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**SAFEGUARDING THE STATE'S REGULATORY  
AUTONOMY: RETHINKING BILATERAL  
INVESTMENT TREATIES IN KENYA**

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## **ABSTRACT**

The current regime under which Bilateral Investment Treaties (BITs) are negotiated is tilted in favour of the foreign investor. Consequently, the BITs that have been concluded by Kenya curtail the government's regulatory autonomy. This is made possible through formal trappings of the law, which though subtle and indirect, lead to chilling implications on the government's regulatory autonomy over foreign investments. While the situation can be blamed on poor negotiation skills on the part of the Kenyan government, in reality, such would be just but an epidermal view as the problem runs much deeper. Through an interpretative analysis of the historical emergence of BITs, this paper argues that BITs were intended to achieve just that – limit governmental action aimed at regulating foreign investments. Therefore, a critique of BITs, purely on textual analysis, would be misplaced, not because of lack of legitimacy in the concerns, but rather, for a failure to appreciate the role played by these ever-present historical nuances. It is for this reason that this paper contextualizes its analysis of BITs within the greater historical context with the ultimate aim of unravelling the implication of this skewed normative framework on the regulatory autonomy of the Kenyan government. The paper demonstrates the pitfalls that await a country too eager to trade its rights to full sovereignty in the hope of growing its economy through Foreign Direct Investments. By so doing, this paper advocates for a conscious management of Kenya's BIT portfolio and a possible rethinking of the necessity of BITs for the country.

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## **DECLARATION**

I, ....., hereby declare that this Thesis is original and has never been presented in any other institution. I also declare that any secondary information used in this Thesis has been duly acknowledged.

SIGNATURE:.....

DATE:.....

## **APPROVAL**

### **SUPERVISOR**

This thesis has been submitted with my approval as University of Nairobi Supervisor.

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## **DEDICATION**

I dedicate this Thesis to my parents and my brother. As my family, you remain my pillars of strength and my bedrock of support. You are, so I am. I hope I have made you proud.



## **ACKNOWLEDGEMENT**

I thank God for the successful completion of this Thesis. Indeed, He has been my ever present help; always lighting my paths and guiding my steps. I owe it all to Him.

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The errors and mistakes in this paper are solely by the author.

## **TABLE OF STATUTES AND LEGAL INSTRUMENTS**

### **DOMESTIC LEGISLATION**

The Constitution of Kenya, 2010.

Foreign Investments Protection Act. Chapter 518, Laws of Kenya.

Investment Promotion Act. No. 6 of 2004, Laws of Kenya.

Natural Resources (Classes of Transactions Subject to Ratification) Act. No. 41 of 2016,  
Laws of Kenya.

Mining Act. No. 12 of 2016, Laws of Kenya.

### **BILATERAL INVESTMENT TREATIES**

Agreement between the Government of the Italian Republic and the Government of the Republic of Kenya on the Promotion and Protection of Investments (1996).

Agreement between the Government of Japan and the Government of the Republic of Kenya for the Promotion and Protection of Investment (2017).

Agreement between the Government of the Republic of Japan and the Government of the Republic of Kenya for the Promotion and Protection of Investment (2017).

Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the Promotion and Protection of Investments (1999).

Agreement between the Swiss Confederation and the Republic of Kenya on the Promotion and Reciprocal Protection of Investments (2006).

Agreement on Economic Co-operation between the Government of the Kingdom of the Netherlands and the Government of the Republic of Kenya (1970).

Treaty between the Federal Republic of Germany and the Republic of Kenya concerning the Encouragement and Reciprocal Protection of Investments (1996).

Declaration of Special Arrangements for the Reciprocal Promotion and Protection of Investments between the Government of the Republic of Kenya and the Government of the Republic of Finland (2009).

Declaration of Special Arrangements for the Reciprocal Promotion and Protection of Investments between the Government of the Republic of Kenya and the Government of the State of Kuwait (2015).

## **LIST OF ABBREVIATIONS AND ACRONYMS**

BIT	Bilateral Investment Treaty
CFIA	Cooperation and Facilitation Investment Agreement
FCN	Friendship, Commerce and Navigation Treaties
FDI	Foreign Direct Investment
FIPA	Foreign Investments Protection Act
GDP	Gross Domestic Product
ICSID	International Centre for the Settlement of Investment Disputes
IPA	Investment Promotion Act
KIA	Kenya Investment Authority
MFN	Most Favoured Nation
MNC	Multi National Corporation
NIC	National Investment Council
OECD	Organization for Economic Co-operation and Development
UNCTAD	United Nations Conference on Trade and Development
USD	United States Dollar

# CHAPTER 1

## RESEARCH PROPOSAL

### 1.0 Introduction

The global economy is characterized by the engagement in business, not only within the territorial boundaries of a country, but also across them.<sup>1</sup> Consequently, in the world over, there has been witnessed an exponential increase within the province of Foreign Direct Investments (hereinafter FDI).<sup>2</sup> FDI access to a country is granted through a variety of ways, including: the conclusion of a Multilateral Agreement on Investment,<sup>3</sup> the formation of regional trading blocs,<sup>4</sup> concessions made by a country to another<sup>5</sup> and the conclusion of Bilateral Investment Treaties (hereinafter BITs). This paper concerns itself with the conclusion of BITs.

Typically concluded between a developed capital-exporting country (home country) and a developing capital-importing country (host country),<sup>6</sup> BITs are tools “designed to encourage

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<sup>1</sup>Jamieson Sara, ‘A Model Future: The Future of Foreign Direct Investment and Bilateral Investment Treaties’ (2012) 53 South Texas Law Review 605.

<sup>2</sup> ibid

<sup>3</sup> Theoretically, the conclusion of a Multilateral Agreement on Investment is feasible. However, to date, the attempts to conclude one have been unsuccessful. For example, in 1995, the Organization for Economic Co-operation and Development (OECD) proposed a broad multilateral framework aimed at the liberalization of the investment regimes within OECD members and non-OECD members. The negotiations were stalled and the Multilateral Agreement on Investment did not come to fruition. Information available at <<http://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm>> last accessed 7<sup>th</sup> August, 2016.

<sup>4</sup> See, for example, the Treaty for the Establishment of the East African Community, where, in a bid to accelerate economic growth and development, the partner states have adopted a liberal stance towards the movement of the factors of production. The Protocol on the Establishment of the East African Community Common Market provides for the free movement of goods, free movement of persons, free movement of labour, free movement of services, free movement of capital, the right of establishment and the right of residence. Information available at <<http://www.eac.int/>> last accessed 8<sup>th</sup> June, 2016.

<sup>5</sup>Atik Jeffrey, ‘Fairness and Managed Foreign Direct Investment’ (1995) 32 Columbia Journal of Transnational Law 1. This is where the host-country has a policy in place that leans towards non-regulation of inbound FDI. The failure to regulate does not however confer any formal investment rights to inbound FDI. The United States of America have traditionally adopted this mechanism.

<sup>6</sup>Uche Ewelukwa Ofodile, ‘Africa-China Bilateral Investment Treaties: A Critique’ (2013) 35 Mich. J. Int’l L. 131. The terms developed country and developing country are used in reference to the United Nation’s Development Programme Country Classification System. This system uses the Human Development Index (HDI), which is a composite of indices, to capture the multifaceted nature of development. However, it is imperative to note that BITs are not strictly concluded between a developed country and a developing country. They involve countries across all levels of development. For instance, there has been a rise in BITs concluded between developing countries themselves. This is attributable to the changing landscape within the realm of

investments by nationals of a state into the territory of another state by according them well-defined protection.”<sup>7</sup>The term BIT, therefore, has two connotations. The first is that it is an agreement – an act of consent between the parties concerned, and the second is its more literal meaning of a document or an instrument of proof.<sup>8</sup> In this paper, the host country referred to shall be the Republic of Kenya.

When a host country concludes a BIT, the implications are twofold. In the first instance, the BIT accords the host country the appeal of a favourable destination for participants in international investment.<sup>9</sup>The resultant benefits to the host country include, amongst others, a surge in the levels of investments, increased economic activity, integration in international trade, training of the human capital, technology spill-overs, increased pay and enhanced productivity.<sup>10</sup>These benefits are deemed to be key drivers in propelling the host country to the levels of economic independence it intends to reach. With this comes the second implication – that such an opportunity may prove to be “predatory and invasive to the host country’s public interests and may impact negatively on its domestic industries.”<sup>11</sup> The resolution of this tension would ideally lie with the host country’s exercise of its regulatory autonomy over the foreign investments. However, the matter is not as straight forward.

Throughout the historical evolution of FDI, the overarching presumption in a typical arrangement between a developed country and a developing country has been that the domestic laws of the developing capital-importing country relating to foreign investments

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trade and investments across the globe and the rise of newly industrialized developing countries. These include Brazil, Russia, India, China and South Africa (BRICS).

<sup>7</sup>Bernardini Piero, ‘Investment Protection under Bilateral Investment Treaties and Investment Contracts’ (2001) 2 *The Journal of World Investment* 235.

<sup>8</sup>Bernard Kishoyian, ‘The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law’ (1994) 14 *Northwestern Journal of International Law & Business* 327, 333.

<sup>9</sup>Trakman Leon, ‘Foreign Direct Investment: An Australian Perspective’ (2010) 13 *International Trade and Business Law Review* 31.

<sup>10</sup>Deborah L. Swenson, ‘Why do Developing Countries Sign BITS’ (2005) 12 *University of California* 131.

<sup>11</sup> *ibid.*

will prove to be inadequate.<sup>12</sup> Consequently, the developed capital-exporting country continuously engage in a continued demand for robust protection with minimal regulation in the host country.<sup>13</sup> Indeed, through the years, this narrative has provided the normative framework in the negotiation of BITs. The result has been the chipping away of a host country's sovereign right to exercise its regulatory autonomy.<sup>14</sup> This results from the kinds of promises and compromises the developing capital-importing country has been all too eager to make in order to attract the much needed foreign investment within its territory. For instance, in most developing capital-importing countries, tight control and restrictions surrounding the entry and establishment of foreign investment have been abandoned in favour of more *laissez-faire* approaches such as promoting the freedom of entry subject to sectoral exceptions.<sup>15</sup> The view that foreign investment, if not kept within definite bounds, could potentially be injurious to the capital-importing country's economy, is no longer held paramount.<sup>16</sup> The assertion that the "limitations on sovereignty, has developed and gained acceptance by capital-importing countries on the premise that its fundamental *telos* is to facilitate economic development"<sup>17</sup> is evidently true.

This paper contextualizes its analysis of the BITs concluded by Kenya within this historical context. It views the provisions in these BITs as a continuum in the historical narrative and contends that the presumption of inadequacy of the investment laws in the developing nations was a product of its time. The historical setting that inspired the developed capital-exporting countries to make certain demands in a bid to ensure the protection to their investment,

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<sup>12</sup> *ibid* (n 1).

<sup>13</sup> *ibid* (n 7).

<sup>14</sup> Srur Muradu, 'The International Investment Regime: Towards Evolutionary Bilateral & Regional Investment Treaties?' (2004) 1 *Manchester J. Int'l Econ.* 54.

<sup>15</sup> Sacerdoti Giorgio, 'The Admission and Treatment of Foreign Investment under Recent Bilateral and Regional Treaties' (2000) 1 *J. World Investment* 105, 106.

<sup>16</sup> *ibid*.

<sup>17</sup> Kleinheisterkamp Jan, 'Investment Treaty Law and the Fear for Sovereignty: Transnational Challenges and Solutions' (2015) 78 *Modern Law Review* 793.

certainly has no counterpart in the modern day developing nation.<sup>18</sup>The paper demonstrates the pitfalls that await the country when it is too eager to trade its right to regulatory autonomy in the hope of growing its economy through FDI.<sup>19</sup>The paper proposes that host countries ought to articulate their interests in BIT negotiations and control their development agenda with regards to foreign investments. It is on this premise that the paper calls to question the entire necessity of the BIT regime for Kenya.

## **1.1 Background to the problem**

With regards to BITs concluded between a developed nation and a developing nation, an appreciation of their respective positions will prove difficult to attain without an introduction to the arrangement and workings of FDI. This is primarily because the operationalization of BITs is premised on the legal principles and instrumentalities of FDI.<sup>20</sup>

### **1.1.1 Definition, arrangement and protection mechanisms of FDI**

FDI has generally been defined as:

The transfer of tangible or intangible assets from one country to another for the purposes of their use in that country to generate wealth under the total or partial control of the owners of the assets.<sup>21</sup>

While there is no doubt that the transfer or even creation of physical property constitutes foreign investment within a country,<sup>22</sup> the notion of FDI transcends beyond the physical

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<sup>18</sup> In those times, the developing nations, particularly those in Africa, had no parallels to the institutions present in the developed nations. For example, private property rights and the adoption of laissez-faire capitalism were yet to gain traction. In the present time, however, the landscape has tremendously improved. In Kenya, for example, there exists a robust legal framework guaranteeing investor rights and protection, including, protection from expropriation anchored in the Constitution.

<sup>19</sup>Trakman Leon, 'Foreign Direct Investment: Hazard or Opportunity?' (2010) 41 Geo. Wash. Int'l. Rev 1,7.

<sup>20</sup>Robbins Joshua, 'The Emergence of Positive Obligations in Bilateral Investment Treaties' (2006) 13 U. Miami Int'l & Comp. L. Rev. 403.

<sup>21</sup>M Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010).As contrasted with Portfolio Investment, the latter is "normally represented by a movement of money for the purpose of buying shares in a company formed or functioning in another country. It could also include other security instruments through which capital is raised for ventures." The distinction between the two is that for Portfolio Investment, there is a clear demarcation between the ownership element and the management-control function. This demarcation does not exist for FDI.



property. Informed by the argument that “the asset is in fact only the instrument through which the investor aims at obtaining a return,”<sup>23</sup> the notion of FDI ought to be broadly conceived as encompassing rights and interests attendant to the asset.<sup>24</sup>

This elementary definition, albeit useful, fails to disclose the actors in the field of FDI. These actors include: the state, state corporations, Multi-National Corporations (hereinafter MNC), international institutions, non-governmental organizations and private organizations.<sup>25</sup> Of all these, the MNC and the state are regarded as the key players. Any study into the subject has to take into account their roles.

The Black’s law dictionary defines an MNC as “a company with operations in two or more countries, generally allowing it to transfer funds and products according to price and demand conditions, subject to risks such as changes in exchange rates or political instability.”<sup>26</sup> The image presented here is that of an entity that commands a great deal of financial resources and has a network of subsidiaries through which control is exercised.<sup>27</sup> As already established, FDI is said to have occurred only when the foreign entity (MNC) makes a physical investment in the host country.<sup>28</sup> How this comes about is that, the MNC, having identified viable economic activities in another country, approaches its home government urging it to enter into an agreement with the foreign country of interest, in order to facilitate and protect its intended investment.<sup>29</sup> Therefore, engagements between the countries is on a governmental level. Reference to the state or country in this paper must therefore be

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<sup>22</sup>ibid (n 20). This is because a typical FDI would involve the purchase or development of productive facilities such as factories, mines, drilling platforms or even offices. Other times, it would include ownership of subsidiary entities based in the host country.

<sup>23</sup>ibid (n 7).

<sup>24</sup> ibid.

<sup>25</sup>Abbot Frederick, ‘A New Dominant Trade Species Emerges: Is Bilateralism a Threat?’ (2007) 10 Journal of International Economic Law 571.

