatory chill"). This is evident when looking at claims and decisions made in most of the arbitration cases, whereby the Government of Tanzania has been reported to be breach of IIA provision(s) mostly FET for practising it sovereign power (passing measures or law that affected foreign investors and their investments).

For example, in Bywater case, Tanzania terminated the contract they had with Biwater company due to its poor performance (as agreed in contract),[829] with good intention which protected the interest of its citizen. However, the Tanzania was sued for violation of FET for terminating Biwater *Gauff* contract arguing that Tanzania has violated the investment treaty (Tanzania -UK BIT). Furthermore, in SCB v. Tanzania, the government was ordered to pay a

[826] Sadaff Habib, "Tanzania Faces a New ICSID Claim under the Terminated Netherlands BIT" (2019) Available at http://arbitrationblog.kluwerarbitration.com/2019/06/21/tanzania-faces-a-new-icsid-claim-under-the-terminated-netherlands-bit-2/ accessed 22 July 2022

[827] Ana Maria Daza-Clark, "Revisiting the Doctrine of the Police Power of States
In: International Investment Law and Water Resources Management" in *International Investment Law and Water Resources Management: An Appraisal of Indirect Expropriation* (Brill | Nijhoff, 2017)

[828] Ibid

[829] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22. See more in https://www.business-humanrights.org/en/latest-news/biwater-tanzania-arbitration/

sum in the region of 185 Million US dollars to Standard Chartered (Hong Kong company) in 2014 for breach of FET and denial of justice claims in domestic court regarding a dispute over electricity tariffs.[830] As a result, the Tanzanian government was ordered to recalculate an electricity tariff, increasing costs by 40 per cent to users of the electricity,[831] which is argued to be unfair to Tanzanian citizens. For such sovereign decision mentioned, the country has spent millions in US dollars compensating foreign investors, for taking reasonable measures that would benefit the public. It is therefore argued by this research that such amount of money could possibly be used to build the nation by improving infrastructure, health care, or education services but instead it is in budget of compensating or sealing with foreign investors cases. The research acknowledges that IIAs are governed by international law, and so without arguing, it is recognised that IIAs are powerful, and that they go beyond national laws and constitutions. However, claim that a developing State as Tanzania might not truly benefit from exiting IIAs by reaching development goals if it is derived from practising its sovereign right.

In addition, Tanzania's IIAs are proven to limit states right to regulate by looking at the challenges that the government of Tanzania faced when it introduced new laws in natural resources.[832] The legal reform in natural resources particularly mining industry was done for the purposes of benefiting the State and its public of Tanzania from natural resource. However, as a result Tanzania measures were announced to opened door for international disputes, which will require Tanzania to provide adequate compensation for affected investors.[833] And for such reasons again argued that the country did put itself in a risk position as it can possibly affect FDI inflows in which the government depend on to increase the living standard of its citizens and develop the country.

The examination of Tanzania IIAs (mostly BITs) done by this research shows majority of IIAs signed by Tanzania between 1960 and 2000 did not clearly address a state's right to regulate. The provisions in IIAs only safeguard for investment protection, but no wording about the state's regulatory authority.[834] This reflect the early IIAs which its primary concentration was

[830] Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania ICSID Case No. ARB/15/41. One of the allegations was a breach of FET.
[831] Donna Peng & Rahmatallah Poudineh ,"Sustainable electricity pricing for Tanzania" (2016) read page 32 -34.
[832] See in chapter 5
[833] Ibrahim Amir, "A Wind of Change! Tanzania's Attitude towards Foreign Investors and International Arbitration" (2018) *Kluwer Arbitration Blog*
[834] Catherine Titi, *The Right to Regulate in International Investment Law*, Vol. 10, Nomos, 2014. Dr Inga Martinkute and Ms Anastasiya Ugale, "Right to Regulate in the Public Interest: Treaty Practice" (2022) Available at https://jusmundi.com/en/document/wiki/en-right-to-regulate-in-the-public-interest accessed 12 July 2022

on investment protections with no concern on how these safeguards may interacted with various areas of public interest. As claimed by Morosini, that the first wave of IIAs were developed to restrict particular components of a nation's power to regulate; this prevented host countries from passing measures that would be detrimental to the interests of foreign investors.[835]In this line of argument can be said that the old generation of IIAs may have given the impression that investments had absolute rights and protections that were unaffected by other factors such as sovereign power. This research argues that the nature of problem (limiting States right to regulate) is influenced by the wording of most of the protection standard agreed by the country. Simple example is none of the Tanzania IIAs has a word that exempt non-discriminatory regulatory measures for legitimate public welfare objectives (public health, safety, and environment) like other IIAs such as The China-Korea Free Trade Agreement, the Trans-Pacific Partnership ("TPP"), and the Comprehensive Economic and Trade Agreement ("CETA") between Canada and the European Union (EU).[836]

However, following the criticism and fear of challenges before arbitral courts against foreign investors (developed countries), majority of nations who wanted to restore their sovereign power being able to pass reasonable measures to protect the environment, human rights, the health and safety of its society have terminated their IIA and renegotiate them. On other hand UNCITRAL suggested in order to bring international investment law into line with sustainable development, it will be necessary to address not only the negative effects of investment treaties on the ability of States to regulate, but also other issues that are currently outside the purview of the investment treaty system, such as States' desires to attract investment that supports their sustainable development goals and to create new methods for the regulation of transnational investors and investment.[837]From the standpoint of Tanzania and other developing nations sincerely call for IIA reform is mostly needed to support the sustainable development goals set or given.

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[835] Fabio Morosini, "Making the Right to Regulate in Investment Law and Policy Work for Development: Reflections from the South African and Brazilian experiences" (2018) *Investment Treaty News* published by the International Institute for Sustainable Development

[836] Kun Fan, "Rebalancing the Asymmetric Nature of International Investment Agreements?" (2018) *Institute for Transnational Arbitration (ITA), Academic Council,* Available at http://arbitrationblog.kluwerarbitration.com/2018/04/30/rebalancing-asymmetric-nature-international-investment-agreements/ accessed 12 July 2022

[837] Matthew C. Porterfield, "Reforming the International Investment Regime through a Framework Convention on Investment and Sustainable Development" (2020) available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a_framework_convention_on_investment.pdf accessed 12 July 2022

In support of the argument above, Thompson, Broude, and Haftel presented their empirical examination finding 'to what extent IIA provisions restrict state regulatory space' by looking at the impact of ISDS experiences on state decisions, the results proved that being exposed to investment claims causes IIAs number of States have either be terminated or be renegotiated their IIAs in favour of higher State's regulatory space.[838]For such reason it claimed that perhaps the negotiated provision in exiting IIAs safeguard investors from a wide variety of potential state actions and make arbitral tribunals to interpret these clauses in a way that made their rulings slightly advantageous to investors,[839] hence a need for reform.

International organisations and academics have suggested a number of options for achieving a better balance between the power to regulate in the public interest and the protection of investments. The options range from explicitly carving out regulatory space in the context of various investment assurances to regulate. However, this research agrees on one thing that is a carve-out for regulatory actions is one way to strike a balance between investment protection and the States right to regulate. [840] And for that reason, the UNICTAD data verify that all newly drafted or revised investment treaties, have limit the scope of investors protections (majority by putting exceptions of FET provision or omit it, as a way of balancing investment protection with a state's right to regulate in the public interest.[841] In addition the new IIAs have less ambiguous investment protection standards and attempt to balance investment protection with a wide range of non-investment objectives, including labour rights, environmental protection, and human rights.[842]

In other point of view this research is not against the protection standard offered to foreign investors in Tanzania, in fact the research acknowledges that before foreign investors invest in any country, especially developing one as Tanzania, need to create a favourable environment to attract them, including having a stable legal framework as argued in Bayindir *v Pakistan*.[843]

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[838] Alexander Thompson,Alexander Thompson, Tomer Broude and Yoram Z. Haftel, "Once Bitten, Twice Shy? Investment Disputes, State Sovereignty, and Change in Treaty Design" (2019*) International Organization* Volume 73 Issue 4

[839] Ana Maria Daza-Clark, "Revisiting the Doctrine of the Police Power of States
In: International Investment Law and Water Resources Management" in *International Investment Law and Water Resources Management: An Appraisal of Indirect Expropriation* (Brill | Nijhoff, 2017)

[840] Ibid

[841] Dr Inga Martinkute and Ms Anastasiya Ugale, "Right to Regulate in the Public Interest: Treaty Practice" (2022) Available at https://jusmundi.com/en/document/wiki/en-right-to-regulate-in-the-public-interest accessed 12 July 2022

[842] See article 24 of the Reciprocal Investment Promotion and Protection Agreement, Morocco-Nigeria, (2016),

[843] Decision on Jurisdiction (2005), para. 239-40. Change of legal framework frustrate legitimate expectations of their investment.

However the research establish that the wording in IIAs agreed by Tanzania invested more not give space to State to regulate for the public interest and because of that, the country add risk for being sued by foreign investors for unfair treatment wherever it pass measures in favour of public or change its legal system to fit State's needs, which for a developing state like Tanzania stable legal framework is regulatory space is needed. In spite of that, this research argues increasing chance of investment claims is not a major issue because foreign investors can win or lose such claims but argue that the issue is in first place that state should not be expected to go through proceedings for practising its sovereign power. Furthermore, there no explainable reason for a sovereign state as Tanzania to go through the cost of defending cases or pay for any liability for the purpose of practising its sovereign power unless there is no solution to the problem (which this research is here to propose a reform).

6.3 Analysis: Rights without Responsibilities

The International law enforce responsibility to States to protect Person or Property of Foreigners in their Territories" from damage.[844] Simply it can be said that host States have international legal responsibility to protect foreign investors against unlawful conduct and provide them a fair and equitable treatment, insisting and prohibit discrimination based on nationality.[845] Contrary the law has not mentioned whether investors actions can be considered to violate international law by polluting environment, not respecting the Human Rights declaration, and not being ethical. This means investors have rights under IIAs are to be protected with no investors responsibilities to perform or obey. Such arguments demonstrate a structural imbalance at the very core of international investment law.

It can therefore be said that the asymmetrical nature of international investment law to overprotect foreign investors results from its focus on state accountability, not the misconduct of foreign investors. And because of the commitment imposed to host States (such as Tanzania) investors has privilege of taking advantage of the protection provided by international law against mistreatment while essentially avoiding liability for their actions toward the host state

[844] Gabriel Bottini, "The Articles on Responsibility of States for Internationally Wrongful Acts and the making of international investment law" (2021) Available at https://www.ejiltalk.org/the-articles-on-responsibility-of-states-for-internationally-wrongful-acts-and-the-making-of-international-investment-law/ accessed 22 July 2022. Also see Responsibility of States for Internationally Wrongful Acts 2001

[845] See in Rahim Moloo, Alex Khachaturian, "The Compliance with the Law Requirement in International Investment Law" (2011) *Fordham International Law Journal Volume* 34, Issue 6 (1)

or local communities inside it.[846] IIAs signed buy Tanzania offers foreign investors protection rights but do so to impose any legal responsibility or commitments to investors and their investments. This makes it hard for host states to protect their citizens because the investment agreements do not establish the liability of foreign investors for reasonable issues such as human rights crimes, and environment pollution.[847] As discussed in chapter five, foreign investors have destroyed the environments negatively affected the health of people in the society through their activities and the few time that State pass measures[848]or made decisions against investors misconduct,[849] investors make a claim for unfair treatment. And since the nature of IIA is in favour of investors tribunals have always disregard host States arguments whenever they attempt to challenge the misconduct of foreign investors within host states because there are no legal justifications for investor accountability while governments have. This explain why ISDS fail to consider the illegality of the investor's behaviour in deciding cases, but instead they only look for investment treaty protection eligibility.[850]

It is therefore argued that the rights without responsibilities is the key factor that contribute to the destructions, negative impacts that foreign investors have caused in Tanzania such as environment destructions, human rights, health, culture and the economy. Dr. Daniel Aguirre[851] shared his opinion on investors rights with no responsibility noting that it is obvious that the international community prioritises investment promotion over investment regulation. However, Governments need to address how corporate interests have displaced those of the environment and human rights, and one way deal or resolve the existing challenge is making ensuring that international businesses are regulated to safeguard and advance human rights.[852] In same line of argument, Ku suggests that along as IIAs come with some privileges, investors should be liable for a wide variety of obligations under international law.[853]

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[846] Ibid
[847] See chapter 5
[848] Good example is the change of law in 2017
[849] See biwater case
[850] Mavluda Sattorova, "The Impact of Investment Treaty Law on Host States: Enabling Good Governance?" (2018) 61–70
[851] An international legal adviser for the International Commission of Jurists in Yangon, Myanmar.
[852] Dr. Daniel Aguirre, "Opinion: Regulating Investor Responsibility, not just Investor's 'Rights'" (2016)Available at https://www.business-humanrights.org/en/blog/regulating-investor-responsibility-not-just-investors-rights/ accessed 11 July 22
[853] Julian Ku, 'The Limits of Corporate Rights Under International Law' (2012) *School of Law at Hofstra University* Available at https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1198&context=faculty_scholarship accessed 23 July 2022

I acknowledge that both investors, and host States have good intention for whichever decision they make. However, it is good to consider the balance of everything and this can only be done by adopting law and policies to protect the society (Tanzania practising its sovereign power). Foreign investors have affected the land and living means of a number of Tanzania citizens, as most of them depend on farming, has also put the health of citizens around mines in danger as it has affected water source and the air is polluted. Investors cannot expect a responsible government to watch in fear that passing measures to protect the interest of public trigger investment claims.

To get around the exiting structural issues with international investment law, a fundamentally redefining of the stakeholders' goals is needed under international investment law in order to get over the opposition to including investor duties in fresh and updated treaties now in existence.[854] Jean Ho, reports that he overprotection of investors that has led to an accountability gap will continue to weaken the legitimacy of international investment law reform unless and until investor responsibility is integrated into it.[855] For such reason majority of States chose to incorporate Corporate Social responsibility (CSR) provision to their IIAs which require investors to uphold human rights, safeguard the environment, and act responsibly when conducting business in the host state.[856] CSR refers to behaviours and standards that businesses, especially multinational corporations, choose to adopt voluntarily to reduce the adverse social, environmental, and other externalities brought on by their operations.[857]

CSR provisions have emerged that address investors directly in recent IIAs. To name a few, direct CSR obligations for investors have been incorporated into the India model BIT (2016),[858]

[854] Mavluda Sattorova of the University of Liverpool, in in James Gathii and Sergio Puig, *Introduction to the Symposium on Investor Responsibility: The Next Frontier in International Investment Law* (Cambridge University Press,2019)
[855] "Jean Ho from the National University of Singapore takes the discussion to the international plane" in James Gathii and Sergio Puig, *Introduction to the Symposium on Investor Responsibility: The Next Frontier in International Investment Law* (Cambridge University Press,2019)
[856] Nathalie Bernasconi-Osterwalder, 'Inclusion of Investor Obligations and Corporate Accountability Provisions in Investment Agreements' (2020) *Handbook of International Investment Law and Policy* pp 1–20. Karl P. Sauvant, 'Promoting Sustainable FDI Through International Investment Agreements (2019) Columbia FDI Perspectives, No. 251 Available at SSRN: https://ssrn.com/abstract=3383835 accessed 12 June 2020
[857] Laurence Dubin, "Corporate Social Responsibility Clauses in Investment Treaties" (2018) Available at https://www.iisd.org/itn/en/2018/12/21/corporate-social-responsibility-clauses-in-investment-treaties-laurence-dubin/ accessed 22 July 2022
[858] See article 12 Issuing, "Investors and their enterprises operating within its territory of each Party shall endeavour to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by

the 2016 Morocco-Nigeria BIT,[859] the 2016 Argentina-Qatar BIT,[860] the 2016 Pan-African Investment Code,[861] the 2016 Iran-Slovakia BIT,[862] and the 2012 South African Development Community (SADC) Model Bilateral Investment Treaty Template.[863] These models have formed a provision that has a positive obligation for the host state not to lower environmental standards.

The incorporation of CSR articles in IIAs indicates that foreign investors' duties under international investment law are expanding. While acknowledging the significance of businesses in advancing labour, human rights, and environmental issues, this type of law does not impose direct responsibilities on foreign investors. However, as a relatively trend of incorporating CSR clauses in investment treaties these clauses have been yet subjected to investment arbitration.[864] Also argued that, even with this considerable progress, of incorporating CSR holding companies accountable for destructing environments or violating human rights in other countries is still difficult.[865]

On other hand, there is a great connection between sustainable development and CSR and State's right to regulate. The connection can be easily explained by the UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD), which "reaffirm the State's right to regulate" by introducing general exceptions that "allow for the measures, otherwise prohibited by the agreement, to be taken under specified circumstances." Or by adding CSR position. By

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the Parties. These principles may address issues such as labour, the environment, human rights, community relations and anti-corruption". Available at https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf accessed 22 July 2022

[859] See article 15 to 19. Available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download accessed 22 July 2022

[860] See article 12 Stating, "Investors operating in the territory of the host Contracting Party should make efforts to voluntarily incorporate internationally recognized standards of corporate social responsibility into their business policies and practices."

[861] See article 22 "Investors shall abide by the laws, regulations, administrative guidelines and policies of the host State. 2. Investors shall, in pursuit of their economic objectives, ensure that they do not conflict with the social and economic development objectives of host States and shall be sensitive to such objectives. 3. Investors shall contribute to the economic, social and environmental progress with a view to achieving sustainable development of the host State." Available in https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf accessed 12 July 2022

[862] See article 10

[863] See article 13, 14 and15. Source, Marcin Menkes, "Commensalism in International Investment Arbitration: The Rule of Law and CSR in the New Dutch Model BIT" (2018) *Kluwer Arbitration Blog* Available at http://arbitrationblog.kluwerarbitration.com/2018/12/30/commensalism-in-international-investment-arbitration-the-rule-of-law-and-csr-in-the-new-dutch-model-bit/ accessed 22 July 2022

[864] Laurence Dubin, "Corporate Social Responsibility Clauses in Investment Treaties" (2018) Available at https://www.iisd.org/itn/en/2018/12/21/corporate-social-responsibility-clauses-in-investment-treaties-laurence-dubin/ accessed 22 July 2022

[865] James Gathii and Sergio Puig, 'Introduction to the Symposium on Investor Responsibility: The Next Frontier in International Investment Law' (2019) *American Journal of International Law* Volume 113 page 1

including a CSR clause in IIAs, as seen in the Benin-Canada BIT,[866] contracting States are required to encourage ethical business practises for businesses based in or subject to the authority of one of the contracting States.[867]

On the other hand, Gathii and Puig pointed out that "the international investment regime is designed to redress the mistreatment of foreign investors, not foreign investor wrongdoing."[868] Because of that regional courts and human right activists increasingly act as a check on state misconduct, but they are steadfastly powerless to address abuses committed by foreign investors.[869]Simply because the behaviour of investors are not adequately governed by international investment law.[870] This is evident from a number of States (including Tanzania) that there is a disparity and it has to change.