<sup>26</sup>Bryan Garner, *Black’s Law Dictionary 7th Edition* (West Group 1999).

<sup>27</sup>Chalamish Efraim, ‘The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement?’ (2009) 34 Brook. J. Int’l L. 303.

<sup>28</sup> ibid (n 20) 407.

<sup>29</sup> ibid (n 27).

understood in its narrow sense, referring to the government, as opposed to the whole community of persons living within a defined territory.<sup>30</sup>

### **1.1.2 Regulatory autonomy of the state**

The Black's law dictionary defines the term regulation as "the act or process of controlling by rule or restriction."<sup>31</sup> Regulation is, therefore, the means by which requirements having legal force are set. Conventionally, regulations concern areas of public interest and the state, as the overall vehicle of public governance, is often vested with this responsibility.<sup>32</sup> States are further charged with the responsibility of setting up structures and mechanisms which serve the dual purpose of pursuing the cause of economic development of the country whilst upholding the sovereignty of the country and the rule of law.<sup>33</sup> It is from this view of the state as a rule-making organ that the concept of regulatory autonomy stems from. Regulatory autonomy of the state entails measures which guarantees the state adequate leeway for it to determine whom to regulate, what to regulate, when to regulate and how to regulate.<sup>34</sup> For the developing nations, the importance of upholding this autonomy cannot be underscored. These nations rely on the regulation by the state to support their investments, product innovation, growth and market openness.<sup>35</sup> The regulatory autonomy of the state is therefore deemed to be a key tool, at the disposal of the government for implementing economic policies and managing the economies of these developing nations.<sup>36</sup> The thrust of this paper is that the

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<sup>30</sup> *ibid* (n 26). A state is defined as "a community of persons living within certain limits of territory, under a permanent organization which aims to secure the prevalence of justice by self-imposed law." A state is alternatively defined as "an association of human beings established for the attainment of certain ends by certain means."

<sup>31</sup> *ibid* (n 26).

<sup>32</sup> Regulatory Policy and the Road to Sustainable Growth. Organization for Economic Co-operation and Development (OECD) Report (2010). Regulations may, however, emanate from non-governmental or self-regulatory bodies to which governments have delegated regulatory powers.

<sup>33</sup> Markus Wagner, 'Regulatory Space in International Trade Law and International Investment Law' (2015) 36 U.P.J. Int'l L 1.

<sup>34</sup> *ibid* (n 32). Within the realm of foreign investments, this autonomy would entail the state's freedom to make pronouncements in relation to, amongst others, adoption of fiscal policies, imposition or variation of tariffs, zoning restrictions, tax burdens and protection of the environment.

<sup>35</sup> *ibid* (n 32).

<sup>36</sup> *ibid* (n 32).

state must safeguard this sovereign right to exercise regulatory autonomy over activities within its territory and control over its development agenda.

### **1.1.3 Competing demands of the foreign investor and the host country**

The potential presence of foreign investments in the host country ushers in certain fundamental concerns. Key amongst them being the competing demands of the foreign investor and the host country. For the foreign investor, the main concern is the commercial gains, direct and indirect, which it expects to derive from the venture.<sup>37</sup> For the host country, the main concern is the need to keep the degree of external control over its economic activities in check and ensure that the foreign investment conforms to its developmental priorities.<sup>38</sup> Ultimately, whether foreign investment in the host country takes place depends on whether it is possible to make arrangements which will satisfy both interests.<sup>39</sup> However, the reality for most developing nations is that, in their economies, the proportion of what they produce and what they consume is almost at par.<sup>40</sup> This means that there is little surplus for investment.<sup>41</sup> Often, this creates an absolute need for an influx of foreign capital, thus arguably putting their interests on the lower end of the bargaining scale.

In the beginning, customary international law provided the basis for the protection of the foreign investors' interests.<sup>42</sup> This was through the utilization of the notion of diplomatic protection and the principles regarding the treatment of aliens.<sup>43</sup> These principles worked

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<sup>37</sup>Surya Subedi, *International Investment Law: Reconciling Policy and Principle* (2 edn, Hart Publishing 2012) 55-56.

<sup>38</sup>Perera Rohan, 'The Role and Implications of Bilateral Investment Treaties' (2000) 26 Commonwealth Law Bulletin 607, 609.

<sup>39</sup>Kinsella Stephen and Comeaux Paul, 'Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA & OPIC Investment Insurance' (1995) 15 New York Law School Journal of International and Comparative Law 1.

<sup>40</sup>Mummery David, *The Protection of International Private Investment. Nigeria and the World Community*. (Frederick A Praeger Publishers 1968), 32.

<sup>41</sup> *ibid.*

<sup>42</sup>*ibid* (n 21).

<sup>43</sup>Nina Mahmood, 'Democratizing Investment Laws: Ensuring "Minimum Standards" For Host States' [2013] J. World Investment & Trade 79. At that time the pertinent question concerned the treatment of aliens in the host-countries. Debates revolved around the question: Should aliens be given equal treatment as nationals? The popular view was opposed to the idea of equal treatment. Led by key scholars such as Vattel, they argued

alongside the domestic laws of the host country and provided both a complementary and supplementary protection to the investors.<sup>44</sup> However, increasingly through the years, foreign investors sought an expansion to their protection, ultimately leading to the creation of BITs.<sup>45</sup>

#### **1.1.4 The mechanism behind BITs**

From the foregoing, BITs create a distinct regime, quite apart from customary international law<sup>46</sup> and the domestic investment laws of the host country.<sup>47</sup> They offer a third-tier of protection to foreign investors. This fortified protection mechanism allays the fears of foreign investors, more particularly that:

Host governments can easily change their domestic law after a foreign investment is made, and the host country officials may not always act fairly or impartially towards foreign investors and their enterprise.<sup>48</sup>

BITs are therefore distinguished from the domestic laws of the host country in that they are less susceptible to change with a change in government.<sup>49</sup> Additionally, no state can alter their provisions unilaterally.<sup>50</sup> They are therefore more stable. Characterised by their peculiar

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that aliens should be treated in accordance with some external standard higher than the national standard. It is in this way that the traditional rules relating to the law of state responsibility of injury to aliens and aliens property came to be applied in foreign investment.

<sup>44</sup> *ibid* (n 37).

<sup>45</sup> *ibid*.

<sup>46</sup> Schwebel Stephen, 'The Overwhelming Merits of Bilateral Investment Treaties' 263. This was informed by the apprehension of home-countries to extend diplomatic protection on foreign investments for fear of jeopardizing its relations with the host-country.

<sup>47</sup> M Sornarajah, 'State Responsibility and Bilateral Investment Treaties' (1986) 20 *Journal of World Trade Law* 79.

<sup>48</sup> Hailu Belete and Esmael Kassahun, 'Rethinking Ethiopia's Bilateral Investment Treaties in Light of Recent Developments in International Investment Arbitration' (2014) 8 *Mizan Law Review* 117. Quoting Jeswald W. Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 *International Lawyer*, 659.

<sup>49</sup> *ibid* (n 37).

<sup>50</sup> Erin O'Connor and Susan Franck, 'Foreign Investment and the Market For Law' (2014) 2014 *U. Ill. L. Rev.* 1617. It is noted that "although both are more general vehicles for state commitments, BITs and domestic law may differ with regard to their durability and effectiveness. Specifically, some scholars argue that domestic laws are more easily changed than treaty provisions because treaties are long-lasting, and vested rights form around the protections promised at the point of investment. This lock-in effect can occur for domestic laws too, but treaty modifications can take the assent of two states whereas domestic law reform requires only the affirmative decision of the host state. In addition, the enforcement of domestic laws can require the cooperation of the host state's courts rather than neutral arbitrators, which can impede their effectiveness. Thus, overall, domestic law may be both less durable and less effectively enforced."

features such as longevity<sup>51</sup> and the continuity of coverage after the termination of the investments,<sup>52</sup> BITs essentially function to generate and bolster investor confidence in the regulatory framework existing in the host country.<sup>53</sup> Furthermore, besides guarantying predictability and stability in its legal framework, the host country also undertakes to bring into congruence, its domestic laws relating to foreign investments and the commitments pledged under the BIT.<sup>54</sup>

### **1.1.5 The bargaining process**

Preceding the conclusion of every BIT, is a bargaining process between the two contracting parties.<sup>55</sup> The premise of the bargain is that the host country will undertake to protect the foreign investments in exchange for a guaranteed increase in foreign capital.<sup>56</sup> The bargaining process is characterised by a series of compromises on the respective interests of the contracting parties until an agreeable consensus is reached.<sup>57</sup> Given the nature of the interests being ceded, ideally, the two contracting parties should sit as equals in the bargaining table.<sup>58</sup> However, the bargaining process has been proved to be littered with asymmetries between the contracting parties and this reflects itself in the provisions of the concluded BIT.<sup>59</sup> Key concerns brought to the fore include: that most BITs, while requiring the inclusion of explicit provisions on the protection of the foreign investor, remained

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<sup>51</sup> *ibid* (n 37). Such treaties are of long duration, usually ten or twenty years.

<sup>52</sup> *ibid* (n 37). Notably, this only covers the investments undertaken while the BIT was still in force.

<sup>53</sup> *ibid* (n 38). See further Jamieson (n 1) 609. BITs generally address the following substantive areas: 1. The admission conditions into the host-country. 2. The standard of treatment to be accorded to the foreign investor and investment. 3. Protection against expropriation. 4. Dispute resolution mechanisms.

<sup>54</sup> *ibid* (n 37).

<sup>55</sup> *ibid* (n 47) 79.

<sup>56</sup> Johnson Alec, 'Rethinking Bilateral Investment Treaties in Sub-Saharan Africa' (2010) 59 *Emory Law Journal* 919.

<sup>57</sup> *ibid* (n 47).

<sup>58</sup> Sandrino Gloria, 'The Nafta Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective' (1994) 27 *Vanderbilt Journal of Transnational Law* 259.

<sup>59</sup> *ibid* (n 46). The author observes that "By the terms of the BITs, foreign investment is assured fair and equitable treatment, full security and protection and no less than national and most-favoured-nation treatment. The foreign investor is assured of management authority and control. The terms of the commitments entered into in respect of the foreign investment are to be observed. If there is a taking by the state of the foreign investment, by means direct or indirect, the state is treaty-bound to pay prompt, adequate and effective compensation."

characteristically silent on the reciprocal obligations of the foreign investor.<sup>60</sup> Second, with most BITs being negotiated around the area of natural resources in the host country, minimal attention was being paid to the rights of the host communities.<sup>61</sup> This was always overshadowed by the obligations of the host states.<sup>62</sup> Third, most BITs ended up affording more rights to the foreign investor vis-à-vis the domestic investor.<sup>63</sup> Therefore, to meet its obligations under the BIT, the host state would at times be forced to implement domestically unsound policies.<sup>64</sup> Lastly, the BITs severely encroached the regulatory space of the host state.<sup>65</sup> These concerns shed light on the revolt staged against the current BIT system by some developing countries in mid 2000s.<sup>66</sup>

It is these asymmetries that piqued the author's interest into seeking the study and understanding of why the 'system' is so. The thrust of this paper is that these incongruences between the interests of the host country and the foreign investor result from the historical setting from which BITs emerged. This has led to the ceding of regulatory autonomy by the host state, as this paper shall seek to demonstrate.<sup>67</sup>

## **1.2 Problem statement**

The current regime under which BITs are negotiated and concluded is greatly tilted in favour of the foreign investor. This regime, while purporting to enhance legal certainty aimed at overcoming the legal deficiencies in the host country, places broad limitations on the exercise of regulatory autonomy by the said host country. This creates a problem because, a country that relinquishes part of its sovereign right to exercise regulatory autonomy over activities

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<sup>60</sup> *ibid* (n 6) 147.

<sup>61</sup> *ibid*.

<sup>62</sup> *ibid*

<sup>63</sup> *ibid*.

<sup>64</sup> *ibid*.

<sup>65</sup> *ibid*.

<sup>66</sup> *ibid*. For example, in 2008, Ecuador terminated 9 of its BITs while in 2009, South Africa undertook a comprehensive review of its BITs program and issued an announcement of a detailed plan to successfully bring some existing BITs to an end while henceforth placing a partial moratorium on the negotiation of future BITs.

<sup>67</sup> *ibid* (n 56).

within its territory, also hands over control over its development agenda and this often leads to less than optimal economic realities. With the recent discovery of minerals and oil in Kenya, the upsurge in foreign companies has been unprecedented. That these foreign investors will lobby their home governments to enter into BIT negotiations is probable. This informs the need for an acute consciousness of the extent of regulatory inhibition that the country will continue to expose itself to if it concludes any more BITs under the normative framework of the current regime.

### **1.3 Purpose of the study**

This paper draws attention to current regime under which BITs are negotiated, flags fundamental issues arising and steers forth a discussion on the regulatory implications borne from this arrangement. By so doing, this paper advocates for a conscious management of Kenya's BIT portfolio and a possible rethinking of the necessity of BITs for the country.

### **1.4 Objectives of the study**

This paper is guided by the following objectives:

- a) Disclosing the competing interests in the historical development of international investment law.
- b) Understanding the interplay between these interests in the BIT negotiation process.
- c) Highlighting the cumulative effect of the disclosed interests on the regulatory autonomy of the host country.
- d) Assessing if BITs can be reasonably expected to not diminish the regulatory autonomy of the host country.

### **1.5 Research questions**

This paper lends itself to providing an answer to the following research questions:

- a) What interest are disclosed in the historical development of international investment law?

- b) What is the interplay between these interests in the BIT negotiation process?
- c) What is the effect of the interplay between these interests on the regulatory autonomy of the host country?
- d) Given the above, can a BIT be reasonably expected not to diminishing the regulatory autonomy of the host country?

## **1.6 Hypothesis**

This paper is guided by the hypothesis that, given the historical context within which BITs emerged, they can only be expected to diminish the regulatory autonomy of the host country.

## **1.7 Theoretical framework**

When examining the policies and practices adopted in a relationship between a developed nation and a developing nation, it is important to bear cognizance to the greater economic development debate.<sup>68</sup> This is in acknowledgement of the fact that, often, the justification for actions and measures taken by the developing country in relation to the developed country, is expressed in connection with the need to attain a greater extent of economic development.<sup>69</sup> Granted, the policies and practices of the developing nation may not always be framed in the context of economic development.<sup>70</sup> Nevertheless, the existence of other justifications does not diminish the relevance of the economic development debate.

Marxism has it that the foundation of a society is the economic relations and that everything else, including the law, is a superstructure.<sup>71</sup> Therefore, to understand the law, one has to place it within a socio-economic context.<sup>72</sup> This is because, the manipulation of external

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<sup>68</sup>Neto Pereira Caio, 'Development Theory and Foundations of Universal Access Policies' (2006) 2 ISJLP 365.

<sup>69</sup>Ndulo Muna, 'Foreign Investment and Economic Development' (1985) 11 Cornell Law Faculty Publications 6. See also Pereira (n 68).

<sup>70</sup> *ibid* (n 68). For instance, in a religious state, "public resources may be allocated to build new temples and provide religious education regardless of the impact of these actions on any particular conception of development as raising standards of living."

<sup>71</sup>Eugene Kamenka, *The Portable Marx* (Penguin Books). Quoting Karl Marx, "A contribution to the critique of political economy,"

<sup>72</sup> *ibid*.



forces is usually canvassed in the neutral language of the law.<sup>73</sup> Previous studies on BITs have placed an emphasis on the textual analysis of the problem. They make no attempt to go behind the text and examine the interplay of factors that underpin these rules.<sup>74</sup> This is despite the fact that, historically, the relationship between developed nations and the developing nations has been punctuated with “charges of neo-colonialism, economic imperialism and capitalist exploitation.”<sup>75</sup> It is for this reason that this paper adopts the dependency theory as its socio-economic context and as a tool to probe the existing regime under which BITs are concluded.

Dependency is defined as “an explanation of the economic development of a state in terms of the external influences – political, economic and cultural – on national development policies.”<sup>76</sup> The initial proponents of the dependency theory such as Raul Prebisch challenged the prevalent traditional neoclassical approach which offered that the developing countries were poor because they were late in coming into the modern economic practices of the developed countries and that once such practices were adopted, then the poverty levels witnessed in these nations would substantially subside.<sup>77</sup> Instead, Raul Prebisch regarded international capitalism as the root cause of the persistent poverty witnessed in the developing nations.<sup>78</sup> By closely examining the patterns of interaction between the developed

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<sup>73</sup>Kale-Kofele Ndiva, ‘The Political Economy of Foreign Direct Investment: A Framework for Analyzing Investment Laws and Regulations in Developing Countries’ (1992) 23 *Law & Policy in International Business* 619. The author acknowledges that “the legal system is not autonomous, nor are the rules and regulations that it devises neutrally applied. Laws are designed to promote and protect certain interests in the society. An analysis of state intervention must also incorporate the external environment.”

<sup>74</sup> *ibid.* For example, the power dynamics between the contacting states.

<sup>75</sup> *ibid.* (n 69).

<sup>76</sup>Osvaldo Sunkel, ‘National Development Policy and External Dependence in Latin America’ (1969) 6 *The Journal of Development Studies* 1, 23.

<sup>77</sup> Vincent Ferraro, ‘Dependency Theory: An Introduction in the Development Economics Reader’ (2008) London, Routledge 58-64. Information available at <<https://www.mtholyoke.edu/acad/intrel/depend.htm>> last accessed 5<sup>th</sup> December, 2017.

<sup>78</sup> *ibid.* (n 77).

countries and the developing countries, Raul Prebisch uncovered inequality as an intrinsic component of these interactions.<sup>79</sup>

The basis of the dependency theory, therefore, is the rejection of the prescriptions of the modernization theory in favour of a strong developmental state.<sup>80</sup> The dependency theory associates capital accumulation with the plunder of economies in the developing nations.<sup>81</sup> The argument is that while improving the social welfare of the citizenry is the ultimate goal, reliance on foreign investment is not the ultimate route.<sup>82</sup> The dependency theory asserts that developing nations are caught up in a dominance and dependence relationship with the developed nations.<sup>83</sup> This is attributed to the historical evolution of the international capitalist system which saw the developed nations being “intentionally exploitative or unintentionally neglectful” of the developing nations.<sup>84</sup> The result was inequality in power relations which continues to stifle any attempts by the developing nations to be self-reliant.<sup>85</sup> Adopting the dependency theory, one is persuaded to perceive the developed nations, not as the holders of solutions but rather, the cause of the problems.<sup>86</sup> Acknowledging that when concluding BITs, the goal for most developing nations is to attract foreign investment by incorporation of terms skewed in favour of the foreign investor, the dependency theory would argue that by so doing, the developing countries are short-changing themselves.<sup>87</sup> This is because, such a

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<sup>79</sup> *ibid.*

<sup>80</sup> Michael Todaro, *Economic Development* (7 edn, Longman Publishers 1994). See generally Chapter 3 on Theories of Development: A Comparative Analysis. As one of the theories of development, the modernization theory espouses the concept of capital accumulation. It posits that at the heart of economic development is the creation of surplus capital. It would then follow that for countries with insufficient capital, there has to be in place the right investment policies to attract foreign capital so as to meet the deficit. The modernization theory advocates for minimal state intervention as the way to go in the attraction of foreign capital.

<sup>81</sup> *ibid.*

<sup>82</sup> *ibid.*

<sup>83</sup> Arturo Escobar, *Encountering Development: the Making and Unmaking of the Third World* (1995, Princeton University Press).

<sup>84</sup> *ibid.*

<sup>85</sup> *ibid.*

<sup>86</sup> *ibid* (n 69).

<sup>87</sup> Vandavelde Kenneth, ‘The Economics of Bilateral Investment Treaties’ (2000) 41 *Harvard International Law Journal* 469. Noting further that developing-state concerns about the adverse effects of foreign investment are very minimal save for when they are dealing large investments.

regime only showcases the pervasiveness of this dominance and dependence relationship.<sup>88</sup> It is for this reason that this paper adopted the dependency theory as its theoretical frame of reference.

### **1.8 Significance of the study**

The absence of a multilateral treaty on foreign investment ostensibly elevates BITs to the *de facto* institutional regime for the regulation and governance of foreign investments within a country.<sup>89</sup> This means that the trajectory taken in the regulation of foreign investments by BITs is the responsibility of individual countries. By pointing out the detrimental norms in the current BIT regime, this paper will prove useful to policy makers and government officials responsible for negotiating BITs. The issues pointed out and questions raised will ensure a stronger, more efficient and more equalitarian regime on foreign investments for the country.

### **1.9 Limitations of the study**

The entire framework of BITs concluded by Kenya could not be evaluated exhaustively within the confines of this paper. It would have been a disservice on the subject to attempt to do so. The paper lends its focus to the regulatory issues that arise from the substantive provisions of the BITs concluded by Kenya.

### **1.10 Literature review**

In order to understand the relationship between BITs and the exercise of regulatory autonomy by the host country, an appreciation of the different influences throughout the historical development of BITs has to be had.<sup>90</sup> As it will emerge, the reality embedded in this historical setting is that of a narrative dominated by the interests of the foreign investor.<sup>91</sup>

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<sup>88</sup> *ibid* (n 69).

<sup>89</sup> *ibid* (n 6) 135.

<sup>90</sup> Dagbanja Dominic, 'The Limitation on Sovereign Regulatory Autonomy and Internationalization of Investment Protection by Treaty: An African Perspective' (2016) 60 *Journal of African Law* 1, 58-59.

<sup>91</sup> *ibid*.

This has in turn informed the nature of the provisions present in BITs concluded by developing nations, including Kenya.

### **1.10.1 Revolt against the local law**

Modern international investment law is traced back to early European trade practices.<sup>92</sup> More specifically, when European traders started to go to other parts of the world such as Latin America, Asia and Africa.<sup>93</sup> The presence of these alien investors ushered in various issues in the host countries, key among them being the treatment of the aliens.<sup>94</sup> At the time, the pertinent question was: What would be the governing law for these traders and their correspondent activities?<sup>95</sup> Would it be the local law of the community where they would set up their trade?<sup>96</sup> Would the law of their nationality continue to attach?<sup>97</sup> Should the aliens be given equal treatment as nationals?<sup>98</sup> These questions lent themselves to heated debates. The popular view, at the time, was opposed to the idea of equal treatment.<sup>99</sup> Led by key scholars such as Vattel, they argued that “these businessmen carried the law of the country of their nationality with them wherever they went and were thus not subject to local law.”<sup>100</sup> These scholars offered that aliens should be treated in accordance with some external standard, higher than the national standard.<sup>101</sup> The implication of these arguments was that, inevitably, there would have to be created a two-tiered system: the legislation enacted by the local population, for the local population, and a separate law governing the alien traders. Customary international law readily became the obvious resort for the second tier of law.

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<sup>92</sup> *ibid* (n 37) 7.

<sup>93</sup> *ibid*.

<sup>94</sup> *ibid*.

<sup>95</sup> *ibid* (n 90) 64.

<sup>96</sup> *ibid*.

<sup>97</sup> *ibid*

<sup>98</sup> *ibid* (n 43).

<sup>99</sup> *ibid*

<sup>100</sup> *ibid* (n 37) 7-8.

<sup>101</sup> *ibid*.

### 1.10.2 Customary international law

At the time, customary international law offered a neat arrangement for the protection of aliens and their property. This is because, customary international law had developed some principles deemed fit for the protection of alien property, key amongst them being that of state responsibility for injury to property belonging to aliens.<sup>102</sup> This principle included a prohibition against the taking of alien property in a discriminatory fashion,<sup>103</sup> a condition that the taking of alien property could only be warranted by a public purpose,<sup>104</sup> and lastly, that in the event of expropriation, the alien had to be justly compensated.<sup>105</sup> It is in this way that the customary international law initially came to be applied in foreign investment.<sup>106</sup> One would be lured to think that these provisions would sufficiently allay the concerns of the foreign investor, but this was not the case.

With time, this customary international law principle started to attract criticisms. First, it was argued that with no predetermined formulae, the principle of just compensation was open to varied interpretations.<sup>107</sup> Second, that customary international law was characteristically silent on pertinent issues for the foreign investor, for example, the right to make monetary transfers from the host country and the right to bring in foreign managers.<sup>108</sup> Thirdly, that customary international law, while offering substantive protection mechanisms to the foreign investor, nevertheless failed to offer a corresponding enforcement mechanism that the foreign

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<sup>102</sup>ibid (n 90) 64.

<sup>103</sup>In *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory: Advisory Opinion*, PCIJ Ser. AB No 44 (1932), the Permanent Court of International Justice had laid down the law, stating that “the prohibition against discrimination...must ensure the absence of discrimination in fact as well as in law. A measure which in [its] terms is of general application, but in fact is directed against...[foreign] nationals...constitutes a violation of the prohibition.”

<sup>104</sup> In the *Case Concerning Certain German Interests in Polish Upper Silesia*, PCIJ Ser. A No. 17 (1926), the Permanent Court of International Justice held that the only prohibited measures are those which international law does not sanction in respect of foreigners and that “expropriation for reasons of public utility, judicial liquidation and similar measures are not affected.”

<sup>105</sup> ibid (n 90) 64.

<sup>106</sup>ibid.

<sup>107</sup>ibid.

<sup>108</sup>ibid.

investor could pursue in case of breach of obligation by the host state.<sup>109</sup> Lastly, it was observed that practically, customary international law was not adequate for the protection of foreign investment.<sup>110</sup> This was because of the apprehension of home countries to generate controversy and thus jeopardize relations with the host country.<sup>111</sup> These perceived deficiencies led to the apprehension by foreign investors that investment arrangements entered into on the strength of the reliance on customary international law for protection, offered little to no assurance of safeguard to investments.<sup>112</sup> This ushered in yet another wave of change in international investment law.

### **1.10.3 The onset of treatification**

As explained above, the resultant effect of the perceived inadequacies of customary international law was its abandonment and the subsequent resort to codification of investment protection mechanisms in treaties. Such is the epidermal view of this phase in the development of international investment law. The onset of treaties in international investment law must be appreciated for what it really was – the continuation of a system of investment protection that was predominantly attuned to the interests of the foreign investor.<sup>113</sup> The text of the first treaties, known as treaties of Friendship, Commerce and Navigation (hereinafter FCNs) is indicative of this.

While, the subject matter of these FCNs treaties was varied and not limited to foreign investments, they lay a great emphasis on the rights to be accorded to the property of the

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<sup>109</sup>ibid. Quoting J.W. Salacuse, *The Law of Investment Treaties* (2010, Oxford University Press) where it was noted that “existing international law offered foreign investors no effective enforcement mechanism to pursue claims against host countries that seized their investments or refused to respect their contractual obligations”

<sup>110</sup> ibid.

<sup>111</sup> ibid (n 46).

<sup>112</sup> ibid (n 90) 65.

<sup>113</sup> ibid. The foreign investors clamoured for a system that would be complete, specific, clear, enforceable and incontestable.

foreign investor.<sup>114</sup> For instance, FCNs provided for the right of entry and establishment of business mostly without limitation, introduced the most-favoured nation clause, strengthened the dispute settling mechanisms available to the foreign investor and introduced prohibitions on restrictions placed on the repatriation of earnings, the seizure of vessels, cargoes, merchandise and effects without the payment of equitable and sufficient compensation or indemnification.<sup>115</sup> The FCNs therefore embodied a greater spectrum of rights to the foreign investor and were hailed to lead to increased negotiation of mutual economic relationships between nations.<sup>116</sup> Indeed, during this period, the negotiation of international investments by way of treaties increased exponentially.

Professor Jeswald Salacuse, however, cautions that these treaties have to be seen for what they were – tools of economic domination for their time.<sup>117</sup> He argues that their language of equality and mutuality only canvassed the underlying favouritism to the foreign investor.<sup>118</sup>

This was because:

Individual treaty chapters...granted foreign traders a variety of privileges, including exemptions from customs duties, the right to be governed by home country law, freedom from the jurisdiction of local courts, and the right to sue and be sued exclusively in special consular courts. In many places, these treaties became the basis of a fully-fledged extraterritorial system of privilege and immunity.<sup>119</sup>

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<sup>114</sup>Ocran Modibo, 'Bilateral Investment Protection Treaties: A Comparative Study' (1987) 8 N.Y.L. Sch. J. Int'l & Comp. L 401, 403-404. The early FCN treaties were primarily trade-oriented agreements; investments played a lesser role. FCN treaties dealt with three key areas. First, they established friendly relations between two sovereign states. The FCN treaty would therefore precipitate any future relations between the two states. Second, they outlined the security to be accorded to commercial ventures set up by foreign investors. Third, they often included provisions on navigation and port access between the states parties.

<sup>115</sup> *ibid* (n 90) 68.

<sup>116</sup> *ibid*.

<sup>117</sup> *ibid*.

<sup>118</sup> *ibid* (n 90) 65. The example is given of one of the most significant treaties in this respect. This was the 1536 Treaty between the King of France and the Ottoman Sultan. The Treaty provided for reciprocal trading and navigation rights between the two monarchs. However, the author observes that "although this agreement and others like it purported to be based on principles of equality and mutuality, they in fact favoured European nationals, not Ottoman subjects, because of their superior economic and technological power."

<sup>119</sup> *ibid*.

Granted the above elucidation, it is clear that the resort to treaties was an externally induced phenomena by the developed capital-exporting nations aimed at securing expansive protection to their investors. This is because “it was their investors who invested abroad and it was they and their investors who were dissatisfied with customary international and domestic legal systems which had previously been used to protect foreign investment.”<sup>120</sup>The principles emanating from this framework and which have continued to be in operation, were therefore not quite developed with the capital-importing country’s interests in contemplation.<sup>121</sup>

These FCN treaties are the precursor to the modern BITs.<sup>122</sup>Indeed, the FCN treaties have been termed as the ‘first generation investment treaties’, while BITs have been referred to as the ‘second generation investment treaties’.<sup>123</sup>The modern day BITs share the features of the FCNs and retain some of the provisions, albeit in a more refined manner.<sup>124</sup>

#### **1.10.4 The intrusive nature of foreign investments: A neglected agenda**

Up until this point, concerns regarding the potential of foreign investments to be intrusive and predatory upon the economies of the host countries featured nowhere in the encounter between the supposed shortcomings of customary international law and the ever present search for an effective investment protection regime.<sup>125</sup>This is understandably so as the movement of capital was unidirectional – from developed nations to developing nations. Most of these developing nations were colonial populations with little say in both the shaping of customary international law and the trajectory taken by the law relating to foreign

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<sup>120</sup> *ibid.*

<sup>121</sup> *ibid.*

<sup>122</sup> *ibid* (n 21) 180.