The inclusion of CSR provisions in recent IIAs has made a shift to a number of investment tribunal as now they acknowledge the accountability and obligation of investors when making decisions.[871]However, as CSR provisions in IIAs argued to be typically voluntary in nature,[872] this research rise a doubt of weather the inclusion of if would resolve the challenge that majority of host State are facing now. Despite that, there is no empirical evidence available of this approach (incorporating CSR) that will prevent investors from affecting the society and environment as they are now and stop foreign investors to make claim when State pass measures in favour of public.[873] Thus, this research proposes a solution that will allow host state to regulate I favour of public without a risk of triggering investment claims is not by adding CSR provision but rewriting the FET provision because an evaluation of the FET

[866] Article 15 and 16.
[867] Ibid
[868] James Gathii and Sergio Puig, 'Introduction to the Symposium on Investor Responsibility: The Next Frontier in International Investment Law' (2019) *American Journal of International Law* Volume 113 page 1
[869] ibid
[870] Martin Jarrett, Sergio Puig and Steven R. Ratner, 'New Options for Investor Accountability in ISDS' (2021) *Blog of the European Journal of International Law* Available at https://www.ejiltalk.org/new-options-for-investor-accountability-in-isds/ accessed 24 July 2022
[871] Yulia Levashova, 'The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States through International Investment Law' (2018) *Utrecht Law Review*, 14(2), pp.40–55.
[872]Nathalie Bernasconi-Osterwalder, ' Inclusion of Investor Obligations and Corporate Accountability Provisions in Investment Agreements' (2020) Handbook of International Investment Law and Policy pp 1–20 Available at https://link.springer.com/referenceworkentry/10.1007/978-981-13-5744-2_56-1 accessed 22 July 2022
[873] Karsten Nowrot and Emily Sipiorski. 'Stipulating Investors' Obligations in Investment Agreements as a Suitable Regulatory Approach to Prevent and Remedy Anti-Competitive Behaviour?' In: Fach Gómez, K, Gourgourinis, A., Titi, C. (eds) International Investment Law and Competition Law. European Yearbook of International Economic Law (2020). Springer, Cham. https://doi.org/10.1007/978-3-030-33916-6_7 accessed 12 June 2020

standard by investment tribunals reveals the growing importance of investor behaviour that perhaps the CSR provision might have not reference it. The conduct of the investor is commonly cited as one of the criteria that should be taken into consideration in the overall evaluation of the legitimate expectations of the investors in the tribunals' assessments of the legitimate expectations of investors under the FET standard, thus proposing a change of FET provision in Tanzania IIA's. And adding that, the significance of the investor's behaviour should be determined in the existence of substantive investment protection provisions, such as fair and equitable treatment of investors.

In summary it can be said that the two interconnected notions 'sovereign power and sustainable development have been used to address the imbalance of exiting IIAs in Tanzania. This is because exiting Tanzania IIA's aimed only to protect foreign and do not mention anything regarding rights to regulate in such aspect or being against such activities or require investors to take care or to repair whatever destruction that investors will cause and IIAs need to consider protecting people and planet (sustainable development) and not corporations only. This can be done if the wording and interpretation of FET permit the government to do so.

6.4 Potential solutions for rebalancing IIA's in Favour of State

Tanzania has not declared its intention of reviewing or reforming existing IIAs. However, From the findings and analysis above (6.2 and 6.3) it is clear that Tanzania need to reform their exiting IIAs. This section discusses different reform options recommended by international institutions governing international investment law international (such as UNCTAD) and reviewing selected State (India, and South Africa) reform process then recommend a reasonable and potential reform method to Tanzania.

Finding a balance between the principles of protecting and promoting foreign investment and the principles for the protecting the nation's interest such as society and the environment, is one of the challenges facing the international investment law regime for over two decades now.[874] And for such reason the IIA regime is has been going through a phase of reflection, evaluation, and revision. This assessment of the old generation IIA has also been influenced by

[874] Suzanne Spears. 'The quest for policy space in a new generation of International Investment Agreements' (2010) *Journal of International Economic Law* 13(4), 1037–1075 doi:10.1093/jiel/jgq048

an ongoing public discussion on the need to modify the IIA framework in order to make it effective for all stakeholders in many different countries.[875]

A number of States, policy makers in international institutions and academia's have pursued different strategies to overcome the unbalanced IIAs. For example, in 2017 ten policy options are presented by UNCTAD for phase 2 of IIA reform, with their benefits and drawbacks analysed. These options include: "(1) jointly interpreting treaty provisions; (2) amending treaty provisions; (3) replacing "outdated" treaties; (4) consolidating the IIA network; (5) managing relationships between coexisting treaties; (6) referencing global standards; (7) engaging multilaterally; (8) abandoning unratified old treaties; (9) terminating existing old treaties; and (10) withdrawing from multilateral treaties."[876] States have option to pursue the reforms outlined in the Road Map in accordance with their national priorities, they are also allowed to modify and adopt these choices. Furthermore, the UNCTAD suggested in order to choose one of the options out of the ten offered it would be the best for a country that wish to reform its existing IIAs to assess the cost and benefit of the option chosen and the decision should ultimately reflect the direction of the country's international investment policy and its long-term development goals.[877]This research however is looking at two common options or strategies offered by UNICTAD (terminating exiting treaties, and amending treaty provision(renegotiate)' then recommend one option that Tanzania can take.[878]

Occasionally this research substitute terminating strategy with 'exit strategy' and amending treaty provision as a 'voice strategy'.[879]The exit (terminate) and voice(renegotiate) are both alternatives used to express unsatisfactory relationship or certain system (referring to IIAs in this perspective). The Exit and Voice strategy is adapted from Hirschman who highlighted two methods that a "public" can express its discontent with the level of service in private businesses (here it is associated with the discontent that Tanzania and its public has over exiting IIAs).First

[875] UNCTAD, 'Policy Options for IIA Reform: Treaty Examples and Data: Supplementary material to World Investment Report 2015' (2015) available at https://unctad.org/system/files/official-document/diaepcb2017d3_en.pdf accessed 15 July 2022
[876] UNCTAD, 'Phase 2 of IIA reform: Modernizing the existing stock of old-generation treaties' (2017) available at https://www.isds.bilaterals.org/?phase-2-of-iia-reform-modernizing&lang=fr accessed 25 July 2022
[877] Ibid
[878] To boycott or terminate existing IIAs
[879] "Voice is the concept that one party in the agreement will make an attempt to change the practices with which it is unhappy, rather than leave the relationship" See in Nancy Welsh, Andrea Schneider, Kathryn Rimpfel, "Using the Theories of Exit, Using the Theories of Exit, Voice, Loyalty, and Procedural Justice al Justice
to Reconceptualise Brazil's Rejection of Bilateral Rejection of Bilateral Investment Treaties" (2014) page 131

option he suggested that public can choose to leave the business and looking for goods or services elsewhere (here this research explain the termination of IIAs and use domestic law to protect investors).Secondly which typically in the case in politics, they might speak up and make an effort to alter the situation[880](here this research suggest or associate the strategy with renegotiation, Tanzania need to speak out the reason for change and propose its own terms particularly FET).

According to Hirschman, publics would profit from mixed options while private enterprises could benefit more through voice than from exit. When quality-conscious customers exercise their voice before leaving, loyalty is a strategy that gives businesses a chance to change for the better. Though balancing the needs of an organization's numerous consumers, such as stakeholders, can be challenging, focusing on improving customer needs is an effective and successful strategy. Below, figure 6.1 has summarise the two options and the expectations of them then analyse one option after the other in the following subsections.

Figure 6.1 Exit or Voice strategy

Exit strategy	**Voice strategy**
What is expected: i. Terminate exiting IIAs. ii. Use domestic law to protect foreign investors	What is expected: i. Amending IIAs starting with model BIT ii. Do not include FET as a protection standard iii. Redraft BITs and replace "FET" with an exhaustive list of state obligations

Exit involves leaving it and seeking out alternative methods of safeguarding foreign investment, whereas voice is making an effort to change the system in order to make it better.[881] Hirschman contends that publics would gain from mixed alternatives and that private

[880] Albert Hirschman, *Exit, Voice, and Loyalty*: Responses to Decline in Firms, Organizations, and States (Harvard University Press 1970)
[881] Albert Hirschman, *Exit and Voice*: *Responses to Decline in Firms, Organizations, and States* (Harvard University Press 1970)

enterprises can benefit more from voice than from exit,[882](which means termination of IIAs or renegotiation of IIAs both options can benefit Tanzania while termination without negotiation can negatively affect foreign investors. The next sections (6.5 and 6.6) will examine both options (strategies) and recommend one.

6.5 Exit Strategy

Exit the IIAs refers to termination of existing international investment agreements.[883] The termination of a treaty releases the contracting parties from any obligation further to perform the treaty enforced.[884] Different States have terminated their existing IIAs in form of BITs with different reasons, some terminated them due to unexpected outcomes in certain investor–State cases, while other nations simply terminated them with a purpose of updating their IIAs.[885]

In case of termination there are three reasons makes the action vali; these includes, "(i) when the observant treaty become dangerous for political and economic existence of a country, (ii) when circumstances which have given rise to the treaty have changed and deprived the old agreement of its reason for existence, (iii) when a treat become incompatible with common international law of civilised States to which the contracting States subscribe."[886] Following the reasoning given by Tanzania for terminating the Tanzania – Netherland 2001 which quoted that the BIT were restricting the government's authority to control investments in the public interest, and that the treaty itself was seen as being inconsistent with Tanzania's most recent legal developments.[887] But also following the analysis of chapter four and five of this research where existing IIAs (looking at FET clause in chapter four) found to be restricting the government to regulate in favour of its public but also looking at the negative impacts caused

[882] Ibid
[883] Barbara Koremenos and Allison Nau, 'Exit, no Exit' (2010) *Duke Journal of Comparative and International Law* vol 21:81
[884] Ibid
[885] Tania Voon, Andrew Mitchell, and James Munro, "Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights" (2014) ICSID Review, Vol. 29, No. 2 (2014), pp. 451–473.Also see Tarcisio Gazzini, "The 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties" (2017) Investment treaty news.
[886] Professor Despagnet views In L. H. Woolsey, "The Unilateral Termination of Treaties" (1926) *The American Journal of International Law* Vol. 20, No., pp.248
[887] Sadaff Habib, "Tanzania Faces a New ICSID Claim under the Terminated Netherlands BIT" (2019) *Kluwer Arbitration Blog* available at http://arbitrationblog.kluwerarbitration.com/2019/06/21/tanzania-faces-a-new-icsid-claim-under-the-terminated-netherlands-bit-2/#:~:text=The%20rationale%20behind%20the%20termination,that%20Tanzania%20had%20recently%20adopted. Accessed 25 July 2022.

by foreign investors in the country simply provide Tanzania legitimate reasons to terminate exiting IIAs as the provide danger to both economic and pollical existence of the country. Furthermore, former agreements were signed due to 'lack of understanding the real nature and consequences of them,[888] and looking at the sustainable goals provided by the UN through the analysis this research made it clear that exiting IIAs cannot support such hence the need for terminating existing IIAs.

6.5.1 Terminating exiting IIAs in Tanzania

An investment agreement can be terminated in accordance with the treaty's termination clauses or, in accordance with Article 54 of the VCLT, as it reads "the termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties after consultation with the other contracting States."[889] The termination of investment agreements could be done in different occasions,[890] these includes (i) termination due to an expire date,(ii) termination by consent (also known us bilateral termination), (iii) termination through replacement treaty (renegotiation) and (iv) unilateral termination. States are allowed to use alternative termination options as they are permitted by public international law.[891] The next paragraphs will explain the common types of termination one by one in details.

6.5.2 Types of termination and their effects

One of the ways that States can discharge its IIAs commitment is by following the expire date agreed in particular IIAs.[892] Most of investment agreements stay in force for a predetermined amount of time that is specified in the treaty. After the agreed time either party may terminate it or renew them. Either way a notice is needed to the other party notice (often six to twelve

[888] Public citizen, 'Termination of Bilateral Investment treaties has not Negatively affected countries' Foreign Direct Investment Inflows' (2018) Available at https://www.citizen.org/wp-content/uploads/pcgtw_fdi-inflows-from-bit-termination_1.pdf accessed 12 June 2020

[889] Article 54 "Termination of or withdrawal from a treaty under its provisions or by consent of the parties" See at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf accessed 22 July 2022

[890] Tuuli-Anna Huikuri, 'Terminating to Renegotiate: Bargaining in the Investment Treaty Regime' (2019). https://www.peio.me/wp-content/uploads/2019/01/PEIO12_Paper_52.pdfn accessed 12 June 2020

[891] Anastasiia Koltunova, Etale Reagan and Marina Trunk-Fedorova, 'Termination of Bilateral Investment Treaties: Alternatives for Least Developed Countries' (2018) Available at https://www.bilaterals.org/IMG/pdf/termination_of_bits_memorandum_13.10.2018_final.pdf accessed 26 July 2022

[892] Can be fixed termination or with renewal option

months) before the end of the first term.[893] For example recently Pakistan terminated 23 BITs out their 43 BITs that have reached the end of their initial tenure.[894] To reduce the risk of international arbitration and give the government room to implement economic policies in the public good, the Government of Pakistan is working on approving the new model BIT(2021) that has rewrite 'problematic clauses' such as FET and indirect expropriation. Pakistan planned to request its treaty partners to sign a Joint Interpretation Protocol in order to lessen the negative impacts or to change the provisions for ISDS, FET, and expropriation for the nine remaining ratified BITs that cannot currently be unilaterally cancelled.[895]This section analyses some of Tanzania's BITs as an example to assess the validity period of exiting BITs, and advice the earliest possibility to terminate the existing treaty with the goal of reforming as Pakistan did.

The 6.2 below shows the outline of Tanzania BITs with their initial period of validity and time of notice needed prior termination (from March 2021).

Figure 6.2 Tanzania BITs with their expire dates.

	BIT	Entry force and Expiry date	Manner of termination	Survival clause.	Written Notice	Deadlines for notification of termination	Period of renewal
1	Tanzania – Canada	9/12/2013 to 09/12/2023	Article 40 (2). This Agreement shall remain in force for a period of 10	15 years	1 Year	09/12/2022 Then can be terminated at any time with notice.	Renewed for an indefinite term

[893] Nathalie Bernasconi-Osterwalder, Sarah Brewin,Martin Dietrich Brauch and Suzy Nikièma 'Terminating a Bilateral Investment Treaty: IISD Best Practices Series' (2020) Available at https://www.iisd.org/system/files/publications/terminating-treaty-best-practices-en.pdf accessed 26 July 2022. Anastasiia Koltunova, Etale Reagan and Marina Trunk Fedorova, "Termination of bilateral investment treaties: Alternatives for Least Developed Countries" (2018) Available at https://www.bilaterals.org/?termination-of-bilateral-37780&lang=en Accessed 24/03/2021

[894] IISD, "Pakistan terminates 23 BITs" (2021) *Investment Treaty News* available at https://www.iisd.org/itn/en/2021/10/07/pakistan-terminates-23-bits/ accessed 27 July 2022 (16 BITs are not ratified)

[895] Ibid

			years. Thereafter it shall remain in force until either Party notifies the other Party in writing of its intention to terminate it. The termination of this Agreement shall become effective one year after notice of termination has been received by the other Party				
2	Tanzania - China	17/04/2014 to 17/04/2024	Article 18 1. This Agreement shall remain in force for a period of ten (10) years and shall continue to be in force thereafter	10 years	1 Year	17/04/2023. Then can be terminated at any time with notice	Renewed for an indefinite term

			unless terminated in accordance with Paragraph 2 of this Article. 2. Each Contracting Party may terminate this Agreement at the end of the initial ten - year period or at any time thereafter by giving one year's advance written notice to the other Contracting Party.				
3	Tanzania - Denmark	21/10/2005 21/10/2015	Article 16 (1) This Agreement shall remain in force for a period of ten years. It shall remain in force thereafter until	10 years	1 Year	Can be terminated at any time with notice	Renewed for an indefinite term

			Contracting Party notifies in writing the other Contracting Party of its intention to terminate this Agreement. The notice of termination shall become effective one year after the date of notification.				
4	Tanzania – Finland	30/10/2002 30/10/2012	Article 17 2. This Agreement shall remain in force for a period of ten (10) years and shall thereafter remain in force until either Contracting Party notifies the other in writing of its intention to	15 years	1 Year	Can be terminated at any time with notice	Renewed for an indefinite term

			terminate the Agreement in twelve (12) months.				
5	Tanzania - Germany	12/07/1968 12/07/1978	Article 14 (2) It shall remain in force for a period of ten years and shall continue in force thereafter for an unlimited period except if denounced in writing by either Contracting Party one year before its expiration. After the expiry of the period of ten years the present Treaty may be denounced at any time by either Contracting Party giving	20 years	1 Year	Can be terminated at any time with notice	Renewed for an indefinite term

			one year's notice.				
6	Tanzania - Italy.	25/04/2003 25/04/2013	Article 15 This Agreement shall remain in force for a period of ten years. Thereafter it shall continue in force until the expiration of twelve months from the date on which either Contracting Party shall have given written notice of termination to the other.	20 years	1 Year	Can be terminated at any time with notice	Renewed for an indefinite term
7	Tanzania - Mauritius	02/03/2013 02/03/2023	Article 12 (3) This Agreement shall remain in force for a period of ten years. Thereafter it shall continue	10 years or as per contract/approval	1 year	Then can be terminated at any time with notice	Renewed for an indefinite term

			in force until the expiration of twelve months from the date on which either Contracting Party shall have given written notice of termination of this Agreement to the other Contracting Party.	02/03/2022.			
8	Tanzania - Netherlands	01/04/2004 01/04/2019 01/04/2029	Article 14 1) The present Agreement shall remain in force for a period of fifteen years. 2) Unless notice of termination has been given by either Contracting Party at least six months before the date	15 years	6 months Terminated	01/09/2018 01/09/2028	10 years

			of the expiry of its validity, the present Agreement shall be extended tacitly for periods of ten years, whereby each Contracting Party reserves the right to terminate the Agreement upon notice of at least six months before the date of expiry of the current period of validity.				
9	Tanzania - Sweden	01/03/2002 01/03/2012	Article 10 (2) This Agreement shall remain in force for a period of ten years. Thereafter it shall remain in force until the	15 years	1 Year	Can be terminated at any time with notice	Renewed for an indefinite term

			expiration of twelve months from the date that either Contracting Party in writing notifies the other Contracting Party of its decision to terminate this Agreement.				
10	Tanzania - Switzerland	06/04/2006 06/04/2016	for a period of ten years. Thereafter, it shall remain in force until either Contracting Party notifies the other in writing of its intention to terminate the Agreement in six months	10 years	6 months	Can be terminated at any time	Renewed for an indefinite
11	Tanzania - United Kingdom	02/08/1996 02/08/2006	Article 14 This Agreement shall remain in	20 years	1 Year	Can be terminated	Renewed for an

			force for a period of ten years. Thereafter it shall continue in force until the expiration of twelve months from the date on which either Contracting Party shall have given written notice of termination to the other			at any time with notice	indefinite term
	Korea, Republic of - United Republic of Tanzania BIT (1998)	15 years			1 year notice		

According to Article 56(1) of the VCLT, "a treaty is not subject to denunciation or withdrawal unless: (a) it is proven that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be indicated by the character of the treaty." In turn, Article 56(2) mandates twelve months' notice prior to the implementation of any withdrawal or denunciation made in accordance with either of these articles. It is therefore acknowledged that a treaty which contains no provision regarding its termination,

and which does not provide for denunciation or withdrawal is not subject to denunciation.[896] But with the figure 6.2 above Tanzania has an opportunity to terminate IIAs that does not favour its interest. However it is advised that the notice should be given as agreed otherwise the short notice might tiger unfair termination as the recent termination of BIT was (a notice of termination was short) Tanzania required to give the other party at least six months before the date of its expiry per agreement but did not.[897] On other hand the negative side of not issuing notice of termination would have automatically renewed for a further term of 10 years (till April 2029) as stated in Article 14 (2).[898] Following the discussion above this research advice Tanzania to keep an eye on termination notification deadlines in order to issue timely notice as specified respective existing BITs since many BITs can get renewed for definite periods of time.[899] This research suggests that ending an investment agreement at its end time is the best way of terminating them. In this note it is suggested perhaps instead of renewing BITs that have expired, the government should create domestic legislation as the main safeguard for foreign investors or provide its counterparts the option to renegotiate and create a new agreement using the Tanzanian new Model BIT. Additionally, in order to accomplish its objective, the government must draw attention to institutional weaknesses that must be fixed.[900]

Unilateral and bilateral termination of treaty: Termination of investment treaty (specifically BITs) can also be done either unilateral or bilateral.[901]Unilateral termination occurs when one party terminate the agreement without the consent of the other party.[902] Unilateral termination allow the current Tanzania's first-generation BITs to come to an end and be replaced with the modern one that protects the interest of State and its public if it wishes.[903]On other hand it is

[896] Following the VCLT rules

[897] Sonal Sejpal and Daniel Ngumy, "Legal Alert | Tanzania Terminates Bilateral Investment Treaty with the Netherlands", (2019)

[898] See Netherlands - United Republic of Tanzania BIT (2001).