<sup>123</sup> *ibid* (n 6) 142.

<sup>124</sup> *ibid* (n 114) 404. The principles of national treatment, most-favoured nation treatment and fair and equitable treatment, presently found in most BITs, developed from the FCN treaties. Present day BITs are however more specialized, broader in scope, confer more rights upon the foreign investor and deal exclusively with foreign investment.

<sup>125</sup> *ibid* (n 90) 70.



investments.<sup>126</sup> Arguably, the world market was, in a limited sense, one unit. This was because of the close integration between the markets of the developed nations and their dependencies; the developing nations.<sup>127</sup> Therefore, both the historical setting and the conscious development of international investment law had pushed this concern to the periphery. However, the advent of political independence by many of the developing capital-importing nations ushered in yet another wave of change within the realm of international investment law.

As the colonial territories gained their independence, a revolt against the now settled two-tiered system slowly brewed. The concept that businessmen of foreign origin would set up shop in their territories, but not be governed by their laws, was upsetting.<sup>128</sup> Relying on the concept of sovereignty, the newly independent states argued that foreign investors should not be allowed to invoke greater rights in the host country than the rights accorded to the nationals.<sup>129</sup> They asserted the position that, while it was their intention to negotiate agreements that guaranteed foreign investment protection in their countries, they were nonetheless unwilling to sacrifice their economic sovereignty in order to obtain that objective.<sup>130</sup> The economic independence asserted by the developing states, in a world of increasingly interdependent states, seemed at best, an ideal at the time. However, the concept was a reflection of the desire by developing nations to gain and maintain measurable control over their economies.<sup>131</sup> Within the realm of FDI, this meant reaping the maximum benefits from the foreign investment but at a minimum sovereignty cost to them.

As a counter, the developed countries mounted yet another set of defences to assert their claims of greater protection to their investments. This time, they invoked the doctrine of state

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<sup>126</sup> *ibid* (n 40) 41.

<sup>127</sup> *ibid*.

<sup>128</sup> *ibid*.

<sup>129</sup> *ibid* (n 37) 8-10.

<sup>130</sup> *ibid*.

<sup>131</sup> *ibid* (n 40) 41.

responsibility which guaranteed the protection of aliens and their property.<sup>132</sup> They advanced a two-pronged argument. First, they maintained that states were under no legal obligation to admit foreign investors into their territories.<sup>133</sup> However, once the states admitted such foreign investors into their territories, then, they had no alternative but to accord them a certain standard of “decent treatment.”<sup>134</sup> Sentiments such as these were expressed:

If any country’s system of law does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens.<sup>135</sup>

The revolt against local law was revived, this time fashioned as a contestation between the national treatment standard versus the international minimum standard. The opponents of the national treatment considered the local law to be “inferior, not well developed and that it failed to meet the standards of justice and equality.”<sup>136</sup> By these inherent weaknesses, the local law was deemed ill-equipped to offer protection to the foreign investor. The foreign investor would be enjoined to be treated equally badly! Schwarzenberger expressed his opposition to such a stance, stating:

Even if the national treatment is laid down in a treaty, the presumption is that there has been an intention of the parties to secure to their nationals in this manner additional advantages, but not to deprive them of such rights as, in any case, they would be entitled to enjoy under international customary law or the general principles of law recognized by civilized nations.<sup>137</sup>

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<sup>132</sup> *ibid* (n 37) 8-10.

<sup>133</sup> *ibid*.

<sup>134</sup> *ibid*

<sup>135</sup> *ibid*. Quoting E. Root. *The Basis of Protection to Citizens Residing Abroad* (1910) 4 *AJIL* 517, 521-522.

<sup>136</sup> *ibid*.

<sup>137</sup> *ibid*. Quoting G. Schwarzenberger, ‘*International Law as Applied in International Courts and Tribunals* (London, Stevens, 1957, 248).

Eventually, the view in favour of the foreign investor carried the day and it was settled that the standard to be applied would be the international minimum standard.<sup>138</sup> A new question emerged: What would be the international minimum standard of treatment?

It is imperative to note that, other than customary international law, there was still a glaring absence of guide material on the subject matter. Up until this time, there was no successfully negotiated international instrument providing the guiding principles on foreign investments.<sup>139</sup> What was in existence, however, was the practice of the investor countries. Even case law pronouncement at the time were heavily nuanced by these practices. In the *Roberts*<sup>140</sup> claim, for example, the General Claims Commission was persuaded that:

Facts with respect to the equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But, such inequality is not the ultimate test of the propriety of the acts and authorities in the light of international law. The test is, broadly, speaking, whether aliens are treated in accordance with ordinary standards of civilization.<sup>141</sup>

In the end, it was submitted that the international minimal standard encompassed the practice of the investor states on the treatment of foreign investment, bolstered by the general principles of justice and equity.<sup>142</sup> Essentially, this meant, for all practical purposes, applying the law of the investor countries.<sup>143</sup>

This newly achieved semblance of normalcy was however disrupted in the early 2000s as some developing nations resorted to more forceful means of expressing their displeasure with the BIT regime in place. In 2008, the Republic of Ecuador terminated nine of its existing

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<sup>138</sup> *ibid.*

<sup>139</sup> *ibid.*

<sup>140</sup> *The Roberts, Hopkins, and British Claims in the Spanish Zone of Morocco Cases* (1926) RIAA.

<sup>141</sup> *ibid.*

<sup>142</sup> *ibid.*

<sup>143</sup> *ibid.*

BITs.<sup>144</sup> In 2009, the Republic of South Africa followed suit, announcing a comprehensive review of its BIT program and placing a moratorium on the future negotiation of BITs, except in cases of compelling economic and political circumstances.<sup>145</sup> Such moves could arguably portend the initial stages of yet another shift in the historical narrative of foreign investments. This is because they call to question the structure, practices and norms embedded in the current BIT concluding regime.

Cumulatively, therefore, the laws governing the current overall investment regime stemmed from a continuous tussle between the interests of the foreign investor and the host country. In light of this, it is evident that a BIT is not a “self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context.”<sup>146</sup> It is based on this understanding that the paper sought to place the contours and trends in the negotiation of BITs against its historical backdrop. On the international scale, that BITs will linger on as the normative framework governing foreign investments is not contested. This is informed, not only by the absence of a multilateral agreement on investments, but also the lack of a comprehensive coverage of the subject by the World Trade Organization (WTO) Agreements.<sup>147</sup> The import of this reality, then, is that an alternative normative framework for the regulation of foreign investments has to be realised by individual countries, as evidenced by the actions of the Republic of Ecuador and the Republic of South Africa.<sup>148</sup> Failure to do so will lead to the further institutionalization of BITs as a symbol of subservience of the domestic laws and institutions to the needs of the foreign investor.

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<sup>144</sup> Information available at <<http://www.latinarbitrationlaw.com/ecuador-evaluates-investment-treaty-framework>> last accessed 10th October, 2016.

<sup>145</sup> *ibid* (n 6) 145.

<sup>146</sup> *ibid.* 142. Notably, the subject of foreign investments does not form part of the Doha Work Program.

<sup>147</sup> *ibid.* Notably, the subject of foreign investments does not form part of the current Doha Work Program.

<sup>148</sup> *ibid.*

## **1.11 Research methodology**

As a qualitative research, this study primarily relied on desk review. The review involved various sources of information, including books, journal articles, published literature reviews, international instruments on foreign investments and other sources deemed relevant. Additionally, the relevant statutes were referred to. The primary statutes were the Kenyan statutes. However, where deemed significant to the discourse, the statutes of other countries were also considered.

## **1.12 Chapter breakdown**

This paper is broken down into five chapters.

### **CHAPTER ONE**

#### **1.0 INTRODUCTION (RESEARCH PROPOSAL)**

This Chapter lays the basis for the discussion of the research topic. It provides a background to the research; specifies the objectives of the research and provides the theoretical framework within which the research topic is being considered. The historical analysis of the research problem forms the bulk of the literature review.

### **CHAPTER TWO**

#### **2.0 THE NEGOTIATION OF BITs UNDER THE CURRENT REGIME**

Building on the historical analysis undertaken in Chapter 1, this Chapter evaluates the interplay of the competing interests during the negotiation process. This discussion is had within the context of a developed nation – developing nation dichotomy. The Chapter elaborates on how the inherent imbalances between the parties affects the structure, practices and norms governing BITs.

## CHAPTER THREE

### 3.0 THE SCHEME OF BILATERAL INVESTMENT TREATIES IN KENYA

Having discussed the historical context from which BITs arose and the realities of the negotiating environment, this Chapter proceeds to make an analysis of the end product – the concluded BIT. The focus will be on key provisions present in the BITs concluded by Kenya. The aim will be to unravel the eventual distribution of benefits amongst the contracting parties. This Chapter also discusses the domestic legislation on foreign investments in Kenya vis-à-vis the concluded BITs.

## CHAPTER FOUR

### 4.0 THE SPECIFIC EFFECTS OF THE BILATERAL INVESTMENT TREATY PROVISIONS ON THE REGULATORY AUTONOMY OF THE STATE

This Chapter moves beyond the broad assertions made in the preceding Chapters and proceeds to specifically highlight the regulatory constraints present in the current structure, practice and norms, and problematize the arising concerns. This is done through an analysis of the implication of the commitments a host country binds itself to under a BIT, supported by the growing jurisprudence emanating from arbitral tribunals.

## CHAPTER 5

### 5.0 FINDINGS, CONCLUSION AND RECOMMENDATIONS

This Chapter summarizes the findings of the study, provides a conclusion and outlines possible recommendations to remedy the situation.

## CHAPTER 2

### THE NEGOTIATION OF BITs UNDER THE CURRENT REGIME

#### 2.0 Introduction

As mentioned in Chapter 1, most BITs are entered into between a developed nation and a developing nation.<sup>149</sup> This reality creates imbalances from the very onset. The imbalance arises, not only from differences in bargaining power possessed by both parties, but also, the direction of the flow of capital.<sup>150</sup> Routinely, the developed nation will be the source of capital or investment, while the developing nation will be the recipient.<sup>151</sup> Building on the historical favouritism already outlined in Chapter 1, this Chapter evaluates how these imbalances further affect the structure, practices and norms of the parties whilst negotiating a BIT.

#### 2.1 The law market

Recalling that the paper intends to use the dependency theory as its analysis tool, it is important to assert the view of the state adopted by the paper. Classical literature present two prevailing views of the state. The first is the classical Marxist view of the state as a partisan committee that advocates for the interests of the whole bourgeoisie.”<sup>152</sup> Put differently, the state relents to the will of private property.<sup>153</sup> The second is the Hegelian view that “the state is independent from, and superior to, all social (forces), as being the dominant force in society.”<sup>154</sup> The state is therefore the trustee of all the societal interests.<sup>155</sup> It is vested with the responsibility of representing the whole society.<sup>156</sup> To do this, it is called upon to maintain a

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<sup>149</sup> See the BITs concluded by different countries using the search function at *the* United Nations Conference on Trade and Development official website. Available at <<http://unctad.org/>> last accessed 10<sup>th</sup> October, 2016.

<sup>150</sup> *ibid* (n 1) 614.

<sup>151</sup> *ibid*.

<sup>152</sup> Colin Leys, *Underdevelopment in Kenya: The Political Economy of Neocolonialism* (University of California Press 1975). See generally Chapter 1.

<sup>153</sup> *ibid* (n 73). The state therefore emerges from the societal relations of production. It is therefore the society that shapes the state and not the state that shapes the society.

<sup>154</sup> *ibid*. Quoting *Marx and Engels on the State, (1963)* 16 W. POL. Q. 946.

<sup>155</sup> *ibid*.

<sup>156</sup> *ibid*.

harmonious relationship between the constituent elements in the society.<sup>157</sup> The paper adopts the Hegelian view of the state. The question that arises, therefore, is on the ability of the state to fulfil this mandate in the context of BITs.

Kindred to the economic man, the state is assumed to be a “rational, self-conscious and self-determining unit.”<sup>158</sup> This begs the question: What role does a ‘rational, self-conscious and self-determining unit’<sup>159</sup> play in the realm of FDI generally and the conclusion of BITs specifically? It has been opined that there are four key drivers within the realm of FDI – cost, competition, market and the government/state.<sup>160</sup> The prevailing view has been that “the market and the states should not be viewed as opposites but as complementary.”<sup>161</sup> This is because the state is vested with the responsibility of erecting a solid institutional foundation for the flourishing of its market.<sup>162</sup> For FDI, this portends the usage of legal instrumentalities for purposes of attracting foreign investment into the host-country.<sup>163</sup> This creates what Ribstein and O’hara term as the “law market”<sup>164</sup> which essentially entails the shopping by capital-exporting countries for favourable governing laws on foreign investment in capital-importing countries.<sup>165</sup>

Within this law market framework, states act as suppliers of legal rules and private parties are the consumers who demand desirable legal rules to facilitate their private transactions.<sup>166</sup>

Private parties can almost always avoid particular laws by removing themselves, their assets,

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<sup>157</sup> *ibid.*

<sup>158</sup> Robin Murray, ‘The Internationalization of Capital and the Nation-State’ (1971) 67 *New Left. Rev.* 84.

<sup>159</sup> *ibid.*

<sup>160</sup> Hunter Richard, Shapiro Robert and Ryan Leo, ‘Legal Consideration in Foreign Direct Investment’ (2003) 28 *Oklahoma City University Law Review* 851.

<sup>161</sup> ‘The Bank in an Unchanging State’ (World Bank). *World Development Report.* (1997).

<sup>162</sup> Tenuche Marietu, ‘Foreign Direct Investments, Strategic Assets and Sustainable Development: A Critique of International Investment in Nigeria’s Steel Sector’ (2010) 3 *Journal of Politics and Law* 139.

<sup>163</sup> *ibid.* (n 50).

<sup>164</sup> Erin O’Hara and Larry Ribstein, *The Law Market* (1 edn, Oxford University Press 2009).

<sup>165</sup> *ibid.*

<sup>166</sup> *ibid.*



and their activities from that state.<sup>167</sup> In addition to avoiding unfavourable laws, parties can seek out favoured legal regimes by locating themselves, their assets, and/or their activities in a location with the preferred laws.<sup>168</sup>

## **2.2 The capital-importing country**

The law market provides an interesting lens through which foreign investment can be viewed. It temporarily exalts the position of the capital-importing country. This is because, firms in the capital-exporting countries are seen as the ones actively seeking FDI avenues and the capital-importing countries as being the supplier of the avenues through their appropriate laws.<sup>169</sup> However, given that the capital-importing country is almost always under compulsion to propel its economy further, it is in a greater need of the foreign investment. This means that the exalted position is quickly reverted. Julius Nyerere captured this quite succinctly. He stated:

The real ideological choice is between controlling the economy through domestic private enterprise or, doing so through some state or other collective institution. But although this is an ideological choice, it is extremely doubtful whether it is a practical choice for an African nationalist...He will find that the real choice is between foreign private ownership on the one hand and local collective ownership on the other...Private investment in Africa means overwhelming foreign investment. A capitalistic economy means a foreign-dominated economy. These are the facts of the African situation.<sup>170</sup>

Aware of this reality, the approach taken by most capital-importing countries has been a generalized approach to all potential foreign investors. This approach is marked by a conscious removal of factors which would be considered as disincentives by the foreign investors.<sup>171</sup>In Kenya, this approach is evidenced by the liberalization of the economy and the

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<sup>167</sup> *ibid.*

<sup>168</sup> *ibid* (n 50).