[899] Anastasiia Koltunova, Etale Reagan & Marina Trunk-Fedorova,"Termination of bilateral investment treaties: Alternatives for Least Developed Countries" (2018) Available at https://www.bilaterals.org/?termination-of-bilateral-37780&lang=en Accessed (24/03/2021) See Madagascar – Germany BIT was signed on 21 September 1962 and entered into force on 21 March 1966. It was terminated by the parties on 17 October 2015, on the day when the new BIT between the Parties entered into force.

[900] Aisha Ally Sinda, "Investor-state dispute settlement in Tanzania" (2019) Available at https://www.thecitizen.co.tz/tanzania/oped/-investor-state-dispute-settlement-in-tanzania-2670464 (accesses 10/08/2021)

[901] Anastasiia Koltunova, Etale Reagan & Marina Trunk-Fedorova, "Termination of bilateral investment treaties: Alternatives for Least Developed Countries" (2018)

[902] Kelvin Widdows, 'The Unilateral Denunciation of Treaties Containing No Denunciation Clause' (1983) *British Yearbook of International Law*, Volume 53, Issue 1, 1982, Pages 83–114, https://doi.org/10.1093/bybil/53.1.83

[903] Some nations ended thier bilateral investment treaties (BITs) unilaterally without also starting new discussions for a new BIT. For example, Ecuador, Cuba, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania, and Uruguay.

beneficial to understand that unilateral termination of a BIT does not guarantee state being free from BITs because of the survival clauses which is also known as umbrella, or sunset clause. The 'Survival clause' can prevents termination of the treaty with immediate effect, also prevents host States form unilateral modifying terms of the agreements or domestic legislation that is applicable to foreign investments.[904] Tanzania BITs have express survival clauses, as shown in *figure 6.2* above.

The conditions under survival clause require a state to protect investments and preserve their rights even after termination. Thus according to survival clause obligations under exiting Tanzania BITs unilateral termination will still commit Tanzania to protect the interest of foreign investors and if the state change and law that can affect investors, survival clauses will give investors rights to initiate dispute settlement proceedings.[905]Unless the contracting parties mutually agreed on termination then with immediate effect and thus in disregard of a survival clause.[906] As stated in Article 70(1)(b) of VCLT " unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention: does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination".[907] However, to avoid legality of survival clause this research would advise Tanzania to clarify her intention of termination with regard to the survival clause by explicitly amend the survival clause and neutralise it as Czech Republic did before terminate its BIT with Indonesia.[908]Using that strategy as an example Tanzania can choose to neutralise the survival clause with other contracting party by shortening or cancel it through mutual agreement before withdrawing from the BIT. Such action (neutralising survival clause) implies that survival clauses will not operate so as to confer some residual protection (for existing investments) following termination.

On other hand, Sir Gerald Fitzmaurice stated in his 1957 report to the ILC that, treaties should be taken to be of "indefinite length, and only terminable... by mutual consent on the part of all

[904] Anthony C. Sinclair, "The Origins of the Umbrella Clause in The International Law of Investment Protection" (2004), 20 ARB. INT'L 411
[905] James Harrison, "The Life and Death of BITs: Legal Issues concerning Survival Clauses and the Termination of Investment Treaties" (2012) 13 J. World Investment & Trade 935.
[906] See Tania Voon, Andrew D. Mitchell, James Munro, 'Parting Ways: The Impact of Investor Rights on Mutual Termination of Investment Treaties' (2014) 29(2) ICSID Review - Foreign Investment Law Journal 463.
[907]Consequences of the termination of a treaty in Vienna Convention on the Law of Treaties 1969
[908] Luke Eric Peterson, "Indonesia ramps up termination of BITs – and kills survival clause in one such treaty – but faces new $600 mil. claim from Indian mining investor" (2015). Also see UNCTAD, "Phase 2 of IIA reform: Modernizing the Existing stock of Old-Generation Treaties" (2017) Available at https://unctad.org/system/files/official-document/diaepcb2017d3_en.pdf accessed 12 July 2022

the parties."[909] In this note, bilateral termination can be done at any time even when existing BIT are still valid if mutual parties agree to the termination (mutual consent). It is mentioned that in States can renegotiate new trade agreements with new provisions in mutual termination. The termination may be affected by means of a different, though related, process, or it may be affected by means of the new agreement. It is said that "The new agreement may serve as the instrument of termination, or the termination may take place through a separate, though related, process."[910]For example, in early 2019, Australia negotiated two new BITs, one with Hong Kong,[911] Peru, and one with Uruguay, both of which were terminated and replaced older BITs from 1993 and 2001, respectively. Mutual termination of BITs with a new replacement treaty also takes place in some instances where the States involved negotiate trade agreements containing investment chapters.[912]

Additionally, termination without the need to negotiate a new agreement is also an option in investment agreements. State participants in a BIT may decide to terminate it without signing a new agreement to replace it. For instance, the Czech Republic mutually agreed to terminate its BITs with Denmark, Italy, Malta, and Slovenia between 2009 and 2010 through the exchange of notes (note verbale), which was seen as an agreement to do so.[913]The benefit of bilateral termination is that it allows States parties also to ignore override the power of "survival" clauses contained in IIAs, which removes all future rights and claims under the treaty. This ability has been demonstrated to be used by States parties. This finding is supported by fundamental principles of treaty law and is unaffected by any purported notion of "acquired rights."[914]

This section brief outlines considerations Tanzania may wish to make when determining how to terminate its exiting IIAs, as well as suggestions for planning and carrying out termination. Depending on the circumstance, Tanzania desiring to terminate the existing IIAs may decide to do so unilaterally or with the approval of the other party. Public international law permits

[909] GG Fitzmaurice, 'Second Report on the Law of Treaties' [1957] YBILC, vol II, 16, 22.
[910] Nathalie Bernasconi-Osterwalder, Sarah Brewin, Martin Dietrich Brauch and Suzy Nikièma, "Terminating a Bilateral Investment Treaty: IISD Best Practices Series" (2020) Page 6
[911] Australia - Hong Kong Investment Agreement (2019)
[912] Australian Department of Foreign Affairs and Trade. "Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China." (2019)
[913] ibid
[914] Andrew Mitchell, James Munro, and Tania Voon, "Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights" (2014) *ICSID Review - Foreign Investment Law Journal*, Volume 29, Issue 2, Spring 2014, Pages 451–473, https://doi.org/10.1093/icsidreview/sit051 accessed 26 July 2022

unilateral termination of a BIT, as was already established, but it must take place "in conformity with the rules of the convention" as explained (depending on the kind of termination clause the BIT contains, the requirements for unilateral termination change). IIAs, on the other hand, can only be terminated in certain circumstances and with the approval of all parties. In this strategy both parties need to agree to terminate the investment treaty by mutual consent and specify a timeline for any future BIT negotiations, neutralise or shorten the BIT's survival provision, or both, at the same time. According to a 2017 UNCTAD analysis, of the 212 BITs that had been cancelled as of March 2017, 9% had been terminated with mutual consent without the parties first negotiating a replacement BIT, 28% had been terminated unilaterally without a replacement, and 63 percent had been replaced by a new treaty.[915]

On other hand as much as, one could thing termination of investment agreements (exit option) not to be a reasonable or common option for developing countries as Tanzania because of the assumed impacts of termination.[916] A number of developing States have done so despite of the challenges that comes under exiting IIAs option. Examples of developing countries that have terminated their IIAs are Africa, India, Pakistan, Indonesia, Bolivia, and Ecuador. Furthermore, it is proved that termination of IIAs does not really affect the country negatively.[917] Moreover, the exit strategy claimed to be used as a means of increasing States voice in international organisation by some of countries, such as South Africa and Australia.[918] By terminating BITs States has increase their bargaining power in negotiating new investment agreements. Moreover, statistics shows that States that have recent terminated their IIAs the outcome of terminating seems to be positive (were able to achieve their goal).[919]And to conclude, the

[915] United Nations Conference on Trade and Development, "Phase 2 of IIA Reform: Modernizing the existing stock of old-generation treaties" (2017) available at https://unctad.org/en/PublicationsLibrary/diaepcb2017d3_en.pdf accessed 12 July 2022

[916] There is an assumed theory that IIAs influence the increase of FDI to a country. Gerhard Rudolph, "Balancing foreign investor protections with domestic policy initiatives in South Africa" (2019) Available at http://arbitrationblog.practicallaw.com/balancing-foreign-investor-protections-with-domestic-policy-initiatives-in-south-africa/ accessed 04/11/2021; PengchengLiu, YueLu, Bin Sheng, Khanindra Ch.Das, and Lei Li, "Can foreign direct investment promote BIT signing?" (2021) *Journal of Asian Economics* Volume 75. Averell Schmidt, "Breach of Trust: How Treaty Withdrawal Shapes Cooperation Among States" (2021)

[917] Public Citizen Research Brief, "Termination of Bilateral Investment Treaties Has Not Negatively Affected Countries' Foreign Direct Investment Inflows" (2018) Available at https://www.citizen.org/wp-content/uploads/pcgtw_fdi-inflows-from-bit-termination_1.pdf accessed 22 July 2022

[918]Kristi How and Emily Choo, ' Negotiation, Compliance and Termination of Investment Treaties: The State's Perspective' (2022) Available at https://globalarbitrationreview.com/guide/the-guide-investment-treaty-protection-and-enforcement/first-edition/article/negotiation-compliance-and-termination-of-investment-treaties-the-states-perspective accessed 22 July 2022

[919] Public Citizen Research Brief, 'Termination of Bilateral Investment Treaties Has Not Negatively Affected Countries' Foreign Direct Investment Inflows' (2018) https://www.citizen.org/wp-content/uploads/pcgtw_fdi-inflows-from-bit-termination_1.pdf accessed 12 June 2020

number of IIAs terminations outpaced the number of new treaties signed. Statistics shows 22 terminations has taken effect and only 18 new treaties were concluded.[920] The following year saw similar figures, with at least 24 terminations taking effect,[921]and at the end of 2019 UNCTAD reports the total number of effective terminations were 309,[922]this shows how much termination of IIAs has been a successful option to number States and for that reason Tanzania should consider it.

6.6 Voice strategy

Voice in this research is referred to the amendment provisions that affects Tanzania power to regulate in favour of its public and other international obligations such as Human Rights and Environment protections. And in this case Tanzania can speak out the factors that affects the agreements and call for a change which is to renegotiate their old-generation BITs. This research paper suggests that a reforming process of IIAs can be done by renegotiation and renegotiation can be done by modifying exiting IIA provisions with either new words, incorporating interpretive clauses, deleting or omitting clauses, into a new generation of international investment agreements, a number of governments have made significant headway toward overcoming that difficulty (IIAs). On other hand it is claimed that to establish new IIAs (reformed IIAs) States need to first terminate the existing BIT, then negotiations follow to replace the existing BIT.[923] This means termination cannot be avoided in any of the strategy or process of reforming IIAs.

As mentioned earlier, number of States (including Tanzania) acknowledged that their the former IIAs mostly BITs were frequently negotiated poorly, rarely took into account the interests of the treaty partner (State's), also lacked sufficient records of the negotiations.[924]And for this reason this research argue that Tanzania has a legitimate reason to call for a change which in this research is a proposal of reforming FET provision. This option is supported by

[920] UNICTAD, "Recent Developments in the International Investment Regime" (2018). Available at https://unctad.org/system/files/official-document/diaepcbinf2018d1_en.pdf accessed 12 June 2020
[921]United Nations Conference on Trade and Development, "Recent development in the international investment regime" (2018) Available at https://unctad.org/system/files/official-document/diaepcbinf2018d1_en.pdf accessed 11 May 2020
[922] United Nations Conference on Trade and Development, "World investment report 2019, p. 100. United Nations" (2019)
[923] ibid
[924] ibid

article 39 of VCLT which States that "a treaty may be amended by agreement between the parties. […]".[925]

Amendment, replacement or renegotiation of new treaty is not a new thing practically, an empirical study confirms almost 170 countries (this includes, Canada, Netherland, South Africa, United States, India, Romani, and Germany) have amended their treaties.[926]What differentiated former treaties with the new ones is the change of language and addition to details. Most of provisions renegotiated are detailed and much longer compare to former ones. For example; the former FET provision in India model BIT state that "investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party."[927] This was replaced by national treatment comparing to the new India model BIT (2016) FET provision is written with extra text that guide the exact area that such protection standard will protect investments, here is an example, "no Party shall subject investments made by investors of the other Party to measures which constitute a violation of customary international law1 through: (i) Denial of justice in any judicial or administrative proceedings; or (ii) fundamental breach of due process; or (iii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or (iv)manifestly abusive treatment, such as coercion, duress and harassment."[928] Amendment of investment treaties (mostly protection standards) does not change the purpose of IIAs, but narrowing or put in details some of the clauses to avoid misinterpretation of them which affect the interests of host States mostly.

Regardless of that, the Law of treaty (VCLT) do allow treaty amendment,[929] which could be a change of entire treaty, section or subsection.[930] Likewise, to some extent treaties signed by Tanzania have clause that allow amendment of treaties though its varies treaty to treaty some clause have a language that initiate it for example ones that state the 'duration and termination clause,[931] have specifically mention the amendment of agreement clause stating "… agreement

[925] Vienna Convention on the Law of Treaties (1969) Available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf accessed 22 July 2022
[926] See e (Protocol (2003) to Germany-Moldova BIT (1994) and Protocol (1997) to South Africa-United Kingdom BIT (1994).
[927] See article 3(2) of India - United Kingdom BIT (1994)
[928] Article 3.1 of India model BIT 2016
[929] See Article 39 and 40 of VCLT. Available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf accessed 12 July 022
[930] Some countries introduced the exceptions of some clauses such as MFN, ISDS mechanism, and FET.
[931] See Article 54 of Tanzania – United Kingdom BIT (2014), Article 13(4) of United Republic of Tanzania - Turkey BIT (2011), Article 12 of Switzerland - United Republic of Tanzania BIT (2004), Protocol (2000) to United States-Panama BIT (1982) and Protocol (2003) to Germany-Moldova BIT (1994).

may be amended by a joint decision of the Parties. An amendment shall enter into force when each Party has notified the other in writing of the completion of the procedures required in its territory for the entry into force of the amendment. The amendment shall enter into force on the date of the later of the two notifications."[932] This explains how Tanzania has a good chance to express her 'voice' in amendment by proposing a FET clause to replace the exiting with the new one that will protect the interests of State.

Furthermore, developing countries are encouraged not underestimate their 'voice' to promote reform. By using her voice Tanzania can possibly replace exiting IIAs with national laws as one method that emerging nations mentioned to use to encourage the current treaty's revision.[933] Since new IIAs cannot come to force unless the old ones are terminated the effect of survival clauses is reasoned by this research but reasoned that even if the 'survival' or sunset clauses extend protection for current investors and restrict the immediate practical impact of termination. However, the issue is not of how badly the global markets would respond to termination of IIAs to renegotiate the key point of voice strategy is to diligently demonstrate that terminating IIAs and use domestic law to protect investors is not disregarding investors rights but rather it is sign of expressing the public dissatisfaction of exiting IIAs. However, it is recommended that the transaction costs (shifting from IIAs as means of protection to domestic legislation) can be substantially high in comparison to treaty negotiation, particularly in a developing country like Tanzania.[934]Following the reasoning above, this research aim to recommend a voice Strategy which is thought by this research to help rebalance IIAs in favor of state.Tanzania should use its voice to adopt a new model BIT is the one that will limit or omit FET standard of protection, because the existing FET provision in existing BITs is viewed as incoherent with the environmental, legal, economical, and social reforms that Tanzania had adopted.

6.7 Reform evidence from other States and Analysis of Strategy used.

Different countries chosen to have taken a different approach on promoting and protecting foreign investment. Yet, they all have a common goal, which is to end 'the inequality between the investors and host countries. This section will discuss other States that have face challenges

[932] Article 41 of United Republic of Tanzania - Canada BIT (2013).
[933] Luke Nottage, "Rebalancing Investment Treaties and Investor-State Arbitration: Two Approaches" (2017) *Journal of World Investment and Trade, Vol. 17, No. 6, pp. 1015-1040,*
Sydney Law School Research Paper No. 16/54
[934] Ibid

which Tanzania is going through now and explore the measures taken to rebalance IIAs in favour of host States. This analysis will strongly assure the effectiveness of this research proposal as the coins and pros of different reforming strategy will be picked from the countries that have tried reforming their IIAs. (i) balancing foreign investors protection with States rights through domestic law (using South Africa as a case study), (ii)Renegotiation (using India as a case study) and other negotiation guide for rebalancing IIAs as offered by SADC (since Tanzania is a member) and one given by CETA.

6.7.1 South Africa

In order to protect foreign investors and their investment in a foreign country IIAs (particularly BITs) have historically been used between nations and also IIAs have been used as means of promoting foreign direct investment in exchange of investor protections.[935] However, South Africa's government released the Protection Investment Act 22 of 2015,[936] to replace investment treaties which is not common because a foreign investor have always been interfered with domestic law or measures believing that violate the foreign investor safeguards provided under conventional BITs.

According to the South African government, the Protection Investment Act 22 2015 aims to protect investors (both local and foreign) and their investments and to achieve a balance of rights and obligations that apply to all investors. Though, foreign entities complaining it will reduce their protection in South Africa and may make them disinclined to invest.[937] The next paragraph will explain why South Africa replaced her investment agreements (BITs particularly) with the Protection Investment Act 22 of 2015

South African government terminated their old generation treaties' reasoning that the protection standards under them were infamously vague and present unacceptably high risks to governments as well as serious investors. Additionally, the former agreements argued not to be in line with new social, economic, and environmental developments, prevents the ability of governments to enact legislation and regulatory measures aimed at promoting public policy

[935] Gerhard Rudolph and Robert Thackwell, "Balancing foreign investor protections with domestic policy initiatives in South Africa" (2019) Available at http://arbitrationblog.practicallaw.com/balancing-foreign-investor-protections-with-domestic-policy-initiatives-in-south-africa/ accessed 22 July 2022
[936] Protection of Investment Act, 2015. Available at https://investmentpolicy.unctad.org/investment-laws/laws/157/south-africa-investment-act accessed 12 May 2020
[937] Ian Matthews (Head of Business Development), "Protection of Investment Act becomes law and may deter foreign investment" (2018) Available at https://www.bbrief.co.za/2018/07/16/protection-of-investment-act-becomes-law-and-may-deter-foreign-investment/ accessed 12 May 2020

objectives, hence the termination.[938] On other hand, majority of BITs were reaching their termination dates for that reason Rob Davies (Minister of Trade and Industry in South Africa) use that as an opportunity to review and to develop a new framework that would assist the nation in striking the right balance between investor rights and obligations and the requirement to adequately protect foreign investors, all the while ensuring that constitutional obligations are upheld and that the government keeps the policy space to regulate in the public interest.[939] Moreover, South African Government is convinced that domestic law will be able to provide adequate guarantees to all investors, their investment and returns on investment.[940]

One of the alleged additional justifications for reform is that the South African government failed to design or provide a model for the investment treaties they had. In the 1990s, the draught model BIT was offered to government authorities, who adopted it without discussion or study. 'I believe they signed these BITs under UK pressure and ignorance 'said, a to well-known attorney Peter Leon.[941]He added South Africa did sign the former BITs under duress, fearing that by not doing so would affect investments inflow in the country, and that only over time did the government officials began to realize what the implications of the legal text, and provisions written in BITs.[942]

Furthermore, the *Foresti v. South Africa, (2007)*[943] case made it clear to the South African authorities that the ability of the state to regulate its domestic public policy objectives were

[938] Rob Davies, "Termination of bilateral investment treaties won't harm relations" (2013) Available at https://www.bilaterals.org/?termination-of-bilateral accessed 12 May 2020. A Chief Director: Trade Policy and Negotiations, International Trade and Economic Development Division in South Africa. Randall Williams, "Nothing Sacred: Developing Countries and the Future of International Investment Treaties" (2009).Available at https://www.iisd.org/system/files/meterial/developing_countries_and_the_future_of_IIAs.pdf accessed 12 May 2020

[939] Mohamad Mossallam, "Process Matters: South Africa's Experience existing its BITs" (2015) GEG Working paper 2015/97

[940] De Gama, M. and De Gama, R. (2013). "South Africa's approach to the implementation of its Investment Policy Framework" by Mustaqeem De Gama & Rafia De Gama. [online] Blogaila.com. Available at: http://blogaila.com/2013/12/05/south-africas-approach-to-the-implementation-of-its-investment-policy-frameworkby-mustaqeem-de-gama-rafia-de-gama/ accessed 24 June 2021

[941] Williams, R. (2009). The Third Annual Forum of Developing Country Investment Negotiators Nothing Sacred: Developing Countries and the Future of International Investment Treaties [online] International Institute for Sustainable Development. Available at: https://www.iisd.org/system/files/meterial/developing_countries_and_the_future_of_IIAs.pdf accessed 1o July 2020

[942] A Chief Director: Trade Policy and Negotiations, International Trade and Economic Development Division in South Africa. Randall Williams, ""Nothing Sacred: Developing Countries and the Future of International Investment Treaties" (2009).Available at https://www.iisd.org/system/files/meterial/developing_countries_and_the_future_of_IIAs.pdf accessed 12 June 2020

[943] Piero Foresti, Laura de Carli and others v Republic of South Africa (ICSID Case No ARB(AF)/07/1) Award, 3 August 2010, online: ICSID, [Foresti et al v South Africa].

under serious threat from the BIT obligations in general and international investment arbitration in particular. The interesting part of Foresti case is that the claim challenged the Mineral and Petroleum Resources Development Act, which was enacted by the government to diverse ownership stakes in natural resources triggered the review in south Africa. In this case a clamant alleged to be denied Fair and equitable treatment when the law required the company to diverse 20 percent of their investments to historically disadvantaged South Africans, as part of South Africa's Black Economic Empowerment requirements pertaining to the issuing of mining rights. Such Act claimed to threaten investors interests and so breached BIT.[944] This can be related to Tanzania, which in 2017 passed laws protecting natural resources to protect the interests of public. But investors are not happy with the law claiming it has and will affect their interest.

In the wake of the settlement, South Africa initiated a review of its investment policy regime. In 2010 the Department of Trade and industry concluded the review of all BITs to which South Africa was a signatory and here are some of the findings that were established; (i) South African efforts in 1990s to attract investment through investment treaties has resulted in agreeing to unequal and unsustainable terms and results to a separate negotiation with each country. (ii) "there is no correlation between a bilateral treaty with a particular country and the flow of foreign direct investment from that country. In fact, some of South Africa's main investors came from countries they did not sign BITs with, for example the United States. As a senior DTI official explains, large investments come in from non-treaty partners, including the United States, India, Malaysia, and Brazil. As explained, "… we could not see any clear unambiguous evidence that the treaties themselves encourage investment, which was also part of the calculation in weighing the possible benefits of the treaties compared to the risk."[945] Following the review, the South African government decided to terminate unilaterally the first-generation BIT in 2013, and introduced the Protection Investment Act 22 2015 to codify BIT provisions into domestic law, and develop a South African Model BIT as basis for any new agreement.[946]

[944] Lungelo Magubane, "Investment protection legislation in South Africa" (2018) *Return to Africa Connected: Issue 1*
[945] Williams, R. (2009) Ibid
[946] Republic of South Africa, Department of Trade and Industry, Update on the Review of Bilateral Investment Treaties in South Africa, (Pretoria: Report to Cabinet, 15 February 2013) online: South African Foreign Policy Initiative. Also see, Protection of Investment Act 22 of 2015

6.7.1.1 Replacing IIAs with Domestic Law Analysis.

The refusal of using an international standard means of protecting foreign investors in the South Africa is not a new norm, the means of using domestic law or standards has been advocated for years now and been advocated by Latin Americans in late 19th century through 'Calvo doctrine' who argued that foreign investors and their investments should be treated as local investors.[947] The standard of Calvo doctrine needed foreign investors to "submit to local conditions with benefits and burdens" in reference to fair treatment [948]Thus it can be argues that the use of domestic law as a standard of treatment to foreign investors is repeating itself in South Africa.

On the other hand, the Protection of Investment Act 22 of 2015 aimed to protect foreign investors through local legislation and has excluded number of protection provision such as the use of international Arbitration, and the most important change was the exclude of FET provision which was provided in most of BITs. The FET in South Africa BITs believed to contradict with state sovereign power hence the refusal of FET and its standard.[949]Therefore South Africa decided investment act not to include FET it was deemed to be too widely framed and subject to controversial interpretation.[950]Besides, majority of foreign investors have signalled their disappointment at the South African government's decision to terminate the BITs instead of seeking to renegotiate the treaties and suggested that it could have a negative effect on investor confidence. One of European official stated that foreigners are hesitant to invest in South Africa for fear that there will be a lack of protection over their investment.[951]

This research argue that the main reason of IIAs were to offer foreign investors international protection standards and the use of domestic law as reasoned by the Government of South Africa may be insufficient protection to foreign investors and creating unfriendly environment to foreign investors.[952] And as Dolzer, argue that the dominant debate in capitals of the third world today is no longer about sovereignty,[953] but rather about competition for foreign capital

[947] Witness Nabalende, "PROTECTING FOREIGN INVESTMENTS USING THE CALVO DOCTRINE" (2020) Available at http://uonjournals.uonbi.ac.ke/ojs/index.php/ffd/article/view/563 accessed 12 June 2020
[948] Ibid
[949] Ian Brownlie, *Principles of Public International Law*, 6th edn (Oxford, Oxford University Press, 2003) 501 – 502
[950] Ibid
[951] Ian Matthews (Head of Business Development), "Protection of Investment Act becomes law and may deter foreign investment" (2018) Available at https://www.bbrief.co.za/2018/07/16/protection-of-investment-act-becomes-law-and-may-deter-foreign-investment/ accessed 12 June 2020
[952] Rudolf Dolzer, "The impact of international investment treaties on domestic administrative law" (2006)
[953] Rudolf Dolzer, "The impact of international investment treaties on domestic administrative law" (2006)

and technology, and thus about the necessary ingredients of a national investment policy which will serve to attract the foreign investor. This explain, south Africa is fighting s wrong battle of protecting its sovereign power and lose focus of creating friendly environment to foreign investors. Following the challenging environment that South Africa is facing now, research does not suggest Tanzania replacing IIAs with domestic law.[954]

South African government terminated their first-generation BITs unilaterally the in 2013 and developed a domestic investment legislation to codify BIT provisions into domestic law[955] known as the Protection of Investment Act 22 (2015) which entered into force in 2018.[956] The Protection of Investment Act 22 (2015) provides for foreign investors and their respective investments to be treated no less favourably than South African investors in like circumstances.[957]

The South African government's attempt to fill the gap created by the lapsed and terminated BITs is mostly represented by the Act. However, the truth is that this legislation significantly weakens the protections that foreign investors previously enjoyed in South Africa and will continue to lead to a decline in foreign direct investment and a growing dissatisfaction among international investors.[958]

Understanding that, Tanzania has a history of carefully examining international laws to determine whether they are consistent with its interests.[959] For such reason this research advice Tanzania to assess its action following the pass of new legislations in 2017 looking at South Africa as an example. The research also contends that the use of domestic law to protect foreign

[954] Richard Jansen van Vuuren, "Investment laws in South Africa – foreign investors take note" (2018) Available at https://www.miningreview.com/news/changes-investment-laws-south-africa-foreign-investors/
[955] Republic of South Africa, Department of Trade and Industry, Update on the Review of Bilateral Investment Treaties in South Africa, (Pretoria: Report to Cabinet, 15 February 2013) online: South African Foreign Policy Initiative. Also see, Protection of Investment Act 22 of 2015
[956] Mills Soko and Mzukisi Qobo, "SA's cancellation of bilateral investment treaties - strategic or hostile?" (2018) Available at https://www.news24.com/fin24/opinion/sas-cancellation-of-bilateral-investment-treaties-strategic-or-hostile-20180928-3 accessed 29/03/2021. Also see Robert Thackwell, "Balancing foreign investor protections with domestic policy initiatives in South Africa" (2019) Available at http://arbitrationblog.practicallaw.com/balancing-foreign-investor-protections-with-domestic-policy-initiatives-in-south-africa/ accessed 12 May 2021
[957] It States in Purpose of Act 4. "The purpose of this Act is to— (a) protect investment in accordance with and subject to the Constitution, in a manner which balances the public interest and the rights and obligations of investors; (b) affirm the Republic's sovereign right to regulate investments in the public interest; and (c) confirm the Bill of Rights in the Constitution and the laws that apply to all investors and their investments in the Republic."
[958] ibid
[959] James Thuo Gathii, "Understanding Tanzania's Termination of Its BIT with the Netherlands in Context" (2019), Available at https://www.afronomicslaw.org/2019/04/01/understanding-tanzanias-termination-of-its-bit-with-the-netherlands-in-context/ (Assessed 29/03/2021)

investors not fit the purpose of reforming IIAs in favour of State and its development However using the Tanzania - Netherland BIT termination. The country has indirectly announced that the new investors from the Netherlands (as well as new investors from Tanzania) cannot rely on the privileged protection that the treaty provides. This implies that in order to preserve their investment, prospective investors must rely on national laws and regulations. Additionally, it implies that they will have to use national courts to file legal complaints when and if necessary. Unless a new agreement is signed that includes that option, access to international arbitration will no longer be available.[960] This shows Tanzania is following footsteps of South Africa.

The South Africa government has determined not to enter into any new BITs, and since the termination of first-generation BITs the country have not renew any BITs that come up for renewal. Instead, the government have the Investment Act to serve as a uniform position for investor protection and a substitute for all the country's BITs.[961] Thus it is advised to Tanzania not to renew BITs but update their domestic legislation that will give confidence foreign investors to invest in country by promising qualified physical security and legal protections for the foreign investor and their investments in accordance with minimum standards of customary international law.

On other hand Tanzania need to be aware of the risks that comes with the Termination of BITs and use of domestic law to protect foreign investors and their investments. Learning from South Africa termination of BITs and replace them with domestic law did not reflect well on South Africa.[962] The country has been accused of using domestic las to dominate foreign investors, rather than trying an attitude of wanting to work together for the benefit of both parties.[963] And because of that South Africa has experienced a sharp decline in foreign direct investment (FDI) since the termination of first-generation BITs, where DI inflows falling by 15.1 per cent to US$4.6 billion.[964]In Addition to That, South African Reserve Bank (SARB) statistics reports the "FDI into South Africa declined from Rand 76 billion in 2008 to Rand 17.6 billion in 2017,

[960] The Netherlands and you. 'Notice on termination Bilateral Investment Agreement Netherlands – Tanzania' (2019) Available at https://www.netherlandsandyou.nl/latest-news/news/2019/03/22/notice-on-termination-bilateral-investment-agreement-netherlands---tanzania accessed 25 July 2022
[961] Deon Govender, "The Foreign Investment Regulation Review: South Africa" (2020) Available at https://thelawreviews.co.uk/title/the-foreign-investment-regulation-review/south-africa
[962] The European Union's Regional Chamber of Commerce and industry stated.
[963] Ian Matthews, "Protection of Investment Act becomes law and may deter foreign investment" (2018) Available at https://www.bbrief.co.za/2018/07/16/protection-of-investment-act-becomes-law-and-may-deter-foreign-investment/ accessed 12 July 2020
[964]Deon Govender, "The Foreign Investment Regulation Review: South Africa" (2020) Available at https://thelawreviews.co.uk/title/the-foreign-investment-regulation-review/south-africa

and a UN report, the 'Global Investment Trends Monitor' indicates that in 2015 FDI into South Africa fell by 74% to $1.5bn."[965]

In contrast, Public Citizen Research Brief, and the Department of Trade and Industry claims that termination of BITs in south Africa has not affected the FDI inflow much in the country and that there is very little to no correlation between investment inflows and BITs.[966] The Public Citizen Research Brief state that, "after termination of BITs South Africa FDI stock increased 10 percent since 2012, from 1.8 trillion Rand to 2.0 trillion Rand, and after South Africa terminated its BIT with Germany in August 2014, FDI stock from Germany in South Africa increased from an annual average of 93 billion rand before termination to 95 billion rand after termination."[967] In short it is still early to tell whether the South African government met their objectives or say whether the new law will impact foreign investment flows. However, the measure that South Africa has managed to allow the state to rule and protect investors at the same time for example section 6 of fair administrative treatment state "the government must ensure administrative, legislative and judicial processes do not operate in a manner that is arbitrary or that denies administrative and procedural justice to investors in respect of their investments as provided for in the Constitution and applicable legislation."[968]

Moreover, the data is not clear of whether termination of BIT and replacement of it with domestic law in South Africa has challenged the country economy and FDI inflow. Though, it is acknowledged that foreign investors do contribute to their economic development and because foreign direct investment (FDI) needs a host state to provide a safe environment investor with their investments and protection traditionally has been offered through bilateral investment treaties (BITs).[969] I doubt whether the use of domestic law might keep investors in Tanzania hence second option which is moderation of FET provision.

On the other hand, South Africa have decided to keep using domestic law rising awareness and only ready to receive foreign investors Foreign investors who put public interest into consideration,[970] and ensuring that the investor's rights are protected but that those rights are

[965] Ibid 48
[966] Public Citizen Research Brief, "Termination of Bilateral Investment Treaties Has Not Negatively Affected Countries' Foreign Direct Investment Inflows" (2018) Available at https://www.citizen.org/wp-content/uploads/pcgtw_fdi-inflows-from-bit-termination_0.pdf accessed 12 July 2020
[967] Ibid 50
[968] See Protection of Investment Act, 2015
[969] Jackwell Feris, "Challenging the status quo – South Africa's termination of its bilateral trade agreements" (2014) International Arbitration Newsletter.
[970] Ibid

also balanced against the sovereign rights of the Republic of South Africa to regulate in the public interest.[971] This experience is used as an important lesson that other countries such as Tanzania to dare taking action in order to protect its interest.

6.7.2 India

India started entering IIAs in early 1990s with a purpose of attracting foreign investments as part of this overall strategy of liberalisation.[972]The foreign investment majorly contributed to Indian economy,[973] however foreign investors have been challenging most of government decisions claiming they have potential of breaching IIAs mostly BITs. After the loss in the case *White Industries v India*[974] the government of India was encouraged to join other nations to review it investment agreements aiming to balance investment protection with India's regulatory power.

Following large number of investment claims, (data shows from 2013 to 2019 India has had a total of 25 claims in which 13 are still pending).[975] India realised the contents of the earlier model BIT were vague and were challenging the government's power to regulate. Hence, terminated most of its BITs[976] and introduced a new model BIT 2016. In 2015 the Government of India proposed a new model of BIT to replace the 2013 one, which became effective 2017. The new model of BIT 2015 that contains several provisions which protect the regulatory space of the host state, and still provided investors with strong protections. Also, to align with the ongoing 2015 model BIT India has issued a joint interpretative statement which can be useful when interpreting BITs provisions.

The new Model BIT 2015 has tempted to protect the interest of host state's by narrowing investor protection and protecting the state's regulatory power to take measures in the public interest. The model includes several improvements in investment practice compared to the old one. It also clarifies the reach and application of the provisions in which the previous was not,

[971] Mtandazo Ngwenya, "The promotion and protection of foreign investment in South Africa: A critical review of promotion and protection of investment bill 2013" (2015)
[972] Pushkar Anand, "Tracing the History, and Impact, of India's Bilateral Investment Treaties" (2019) Available at https://thewire.in/books/prabhash-ranjan-bilateral-investment-treaties accessed 27 July 2022
[973] Pami Dua and Aneesa, I. Rashid, "Foreign Direct Investment and Economic Activity in India" (1998) Indian Economic Review,New Series, Vol. 33, No. 2 (July-December 1998), pp. 153-168
[974] White Industries Australia Limited v. Republic of India, UNCITRAL, Final Award (Nov. 30, 2011).
[975] https://investmentpolicy.unctad.org/investment-dispute-settlement/country/96/india
[976] To date (October 2020), Government of The India has terminated 67 BITs out of 86.

for example, the model includes "a hybrid enterprise and asset-based definition of investment (Article 1.4), as opposed to the broader asset-based definition typically contained in India's investment treaties." One of the major changes noticed in the 2015 model BIT is narrowing the scope of FET which influence a lot of investment claims.

The scope of FET which was wide but has been narrowed from a general Fair and equitable treatment to protection against denial of justice, certain violations of due process, targeted discrimination, and manifestly abusive treatment (Article 3.1) as it States " Each Party shall not subject Investments of Investors of the other Party to Measures which constitute: (i) Denial of justice under customary international law; (ii) Un-remedied and egregious violations of due process; or (iii) Manifestly abusive treatment involving continuous, unjustified and outrageous coercion or harassment."[977] Hanessian, and Duggal claim that the 2015 Model BIT adopts a narrow formulation, which is distinct even from the customary international standard formulated in the 1926.[978]

Moreover the 2015 draft provided an exception to this general trend, imposing obligations on investors such as requirements to comply with host state laws and to abide by transparency and anti-corruption standards.[979] These changes are similar to what Tanzania has initiated already such as terminating BITs and demanding investment disputed being resolved locally.