<sup>169</sup> *ibid* (n 164).

<sup>170</sup> *ibid* (n 73) Quoting J. Nyerere, *Economic Nationalism, in Freedom and Nationalism* 264 (J. Nyerere ed.)

<sup>171</sup> Yelapaala Kojo, 'Costs and Benefits from Foreign Direct Investment: A Study of Ghana' (1981) 2 N.Y.L. Sch. J. Int'l & Comp. L 72, 85.

removal of obstacles such as import and export licences, exchange controls, restrictions on remittance of dividends and profits and a reduction in the number of licencing requirements.<sup>172</sup> Admittedly, this represents the general orientation of a capital-importing country entering into BIT negotiations. However, it has to be appreciated that, it is “neither useful nor realistic to consider all foreign investments as a single homogenous and static group in which all have the same aims, needs and problems and all are subject to the same treatment and conditions-unaffected by the changes which the dynamics of political and economic development impose.”<sup>173</sup> Such an approach only leads to the mismatch of interests by the capital-importing country.<sup>174</sup> Indeed, it is here that sight of the fact that even as it seeks to actively woo foreign investors, the capital-importing country has to be cognizant of the myriad of interests involved and the need to balance them out, is lost.<sup>175</sup> The capital-importing country ought to be guided by the consideration of whether potential contributions from the investments warrants the attendant costs of the legal commitments in BITs.<sup>176</sup> The fundamental question for the capital-importing country should be how to garner all the possible benefits of foreign investment but at the least possible cost to it.<sup>177</sup>

### **2.3 The capital-exporting country**

Classical economic reasoning posits that production takes place in “those economies enjoying a comparative advantage.”<sup>178</sup> In international investment, this advantage is computed in terms of the price factor in the factors of production.<sup>179</sup> An example would be cheap labour in the

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<sup>172</sup> Information available at <<http://brandkenya.go.ke/wp-content/uploads/2015/08/WhyInvestInKenya1.pdf>> last accessed 4<sup>th</sup> December, 2017.

<sup>173</sup> K. Ryan, ‘Investment Contracts and the Developing Countries’ 91, 93.

<sup>174</sup> *ibid* (n 73) 625.

<sup>175</sup> *ibid* (n 50) 1620.

<sup>176</sup> *ibid*.

<sup>177</sup> *ibid* (n 56).

<sup>178</sup> *ibid* (n 2).

<sup>179</sup> Telford Ted and Ures Heather, ‘The Role of Incentives in Foreign Direct Investment’ (2001) 23 *Loy. L.A. Int’l & Comp. L. Rev.* 605. In the free global market, companies seek out the opportunity to become more competitive. They do this by increasing productivity and controlling the attendant costs. Notably, few factors have an impact on these two measures as the location of the enterprise.

country of investment.<sup>180</sup> The question that arises, therefore is: if these advantages are already existent in the host country, why then does the need for foreign investment arise? The capital-exporting country is thus put to the task of proving the worth of their MNCs.

Efficiency is often cited as the main answer to this question. The capital-exporting country contends that their firms have, inherent in them, certain competitive advantages that permit them to be more effective in their utilization of resources, as compared to the domestic firms in the host country.<sup>181</sup> Stephen Hymer opines that these competitive advantages are a natural reaction by the foreign firms to competition.<sup>182</sup>

These advantages are needed to overcome the natural advantages of local ownership and control. Local managers should be more familiar with the local environment, have greater regulatory influence and should command local factors at more favourable prices.<sup>183</sup>

These assertions have the backing of theoretical literature on the subject, which indeed claim that “foreign investors possess some sort of intangible asset which cannot easily be sold – such as management skills.”<sup>184</sup> Therefore, by asserting the superiority of their foreign firms in the utilization of local assets, capital-exporting countries make the pitch that it would be more advantageous for the host-country to place its assets “in the hands of those who can use them best.”<sup>185</sup>

However, it has been asserted that this is not the only ground for the claim of superiority by the capital-exporting country in the negotiation of BITs. Scholars have opined that embedded

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<sup>180</sup> *ibid* (n 2).

<sup>181</sup> *ibid*. These advantages include greater economies of scale, ownership of proprietary technology, management superiority and refined research and development capabilities.

<sup>182</sup> Stephen Hymer, *The International Operations of National Firms: A Study of Foreign Direct Investment* (The MIT Press 1976).

<sup>183</sup> *ibid*.

<sup>184</sup> Haddad Mona and Harrison Ann, ‘Are There Positive Spillovers from Direct Foreign Investment?’ (1993) 42 *Journal of Development Economics* 51, 52.

<sup>185</sup> *ibid* (n 5).

in any negotiation between a developed nation and a developing nation are the following political nuances.

- a) That the developed nation will undertake the implementation of economic changes favourable to the developed nation;<sup>186</sup>
- b) That the developed nation will undertake the granting of special concessions towards the developing nation;<sup>187</sup> and
- c) That the developed nation will aid in the developing nation's quest for greater power in decision making in any given fora.<sup>188</sup>

Therefore, in the grand scheme of things, the host country is wooed into the belief that it should be more inviting and accepting of foreign investments as a matter of its overall self-interest.<sup>189</sup> The capital exporting country posits itself as the conduit that will enable the capital importing country to finally play catch-up and accelerate its level of economic development.<sup>190</sup>

These claims of superiority, not only of resource utilization, but also of political dominance, have an effect on the bargaining process.<sup>191</sup> They vest on the capital-exporting country, more leverage as compared to the host country.<sup>192</sup> The host country therefore begins the negotiations from a point of weakness. This in turn influences the willingness of the host country to give into concessions.<sup>193</sup> Other times, the host country is stripped off this will and is forced to embrace the terms of the BIT notwithstanding possible deleterious effects to its

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<sup>186</sup>ibid (n58) 263. Quoting Sidney Weintraub, *What Life Is Left In the North-South Dialogue?* (1980) 2 World Econ.453, 457. For example, changes in the broad economic principles under which economic interaction between developed nations and developing nations usually takes place, say for example, the reliance on market forces for determining the terms of trade.

<sup>187</sup>ibid. For example, greater amounts of aid, generous treatment of exports from the developing nation and specific commodity agreements.

<sup>188</sup>ibid. For example, moving more negotiations to the United Nations where their voices carry more weight.

<sup>189</sup> ibid.

<sup>190</sup>ibid (n 48) 119.

<sup>191</sup>ibid (n 50).

<sup>192</sup>ibid.

<sup>193</sup>ibid.

interests.<sup>194</sup> An observation made by a member of the United States of America BIT negotiation team during his tenure is quite illuminating of the negotiation process. He observed that:

BIT partners turn to the US BIT with the equivalent of an IMF gun pointed at their heads; others may feel that, in the absence of a rival super-power, economic relations with one that remains are inevitable. For many, a BIT relationship is hardly a voluntary, un-coerced transaction. They feel that they must enter into the agreement, or that they would be foolish not to...A BIT negotiation is not a discussion between sovereign equals. It is more like an intensive training seminar conducted by the United States, on US terms, on what it would take to comply with the US draft.<sup>195</sup>

Ultimately, after great concessions have been made, the rights of the foreign investor are finalized in a treaty.<sup>196</sup> Viewed this way, the position of the capital importing country, relative to the capital-exporting country, is one of a recipient as opposed to an investor. Ergo, the notion that a BIT is benevolent and good for what it ails, is a false one.<sup>197</sup>

## **2.4 The main contention: Maximum protection and minimum regulation**

The negotiation process outlined above reveals that the claim of equality during negotiation of BITs is a faux. Under this regime, the capital-exporting country has the upper hand. By extension, this means that the interests of the foreign investor still remain supreme. The demand made is that of maximum protection available and also, the greatest latitude to undertake operations in the host country.

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<sup>194</sup>Barnes William, 'Foreign Investment in Canada and Mexico: An Agenda for Host Country Screening' (1977) 1 Boston College International & Comparative Law Journal 1.

<sup>195</sup>ibid (n 37) making reference to the remarks of J.E. Alvarez during his tenure as Chair of a Panel at the ASIL. See further Kishoiyan (n 8) 356, where it is noted, by way of example, that in the matter of compensation, "the developing countries have collectively supported the position that the issue of compensation is one to be decided solely by their tribunals. Their collective position has been embodied in several United Nations General Assembly Resolutions. The developed countries in their turn have insisted upon a standard for compensation which requires the payment of appropriate compensation that accords with international legal standards as exemplified in the Hull formula of "prompt, adequate and effective compensation. Whereas developing countries have a common stance in international fora, their bilateral agreements with most of the developed countries do not run in tandem with their avowed position in the U.N. General Assembly which situation manifests an amount of duplicity on their part."

<sup>196</sup>ibid (n 50).

<sup>197</sup>ibid (n 6).

Generally, the stance adopted by the host country with regards to the levels of control or decontrol to be granted to the foreign investor are attributable to the host country's orientation towards FDI.<sup>198</sup> The levels of regulatory controls oscillate between two basic trends: the open door policy and the restrictive approach.<sup>199</sup> The open-door policy is characterised by the lack of unequivocal prohibitions on foreign investments.<sup>200</sup> Sornarajah succinctly refers to it as the "untrammelled movement of multinational corporations around the world."<sup>201</sup> Prohibitions only exist where the state deems it absolutely necessary.<sup>202</sup> The open door policy is heavily reliant on the market forces to direct the flow of investments in an efficient manner that is representative of all the interests involved.<sup>203</sup> The host country seemingly gives little credence to concerns relating to the potential cost of foreign investment.<sup>204</sup> It should be noted, however, that the unrestricted right of access under the open door policy, does not expunge the right of the host-country to interfere in the operations of the investment after it has been established, for the protection of the country's interests.<sup>205</sup>

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<sup>198</sup>Berke Howard, 'Host Countries' Attitudes Toward Foreign Investment' (1977) 3 *Brook. J. Int'l L.* 233. For example, periods of increased nationalistic feelings, such as the decolonization period, witness stringent regulatory controls on FDI, while periods when the accumulation of capital is perceived to be a dire need, witness increased regulatory decontrol measures.

<sup>199</sup>*ibid.*

<sup>200</sup> See generally Carolyn Kubota, 'Closing the Open Door to Foreign Direct Investment' (1982) 15 *Cornell Int'l L. J.* 121.

<sup>201</sup> *ibid.* (n 47) 614. The main proponent of this open door policy is the United States of America. In 1977, the Economic Policy Group issued a policy statement for the Carter Administration that upheld the long standing United States commitment to an open international economic system. The policy statement concluded that "[t]he fundamental policy of the U.S. Government toward international investment is to neither promote nor discourage inward or outward investment flows or activities ...The Government, therefore, should normally avoid measures which would give special incentives or disincentives to investment flows or activities and should not normally intervene in the activities of individual companies regarding international investment."

<sup>202</sup> *ibid.* (n 200). These instances would include investment in a sensitive industry, when it concerns matters of national security and the protection of a national interest.

<sup>203</sup> *ibid.* (n 198). See further Sornarajah (n 47) 616, where the author notes that in addition to market forces, seemingly innocent laws could be utilized in the regulation of FDI. For instance, in the United States of America, the Anti-Trust laws, whose purpose is to curb the dominant players in the market from abusing this position, could be utilised in the regulation of FDI. The thrust of adopting such a stance would be that the entry of a large foreign MNC, either on its own accord or through a merger, would lead to an automatic conferment of a dominant position on the MNC. Therefore, its entry cannot be allowed.

<sup>204</sup> *ibid.* (n 200).

<sup>205</sup> Simon Reich, 'Roads to Follow: Regulating Direct Foreign Investment' (1989) 43 *Int'l. Org.* 543.

On the other hand, the restrictive policy is characterised by the imposition of rigid rules on foreign investment.<sup>206</sup> This position is often prompted by nationalistic feelings and economic pressures on the state.<sup>207</sup> Notably, however, there is a great discrepancy in the strictness with which the restrictive approach is implemented. For some countries, the regulatory mechanisms, such as screening, are just a mere formality.<sup>208</sup> They provide a platform for the gathering of data on the level of foreign activity in the host-country.<sup>209</sup> In other countries, the regulatory process is an instrument for controlling the types and levels of foreign penetration in the local economy.<sup>210</sup>

These two trends accurately capture the dilemma of the host country in the conclusion of BITs. While its economic needs may compel it to lean towards active recruitment of foreign investment, the need to safeguard its sovereignty demands that it should place some limit on the level of foreign investment.<sup>211</sup> It must be remembered that:

The aim of the host state is to maximise the benefits that the foreign investment brings into the economy and minimise the potential it has for harm. This idea requires the harnessing of the foreign investment carefully to the objectives of the host state. It by necessity means the imposition of a careful regulatory structure on foreign investment which eliminates harm and increases benefits that the foreign investor brings.<sup>212</sup>

Ideally, the host country would prefer to maintain a strong degree of sovereign control over foreign investments entering within its territory. The reality, however, is that masked under the grand projected returns set to be achieved, this assurance is often surrendered in the BIT

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<sup>206</sup> *ibid* (n 198).

<sup>207</sup> *ibid*. This would include, for example, the host-country's sensitivity to foreign investment prompted by the level of foreign investment in the country and the industries involved. This prompts the fear of foreign domination through a foreign-takeover in the host-country. The example of Canada is given. The Canadian spirit of economic nationalism has been said to resemble that of the less developed countries.

<sup>208</sup> *ibid*. 235.

<sup>209</sup> *ibid*.

<sup>210</sup> *ibid*.

<sup>211</sup> *ibid*. 243.

<sup>212</sup> *ibid*

negotiations.<sup>213</sup> Put differently, the assumption that the foreign investments will be an economic catapult to the host country's economy becomes the grand bargain that settles the tussle between the competing need for protection and regulation.<sup>214</sup> The observation below rings true.

Treaties have great potential to credibly commit developing countries to pro-investment policies by using formal international law to tie the hands of policy makers. In exchange for accepting legal limits on their policy autonomy, developing countries can expect to see a corresponding increase in foreign direct investment (FDI).<sup>215</sup>

However, because of the non-quantifiable nature of the expected return,<sup>216</sup> most host countries have difficulty comprehending this projected return.<sup>217</sup> Coupled with the fact that host countries typically overshoot the competitiveness of their environment, this results in regulatory bargains that may not yield the expected returns.<sup>218</sup> In Kenya, data from the National Bureau of Statistics reveal the empirical realities of foreign investments. For instance, despite a significant increase in the level of FDI in the year 2015 (by 619.7 Million USD) and the year 2016 (by 393.4 Million USD), this accounted for only 1% and 0.6% of the Gross Domestic Product (GDP) in the respective years.<sup>219</sup> Furthermore, the statistics also

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<sup>213</sup>Yackee Webb, 'Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?' (2008) 42 *Law & Soc'y Rev.* 805, 806.

<sup>214</sup>Afrin Zakia, 'Foreign Direct Investments and Sustainable Development in the Least-Developed Countries' (2004) 10 *Ann. Surv. Int'l & Comp. L.* 215, 217. See also Neumayer Eric & Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?' (2005) 33 *World Development* 85, where the authors report that developing countries that sign large numbers of BITs can expect to see their shares of FDI nearly double. See also, Salacuse Jeswald & Nicholas P. Sullivan 'Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46 *Harvard International Law Journal.* 67, 130 where the authors present evidence to the effect that investors care greatly about BIT protections. In their model, a developing country that enters a BIT with the United States can expect to see an additional \$1 billion in FDI per year.