From the discussion above it is clear and certain that termination of BITs and the introduction of new model BIT (2016) is same as every other nation, which is to reduce investment claims and having a model BIT that can balance the interests of two contracting parties in aspect allowing the government to regulate in favour of public without fear of breaching investment agreements as mentioned. However, it is doubtful whether the model can achieve any of its purposes. Because India's continues to engage with the ISDS system unlike countries like South Africa and other Latin American countries,[980] this means the new model still permit investors to challenge government actions.

[977] https://oxia.ouplaw.com/page/631
[978] Grant Hanessian, and Kabir Duggal "The 2015 Indian Model BIT: Is This Change the World Wishes to See?" (2015) ICSID Review, Vol. 30, No. 3, pp. 729–740
[979] Grant Hanessian, and Kabir Duggal "The 2015 Indian Model BIT: Is This Change the World Wishes to See?" (2015) ICSID Review, Vol. 30, No. 3, pp. 729 –740
[980] Ranjan, Prabhash; Singh, Harsha Vardhana; James, Kevin; Singh, Ramandeep (2018). "India's Model Bilateral Investment Treaty: Is India Too Risk Averse?" Brookings India IMPACT Series No. 082018.

Despite the challenges India has influenced developing countries such as Tanzania to make changes in investment law. India submitted formal notices to 61 partner states 26 in 2016 to unilaterally terminate BITs for which the initial period had already passed or would soon expire. This came when India's updated model BIT was internally approved and published in 2015. Since then, India has used this improved model as the foundation for new negotiations.[981]What do Tanzania has to take from India is that, revising its IIAs is not a new thing and that even developing nations such as India and Pakistan that has been assumed to be weak negotiator(s) have played major roles in reforming IIAs. Thus, would be good for the government to do a review of its investment treaties and join the movement of rebalancing IIAs in favour of state(s).

6.3 Southern African Trade Development Community

The use of BITs has a long history in the countries of Southern Africa. Every single one of the 15 Southern African Development Community (SADC) member states (including Tanzania). is a party to at least one BIT. The BITs signed by SADC member states generally adhere to the 'format, structure, and content of traditional BITs'.[982]The draught SADC Model Bilateral Investment Treaty Template and Commentary was thoroughly discussed during a meeting of investment policy makers and treaty negotiators from the 15 SADC members. The template is intended to represent unified strategies that will help the Member States in their individual and group negotiations of international investment agreements (IIAs) with third parties as well as in the review of existing treaties.[983]

The template proves an effort to improve the sustainable development dimension of upcoming IIAs by including provisions on environmental and social impact assessments, measures to combat corruption, standards for human rights, the environment, labour, corporate governance, and the right of States to regulate and pursue their development goals.[984] Simply it can be said

[981] UNCTAD Investment Policy Hub. (n.d.). India bilateral investment treaties. https://investmentpolicy.unctad.org/ international-investment-agreements/countries/96/india accessed 12 June 2021

[982] Sean Woolfrey, "The SADC Model Bilateral Investment Treaty Template: Towards a new standard of investor protection in southern Africa" (2014) Available at https://www.tralac.org/publications/article/6771-the-sadc-model-bilateral-investment-treaty-template-towards-a-new-standard-of-investor-protection-in-southern-africa.html accessed 27 July 2022

[983] UNCTAD, "SADC moving forward on model bilateral investment treaty template" (2012) Available https://unctad.org/es/node/307 accessed 27 July 2022 2

[984] Ibid

that the model specifically aims to strike a balance between the rights and obligations of the State Parties, investors, and investments under the agreement. The SADC Model Bilateral Investment Treaty Template claimed to be a good illustration of how investment governance in southern Africa is changing.

By advocating an investment governance strategy that significantly departs from the status quo offered by the BITs now in effect in southern Africa, this Trade Brief claimed to demonstrate how the Model BIT captures fresh thinking about investment governance. The brief also looks at the precise recommendations and proposal the Model BIT offers with regard to different BIT provisions and shows how they differ from the normal shape such provisions take in the BITs previously reached by SADC member states.[985]

The SADC Model BIT however is a non-binding model template but allow governments to use or adapt while negotiating their BITs. The model provides many alternatives and suggestions which can be used to address the problems caused by the old generation BITs that Tanzania use. For example, it offers substitute clauses to replace and clarify contentious old regime BIT clauses like the definition clauses, the fair and equitable treatment clause, and the investor-state dispute resolution (ISDS) clause. Nigeria and Morocco are example of the countries who have signed BITs that included many of the proposed features by the SADC Model BIT. Such as imposing investor environmental obligations and replace FET provision with words that limits actions that would violate FET and expressly eliminates the notion of legitimate expectations in order to strike a balance between State regulatory authority and investment protection.[986]

For instance, in Morocco-Estonia BIT FET provision states that "[m]easures that have to be taken by either Contracting Party for reasons of public security, order or public health or protection of environment shall not be deemed as a less favourable treatment" other good example of FET provision which limit broad interpretation is the Article 4 of France – Colombia (2014) stating "….it is understood that the obligation to provide fair and equitable treatment, does not include a clause stabilization legal or prevents a Contracting Party to adopt its legislation in accordance with the terms of this paragraph."[987] Also Colombia model BIT States "[F]air and equitable treatment shall not be construed as to prevent a Contracting Party

[985] Sean Woolfrey (Ibid)
[986] See Article 5 of the SADC Model BIT (2012) and the Morocco Model BIT (2019)
[987] 4(1) b Available at https://edit.wti.org/document/show/b1f4e650-ab74-4bf5-91fd-4d876cf86b0f accessed 12 May 2021

from exercising its regulatory powers in a transparent and non-discriminatory manner and in accordance with due process.[988]

In aspect of sovereign power, the SADC new model BIT in Article 20.2 clarified the need of starting power to regulate by stating "shall be understood as embodied within a balance of the rights and obligations of investors and investment and host States."[989] This indicates that the right to regulate should be balanced against the rights of investors under the treaty. This provision is viewed by the drafters as the 'broader goal' that will ensure that arbitrators will not consider 'investment treaties purely as investor rights.' The commentary to Article 20.2 further emphasises that "in view of the broad obligations in BITs, it is useful to reaffirm the Host State's right to regulate investments in the public interest."[990] This type of FET provision would convince tribunals to consider States right to regulate even if foreign investors expectation is affected because state have clarified the standard of FET offered.

On other hand Tanzania seems to take a different approach to regain its sovereign power by using domestic law to regulate in favour of public by reforming its law,[991] and help the government benefit the exiting investments.[992] For example the Review And Re-Negotiation of Unconscionable Terms Act 2017 has made it clear on the means of renegotiating in favor of the state and its citizens as stated: "The principle of permanent sovereignty over natural wealth and resources shall afford fair and equitable treatment to the parties."[993] On other hand the law has not mention the interests of foreign investors to be considered as section 6(2) added the law "aim at restricting the right of the State to exercise full permanent sovereignty over its wealth, natural resources and economic activity;(b)are restricting the

[988] Article 4(d) of Colombia model BIT
[989] The South African Development Community (SADC) Model BIT Template of 2012 with Commentaries, Article 20, p. 40.
[990] Ibid
[991] The Written Laws (Miscellaneous Amendments) Act 2017, the Natural Wealth and Resources (Permanent Sovereignty) Act 2017, and the Natural Wealth and Resources (Review and Re-Negotiation of Unconscionable Terms) Act 2017 (Contract Review Act).
[992]"The legislation aims at reasserting the State's permanent sovereignty over all-natural resources, at ensuring that natural resources are exploited for the greatest benefit and welfare of the People of Tanzania, and at establishing a tight institutional control over such exploitation. "The Act declares four basic principles: (1) ownership and control over natural resources is exercised by the government on behalf of the People of Tanzania (Section 4.2); (2) any arrangements related to the exploitation of natural resources is subject to approval by the National Assembly (Section 6.1); (3) for any such arrangement there must be guaranteed return into the Tanzanian economy; and (4) earning obtained from such arrangements must be retained in Tanzanian banks and institutions. Reminiscent of the Calvo clause, Section 11 establishes the exclusive competence of domestic judicial bodies and other organs to settle disputes related to the exploitation of natural resources". By Tarcisio Gazzini, (u.n) "A Legitimate but Risky Path: The New Tanzanian legislation on natural resource". International Law
[993] Section 4(3)

right of the State to exercise authority over foreign investment within the country and in accordance with the laws of Tanzania."[994] Although it is questioned whether the law is fair for foreign investors and whether the legitimate expectation of foreign investors are considered. This is because under the concept of legitimate expectations in international investment law, States are required to maintain a certain degree of stability and predictability in their regulatory framework, which is relied upon by investors when making investments. It is well known that tribunals have considered there to be a breach of an investor's legitimate expectations where a host state makes substantial changes to the legal framework which result in serious financial losses being suffered by the investor.[995] Furthermore, foreign investors have exploited FET for any legitimate Act or measures that the government of Tanzania has taken for public welfare and interests, amounting to violation of FET. Even if the Government has taken measures with no intention of hurting foreign investors and their investment. The measures taken are usually judged opposite by arbitral tribunals. Thus, to balance power, Tanzania might need to add exception into FET provision that allow State to relegate by looking at the SADC Model BIT 2012.

6.4 Comprehensive Economic and Trade Agreement

The EU and Canada have a comprehensive economic and trade deal that would help the reduction of trade restrictions and customs fees, the agreement is called, Comprehensive Economic and Trade Agreement (CETA) which was sealed September 21, 2017. One of the major things CETA did was to reform the investment protection rules[996] As part of the CETA negotiations, Canada and the EU agreed to include specific reform strategies for measures relating to investment protection and investment dispute resolution.[997] CETA reform trounced three areas which included, 'right to regulate, judicial standard and investors' conduct.[998] This

[994] Ibid
[995] Yulia Levashova, "The Role of Investor's Due Diligence in International Investment Law: Legitimate Expectations of Investors" (2020) Kluwer Arbitration Blog
[996] Christian Tietje and Kevin Crow, "The Reform of Investment Protection Rules in CETA, TTIP and Other Recent EU-FTAs: Convincing?" (2016). Available at SSRN: https://ssrn.com/abstract=2885279 or http://dx.doi.org/10.2139/ssrn.2885279 accessed 12 July 2022
[997] Makane Moïse Mbengue and Mohamed Negm, "An African View on the CETA Investment Chapter" (2018) Studies in European Economic Law and Regulation book series (SEELR, volume 15)
[998] Trade-Leaks, "Investor protection in CETA: Gold standard or missed opportunity?" (2016) Available at https://trade-leaks.org/wp-content/uploads/2016/09/ICS-CETA-Report-WEB.pdf accessed 12 July 2022

research has pay attention right to regulate connecting to FET protection standard included in CETA.

For several years, members of States have been unhappy with intra-EU BITs for being incompatible with the law of the Single Market.[999] Following the dissatisfaction of BITs, in August 2020 majority of EU States decided to terminate investment treaties concluded between them.[1000] The reason for termination argued to be influenced by the Court of Justice of the European Union's ("CJEU") decisions in *Slovak Republic v Achmea*, case in 2018 where an arbitration provision in Netherlands and Slovakia (BIT) found to be incompatible with EU law.[1001] Majority of EU members and foreign investors have been affected by the Netherlands and Slovakia (BIT) case decisions as it resulted to termination of not less than 196 BITs between EU Member States ("intra-EU BITs"). EU member members have decided to terminate and not renegotiate for the purpose of such terms being excluded. Since IIAs being incompatible with most of government measures has probably proved to be a reason of terminating BITs and other investment agreements in all assessed countries and call for reform.

The EU opted to introduce new means of investment protection in which one of the aims that the new means of investment of protection will achieve in giving States rights to regulate for public interest.[1002] Through CETA two substantive articles were introduced in reference to that: the right to regulate "reaffirm the right to regulate in order to achieve the "legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity"; and (ii) make it clear that any regulation or change to the law that adversely affects an investment or interferes with an investor's expectations is illegal."[1003] For the sake of balancing the interests of contracting parties CETA aimed to promote investment but also protect the role of government in society in regards to right to regulate,[1004] For example in Article 8.9 (1) it reads,

[999] Clifford chance, "EU investment treaty protection future uncertain: what should investors do?" (2020)
[1000] Hannes Ingwersen and Kirstin Schwedt, "Treaty to terminate intra-EU BITs enters into force" 2020.
[1001] See in CJEU judgment in Slovak Republic v. Achmea BV: intra-EU
[1002] European Commission, "Investment Protection and Investor-to-State Dispute Settlement (ISDS) in EU agreements" (2014) Available at https://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152290.pdf accessed 12 June 2020
[1003] See CETA, Article 8.9 (1) and (2). Other CETA provisions which incorporate the General Exceptions from GATT Article XX (CETA, Article 28.3(2)) expressly do not apply to the relevant sections of CETA's provisions on investment protection in https://trade-leaks.org/wp-content/uploads/2016/09/ICS-CETA-Report-WEB.pdf accessed 12 July 2022
[1004] See preamble 1(C) at Council of the European Union, "Joint Interpretative Instrument on the Comprehensive Economic and Trade
Agreement (CETA) between Canada and the European Union and its Member States." (2016) Available at https://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/en/pdf accessed 12 June 2022

"for the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity."[1005] CETA was not created to ignore the duty of protecting foreign investors to protect States interest but creating environment of host States to exercise its sovereign power to regulate while protecting foreign investors.[1006] Section six of CETA clarify that "modern rules on investment that preserve the right of governments to regulate in the public interest including when such regulations affect a foreign investment, while ensuring a high level of protection for investments."[1007]

Furthermore, to protect the interest of State, CETA rewrote FET clause which with an exhaustive list of state obligation that would not limit States right to regulate. FET provision is written in a way that it expresses precisely what this standard of treatment consists of, "without leaving unwelcome discretion to the Members of the Tribunal."[1008]Under CETA, cases that constitute to a violation of the FET standard must relate to "denial of justice, "manifest arbitrariness," and "basic breach of due process". To achieve the purpose, CETA clarified most of protection standards including FET standard and wrote a precise language with a list of state action that constitute breach of FET, but also revealed the joint interpretative instrument which States formulation of FET in reference to Article 31 of VCLT. This can be seen in Article 8.9 (1) which "specifies that the adopted laws and regulations of a state should be in the 'public interest.' In comparison to the list of legitimate objectives mentioned in Article 8.9(1), the Joint Interpretative Instrument has added 'social services,' 'public education' and 'privacy and data protection' as examples of a state's legitimate objectives. This indicates that the list of legitimate objectives in the text of the CETA are merely examples and, as such, the list is not exhaustive.

Article 8.9(2) of the CETA further clarifies that: *"(2) For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations*

[1005] ibid
[1006] Council of the European Union, "Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States." 13541/16 Available at https://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/en/pdf (accessed 16/08/2021)
[1007] Council of the European Union, "Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States." 13541/16 Available at https://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/en/pdf (accessed 16/08/2021)
[1008] Investment Provisions in the EU-Canada Free Trade Agreement (CETA)' (Press Release, 3 December 2013)

of profits, does not amount to a breach of an obligation under this Section."[1009] An article like this clarify the power that a sovereign state has and impose limitation on FET treatment and its interpretation not to interpreted broadly and therefore it protect the interest of host state and its governing power.

The preamble about states' "right to regulate" with references to a non-exhaustive list of policy are included in CETA. However, it is mentioned that such preamble is there only as symbolic (not binding) to offer clarification on the intent behind or how the treaty should be interpreted. Without additional substantive measures, they do not alone guarantee that the ambiguous allusions to the power to regulate would be upheld.[1010]In summary it can be said that CETA has the unique and modern reform elements that can be included in model treaties and international investment agreements for Tanzania

6.8 A call for Tanzania's IIA reform

This research supports the argument in literature to reason that the existing Tanzania IIAs do not serve the interests, and purposes of Tanzania.[1011]After the analysis this research add that despite the benefit influenced by exiting IIAs Such as increase of FDI majority of the exiting Tanzania's investment agreements have not achieved the sustainable development goals and to resolve the disparity existing in current IIAs this research IIAs reform starting with FET provision a key protection standard has a linkage to the regulation implications that Tanzania has.

While several States terminate the old generation IIAs, some renegotiate modern IIAs that change the asymmetrical structure of IIAs. Tanzania is one of the States still use old generation treaties, which contain broad and vague clauses while working on 'keeping it local' (try to rebalance Sates and investors interest through domestic law particularly in natural resource sectors).

As reasoned in previous chapters the vagueness in international law particularly in IIAs have been a major reason to a reform former generation IIAs. Ambiguity in investment protection

[1009] Available at https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/index_en.htm
[1010] Ibid
[1011] Aisha Ally Sinda, *Foreign Direct Investment in Tanzania: Implications of Bilateral Investment Treaties in Promoting Sustainable Development in Tanzania* (2013) University of Pretoria.

text such as FET claimed to have potential benefits and drawbacks to both foreign investors and host States. However, the major drawback of the ambiguity of investment protection clause is flexibility, especially in the situation of unforeseen political circumstances where tribunals can interpret in a way that the interest of host States are not protected.[1012] The issue of vagueness is not address in BITs only but also in multilateral IIAs as Comprehensive Economic and Trade Agreement advised.

The UNCTAD recommended about ten different options that countries can use to modernise their first-generation treaties. The reform proposal covers five areas which includes: "Safeguarding the right to regulate, while providing protection, the availability of options allows States to adopt one that fits their reform objectives, reforming Investment disputes, Promoting and safeguarding investment, ensuring responsible investments, and enhancing systematic consistency." [1013]The UNCTAD, also proposed ten options that States could chose to reform their IIAs, and one of the options is amending treaty provision(s). Similarly, the guideline of the road map to reform proposes States to focus on reform to critical areas, thus, this research opt for the amendment of treaty provision which also offered two option which is either introducing new provisions or removing existing provisions. Taking note from UNCTAD proposal in amending FET provision this research recommends reforming a new FET clause and rewrite it with an exhaustive list of State obligations and clarify the treatment standard.

6.8.1 Reforming FET Provision in Tanzania's IIAs

This subsection will reason why the research opt to reform Tanzania IIAs through FET provision.

The FET provision is the key investor's right protection that allow investors to make claims over any measures that government take for the benefit of the public interest. It is because of FET protection standard that the government of Tanzania have been scared of taking actions to resolve any problems that are triggered by a particular investment such as environment destruction, as well as general measures to implement more systemic change or minimize liability under international investment treaties with fear that they will face claims. Tribunals

[1012] Christian Tietje and Kevin Crow, "The Reform of Investment Protection Rules in CETA, TTIP and Other Recent EU-FTAs: Convincing?" (2016). Available at SSRN: https://ssrn.com/abstract=2885279 or http://dx.doi.org/10.2139/ssrn.2885279 accessed 12 July 2022
[1013] UNCTAD, "International Investment Agreements Reform Accelerator" (2020) Available at https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf accessed 22 July 2022

seems to have set standards for State behaviour toward foreign investors when defining what constitutes improper administration or a breach of due process under fair and equitable treatment. These standards sometimes have an impact on future behaviour by the respondent State and other States and are very likely to have an impact on tribunal decision-making in other cases related to States measures.[1014] Following this argument, when resolving disputes between investors and States, the tribunals also serve as previously agreed-upon review bodies of a State's specific actions, in some cases using tools of public law review or proportionality analysis when faced with tricky trade-offs between investor protection and the State's environmental or economic policy decisions in the interest of the general public.[1015] This research therefore argue that having a clear FET with exhaustive list of state obligations might help both stakeholders to understand what FET breach consist of.

Currently Tanzania needs to continue re-assessing the exiting BITs as they did in 2018 with Tanzania – Netherland. If the country still wishes to be free from obligations under the existing BITs and uncertainties arising under them. A reform is needed, and for it to take place it is essential for Tanzania to issue notice of termination to existing BITs within reasonable time as recommended in signed treaties[1016] to terminate the existing ones and replace them with new BITs with modified FET. Tanzania reform process can be encouraged by number of developing States which took courage to terminate the old generation IIAs. This can be done by looking at the Moroccan Model BIT (2019), the Pan African Investment Code (2016), the Colombian Model BIT (2017), the Dutch Model BIT, the South African Development Community (SADC) Model BIT (2012), India Model BIT 2016, and the Brazilian Model BIT (2015). These BITs contain "new-generation" model BITs features. The primary feature that unites these model new BITs and distinguishes them as representatives is that they include provisions on investor obligations in addition to the conventional methods for investor protection such as replacing FET provision with an exhaustive list of state obligations.[1017]

[1014] Benedict Kingsbury and Stephan W. Schill, "Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law" (2009) *NYU School of Law, Public Law Research Paper* No. 09-46. Also see Eric De Brabandere, "Reforming Investment Law and Arbitration and the "New Economic World Order": Between Myth and Reality" (2020) Proceedings of the ASIL Annual Meeting, Volume 114, 2020, pp. 67 – 70 Available at DOI: https://doi.org/10.1017/amp.2021.25 accessed 27 July 2022

[1015] Ibid

[1016] See figue6.1

[1017] Arpan Banerjee, and Simon Weber "The 2019 Morocco Model BIT: Moving Forwards, Backwards or Roundabout in Circles?" (2022) *ICSID Review - Foreign Investment Law Journal*, Volume 36, Issue 3, Pages 536–562, https://doi.org/10.1093/icsidreview/siab021 accessed 27 July 2022

The research is therefore advice Tanzania to review its IIAs and issue notice to contracting party that signed former generation IIAs its intention to either terminate or renegotiate exiting IIAs as other countries such as India, Bolivia, Indonesia, Ecuador, and South Africa did.

6.8.2 Terminate Exiting Tanzania IIAs to Renegotiate.

It is uncertain whether termination is largely a replacement for renegotiation or whether it is a quite different tactic that arises from unique concerns, in which case it would require its own theoretical justification. Analytically, it might be challenging to discern between the renegotiation and termination techniques because they are frequently combined in practise. The initial IIA may be terminated as the result of renegotiation in some circumstances, while in others, termination is a component of a long-term renegotiation plan. Indonesia, for instance, is letting its current BITs expire as the first stage in a renegotiation plan rather than as a means of achieving this goal in and of itself.

However it is reasoned that if exiting IIAs are renegotiated without being terminated, there is a chance that foreign investors who currently rely on exiting IIAs to no longer be protected by the terminated agreement if no transitional arrangements are negotiated to do so, or if an expire provisions do not mention such.[1018]The unilateral termination (proposed by this research)[1019] and renegotiation of existing investment treaties are the two main methods states might use to modify existing IIAs. All strategies (unilateral terminations and renegotiations) are merged into one outcome of interest an empirical test that prove so.[1020] However, it is important to understand that a State may wish to terminate for reasons that are different from those that it might desire to renegotiate. However, in relation to Tanzania this research reason that the proposal for termination are ones that influence the renegotiation of new IIAs.

A renegotiated BIT is defined as a signed and ratified agreement that replaces an already mutually ratified BIT or an already mutually ratified BIT that contains a signed (and, if applicable, ratified) revision. This means Investment agreements that were drafted and then

[1018] Ibid

[1019] This is when IIAs are close to renewal date.

[1020] Tuuli-Anna Huikuri, "Terminating to Renegotiate: Bargaining in the Investment Treaty Regime" (2019) Available at https://www.peio.me/wp-content/uploads/2019/01/PEIO12_Paper_52.pdf (accessed 18/05/2022)

revised before becoming effective are not included in the definition of renegotiated treaties.[1021]There are three ways that existing BITs can be renegotiated. First, states have the option to maintain the current agreement while adding a new protocol. In these situations, the treaty modifications typically focus on a few of distinct topics (which may nevertheless be quite important to the parties). The Second option allow the parties to an existing agreement to establish a new investment treaty and include a provision that nullifies the earlier agreement. Third, instead of a BIT, the parties may opt for a free trade agreement (FTA) including an investment chapter. Here, only FTAs that expressly revoke and replace the BIT are included, such as those between the United States and Morocco and Taiwan and Nicaragua.[1022] Furthermore looking at UNCTAD study statistics it is proven that termination to renegotiate is a better strategy or option For example recently (2017) is was reported that out of t the number States that terminated their treaties particularly BITs 9% were bilateral terminated without the parties negotiating any replacement BIT, and 28% were unilaterally terminated without a replacement, and 63% were replaced by a new treaty**.**[1023]Following this empirical evidence, this research therefore adapts the first option but propose to terminate and renegotiate a BIT that have new FET provision.

On other hand to terminate and renegotiate as a mean of reform come with challenges, for example unilaterally termination of BITs might send a negative message to contracting partner States and foreign investors about how the government of Tanzania wish to change its commitment protecting them, which it may have negative effects the country reputation among a larger worldwide investment audience. On other hand, renegotiation takes time (from the experience of other states might take two to six years), effort, and cost diplomatic resources to renegotiate new BIT terms.[1024] Besides, existing IIAs can only be unilaterally terminated once the IIA is close to the expire date (like Tanzania – Netherland BIT termination was done) of which add more time for change.

[1021] Broude, Tomer and Haftel, Yoram Z. and Thompson, Alexander, "Legitimation Through Renegotiation: Do States Seek More Regulatory Space in Their BITs?" (2016). Forthcoming in Daniel Behn and Ole Kristian Fauchald, Empirical Perspectives on the Legitimacy of Investment Treaty Arbitration (2017)., Hebrew University of Jerusalem Legal Research Paper 17-1, Hebrew University of Jerusalem International Law Forum Working Series 06-16, Available at SSRN: https://ssrn.com/abstract=2845297 or http://dx.doi.org/10.2139/ssrn.2845297 accessed 27 July 2022

[1022] Yoram Haftel, and Alexander Thompson "When do states renegotiate investment agreements? The impact of arbitration" (2018) *The Review of International Organizations* 13(1)

[1023] https://unctad.org/system/files/official-document/diaepcb2017d3_en.pdf accessed 12 July 2022

[1024] Tuuli-Anna Huikuri, "Terminating to Renegotiate: Bargaining in the Investment Treaty Regime" (2019) Available at https://www.peio.me/wp-content/uploads/2019/01/PEIO12_Paper_52.pdf (accessed 18/05/2022)

Furthermore, majority of IIAs signed by Tanzania contain "survival clauses" that limit States legal advantages while still posing political and economic risks. On other hand, looking at other States experience, renegotiation is a more popular choice that has rapid results and enables recalibration of IIAs. Renegotiation has the additional benefit of enabling governments to regain freedom without violating existing agreements or giving the impression that the entire regime is being undermined. [1025] And records shows that several States have unilaterally terminated their treaties and renegotiated new owned with moderated provisions.[1026]

Looking figure 6.2 below,[1027] Haikuri reasoned that compared to the substantial number of BITs that are still in effect, the percentages of terminated and renegotiated investment treaties are tiny (scholar did look at exiting BITs that were in force 2359 and compared them to terminated one 216).[1028]However Thompson and his fellow[1029] empirically examined the reality of termination and renegotiation by examining and found out calculating from the past 25 years of reforming campaign about 200 investment BITs have been renegotiated since the initial round of negotiations, this provide hope that a renegotiation strategy is more safter for Tanzania to regain its sovereign power to regulate in favour of public.

[1025] Alexander Thompson, Alexander Thompson, Tomer Broude and Yoram Z. Haftel "Once Bitten, Twice Shy? Investment Disputes, State Sovereignty, and Change in Treaty Design" (2019) *International Organization* Volume 73 Issue 4
[1026] Ibid
[1027] By Tuuli-Anna Huikuri, "Constraints and Incentives in the Investment Regime: How bargaining power shapes BIT reform" (2020) Available at https://www.peio.me/wp-content/uploads/2021/papers/PEIOo21_paper_58.pdf accessed 19 July 2022
[1028] Ibid (page 2)
[1029] Alexander Thompson, Alexander Thompson, Tomer Broude and Yoram Z. Haftel "Once Bitten, Twice Shy? Investment Disputes, State Sovereignty, and Change in Treaty Design" (2019) *International Organization* Volume 73 Issue 4

Figure 6.2 Signed and terminated BITs

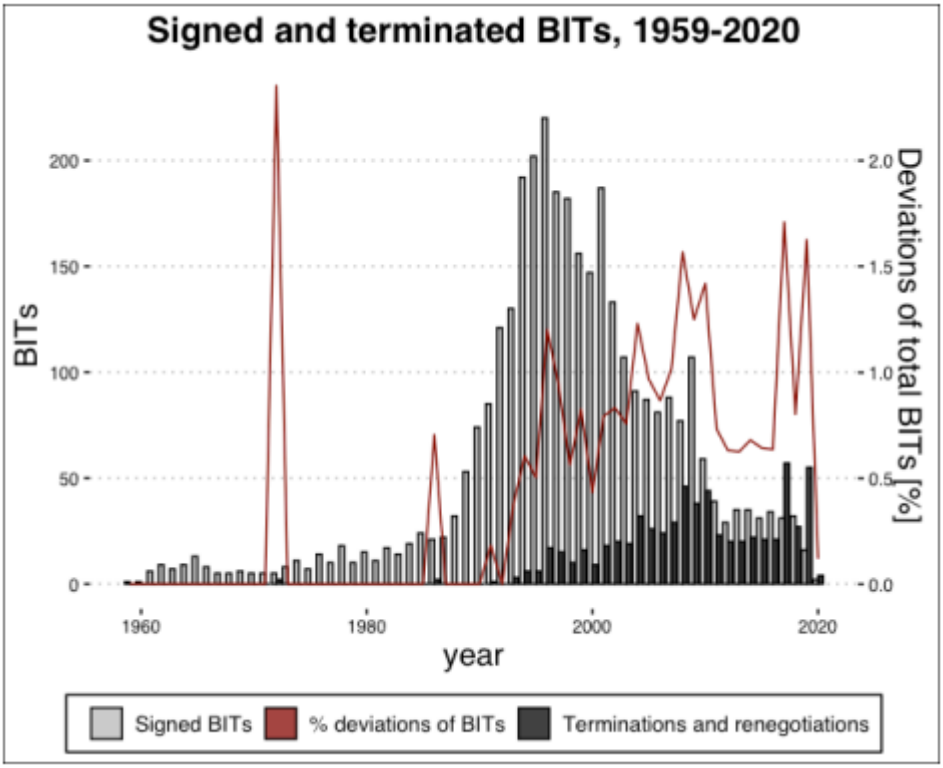


Figure 6.2 show the "signed BITs, terminations and renegotiations, and percentage of deviations of total stock of BITs signed over time"[1030]

Renegotiation argued to offer an empirical perspective into how Governments are dissatisfied with IIAs manifests in actual government choices to re-evaluate their treaty responsibilities, perhaps giving them greater legitimacy.[1031] Based on an original data set of 161 renegotiated agreements, it is argued that states have not consistently worked to adjust their BITs over time in order to maintain broader regulatory space.[1032] In point of fact, the majority of renegotiations claimed to make States more investor-friendly even though reform demonstrate a stronger propensity to restrict investor rights. Nevertheless, by terminating exiting IIA (following the expire dates) reasoned that Tanzania will somehow increase its bargaining power,[1033] which is

[1030] By Tuuli-Anna Huikuri, "Constraints and Incentives in the Investment Regime: How bargaining power shapes BIT reform" (2020) Available at https://www.peio.me/wp-content/uploads/2021/papers/PEIOo21_paper_58.pdf accessed 19 July 2022
[1031] Broude, Tomer, Yoram Z. Haftel, and Thompson Alexander, "Legitimation Through Renegotiation: Do States Seek More Regulatory Space in Their BITs?" (2021). In The Legitimacy of Investment Arbitration: Empirical Perspectives, p. 531-554.
[1032] Ibid
[1033] Tuuli-Anna Huikuri, "Terminating to Renegotiate: Bargaining in the Investment Treaty Regime" (2019) Available at https://www.peio.me/wp-content/uploads/2019/01/PEIO12_Paper_52.pdf (accessed 18/05/2022)

an advantage. This research however advice Tanzania to announce clear its intention of termination to reform it wish to terminate investment agreements are close to them expire dates to avoid unnecessary claims.

In summary this research insist that would be important for Tanzania to know that the proposal of amending their exiting IIAs will not take place possible unless their negotiating position with the other party to the bilateral treaty makes it possible for them to so.[1034]Chapter seven will clarify the propose of terms or provision that Tanzania can reform and renegotiate and evaluate the possibility of proposal.

6.9 Summary of the chapter

It has become clear throughout the chapter that there are many issues within the exiting international investment agreements signed by Tanzania and that the issues need to be resolved. Because of that this research suggests that in order for Tanzania to have to regain its sovereign power and regulate in favour of public, the Government needs to unilateral terminate existing IIAs and renegotiate with a new FET provision(Due to the fact that FET elements in existing Tanzania IIAs are vaguely worded and undefined).The chapter has also explained and discussed how Academia's, States and international institutions have provided significant inputs towards the drafting of new IIAs aiming to balancing investment protection with States regulatory power. Some countries have decided to terminate all existing IIAs, and replace them with new ones, while some have decided to use domestic legislation as a means of protecting foreign investors, and others moderate some of the provisions that they thought would help States to regulate without breaching IIAs. The objective of this chapter was to analyse the findings discussed in chapter five and consider a best way of reforming its IIAs in favour of host States (using Tanzania as case study) by learning from other countries discussed. The chapter also discussed evaluated different solutions that could be used to resolve the problem identified for the purpose of identifying the need for a reform. In it, the CETA, SADC model BIT (2012), UNICTAD, and UNCITRAL most recent reform proposal related to FET clause and evaluated different suggestion before addressing a reasonable remedy for Tanzania challenges.

[1034] Chapter seven will discuss Tanzania position

CHAPTER SEVEN: REFORM PROPOSAL

7.1 Introduction

Following the analysis of the various solutions that could be used to reform old generation IIAs.[1035] This chapter will propose and examine the potential reform strategy that Tanzania could use to rebalance IIAs in favour of it itself and the public. The chapter is therefore articulated into number sections and subsections. The first section will justify the chosen reform option (which is to reform the FET provision) and establish the look of the suggested Tanzania's new FET provision. Followed by the analysis of the proposed FET provision. Then discuss the possible reality of implementing the new FET provision in future IIAs and the challenges or renegotiating new FET provision.

7.2 Reform of FET Provision

By far, the most contested clause in IIAs is the FET provision. Statistics shows in more than 80% of recorded ISDS cases, investors alleged a breach of FET and because of the broad interpretations host States have frequently been charged for breaching FET which make investors win the claims. Thus, by providing clarification of the FET provision can significantly increase predictability for States and investors and an interpretive direction to arbitral tribunals. The less exposure to investment claims will definitely allow State to practise its sovereign power such as regulating in favour of public while protecting investors.[1036]

The "fair and equitable treatment" Standard is formulated in investment agreements in a variety of ways. While other agreements do not contain such a reference to international law, some agreements, particularly some BITs, expressly define the norm by reference to international law. The proper interpretation of the "fair and equitable treatment" standard depends on the precise wording of the particular treaty, its context, the object and purpose of the treaty, as well as on the negotiating history or other cues of the parties' intentions. This is because the "fair and equitable treatment" standard's formulations vary. For instance, several accords explicitly link or, in some situations, limit fair and equal treatment to the bare minimum of international customary law.

[1035] See Chapter 6
[1036] UNCTAD, "International Investment Agreements Reform Accelerator" (2020) Available at https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf accessed 22 July 2022

Depending on the context of the parties' intent, other treaties that either do not mention international law or link the standard to international law without mentioning custom, for instance, could be interpreted as granting the standard a scope of application that is broader than the minimum standard as established by international customary law. Regardless of how governments interpret the "fair and equitable treatment" standard, it is understood that the minimum standard refers to an evolving international customary law that is not "frozen" in time but may change over time depending on the general and consistent practise of States and opinio juris, which may be reflected in legal precedent pertaining to the interpretation and application of these treaties.

Consequently, this research proposes an extensive list of more precise requirements be used in place of the unqualified FET provision. Although Tanzania has little experience of being accused to breach of FET (most of cases are still pending),[1037] there is great potential of for arbitration claims related to FET obligation, which can cause severe impact on Tanzania economy and its development goals.[1038]Therefore having a different form of FET would take a fresh approach to dealing with important concerns (discussed in chapter 6) in a way that is more constrained and cautious than the FET language

7.2.1 Replacing FET with an exhaustive list of State obligations

Out of the ten options of modernising the existing stock of old generation treaties offered by UNCTAD in 2017,[1039] this proposal aligned the option two (amending treaty provision) and supported with the 2020 IIA reform accelerator focuses on eight key IIA provisions that needs reform the most and that have shown a clear tendency towards change in line with the sustainable development goals and towards protecting the State's power to regulate under IIAs. In its analysis UNCTAD mentioned FET provision as one of the protection standards that challenge genuine States measures and that the provision has a major influence on sustainable development or affect the host State's capacity to regulate in the interest of sustainable

[1037] See in Tanzania as a responded state in https://investmentpolicy.unctad.org/investment-dispute-settlement/country/222/tanzania-united-republic-of/respondent accessed 22 July 20200

[1038] Matthew Hodgson, "Briefing note: New laws create potential for arbitration claims against Tanzania" (2017) Available at https://www.allenovery.com/en-gb/global/news-and-insights/publications/briefing-note-new-laws-create-potential-for-arbitration-claims-against-tanzania ; Ying Zhu, "Fair and Equitable Treatment of Foreign Investors in an era of Sustainable development" (2018) *Natural Resources Journal* Vol. 58, No. 2 (Summer 2018), pp. 319-364

[1039] UNCTAD, "Phase 2 of IIA reform: Modernizing the Existing stock of Old-Generation Treaties" (2017) Available at https://unctad.org/system/files/official-document/diaepcb2017d3_en.pdf accessed 27 July 2022

development of which has been the major concern of this research. Three options in reference to reforming FET were offered which includes "replace FET with an exhaustive list of State obligations, clarify the FET standard, or reduce FET to a political commitment or entirely omit the FET clause"[1040]

While some countries have considered various solutions such as, termination of all existing IIAs, and use of domestic law to protect foreign investors as done by South Africa while some excluded FET in the new treaties. This study strongly supports a modernization approach that advances the goals and objectives of international investment protection. For that reason, the research argued that FET provision in IIAs is necessary for developing countries and excluding FET in future IIAs is likely to affect the flow of foreign direct investment (FDI) in developing country like Tanzania. Thus, unilateral termination of existing IIAs which are close to their expire dates and renegotiate future IIAs with a FET that has an exhaustive list of State obligations. The research insists on termination of existing treaties first because according to UNCTAD the replacements treaty provisions typically take effect through different agreements, and which is or can be ratified by the same parties.[1041]

Although it is within the exclusive rights of foreign investors to allege the violation of the FET clause and bring arbitral claims against host States however, it is pertinent that having a guide on the breach of state obligations that would constitute violation of the FET provision in Tanzania's future international investment agreements will reduce investment claims and broad interpretation of FET as it is now. This change reasoned to be important, as it will help to ensure predictability for both foreign investors and States on the obligations that would constitute violation of international investment agreements between the parties through FET provision; in addition, it will help to enhance interpretative guidance to arbitral tribunals.[1042] Below are examples of moderated FET provision in the most recent form of IIAs which have listed Specific States obligations that amount to breach of FET, in which this research adapt to rewrite Tanzania's new FET provision.