<sup>215</sup>*ibid* (n 213) 806.

<sup>216</sup>Onwueke Chika, 'Reconciling the Scramble for Foreign Direct Investments and Environmental Prudence' (2006) 7 *Journal of World Investment and Trade* 113. These include access to new technologies, the opportunity for technological transfer, the opportunity for increased revenue, increased employment opportunities, a reduction on the dependence of foreign aid and external debt, the support for the domestic suppliers through external linkages, to mention but a few.

<sup>217</sup>*ibid* (n 179).

<sup>218</sup> *ibid*.

<sup>219</sup>Information available at <<https://www.ceicdata.com/en/indicator/kenya/foreign-direct-investment>> last accessed 5<sup>th</sup> December, 2017.



show declined levels of the indicators of economic growth such as market capitalization, nominal GDP growth and real GDP growth.<sup>220</sup> This statistics further buttress the argument that “the desire for FDI overwhelmingly precludes the possibility of effectively using the results of a thorough analysis of economic, political, and social or other gains that may come from such inflows, and therefore what laws and policies need to be erected to realize such gains.”<sup>221</sup>The resultant effect is “BITs that extend far into the developing countries’ policy space, imposing damaging binding investment rules with far-reaching consequences for development.”<sup>222</sup>

## 2.5 Questioning the grand bargain

Scholars have devoted substantial time and resources into examining whether, following the conclusion of a BIT, the host country indeed registers any significant changes in its level of economic development.<sup>223</sup> While empirical research on this assumption is abound, it is unfortunate that the results reveal no consensus on the matter.<sup>224</sup>Some studies have concluded that BITs do indeed lead to massive flows of FDI into the host country which, in turn, consequently registers positive economic development indices.<sup>225</sup> Some studies are less magnanimous and apportion any resultant improvement in economic development in a modest fashion.<sup>226</sup> Studies that attribute zero to negative impact of BITs to the economic

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<sup>220</sup> *ibid.*

<sup>221</sup> Victor Mosoti, ‘Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between’ (2005-2006) 26 *Nw. J. Int’l L. & Bus.* 95. See also Berhane G. Mariam, ‘Challenges to Democratic and Economic Transition in Kenya, Ethiopia and Sudan: A Comparative Study of the Political, Economic and Social Structures in the Three Countries’ (2001).

<sup>222</sup> The South African Department of Trade and Industry in its Bilateral Investment Treaty Policy Framework Review.

<sup>223</sup> Yackee Webb, ‘Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence’ (2011) 51 *Virginia Journal of International Law* 397, 398. “Most of these studies follow a common research design. The number of BITs that a state has signed or ratified is counted up, with the resulting independent variable regressed against country-level FDI flow data - such as that included in the World Bank’s World Development Indicators, usually using a pooled cross-sectional time series design.”

<sup>224</sup> The empirical literature on BITs and FDI is helpfully summarized in the United Nations Conference on Trade and Development official website. Available at <<http://unctad.org/>> last accessed 10<sup>th</sup> October, 2016.

<sup>225</sup> *ibid* (n 223).

<sup>226</sup> *ibid.* FDI can promote growth; much will depend on the state in issue, the nature of FDI and the manner of its use and regulations imposed on it

development of the host state are also present.<sup>227</sup> Granted, the lack of definitive outcome in these studies partly stem from the difference in methodology, data sources and model content used.<sup>228</sup> This notwithstanding, the underlying message is glaring. The grandiose claims about the economic development that would follow the conclusion of a BIT, should be consumed with caution.<sup>229</sup> The host country should not be too eager to surrender its regulatory control on the basis of this claim as this only leads to the further institutionalization of the imbalanced system of BIT negotiation.

## 2.6 Conclusion

The discussion in this Chapter reveals the inherent imbalances in the structure, practices and norms attendant to the negotiation of BITs. Underlying any successful economic regime, is the concept of fairness, which is deemed key for the realization of any accruing benefits.<sup>230</sup> In the negotiation of BITs, the term fair is taken to be devoid of any universal meaning.<sup>231</sup> The following excerpt is instructive:

The fairness that matters is not a moral quality transcendently revealed to all, but rather that which for whatever reason is believed by certain actors. In the case of FDI, fair is simply what both the host-country and home-country accept to be fair.<sup>232</sup>

This is an interesting proposition as it places authority of ensuring fairness in the concluded BIT within the immediate control of the contracting parties. However, this proposition begs the question: Can a party to a BIT, under the disability of asymmetric practices and norms, be said to be in control of the fairness to be achieved? It would seem not. A common occurrence for such a BIT is a textual claim of equality and fairness, but the eventual yielding of unfair

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<sup>227</sup> *ibid.* Authors like Somarajah argue that it is empirically untestable whether states will receive more investments if they conclude such treaties. Salacuse and Sullivan also hold a similar view and attribute increase in flow of FDI to local political and economic conditions and government policies than BITs.

<sup>228</sup> *ibid.*

<sup>229</sup> *ibid.* (n 214) 217.

<sup>230</sup> *ibid.* (n 5).

<sup>231</sup> *ibid.*

<sup>232</sup> *ibid.*

realities.<sup>233</sup> The fairness of an action therefore is dependent on the results. In the conclusion of BITs, it has been opined that “what really matters is not the fairness, but unfairness, for it is the perception of unfair results which stresses the economic system.”<sup>234</sup>The eventual distribution of benefits between the contracting states will be show cased in the next Chapter in order to gauge the fairness or unfairness of the regime.

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<sup>233</sup>ibid.

<sup>234</sup>ibid.

## CHAPTER 3

### THE SCHEME OF BILATERAL INVESTMENT TREATIES IN KENYA

#### 3.0 Introduction

Having discussed the historical context from which BITs arose and the realities of the negotiating environment, this Chapter proceeds to discuss the end product – the concluded BIT. In a bid to unravel the eventual distribution of benefits amongst the contracting parties, this Chapter discusses key provisions present in the BITs concluded by Kenya. It shall emerge that, in line with the historical narrative and the realities of the negotiating environment, the draftsmanship of these BITs confers extensive rights upon the foreign investor. Every other provision lends itself to an unqualified protection of private investment interests, while being characteristically silent on the correspondent duties to the foreign investor.

#### 3.1 Bilateral Investment Treaties in force

Kenya has negotiated a number of BITs with other countries. Data from the United Nations Conference on Trade and Development (UNCTAD) indicates that Kenya has negotiated and signed BITs with: Burundi, China, Finland, France, Germany, Iran, Italy, Japan, Korea, Kuwait, Libya, Mauritius, Netherlands, Qatar, Slovakia, Switzerland, Turkey, United Arab Emirates and the United Kingdom.<sup>235</sup> However, not all of them are operational. Presently, only eleven (11) of these BITs are operational. These are as presented in the table below.

NO.	COUNTRY	COMMENCEMENT PERIOD
1.	Netherlands	Entered into force in 1979
2.	United Kingdom	Entered into force in 1999
3.	Italy	Entered into force in 1999

<sup>235</sup> Information available at <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/108>> last accessed 2<sup>nd</sup> December, 2017.

4.	Germany	Entered into force in 2000
5.	Burundi <sup>236</sup>	Entered into force in 2009
6.	France	Entered into force in 2009
7.	Finland	Entered into force in 2009
8.	Kuwait	Entered into force in 2009
9.	Switzerland	Entered into force in 2009
10.	Japan	Entered into force in 2017
11.	Republic of Korea	Entered into force in 2017

The structure and content of these BITs is largely considered *sui generis*, as they do not disclose much deviation from each other.<sup>237</sup> They all have a preambular clause which is a restatement of the purpose to which the BIT lends itself to; a definitional clause which gives meaning to key terminologies used and also outlines the kind of investments envisaged under the BIT; and clauses on the substantive and procedural rights accorded to the foreign investor.

### 3.2 Objectives

With titles such as “Agreement on Economic Co-operation”<sup>238</sup> and “Agreement...on the Promotion and Reciprocal Protection of Investments,”<sup>239</sup> the purpose to be served by these BITs is telling. They represent the parties’ desire to strengthen ties of friendship and intensify economic relations between them. This understanding trickles down to the Preambular Clause

<sup>236</sup>For purposes of this paper, the BIT concluded with Burundi will not be considered in the analysis, as it is a BIT concluded between two developing countries.

<sup>237</sup> *ibid* (n 48) 122. The wording of the clauses are however fashioned in variation to each other.

<sup>238</sup> Agreement on Economic Co-operation between the Government of the Kingdom of the Netherlands and the Government of the Republic of Kenya. Available at <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1793>> last accessed 24th July, 2016.

<sup>239</sup> Agreement between the Swiss Confederation and the Republic of Kenya on the Promotion and Reciprocal Protection of Investments. Available at <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/3263>> last accessed 24th July, 2016.

of the BITs where the objectives to be met are often set out. The Preamble to the Kenya-UK BIT, for example, sets out the objectives as follows:

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya; Desiring to create favourable conditions for greater investment by nationals and companies of one State in the territory of the other State; Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States.<sup>240</sup>

From this, the following can be deciphered. First, the reiteration that the key thrust in the conclusion of BITs is that they are instruments of development; lending themselves to the stimulation of private business ventures from foreign nationals through the establishment and guarantee of certain favourable conditions.<sup>241</sup> Second, that implicit in the conclusion of BITs, is the promise of reciprocity in treatment.<sup>242</sup> This is hinged on the assumption that investors from both contracting parties will be investing in the respective territories. Ergo, such limitations in each states freedom of action, is presumed to be borne by both parties.

### **3.3 Scope of investments**

Often, in BITs, the term “investment” is defined as broadly as possible and includes both tangible and intangible property.<sup>243</sup> Arguably, the all-encompassing language serves to ensure that protection is accorded to all conceivable forms of investments.<sup>244</sup> In this regard, the following are some of the envisaged investments set out in the BITs.

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<sup>240</sup> The Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the Promotion and Protection of Investments. Available at <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1795>> last accessed 24th July, 2016.

<sup>241</sup> Gallis Glenn, ‘Bilateral Investment Protection Treaties’ (1984) 2 *Journal of Energy and Natural Resources Law* 77, 81.

<sup>242</sup> *ibid.*

<sup>243</sup> *ibid.*

<sup>244</sup> *ibid* (n 114) 406.

- a) movable and immovable property as well as any other rights in *rem*, such as mortgages, liens and pledges;<sup>245</sup>
- b) interest in companies including shares, debentures, bonds, loans, other debt instruments and any other kind of participation in companies;<sup>246</sup>
- c) claims to money which has been used to create an economic value or claims to any performance having an economic value;<sup>247</sup>
- d) intellectual property rights;<sup>248</sup>
- e) concessions for the search, extraction and exploitation of natural resources. Under public law or by contract;<sup>249</sup>

Notably, the character of these investments is that they can be both extensive and diverse in nature. Notwithstanding the restrictions on ownership of commercial or industrial properties by non-Kenyan citizens across different sectors of the economy,<sup>250</sup> Kenya still maintains a predominantly open door policy towards foreign investments. Therefore, from the outset, there is no telling into which sector of the economy the foreign investments can permeate to.

### 3.4 Content

As was intimated to earlier, most BITs are *sui generis* in character – they follow a certain pre-established pattern and their provisions closely mirror each other. The core substantive commitments made to the foreign investor include a guarantee of freedom from

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<sup>245</sup> Treaty between the Federal Republic of Germany and the Republic of Kenya concerning the Encouragement and Reciprocal Protection of Investments. See Article 1(1) (a). Available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1350> last accessed 24th July, 2016. See also (n 239) Article 1(2) (a) and (n 240) Article 1(a) (i).

<sup>246</sup> See Agreement between the Government of the Italian Republic and the Government of the Republic of Kenya on the Promotion and Protection of Investments. Article 1(1) (b). Available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3230> last accessed 24th July, 2016. See also (n 245) Article 1(1) (b) and (n 239) Article 1(2) (b) and (c).

<sup>247</sup> See (n 245) Article 1(1) (c), (n 239) Article 1(2) (d) and (n 246) Article 1(1) (c).

<sup>248</sup> See (n 245) Article 1(1) (d), (n 239) Article 1(2) (e) and (n 246) Article 1(1) (d). These rights include copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), know-how and goodwill.

<sup>249</sup> See (n 245) Article 1(1) (e), (n 239) Article 1(2) (f) and (n 246) Article 1(1) (e).

<sup>250</sup> Sectoral investment restrictions imposed by law include in the banking and finance industry, media industry, mining industry, real estate industry, telecommunications industry, insurance industry, maritime industry, engineering industry and the private security industry.

discriminatory practices by the host country, the right to compensation for expropriation and the right to freely transfer funds and repatriate investment capital and returns.<sup>251</sup> These substantive commitments provide the basis for a key procedural guarantee – that in the event of an alleged breach of the BIT, the foreign investor has the right to unilaterally initiate binding and enforceable international arbitration against the host state.<sup>252</sup> This accompanying procedural right therefore bolsters the credibility of the substantive commitments.<sup>253</sup> Below is a closer look at these substantive commitments that Kenya has promised to undertake.

### **3.4.1 Provisions against discrimination**

The non-discrimination of investments based on the nationality of the investor is one of the key principles of international investment law. All BITs seek to obtain a commitment to this principle by incorporating two key clauses guaranteeing the Most Favoured Nation Treatment standard and the National Treatment standard.

#### **Most-Favoured Nation Treatment standard**

The Most-Favoured Nation Treatment (hereinafter MFN Treatment) standard is a principle whose operationalization “establishes equality of opportunity on the highest possible plane: the minimum of discrimination and the maximum of favours conceded to any third state.”<sup>254</sup> The incorporation of the MFN Treatment standard, therefore, guarantees foreign investors that the competitive opportunities available in the country will be made available to them on equal footing as other foreign investors from elsewhere.<sup>255</sup>

Evident from the MFN Treatment Clauses in all the BITs operational in Kenya, a typical MFN Treatment Clause has 3 components:

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<sup>251</sup> *ibid* (n 6) 141.

<sup>252</sup> *ibid* (n 223) 403.

<sup>253</sup> *ibid* (n 48) 121.

<sup>254</sup> *ibid* (n 37) 67.

<sup>255</sup> *ibid*.



- a) A guarantee by both contracting parties that they shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal of investments made by investors from the other contracting party;
- b) A specific duty to refrain from according the admitted investments any treatment less favourable than that accorded to admitted investments or returns of investments of investors of any third State; and
- c) An exception to this general rule, recognizing that special advantages are sometimes granted to investors of other third states by virtue of agreements establishing customs unions, economic unions, monetary unions or similar institutions, and relieving the contracting party of the obligation to accord such advantages to investors of the other contracting party.

Arising from these provisions, it is clear that the MFN Treatment standard inexplicably extends the services of the shrewdest negotiator in any other investment arrangements, gratuitously, to all other BITs.<sup>256</sup> By extension, this means that the use of this standard is constantly metamorphosing, depending on the agreements entered into by Kenya. The standard, therefore, not only binds the contracting parties to past agreements, but also, any future arrangements entered into in relation to foreign investments inexplicably come within its fold.<sup>257</sup>

### **National Treatment standard**

While the MFN Treatment standard seeks to establish equality of opportunities between foreign investors from different countries, the National Treatment standard entitles the foreign investor to the extension of treatment similar to that accorded to the Kenyan nationals.<sup>258</sup> Therefore, the National Treatment standard seeks to curb discriminatory

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<sup>256</sup> *ibid* 68.