[1040] UNCTAD, "International Investment Agreements Reform Accelerator" (2020) Available at https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf accessed 22 July 2022
[1041] UNCTAD, "International Investment Agreements Reform Accelerator" (2020) Available at https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf accessed 22 July 2022
[1042] Yulia Levosha, "The right of States to regulate in their public interest and the rights of investors to receive Fair and Equitable Treatment: The search for balance in treaties and cases on international investment law ", (2018)

7.2.2 Example(s) of modern FET provision that exhaustively laying out States obligations that amount to breach of FET.

IIA	Article
Netherland model BIT (2019)	"9(2) A Contracting Party breaches the aforementioned obligation of fair and equitable treatment where a measure or series of measures constitutes: a) Denial of justice in criminal, civil or administrative proceedings. b) Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings. c) Manifest arbitrariness. d) Direct or targeted indirect discrimination on wrongful grounds, such as gender, race, nationality, sexual orientation or religious belief. e) Abusive treatment of investors such as harassment, coercion, abuse of power, corrupt practices or similar bad faith conduct; or f) A breach of any further elements of the fair and equitable treatment obligation adopted by the Contracting Parties in accordance with paragraph 3 of this Article."
Morocco Model BIT (2019)	"6.1 Investments made by investors of one Party in the territory of the other Party in accordance with its laws and regulations shall, in accordance with the provisions of this Article, be accorded fair and equitable treatment by the latter Party and full protection and security that should not be less than that accorded to its own investors and their investments or to investors of a third State and their investments. It is understood that: a) A party violates the obligation to provide fair and equitable treatment under paragraph 1 when a measure or series of measures, constituting: (i) a denial of justice in criminal, civil or administrative proceedings; or ii) a fundamental violation of the rights of the defence; or iii) targeted discrimination on patently unjustified grounds, such as gender, race or religious belief; or

	iv) grossly abusive treatment, such as harassment, coercion and pressure. Note: For greater certainty, the fact that an investor or investment does not achieve its desired results does not constitute a denial of justice. (b) the full protection and security set out in paragraph 1 refers only to the Party's obligations with respect to the physical security of investors and their investments in its territory and not to any other obligations. 6.2 For greater certainty, a change in the law of a Party does not in itself constitute a violation of section 6.1. 6.3 Nothing in this Article shall be construed to prevent a Party from taking any measure considered necessary to protect public order, public health or the environment, provided that such measures are not applied in a discriminatory, abusive or unjustified manner. 6.4 It shall not be a violation of this Article for a Party to take or fail to take any action that adversely affects the expectations of an investor. 6.5 It shall not be a violation of this Article that an investment incentive has not been granted, renewed or continued, or has been modified by a Party. 6.6 The income from the investment, if reinvested in accordance with the applicable laws and regulations of the Host Party, shall enjoy the same protection as the original investment. 6.7 A finding that a breach of any other provision of this Agreement or any other international agreement entered into by a Party does not constitute a breach of this Article. 6.8 The treatment provided in this Article shall apply to the management, maintenance, use, enjoyment, sale or liquidation in the territory of a Party of investments made by investors of the other Party"
Slovakia Model BIT (2019)	"6. Standard of Treatment 1. Each Contracting Party shall accord to investments and returns of investors of the other Contracting Party, and to investors with respect to

	their investments, at all times fair and equitable treatment and full protection and security in accordance with paragraphs 2 to 4. 2. A breach of the obligation of fair and equitable treatment referenced in paragraph 1 may be found only where a measure or series of measures constitutes: a) denial of justice in criminal, civil or administrative proceedings; b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings. c) manifest arbitrariness. d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or e) abusive treatment of investors, such as coercion, duress and harassment. 3. For greater certainty, "full protection and security" refers to the Party's obligations relating to physical security of investors and investments. 4. For greater certainty, a breach of another provision of this Agreement, or of a separate international agreement does not establish a breach of this Article. 5. Upon a proposal of a Contracting Party the Contracting Parties shall duly consider the amendment of the paragraph 2. of this Article in order to add other elements which constitute breach of the fair and equitable treatment obligation.”
Brazil -India (2020)	“4.1 Based on the applicable rules and customs of international law as recognized by each of the Parties and their respective national law, no Party shall subject investments made by investors of the other Party to measures which constitute: a) Denial of justice in any judicial or administrative proceedings. b) Fundamental breach of due process. c) Targeted discrimination, such as gender, race or religious belief. d) Manifestly abusive treatment, such as coercion, duress and harassment; or e) Discrimination in matters of law enforcement, including the provision of physical security. 4.2 Nothing in this Treaty shall be construed as to prevent a Party from adopting or maintaining affirmative action measures towards vulnerable groups.

	4.3 A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article. 4.4 Subject to its laws and regulations and policies on the entry of foreign nationals, each Party shall provide the facilities and the necessary permissions for the entry, exit, residence and work of the investor of the other Party and any national of the other Party having a permanent or temporary relationship with the investment, including administrators, experts and technicians. 4.5 Existing investments shall not be affected by subsequent changes in admission requirements."
Rwanda–United Arab Emirates (2017)	(4) Fair and equitable treatment "1. Each Contracting Party shall accord fair and equitable treatment and full protection and security to investors of the other Contracting Party and their covered investment in its territory in accordance with paragraphs 2 to 5. 2. A Contracting Party breaches the obligation of fair and equitable treatment referenced in paragraph l where a measure or series of measures constitutes: a. denial of justice in criminal. civil or administrative adjudicative proceedings. b. fundamental breach of due process in judicial and administrative proceedings. c. targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief. d. abusive treatment, such as coercion, abuse of power or similar bad faith conduct. or e. a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article"
CETA, Article More specific	8.10, paras 2-3 "A Party breaches the obligation of fair and equitable treatment referenced in paragraph [previous] if a measure or series of measures constitutes: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings. (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as

	gender, race or religious belief; (e) abusive treatment of investors, such as coercion, duress and harassment; or (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph [next] of this Article. The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment may develop recommendations in this regard and submit them to the Trade Committee for decision."

The table above provides examples of FET clause which Tanzania could adopt for its future IIA negotiations. The options above makes a clear effort of protect states' regulatory authority by outlining specific governmental activities that amount to breach of FET and other situations that cannot be seen as a violation of FET. Such provisions also allow foreign investors to be treated fairly just with limitation of which the research aim to impose. Having FET with exhaustive list of State obligations on other hand fit the principle underlying international investment regime which is to protect foreign investors rights and property but also to promote and increase FDI inflow in host States.[1043] An exhaustive list of state obligations is significant reforms in the regime of international investment agreements and arbitral jurisprudence that reflects the emergence of sub-elements of the fair and equitable treatment.

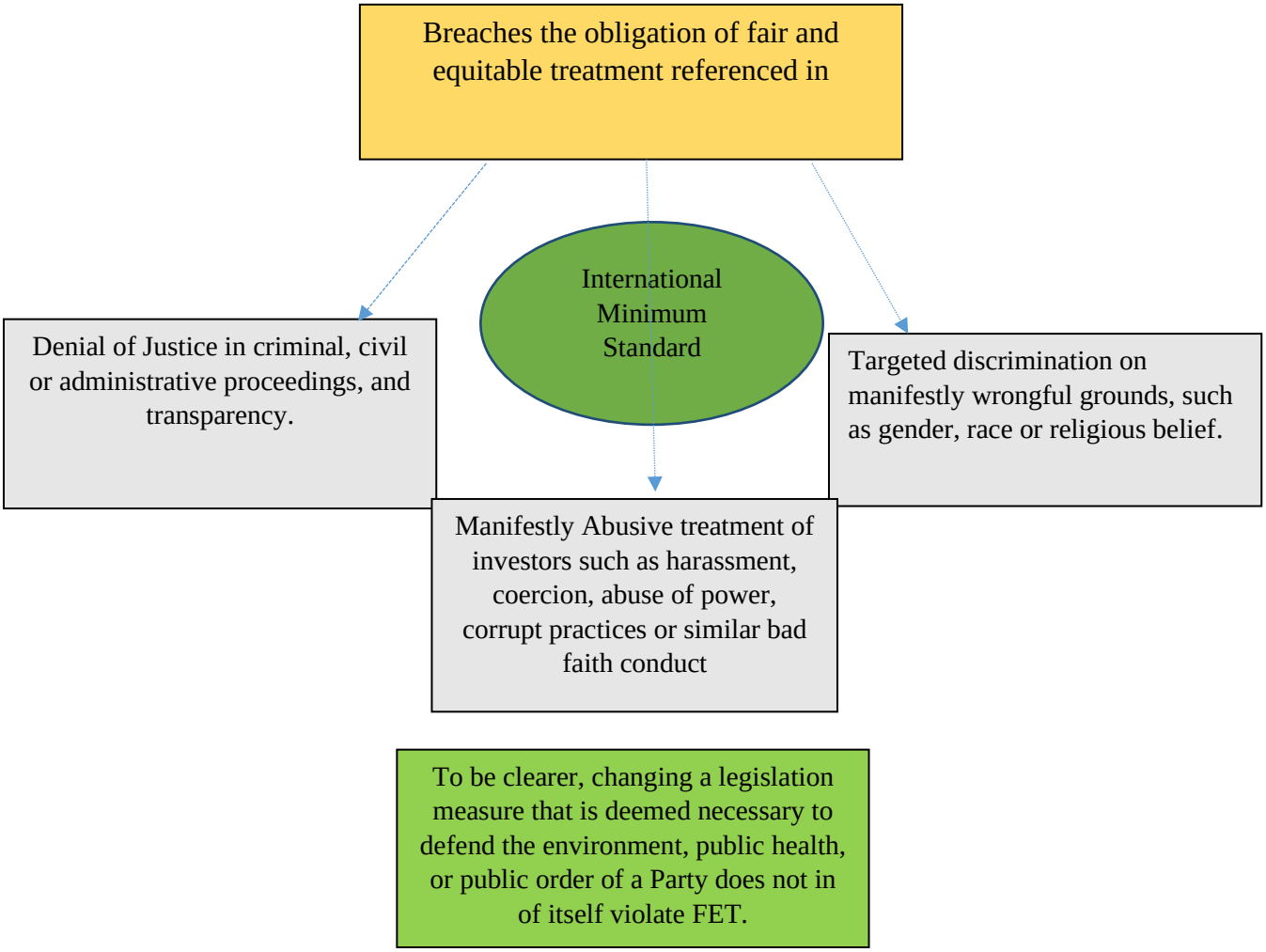
7.3 Elements of FET to be included in Tanzania model BIT

Arbitration tribunals, academics, and practitioners reportedly had trouble determining whether the FET norm referred to the minimal standard of care under customary international law or to an international standard. Also understanding imposed by existing FET provisions is the obligations that comes with it whether some of a stand-alone FET responsibility or a connection to other substantive rights. Further complicating matters is the inherent ambiguity of the terms "fair" and "equitable," particularly when it comes to the host State's regulatory freedoms

[1043] Bonnitcha, Jonathan, Skovgaard Poulsen, Lauge N, & Waibel, Michael. "The Political Economy of the Investment Treaty Regime" (2017). Oxford: Oxford University Press USA – Oso

without going against the protection standard. Following the issues above this research suggest a proposal that can resolve majority of the discovered issues under exiting FET provision. Below (7.3.1) are elements proposed to be included in the new FET provision in Tanzania IIAs. The wording of proposed FET clause will be a bit long compared to the existing FET provisions available in Tanzania existing IIAs.

7.3.1 Exhaustive List of State Obligations (and words of clarity) to be included in Tanzania's future IIAs as breach of FET.



The identified elements appear to have sufficient legal content to allow the interpretation of FET and cases related to it to be judged on the basis of law in accordance with the Vienna

Convention on the Law of Treaties,[1044] and decisions not to be made by a process approaching ex aequo et bono. And comparing it to existing FET provision in Tanzania IIAs the suggested has key elements that offer more specific description of the duty to treat foreign investors and their investments fairly and equally. The wording of provisions also seeks to protect rules that aim to achieve "legitimate policy objectives," does provides room for regulation to combat anti-competitive behaviour and also from the mentioned obligations sustainable development can be achieved, acknowledged and promoted.

Furthermore, following the suggestion above it would be inappropriate at in future claims to establish a broad interpretation of the "fair and equitable treatment" standard. The jurisprudence which has applied in proposed FET and identified elements of its normative content is relatively recent and therefore does not allow broad interpretation.

Even though the inclusion of minimum protection standard in FET has been criticised not to be a major means of avoiding interpretation,[1045] but in order to avoid a too broad interpretation of fair and equal treatment, the new FET will specify that fair and equitable treatment is limited to the international minimum standard and investors should not demand treatment above and beyond what is necessary by that standard, nor should they create any new substantive rights, as long as treatment does not exceed the minimal level.[1046] Simply it can be said that the words under new suggested FET protection hope to limit the scope of interpretation as it will provide a clarity on state acts that constitute breach of FET provision, also more specifically the FET provision that its wording proposes a right of state to regulate.

7.4 Analysis of the potential solution

This section will discuss possible challenges that could make it hard for Tanzania and its negotiators to implement this reform proposal.

According to UNCTAD, replacing old providing in treaty with a new one come with number of challenges, this includes the need of a treaty partner or parties participation with comparable

[1044] Ibid
[1045] See chapter 4
[1046] Lebero, Richard K. "The international law framework for foreign investment protection: an analysis of African treaty practice." (2012) PhD research

viewpoint. Also, reform process does not always ensure the inclusion of reform-oriented aspects (depends on the negotiated conclusion). Furthermore, the reform process may require an effective transition between the old and new treaty provisions and lastly it can be expensive and time-consuming because it entails renegotiating entire treaty sections.[1047] The next paragraphs will discuss mentioned points in detail.

This reform proposal might not come to force if contracting partners do not agree with the change of FET provision. In other words, they are supposed to be involved in the reform process as an agreement is needed. The term agreements in IIAs means the contracting parties have to reach to trade agreements and make both sides to obligated or abide by their provisions.[1048] For the reform to be successful or partners contracting partners have share the same opinions that perhaps Tanzania has(replacing the exiting FET with an exhaustive list of State obligations). If other contracting States are not happy or not in agreement with the new FET provision (based on the interest of their investments), then could be impossible to establish a change.

In aspect of interest, it is reported that foreign investors have already shared their point of view regarding the new FET that it is more restrictive compared to the old FET,[1049] because it does limit the capacity of an arbitral tribunal to adopt a broad interpretation of the substantive obligation hence can be a challenge to renegotiate it. For such reason research argue that it is important for Tanzania to build or have greater negotiating power to help modifies the treaty to better reflect its interests and avoid future complains.[1050] According to OHCHR, countries that compete to attract direct foreign investment, they frequently experience unequal reciprocity rather than reciprocal gain due to asymmetrical access to information, interest, and bargaining skills.[1051] It is the negotiation process and power explain why do States chose to either terminate and renegotiate or to keep their old treaties and since this proposal recommend

[1047] UNCTAD, "International Investment Agreements Reform Accelerator" (2020) Available at https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf accessed 22 July 2022
[1048] Ibid
[1049] Alvin Yeo SC, Chou Sean Yu and Koh Swee Yen, "Accessing Investment Treaty Protection: The Investor's Perspective" (2022) Available at https://globalarbitrationreview.com/guide/the-guide-investment-treaty-protection-and-enforcement/first-edition/article/accessing-investment-treaty-protection-the-investors-perspective accessed 27 July 2022
[1050] Tuuli-Anna Huikuri, "Constraints and Incentives in the Investment Regime: How bargaining power shapes BIT reform" (2020) Available at https://www.peio.me/wpcontent/uploads/2021/papers/PEIOo21_paper_58.pdf Accessed 19 July 2022
[1051] OHCHR, 'Reforming International Investment Agreements' (2021) Available at https://www.ohchr.org/sites/default/files/2022-06/Reforming-International-Investment-Agreements.pdf accessed 25 July 2022

terminate to renegotiate their IIA. The next subsection will discuss and analyse notion behind bargaining power.

7.4.1 Negotiation Power to reform FET provision

Power defined as "is the ability to move a party in an intended direction."[1052] Power has a well-known impact on how well negotiators perform,[1053] and the balance of bargaining power in any given negotiation process is influenced by a number of factors both "coercive" and "persuasive" sources of power.[1054] If there is no balance, the stronger party always negotiate to its advantages while the weaker party tries to manage its position which makes them rule taker.[1055] In this proposal (renegotiating FET provision in future IIAs) capital exporting countries assumed to be rule maker in other words it is said that as they have more bargaining power, they can persuade host State with the benefits that comes with investments such as increase of revenue, employment, increase of technology,[1056] while Tanzania in exchange of natural resource still assumed to be a rule taker (needs the benefit of FDI to develop),[1057] and that it is argued the physical resources and institutional frameworks are not always determine the bargaining power in international relations.[1058]For that reason Tanzania could face challenges to convince contracting partners to renegotiate new IIAs with new FET if contracting partners are not happy with such changes.

On other hand this research argues that Tanzania has affect its small bargaining power by imposing number of obstacles to foreign investors in natural resources following the measures passed in 2017 by the late president John Magufuli,[1059] which referred to be investor unfriendly.

[1052] Frank Pietsch, "Power in International Negotiations: Symmetry and Asymmetry" (2012) Available at https://www.cairn.info/revue-negociations-2011-2-page-39.htm Accessed 19 July 2022

[1053] Peter Kim, Robin Pinkley, and Alison Fragale, "Power Dynamics in Negotiation" (2005) *Academy of Management Review*, 30, 799-822.