<sup>257</sup> *ibid*.

<sup>258</sup> *ibid* 70-73.

tendencies pegged on the nationality of ownership of any given investment.<sup>259</sup> The UNCTAD Series on Issues in International Investment Treaties defines the National Treatment as:

A principle whereby the host country extends to foreign investors treatment that is at least as favourable as the treatment that it accords to national investors in like circumstances. In this way, the national treatment standard seeks to ensure a degree of competitive equality between national and foreign investors.<sup>260</sup>

Given that the rationale behind the National Treatment standard is the elimination of artificial distortions in competition and the enhancement of efficiency in the working of the market,<sup>261</sup> parties to a BIT will often make provisions on how to address the inequalities arising from their differences in economic endowment and technical capabilities. It is therefore common place to find provisions calling for the “differentiation between national and non-national firms in order to bring about a degree of operative equality.”<sup>262</sup> Typically, the parties to a BIT may agree on either of the following options. The first – that the granting of a general right to National Treatment is subject to an agreed upon “negative list.”<sup>263</sup> The list may, for example, exclude certain industries from the application of the National Treatment principle. The second – that the parties will proceed on the understanding that there are no general rights to National Treatment *per se*.<sup>264</sup> Instead, the obligation of National Treatment attaches only upon the fulfilment of the requirements of a “positive list.”<sup>265</sup> The positive list would therefore outline the criteria to be met by the foreign investor before claim of National Treatment can be met. Lastly, the granting of a general right to National Treatment but

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<sup>259</sup> *ibid.*

<sup>260</sup> *ibid.*

<sup>261</sup> *ibid.*

<sup>262</sup> *ibid.*

<sup>263</sup> *ibid.*

<sup>264</sup> *ibid.*

<sup>265</sup> *ibid.*

subject to exceptions stipulated in the BIT.<sup>266</sup> Here, the National Treatment clause found in the BIT concluded between Kenya and Switzerland is instructive. It stipulates that:

The provisions of...this Article shall not prevent a Contracting Party from granting special incentives to its own nationals and companies in accordance with its laws and regulations, in order to stimulate and promote the creation of local industries, in particular small and medium sized enterprises, provided that such incentives do not significantly affect investments of investors of the other Contracting Party.<sup>267</sup>

Whichever formulation of the National Treatment principle the contacting parties choose to adopt, the working of the standard is that it confers an inherent right to the foreign investor. Other than in the case of a positive list, the foreign investor bears no obligation to the host state to fulfil any conditions before the right can attach. The National Treatment principle thus provides a legitimate basis for any claims of discrimination by the foreign investor.

### **3.4.2 Protection from expropriation**

Throughout the historical development of international investment law, the quest for utmost guarantee of protection to property has arguably been the single greatest concern for the foreign investor.<sup>268</sup> In cognizance of this, protection of foreign investment from expropriation has been maintained as an age-old principle in international investment law. The jurisprudence on this principle has been subject to extensive debate throughout the course of time.<sup>269</sup> However, it is now settled that foreign-owned property ought not to be subjected to measures tantamount to expropriation unless the measure is informed by public purpose or national interest; the measure is non-discriminatory; the expropriation is done in accordance with the applicable laws and due processes; and prompt, adequate and effective compensation is paid.<sup>270</sup> Indeed, all the six BITs concluded have provisions that give effect this

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<sup>266</sup> *ibid.*

<sup>267</sup> *ibid* (n 239) see Article 4.

<sup>268</sup> Carroll John, 'The Foreign Direct Investment Regulations' 331.

<sup>269</sup> *ibid.*

<sup>270</sup> *ibid* (n 37). See Chapter 5.

understanding.<sup>271</sup> Generally, therefore, Kenya has the right to expropriate property, but this right has to be exercised within these set parameters.

### **3.4.3 Transfer of payments and repatriation of profits**

The general understanding in international investment law is that a system that facilitates transfer of payments equals an attractive climate for foreign investment.<sup>272</sup> Parties to a BIT usually seek to ensure that their investors can repatriate the profits from the investment back to their home country. In light of this, BITs contain provisions guaranteeing the unrestricted transfer of payments resulting from the investment. This right covers:

- a) interests, dividends, profits and other returns;<sup>273</sup>
- b) repayments of loans related to investment;<sup>274</sup>
- c) the proceeds of partial or total sale of the investment;<sup>275</sup>
- d) compensation for dispossession or loss;<sup>276</sup> and
- e) earnings of foreign employees working in relation to an investment once the legal requirements have been fulfilled.<sup>277</sup>

This right is not entirely unfettered. It is commonplace to find a provision making the transfer of payment subject to any such measures taken by the host state deemed necessary to “safeguard the integrity and independence of its currency, its external financial position and balance of payments.”<sup>278</sup> However, such measures need to be equitable and applied in good faith.

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<sup>271</sup> See (n 238) Article 9, (n 239) Article 6, (n 240) Article 4 and 5, (n 245) Article 4 and (n 246) Article 5.

<sup>272</sup> *ibid* (n 8).

<sup>273</sup> See (n 238) Article 8, (n 239) Article 5, (n 240) Article 6, (n 245) Article 5 and (n 246) Article 6.

<sup>274</sup> *ibid*.

<sup>275</sup> *ibid*.

<sup>276</sup> *ibid*.

<sup>277</sup> *ibid*.

<sup>278</sup> See Kenya’s Model BIT at Article 6. Available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2822> last accessed 24th July, 2016.

### **3.5 Domestic legislation on foreign investments**

The discussion above outlines the substantive guarantees that Kenya makes to the foreign investor. Glaringly absent from these provisions, are any corresponding duties placed upon the foreign investor. The overall willingness of Kenya to accept foreign investments on these liberal terms excludes the possibility of addressing any of its concerns within the BIT. What then happens, is that, in an attempt to showcase a semblance of regulatory control over foreign investments these concerns are relegated to domestic legislation.<sup>279</sup>In Kenya, the expression of domestic legislation on foreign investments is found in the Constitution, the Natural Resources (Classes of Transactions Subject to Ratification) Act,<sup>280</sup>the Foreign Investments Protection Act<sup>281</sup>(hereinafter FIPA) and the Investment Promotion Act<sup>282</sup> (hereinafter IPA).

#### **3.5.1 The Constitution of Kenya**

The Constitution strikingly addresses both the needs of the foreign investor and that of the state. For the foreign investor, the Constitution provides robust safeguards for the protection of investments and private property. These safeguards are evident in Article 40 which guarantees utmost protection of the right to property of any description and held in any part of the country<sup>283</sup> and Article 27 which guarantees the right to equal protection and equal benefit of the law.<sup>284</sup>

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<sup>279</sup> *ibid* (n 18) 9.

<sup>280</sup> Act No. 41 of 2016, Laws of Kenya.

<sup>281</sup> Chapter 518, Laws of Kenya.

<sup>282</sup> Act No. 6 of 2004, Laws of Kenya.

<sup>283</sup> Article 40 (1) provides that: Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property— (a) of any description; and (b) in any part of Kenya. Further, Article 40 (3) provides that: (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation— (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that— (i) requires prompt payment in full, of just compensation to the person; and (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

<sup>284</sup> Article 27 (1) provides that: Every person is equal before the law and has the right to equal protection and equal benefit of the law. Article 27 (2) provides that: Equality includes the full and equal enjoyment of all right and fundamental freedoms.

For the purposes of upholding the state's exercise of its regulatory autonomy, the Constitution places several safeguards, amongst them, Article 66 which vests the state with the prerogative to regulate the use of any land and any interest or any right over any land in Kenya<sup>285</sup> and Article 71 which provides that certain classes of transactions relating to natural resources shall be subject to ratification by parliament.<sup>286</sup> To the extent that the investments envisioned under a BIT would relate to natural resources, Article 71 would arguably be the first step in the state's exercise of its regulatory autonomy over such investments. Notably however, while Article 71 rightly ought to be heralded as a step in the right direction, it is nonetheless riddled with limitations. First, Article 71 only applies to transactions entered into before or after the effective date – the 27<sup>th</sup> day of August, 2010. Other than the BITs recently signed between Kenya and Japan and Kenya and the Republic of Korea, this precludes all other operational BITs from the ambit of parliament. Put differently, by the principle of non-retrospective application of the law, the state does not enjoy the constitutional prerogative to subject these BITs to ratification by parliament. Secondly, Article 71 seemingly extends the tool of ratification by parliament to transactions involving natural resources only.<sup>287</sup> It must be appreciated that the scope of investments covered in BITs are not limited to natural resources. On the face of it, this measure would not apply to investment agreements with no bearing on natural resources.

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<sup>285</sup> Article 66 (1) provides that: The State may regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning. Article 66 (2) provides that: Parliament shall enact legislation ensuring that investments in property benefit local communities and their economies.

<sup>286</sup> Article 71 (1) provides that: A transaction is subject to ratification by Parliament if it – (a) Involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya; and (b) is entered into on or after the effective date. Article 71 (2) provides that: Parliament shall enact legislation providing for the classes of transactions subject to ratification under clause (1).

<sup>287</sup> The term natural resource is defined in Article 260 of the Constitution as the physical non-human factors and components, whether renewable or non-renewable, including— (a) sunlight; (b) surface and groundwater; (c) forests, biodiversity and genetic resources; and (d) rocks, minerals, fossil fuels and other sources of energy.

### 3.5.2 The Natural Resources (Classes of Transactions Subject to Ratification) Act

Pursuant to the provisions of Article 71 of the Constitution, parliament enacted the Natural Resources (Classes of Transactions Subject to Ratification) Act in 2016. This Act gives further specificity to the classes of transactions subject to ratification by parliament. The Schedule to this Act specifies the following transactions as those requiring ratification by parliament:

	<b>NATURAL RESOURCE</b>	<b>TRANSACTION</b>
1.	Crude oil and natural gas	Authorization to extract crude oil or natural gas.
2.	Minerals	Mineral agreements with a threshold of 500 million USD.
3.	Water resources	The extraction of sea water within the territorial sea for private commercial use.
4.	Underground water resources	The extraction of underground steam within a water conservation or other water resource protected area.
5.	Wildlife	Extraction of oil, gas, and minerals within a wildlife conservation area or other wildlife protected area.
6.	Wildlife	Export and re-export of endangered wildlife species.
7.	Wildlife	Excision or change of boundaries of gazetted national park or wildlife protection area.
8.	Forests	Long term concession of a gazetted forest resource.
9.	Forests	Excision or change of boundaries of gazetted public forests or nature reserves.
10.		Any other transaction subject to ratification under an Act of Parliament.

Following the recent resource discoveries in Kenya, such as the two new water sources at Lotikipi Basin and Turkana Basin, the discovery of oil reserves at Tullow, the coal power plant in Lamu and the natural gas plant in the coastal region, the provisions and stipulations of this Act are most certainly timely. However, caution must be expressed at the fact that foreign investors keen on tapping into these new opportunities in Kenya are drawn from countries with which Kenya has signed a BIT with and also, countries with which no such BIT is existent. While for the latter the application of this Act is evident, the matter is not as straightforward for the former as they are still governed by the BITs.

### **3.5.3 Foreign Investments Protection Act**

The FIPA is cited as an act of parliament “to give protection to certain approved foreign investments and for matters incidental thereto.”<sup>288</sup> The FIPA can rightly be regarded as the substantive law governing foreign investments in the country as it broadly outlines the rights attendant to foreign investments. The FIPA makes provisions for the obtaining of investment certificates by a foreign investor,<sup>289</sup> the transfer of profits,<sup>290</sup> protection from compulsory acquisition<sup>291</sup> and special arrangements for investor promotion and protection.<sup>292</sup>

### **3.5.4 Investment Promotion Act**

The IPA is cited as an act of parliament “to promote and facilitate investment by assisting investors in obtaining the licences necessary to invest and by providing other assistance and incentives and for related purposes.”<sup>293</sup> The IPA outlines the procedural law to be followed in guaranteeing the foreign investors the rights as provided in the FIPA. The IPA makes provisions for, amongst others, the procedure for consideration of application for an

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<sup>288</sup> *ibid* (n 281). See preamble.

<sup>289</sup> *ibid*. See Section 3 and 4.

<sup>290</sup> *ibid*. See Section 7.

<sup>291</sup> *ibid*. See Section 8. This provision is subject to the Constitutional stipulations on compulsory acquisition by the state.

<sup>292</sup> *ibid*. See Section 8B.

<sup>293</sup> *ibid* (n 282). See preamble.



investment certificate,<sup>294</sup> the conditions to be met by a foreign investor for the issuance of an investment certificate,<sup>295</sup> the revocation of an investment certificate<sup>296</sup> and the entitlement to certain licences.<sup>297</sup> The IPA also establishes administrative bodies mandated to promote and facilitate investments in Kenya. These bodies are the Kenya Investment Authority<sup>298</sup> (hereinafter KIA) and the National Investment Council<sup>299</sup> (hereinafter NIC).

### **3.6 BITs vis-à-vis domestic legislation**

To the extent that the domestic legislations discussed above define the rights and protections accorded to foreign investors in the country, they can be regarded as complementary to the rights and protections offered to foreign investors under BITs and also under customary international law. In actual fact, it is not uncommon to find some of these legislative provisions in BITs. This is brought about either by direct incorporation or an agreed interpretation stance.<sup>300</sup> For instance, unless otherwise stipulated, it is generally understood that the assets receiving protection under a BIT are those invested in accordance with the domestic laws and regulations of Kenya.<sup>301</sup> In effect, this incorporates any legislation mandating approval of investments by Kenya into the BIT.<sup>302</sup>

The misfortune is that domestic legislation of the majority of developing nations is prompted by the single-minded purpose of attracting foreign investment. Domestic legislation is therefore characterized by overly extensive concessions that limit the possibility of any meaningful regulation by the state. For instance, the IPA provides that an investment certificate will be issued if, amongst other conditions, it is deemed that the said foreign

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<sup>294</sup> *ibid.* See Section 3, 5 and the First Schedule.

<sup>295</sup> *ibid.* See Section 4 and 7.

<sup>296</sup> *ibid.* See Section 10 and 11.

<sup>297</sup> *ibid.* See Section 12 and 13.

<sup>298</sup> *ibid.* See Section 14 and 15.

<sup>299</sup> *ibid.* See Section 26 and 27.

<sup>300</sup> *ibid.* (n 18) 9.

<sup>301</sup> *ibid.* (n 173) 93-94.

<sup>301</sup> *ibid.* (n 173) 93-94.

<sup>302</sup> *ibid.* (n 8) 345.

<sup>303</sup> *ibid.* (n 282). See Part IV of the Act.

investment and activities related thereto, will be beneficial to Kenya.<sup>303</sup> The IPA goes further to outline the factors to be taken into consideration by KIA in the assessment of the beneficial nature of any given foreign investment. KIA is required to consider the extent to which the investment will contribute to the creation of employment for Kenyans,<sup>304</sup> the acquisition of new skills or technology for Kenyans,<sup>305</sup> the implications on the tax revenues or other government revenues,<sup>306</sup> the transfer of technology to Kenya,<sup>307</sup> the effect in foreign exchange, either through exports or import substitution,<sup>308</sup> the utilization of domestic raw materials, supplies and services,<sup>309</sup> the adoption of value addition in the processing of local, natural and agricultural resources<sup>310</sup> and the utilization, promotion, development and implementation of information and communication technology in the country.<sup>311</sup> One may be persuaded to celebrate the fact that these factors represent an imposition of obligations on the foreign investor. However, such an assumption would be overly optimistic. This is because, the draftsmanship of these factors is very broad and permissive. For instance, while the IPA requires the employment of Kenyans, it falls short of stipulating the percentage threshold. While it favours the utilization of domestic resources, it falls short of prescribing the quotas to be observed. Most importantly, while these legislative prescriptions are very neat, not all of them are compulsory.<sup>312</sup> This means, therefore, that KIA is under no obligation to deny an investment certificate to a foreign investor who operates in defiance of these factors. A foreign investor in breach of these requirements may have the available sanctions meted upon him, without necessarily losing the protections guaranteed under a BIT.