[1054] ibid

[1055] Alschner, Wolfgang and Skougarevskiy," Dmitriy, Rule-Takers or Rule-Makers? A New Look at African Bilateral Investment Treaty Practice" (2016). TDM Special Issue on Int'l Arbitration involving Commercial and Investment Disputes in Africa (Forthcoming), Available at http://dx.doi.org/10.2139/ssrn.2791474 accessed 12 June 2022

[1056] Moga Tano Jilenga, Helian Xu and Igor-Mathieu Gondje-Dacka, "The Impact of External Debt and Foreign Direct Investment on Economic Growth: Empirical Evidence from Tanzania" (2016) *International Journal of Financial Research* Vol. 7, No. 2; 2

[1057] Tesfaye Ayalew Mekonen, Athuman Makona, Hanna Sokalava, Mohammed Ramadan, and Minojiddini Gulnorai, "Bargaining Power of Developing Countries in Trade Negotiations" (2019) Available at https://libeldoc.bsuir.by/bitstream/123456789/38057/1/Mekonen_Trade.pdf Accessed 14 July 2022

[1058] Ibid

[1059] See in chapter 5

The measures passed argued to lead to a rise in investor mistrust, and harmed Tanzania's reputation from what it was a 'business-friendly nation'.[1060] Furthermore, it is argued that a limited industrial development, environmental concerns, lack of transparency, inadequate legal compliance, and dynamic of labour market supported by rigid labour laws in Tanzania has and can affect Tanzania bargaining power.[1061]

Simply it has been established by number of scholars that when a richer source country and a poorer host country (as Tanzania) are negotiating some terms developed States has power over developing.[1062]Following this reasoning, this research can evidently explain why number of developing States signed investment agreements that constrain their sovereign power and sustainable development.

Thus, if Capital exporting countries assumed to have more bargaining power over developing States.[1063] Therefore there could be some concern whether capital will positively respond to the new wording of FET that Tanzania wish to renegotiate.

Nevertheless, it is argued that developing States mostly Africans States to stop being naive counterproductive on this 21st century. And that they need to pursue its need for reforming investment treaties by renegotiating existing treaties or withdrawing from them and prepare ones that support the need of State. Moreover, it is not an accident that the majority IIAs reform initiatives have been led by countries that assumed to have less bargaining power countries with poor economic condition and named as rule takers such as India, South Africa, Ecuador, Bolivia and Indonesia, these countries unilateral terminated most of their old generation IIAs in from of BITs and were able to renegotiate the new one of which some are in force.[1064]

[1060] Ibrahim Amir, "A Wind of Change! Tanzania's Attitude towards Foreign Investors and International Arbitration" (2018) *Kluwer Arbitration Blog* Available at http://arbitrationblog.kluwerarbitration.com/2018/12/28/a-wind-of-change-tanzanias-attitude-towards-foreign-investors-and-international-arbitration/ accessed 12 June 2020

[1061] Export Enterprise, "Country risk of Tanzania : Investment" (2022) Available at https://www.objectif-import-export.fr/en/international-marketplaces/country/tanzania/country-risk-in-investment (accessed 18 July 2022

[1062] Ernest Stern and Wouter Tims, "The Relative Bargaining Strengths of the Developing Countries" (175) American Journal of Agricultural Economics Vol. 57, No. 2 (May 1975), pp. 225-236 (12 pages), Anke Moerland, o "Developing Countries Have a Say? Bilateral and Regional Intellectual Property Negotiations with the EU" (2017) IIC - *International Review of Intellectual Property and Competition Law* volume 48, pages760–783, Moga Tano Jilenga , Helian Xu and Igor-Mathieu Gondje-Dacka, "The Impact of External Debt and Foreign Direct Investment on Economic Growth: Empirical Evidence from Tanzania" (2016) *International Journal of Financial Research* Vol. 7, No. 2; 2

[1063] Tania S. Voon, Andrew D. Mitchell and James Munro: "Parting Ways: The Impact of Investor Rights on Mutual Termination of Investment Treaties", (2014) ICSID Review - Foreign Investment Law Journal available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2365996.

[1064] Ibid

Not to forget the Government of Tanzania officially transitioned from a low-income country to a lower-middle-income country in July 2020, it marked an important turning point.[1065] For such reason, if economic power support bargaining power of State during the negotiations of investment treaties the research advice Tanzania that now it in a good position to terminate and renegotiate IIAs starting with BITs.

7.4.2 Transition Time and Cost

Other proposed challenged that assumed could affect the implementation of this reform proposal is the Cost of reforming IIAs.

It is mentioned that reforming IIA provision can be expensive and time-consuming because the negotiation of one provision involves the whole treaty and therefore would be like starting from scratch.[1066] Taking India as an example the country announced its intention of reforming its future investment agreements in 2011 and the new model BIT was reviled late 2015.[1067]Also looking at Indonesia reforming process, the country started to announce the termination of their old generation BITs in 2014 and actively started to renegotiate them in 2018.[1068]The process of terminating and renegotiating can cost time from the few selected country used as an example the process took approximately four years, even though in their case the country were rewriting the chole treaty, UNCTAD argued reforming IIA provision process could be similar to reforming the whole model of agreement.[1069]

Conversely Netherland reform process did not take much of time as it did announce the draft in 2018 and the new model was available to the public by 2019.[1070] The difference between the

[1065] World Bank," The World Bank in Tanzania: The World Bank supports Tanzania's growth through policy analysis, grants, and credits, with a focus on infrastructure and the private sector." (2020) Available in https://www.worldbank.org/en/country/tanzania/overview accessed 19 July 2022
[1066] UNCTAD, "International Investment Agreements Reform Accelerator" (2020) Available at https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf accessed 22 July 2022
[1067] Pushkar Anand, "Why India's Bilateral Investment Treaty Model Needs a Rethink:
A recent report by the Standing Committee on External Affairs shows how there are two missing pieces to the puzzle"(2022) available at https://thewire.in/business/why-indias-bilateral-investment-treaty-model-needs-a-rethink accessed 22 July 2022.
[1068] David Dawborn, Gitta Satryani, Antony Crockett, and Tomas Furlong, "New Procedural Rights for Investors as Indonesia-Singapore BIT Comes into Force" (2021) Available at https://hsfnotes.com/indonesia/2021/03/17/new-procedural-rights-for-investors-as-indonesia-singapore-bit-comes-into-force/ accessed 30 July 2022
[1069] Ibid
[1070] Kabir Duggal, and Laurens van de Ven, "The 2019 Netherlands Model BIT: riding the new investment treaty waves" (2019) Arbitration International, Volume 35, Issue 3, Pages 347–374, https://doi.org/10.1093/arbint/aiz013

timing of these two countries is the availability of expertise in the country. The level of expertise (power of expertise) can also be called negotiating power as in relate to other factors considered in bargaining power.[1071] A good expertise in negotiation has power to convince or change the perception of other negotiating party.

However, just like other developing countries India mentioned to have lack of international lawyers who are expertise and experience to write new model BIT hence more time and cost.[1072]Similar situation could be argued to Tanzania the country does not have enough expertise with experience and for that reason the government might need to employ expertise who might cost a huge amount of money.[1073]Also understanding the fact that Tanzania does not have a model BIT,[1074] the government might need even more time to design a model BIT that will include a proposed FET and more time could be needed to renegotiate the agreement with contracting partners. Simply it can be said that the reform initiatives cost, might take up time, require skilled labour, and can be bureaucratic. However, the costs or impacts of reforming existing Tanzania IIAs reasoned to be lesser compared to the cost of keeping existing IIAs because as the country is working towards its goal of increase sustainable development it might be dealing with arbitration cost defending investors claims. Additionally, the restrictions on state regulatory space might continue to affect Tanzania sovereign power through the commitment imposed by FET clause in exiting IIA. Therefore, the research sees the need and possibility of implementing the proposed changed despite of the cost that reform process come it.

[1071] Tarald Laudal Berge and Oyvind Stiansen, "Negotiating Power with Models: The power of Expertise" (20160

[1072] Shubham Dutt,"Standing Committee Report Summary India and Bilateral Investment Treaties" (2021) PRS *Legislative Research* Available at https://prsindia.org/files/policy/policy_committee_reports/Standing%20Committee%20Report%20Summary_India%20and%20Bilateral%20Investment%20Treaties.pdf accessed 27 July 2022

[1073] Jolyon Ford, *Unable or Unwilling*? Country study iv: Tanzania (ISS Monograph Series 2008) Yarik Kryvoi," Three Dimensions of Inequality in International Investment Law" (2020) *The British Institute of International and Comparative Law (BIICL)*

[1074] A model BIT is a version of a contract that can be used as a guide during negotiations. However, this research could not access Tanzania model BIT which prove the absence of it. Most of model BIT might be formally produced by the state and made public, or it could be more informal and used just by the state internally in this line of discussion Tanzania has not made it publicly whether they have a model BIT which is a challenge of this proposal.

7.4.2 The Way Forward

Even though there is an underlying asymmetric discussion that shape IIAs,[1075] these agreements mostly BITs are 'viewed as an equilibrium established between two or more States', which reflects on their counter balancing and interests and negotiating strength.[1076] It is argued that there not a single trade agreement that is indisputably beneficial or terrible, instead, it all relies on how the country negotiates.[1077] When it comes to BIT negotiations, States usually take one of two approaches depending on the existing status of the country.

If a state possesses a model BIT text, it may choose to negotiate from it. Most of States have a model BIT text which is used or decide to negotiate the expected investment agreement. This is made by States formally and can be accessed by public, however Tanzania assumed not to have one.[1078] However it is mentioned that States may be alternative to their treaty practise in the absence of a model BIT, State usually adopt the agreement from other treaties within similar subject on consistency with States existing obligation and policy, particularly where the negotiating parties have already reached an agreement on identical subject matter the country may propose its term (here the research refer to the proposed FET) before the conclusion of IIA.[1079]

[1075] Todd Allee and Clint Peinhardt, "Evaluating Three Explanations for the Design of Bilateral Investment Treaties" (2013) *World Politics,* Volume 66, Issue 1. Factor in determining symmetry and asymmetry in negotiating processes is the power dynamic and its relational qualities. These factors include political power, economy and knowledge, See in Frank R. Pfetsch, "Power in International Negotiations: Symmetry and Asymmetry" (2012) Available in https://www.cairn.info/revue-negociations-2011-2-page-39.htm accessed 17 July 2022

[1076] Dr Alex Mills "The Balancing (and Unbalancing?) of Interests in International Investment Law and Arbitration" (u.n) Final draft, for inclusion in Z Douglas, J Pauwelyn and J Vinuales (eds), 'The Foundations of International Investment Law' (forthcoming, OUP) Available on https://core.ac.uk/download/pdf/16262819.pdf (accessed 14/11/2021)

[1077] Tesfaye Ayalew Mekonen, Athuman Makona, Hanna Sokalava, Mohammed Ramadan, and Minojiddini Gulnorai, "Bargaining Power of Developing Countries in Trade Negotiations" (2019) Available at https://libeldoc.bsuir.by/bitstream/123456789/38057/1/Mekonen_Trade.pdf Accessed 14 July 2022

[1078] Kristi How and Emily Choo, "Negotiation, Compliance and Termination of Investment Treaties: The State's Perspective" (2022. Available at https://globalarbitrationreview.com/guide/the-guide-investment-treaty-protection-and-enforcement/first-edition/article/negotiation-compliance-and-termination-of-investment-treaties-the-States-perspective#footnote-026 (accessed 02/05/2022)

[1079] This fits the need of Tanzania which does not have a model of BIT or other investment agreement.

In either case, these techniques mentioned to allow governments to engage in more efficient discussions by building on previous experience rather than negotiating a draught treaty from the ground up. They also assist states in drafting legislation that is compatible with their existing duties and investment strategy.[1080]For the negotiations of proposed FET provision to be successful, partied involved are expected to make a compromise in return for similar or greater concessions from the other party. Even though capital exporting countries in the negotiation assumed to have significant bargaining power, it is highly unlikely that a consensus will be reached if countries on both sides of the negotiation only focus on their own respective needs and interests, ignoring the needs and interests of countries on the other side of the negotiation such as protecting States sovereign power, human rights and the environment.

Though, it is obvious that a country's ability to influence other negotiating nations for its own advantage increases with its level of bargaining power, and the opposite is also true.[1081]This research reasoned that if Tanzania's negotiators address the purpose of amending the exiting FET which is ensuring that the FET protection standard does not prevent governments from acting legally to safeguard the welfare of the public and promoting sustainable development. Would have the ability to have a competitive bargaining power over investment negotiators (capital exporting countries). In support of this, Mann and Moltke contended that no one can continue to ignore the environmental and sustainable development implications of their decisions, as has been the case in the expanded investment negotiations since 1990.[1082] Threats to the environment are now considered to be threats to both national security and the economy for that reason investors need to be concerned too. The two scholars added that environment and sustainable development are part of what investors do, and if not, it is a very essence of what they do. For that reason, there is no longer any justification for to simply encourage investment and market liberalisation while leaving the sustainability aspects to national legal frameworks especially when IIAs are expressly governed by international law that recognise

[1080] Chester Brown, "Introduction: The Development and Importance of the Model Bilateral Investment Treaty", in Commentaries on Selected Model Investment Treaties (Oxford University Press, 2013), in Kristi How and Emily Choo, "Negotiation, Compliance and Termination of Investment Treaties: The State's Perspective" (2022)

[1081] Tesfaye Ayalew Mekonen, Athuman Makona, Hanna Sokalava, Mohammed Ramadan, and Minojiddini Gulnorai, "Bargaining Power of Developing Countries in Trade Negotiations" (2019) Available at https://libeldoc.bsuir.by/bitstream/123456789/38057/1/Mekonen_Trade.pdf Accessed 14 July 2022

[1082] Howard Mann and Konrad von Moltke, "Protecting Investor Rights and the Public Good: Assessing NAFTA's Chapter 11" (2018) Background Paper to the ILSD Tri-National Policy Workshops Mexico City: March 13; Ottawa March 18; Washington: April 11 http://www.iisd.org/trade/ILSDWorkshop accessed 27 July 2022

and promote sustainable development,[1083] and promote State's sovereign power.[1084] Understanding this the party would be in weak position not to agree with the proposed FET in future IIAs

This section analysed the reform proposal assessed the realistic and possibility of it to be attained and since both parties' host and investors home state must come to an agreement. And conclude that Both parties may benefit more from the reform idea if it is implemented. The section adds that in reference to bargaining power it is important for the negotiators to keep in mind that both developed and developing countries have a stake in seeing FDI rise. Not only do developing nations want to attract it, but wealthy nations also want to provide their investors with more and better options. Therefore, it is evident that despite the cost and time of renegotiating future IIAs this proposal can easily be implemented.

7.4 Summary of the chapter

Tanzania has shown its intention of reforming its exiting IIAs by making sure that all investment-related policies favoured both the country's development and its citizens through the Netherland BIT termination.[1085]The objective of this chapter was to recommend a solution that would rebalance IIAs in favour of State. The chapter has made it clear that reforming FET provision by replacing old one a FET with an exhaustive list of State obligations will align with the new generation of FET and more important will help narrowing the scope and application of FET when tribunal interpret it as it makes it clear which specific government conduct would amount to breach of FET, and not just any procedure that can possibly affect investors interest(s).

[1083] See Virginie Barral, "Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm" (2012) European Journal of International Law, Volume 23, Issue 2, May 2012, Pages 377–400, https://doi.org/10.1093/ejil/chs016 .Also at https://www.un.org/esa/sustdev/sdissues/intl_law/law_decisions.htm accessed 27 July 2022

[1084] Sneha Dawda, "To What Extent Does International Law Reflect the Sovereign Will of States?" (2016) Available at https://www.e-ir.info/pdf/62880 accessed 27 July 2022, Samantha Besson, "Sovereignty" (2011) Available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472 accessed 27 July 2022

[1085] Ibid

Chapter Eight: Conclusion

IIA provisions argued to be inadequately constructed, and that were not negotiated, but simply placed on the table and signed with no clue that it would have actual affects them.[1086] In line with this argument, this research conclude buy saying that when Tanzanian officials when signing IIAs in the 1990s, neglected to consider the effects of certain of the IIA provisions (particularly FET). Because of this, foreign investors have been utilising FET provision to argue against any policy the State adopts in favour of public interest, and some tribunals have held the state accountable for using its sovereign authority in accordance with the law.

The consequences of Tanzania signing IIAs (that are in force now) did not come under scrutiny until the twenty-first century, when the Tanzanian government found itself on the receiving end of a first significant claim in 2005, the *Biwater V. Tanzania*. By signing existing IIAs Tanzania sincerely intended to attract international investors who would help to strengthen the country's economy but potentially accomplish the opposite. Provost and Kennard argue that it is like making something with the finest of intentions, and then it grows and attacks you,[1087]this is precisely explained how exiting Tanzania have cost its sovereign power. Instead of stimulating economic growth, IIAs have frequently resulted in restrictions on the types of policies that emerging countries may employ to boost their home economy and regional businesses.[1088] This explains why India, South Africa, Bolivia, Indonesia, Netherlands, and Australia, as well as Tanzania, have terminated some of their old IIAs.

Building off from the existing literature, this research examined all BITs signed by Tanzania (from 1965 – 2013) as a sample to examine the how FET provision contributed to Tanzania's difficulties in formulating policies promoting sustainable development and upholding human rights as a sovereign state. The findings confirm that the wording of the FET provisions in the majority of Tanzanian BITs are not uniform, vague and susceptible to various interpretations, which explains why the majority of States' reasonable measures were deemed unfair and gave

[1086] Prof. Christopher Schreuer, oral testimony on behalf of the Claimant, Wintershall Aktiengesellschaft v. Argentina, ICSID Case No. ARB/04/14, Award (8 Dec. 2008), at 85.
[1087] Comment in Claire Provost and Matt Kennard in "The obscure legal system that lets corporations sue countries" (2015) Available at https://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corportations-sue-states-ttip-icsid accessed 10 June 2020
[1088] OHCHR, "Reforming International Investment Agreements" (2021) available at https://www.ohchr.org/sites/default/files/2022-06/Reforming-International-Investment-Agreements.pdf accessed 25 July 2022

rise to investment claims. For that reason, this research highly recommended Tanzania to terminate other IIAs that are approaching their expiration dates and renegotiate to replace the outdated FET with a comprehensive list of State duties, despite the fact that the question of negotiating power was addressed. The study also suggested that while (re)negotiating future IIAs, States negotiators should be precise and confident by ensuring that the other contractual parties comprehend the rationale behind the change.

Having a more defined FET provision as one proposed will help to correct the disparity between the host State and foreign investors in IIAs. Also since the existing FET reasoned to prevents Tanzania from using their sovereign authority to regulate in the public interest under IIAs the proposal from this research has proposed some wording to be added in FET provision on top of an exhaustive list of State obligations which specify that any action deemed essential to safeguard the environment, public health, or public order as long as it is not done in a biased, abusive, or unreasonable way would not count as breach of FET as Morocco model BIT (2019) did. This clarification will assist Tanzania in regulating the public interest and serving the IIAs' goal of protecting and treating foreign investors equitably.

In summary it can be said that this research also recognises that the State's investment treaty-related problems might not be entirely resolved by changing the FET provision. However, replacing FET with an exhaustive list of State obligations may undoubtedly lower the number of FET claims, awards against the state, and enable the State to regulate in the public's best interests and other sustainable development goals. Using FET provision, the reform proposal has provided answers to questions that could be addressed, such as how long it might take Tanzania to implement the changes suggested and whether the proposal could be the solution to all of Tanzania's problems with IIAs. It also addresses other issues, like the lack of sustainability and cooperative social responsibility provisions in IIAs. However, there are elements in IIAs that have been noted to be problematic when attempting to balance the interests of the contracting parties, including Full protection and security, most favoured national treatment, Indirect Expropriation, national treatment and definition of investment which were not addressed in this research.

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