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<sup>303</sup> *ibid*(n 282). See Part IV of the Act.

<sup>304</sup> *ibid.* Section 2(a).

<sup>305</sup> *ibid.* Section 2(b).

<sup>306</sup> *ibid.* Section 2(c).

<sup>307</sup> *ibid.* Section 2(d).

<sup>308</sup> *ibid.* Section 2(e).

<sup>309</sup> *ibid.* Section 2(f).

<sup>310</sup> *ibid.* Section 2(g).

<sup>311</sup> *ibid.* Section 2(h).

<sup>311</sup> *ibid.* Section 2(h).

<sup>312</sup> This is with the exception of the requirements as to creation of employment, acquisition of new skills and the generation of revenue.

Further compounding this problem is the fact that the regulatory compliance in the domestic legislations discussed above is heavily conditioned on discretion. This discretion is mostly vested upon the relevant Cabinet Secretary or the administrative agency involved.<sup>313</sup> Effective regulation by the state, in accordance with the prescriptions of the domestic legislations, is therefore primarily reliant on the reasonable exercise of this discretion.<sup>314</sup>

It must be recalled that, although complementary, BITs create a distinct tier of legal protection – above the domestic laws of the host country and the principles of customary international law. This means that, generally, the guarantees and protection mechanisms outlined in BITs are deemed to be above and beyond those established by the lower level tiers.<sup>315</sup> Therefore, any constraints imposed by the lower level tiers would largely be considered incongruent to BIT provisions. This explains why, while the domestic legislation may theoretically prescribe barriers aimed at upholding the regulatory autonomy of the state, in practical terms, their implementation reveals some ambivalence. This goes to show that the liberalization stemming from BITs trickles down to the domestic legislation on the matter. It can therefore not be argued that provisions in domestic legislation grants Kenya a significant amount of control over the overall liberality concerning the regulation of foreign investment.<sup>316</sup>

### **3.7 The continued imbalance**

The BIT provisions highlighted above are a testament to the results of an imbalanced negotiation process. While the host state makes broad concessions, the language of the provisions is silent on the duties and obligations placed on the foreign investor. Put

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<sup>313</sup> *ibid* (n 282). Section 4(2) places the discretion upon KIA to determine whether an investment is beneficial to the country. See also (n 281) in Section 3(2) the Cabinet Secretary is vested with the discretion of determining whether an investment is beneficial to the country and proceeding to issue an investment certificate to the foreign investor on a discretionary basis.

<sup>314</sup> Akilano M. Akiwumi, 'The Need for the Harmonization of African Investment Laws' (1985) 2 *Africa & L. Int'l Rev.* 1, 5.

<sup>315</sup> *ibid* (n 1).

<sup>316</sup> *ibid*.

differently, none of these guidelines or norms creates any specific duty or liability on the foreign investor. For example, there are no performance requirements placed on the foreign investor,<sup>317</sup> the issue of compensation to the host country on account of any damage caused by the activities of the foreign investor is omitted entirely,<sup>318</sup> and regard for the need to maintain contingency plans in the event of environmental, or other concerns, is also lacking.<sup>319</sup> One may argue that the absence of these obligations does not entirely disadvantage the host country as the host country can make recommendations to the foreign investor to address the particular concern. However, it has to be appreciated that recommendations do not have binding force. Therefore, in the absence of a specific duty or liability, the foreign investor has the option of non-compliance. This may lead to hostile relations, but any action taken by the foreign investor would not be in breach of any right of the host country.

These inadequacies certainly go against the notion of the state as a rational, self-conscious and self-determining unit. The host country is all too willing to give up its sovereign right to administer its domestic laws and control its economic trajectory. It is becoming more apparent that the host country would much rather conclude a BIT on these terms, than miss out on the opportunity altogether. It is conceivable that this trend may ultimately lead to indifference to the legal and economic issues in the host country.

### **3.8 Conclusion**

This chapter has explored the substantive provisions found in the BITs concluded by Kenya. On the surface, “they are a liberal set of inducements quite attractive to any foreign investor.”<sup>320</sup> Their implication on the regulatory autonomy of the host country has been set on a very broad premise – that they limit the regulatory autonomy of the host country. The next

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<sup>317</sup>ibid (n 15) 107. Notably, many BITs to which developed nations are a party to, prohibit the imposition of performance requirements, citing it as a discriminatory and anti-competitive practice.

<sup>318</sup>ibid (n 213) 225-226.

<sup>319</sup>ibid. The foreign investor is therefore under no obligation to adopt environmentally sensitive policy measures or technology where the need calls for it.

<sup>320</sup>ibid (n 171) 85.

chapter will go beyond this broad premise and seek to specifically elaborate how these provisions limit the regulatory autonomy of the host country.

## CHAPTER 4

### THE SPECIFIC EFFECTS OF THE BILATERAL INVESTMENT TREATY PROVISIONS ON THE REGULATORY AUTONOMY OF THE STATE

#### 4.0 Introduction

Up until this point, the recurrent contention of this paper has been that the historical conditions and context within which BITs arose, coupled with the imbalances evident in the negotiation process, have worked to push the concerns of the host country to the periphery. The exact distribution of benefits emanating from a BIT concluded under this regime has been highlighted in Chapter 3. It has been showcased that the persistent challenge for the host country has been finding a balance between “securing the benefits of investment liberalization without limiting the freedom of governments”<sup>321</sup> to exercise their regulatory autonomy over the foreign investments.<sup>322</sup> The observation, thus far, has been that the regulatory autonomy of the host country, with regards to the foreign investments, incessantly seeks to be diminished. This has been based on the pretext that, under the current regime, the objectives of the foreign investor and the host state are seemingly irreconcilable.

This Chapter moves beyond these broad assertions and specifically highlights the regulatory constraints perpetrated by the current structure, practices and norms. Through an analysis of the implication of the commitments a host country binds itself to under a BIT, supported by the growing jurisprudence emanating from arbitral tribunals, this Chapter problematizes the arising concerns. It shall emerge that BITs are solely aimed at curbing the extent of the state’s regulatory function, for the benefit of the foreign investor.<sup>323</sup> This is largely informed by an innate quality of BITs – they tend to consist of standards rather than rules. The interpretation of these standards is often up for debate. As a result, foreign investors have been engaged in a

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<sup>321</sup> *ibid* (n 90) 74. Quoting A. Mattoo and A. Subramanian, ‘Regulatory Autonomy and the Multilateral Disciplines: The Dilemma and a Possible Solution’ (1998) 1 *Journal of International Economic Law* 303.

<sup>322</sup> *ibid*.

<sup>323</sup> *ibid*.

continuous clamour to secure expansive rights attendant to their investments.<sup>324</sup> Some of these right have been more substantial than many host countries anticipated.<sup>325</sup> It is therefore doubtful if BITS can have a contrary effect – that is, ceding some regulatory latitude to the host state.

#### **4.1 What bilateralism?**

The term bilateral, as used in BITs, means “affecting reciprocally two nations or parties.”<sup>326</sup> As stated in Chapter 3, implicit in the conclusion of a BIT is the understanding that reciprocal treatment will be extended to foreign investors from both contracting parties within the territory of either state.<sup>327</sup> This understanding is based on the implied assumption that investors from the both parties to the BIT will be investing in each other’s territory. This implied assumption is hopeful and superficial. This is because, “it may be that investors from one contracting party may never invest in the territory of the other contracting party or, if they do invest, the investment may be so small, inconsequential and insignificant.”<sup>328</sup>

Put more directly, the question arises, how many Kenyan investors are to be found within the territories of the countries with which Kenya has operational BITs with? Taking the United Kingdom as an example, an analysis of their FDI returns for the year 2015, indicates that majority of their foreign investment comes from member states to the OECD.<sup>329</sup> In fact, foreign investment from the African continent falls within the bracket “others.”<sup>330</sup> Further statistics from the Office for National Statistics in the United Kingdom shows that the key

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<sup>324</sup>Mary Hallward-Driemeier, ‘Do Bilateral Investment Treaties Attract FDI? Only a Bit... and They Could Bite’ 1, 4.

<sup>325</sup>ibid.

<sup>326</sup> Merriam-Webster (1983) Webster's Ninth New Collegiate Dictionary. Available at <<http://www.merriam-webster.com/dictionary>> last accessed 17th August, 2016.

<sup>327</sup>Gunawardana Asoka, ‘The Inception and Growth of Bilateral Investment Promotion and Protection Treaties’ (1992) 86 Am. Soc’y Int’l L. Proc. 544, 546.

<sup>328</sup>ibid (n 90) 74.

<sup>329</sup> Information available at <<http://www.oecd.org/daf/inv/investment-policy/FDI-in-Figures-April-2016.pdf>> last accessed 23rd September, 2016.

<sup>330</sup>ibid.

industries receiving direct investment from Africa were “transportation and storage, and administrative and support service activities.”<sup>331</sup>

Realistically, therefore, the need for protection under a BIT regime may never quite arise for the Kenyan investor. Therefore, the presence or absence of a BIT is, quite arguably, inconsequential. This calls to question the need for Kenya to be party to a “bilateral” treaty under which the reciprocal benefits accruing to its potential investors are less apparent. This concern is succinctly captured in the following excerpt:

The use of concepts such as "capital exporting" country and "capital importing" country in international investment discourse suggests that some countries "export" capital while others "import" it. This suggests that some countries invest and others receive investment. Since from the outset bilateral investment treaties have always been aimed at the reciprocal protection of investment from the two contracting countries, it is not clear whether a country that imports capital or receives investment (the capital importing country) but does not export capital or invest abroad needs to be party to such treaties.<sup>332</sup>

However, even if one were to reject this argument, say, by asserting that the reality on the ground notwithstanding, BITs serve the bigger purpose of demonstrating economic co-operation between countries, their bilateral character would still be up for challenge. This is because, the real testament as to the falsity of the “bilateral” nature of BITs, is to be found in the terms contained therein. As elaborated in Chapters 1 and 2, the overall scheme of investment treaties is based on a give-and-take relationship. Put differently, for every right granted, it is anticipated that there must be a corresponding duty imposed on the other party. However, from the elaboration of the key provisions in these BITs, it is evident this fundamental component is lacking. While the host country grants a broad spectrum of substantive rights to the foreign investor, the investor assumes no corresponding duties or

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<sup>331</sup>Information available at

<https://www.ons.gov.uk/economy/nationalaccounts/balanceofpayments/articles/theukstradeandinvestmentrelationshipwithafrica/2016> last accessed 23<sup>rd</sup> September, 2016.

<sup>332</sup>ibid (n 90) 76.



obligations towards the host country. This means that often, the host country will find itself stripped off the legal basis to assert claims to regulatory autonomy and to manoeuvre the policy space in relation to foreign investments.<sup>333</sup> The multitude of claims brought against the host country based on actions that would otherwise be considered as the exercise of the state's prerogative to regulate by making pronouncements on policy and enacting legislation is a testament to this reality.

Viewed this way, BITs ought to be more correctly identified as representing "substantive unilateralism" or "unilateral symmetry".<sup>334</sup> This is because, in substance, BITs embody the protection of rights for one party only.

#### **4.2 BITs as instruments creating obligations *erga omnes***<sup>335</sup>

The BIT negotiation process, as outlined in Chapter 2, entails the exchange of *quid pro quo* between the two states involved.<sup>336</sup> This means that the concessions made by any of the parties, is often dependent on the specific returns promised by the other party.<sup>337</sup> Viewed this way, each BIT arguably "stands on its feet as formulating a particular legal order shared by the two parties only and it reflects a compromise of the particular interests of the parties."<sup>338</sup> It would therefore not be farfetched to assert that it is often not anticipated that a BIT would transform to an international consensus that could potentially lead to the creation of a structure for the protection of foreign investment.<sup>339</sup> This assertion would further be supported by the fact that BITs are fundamentally contractual in nature. This means that they are binding only on the parties concerned; other parties can neither claim benefits under them nor be regulated by them.

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<sup>333</sup> *ibid.*

<sup>334</sup> *ibid.*

<sup>335</sup> The term *erga omnes* is a Latin phrase meaning towards all.

<sup>336</sup> *ibid* (n 8).

<sup>337</sup> *ibid.*

<sup>338</sup> *ibid.*

<sup>339</sup> *ibid.*

This notwithstanding, the obligations created under a BIT nevertheless transcend beyond the two contracting parties. They become obligations *erga omnes* – binding against all. This is greatly so because of the invocation of the MFN Treatment clause. In operation, the MFN clause is a tripartite relationship expressed as follows:

MFN clauses in international law presupposes a relationship of at least three States: State A (the granting State) enters into an obligation vis-à-vis State B (the beneficiary State) to extend rights and benefits granted in a specific context to any third State C. The consequence of the MFN clause in the treaty between A and B (basic treaty) is that State B can invoke and rely on all benefits State A grants vis-à-vis State C (in the comparator treaty) as long as the granted benefit is within the scope of application of the MFN clause in the relationship between A and B.<sup>340</sup>

Put differently, the MFN clause immediately “multilateralizes any commitment which a developing party might have preferred to keep bilateral in order to secure, through negotiations, some specific reciprocal undertaking by the capital-exporting party in return.”<sup>341</sup> A foreign investor can therefore claim entitlement to treatment accorded to other foreign investors either under a BIT regime or any other commercial agreement to which the state concerned is a party.<sup>342</sup>

Quite notably, the MFN clause is governed by the *ejusdem generis* principle.<sup>343</sup> This means that MFN obligations “applies to issues belonging to the same subject matter or the same category of subjects to which the clause relates.”<sup>344</sup> In BITs, foreign investment is the subject matter while foreign investors are the subjects. With most BITs having the MFN treatment clause generally drafted, this certainly leaves considerable scope for the interplay of competing interpretations.<sup>345</sup> This reality is evident from the jurisprudence emerging from the

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<sup>340</sup>ibid (n 48) 123.

<sup>341</sup>ibid (n 15) 107.

<sup>342</sup>ibid (n 37).

<sup>343</sup>ibid (n 48) 124.

<sup>344</sup>ibid.

<sup>345</sup> Dana H. Freyer and David Herlihy, ‘Most Favored Nation Treatment and Dispute Settlement in Investment Arbitration: Just How “Favored” is “Most Favored?” (2005) 20 Foreign Investment Law Journal 1, 60.

arbitral tribunals where the MFN Treatment principle is continuously granted more latitude. The exact delineations of the MFN Treatment principle has been the subject of debate. More specifically, the discourse has been whether the MFN Treatment clause only applies to the substantive guarantees or if it extends to procedural provisions as well.<sup>346</sup> Such was the question faced by the arbitral tribunal in *Maffezini*.<sup>347</sup> It was ultimately decided that the MFN Treatment clause extended to procedural rights in dispute resolution. It was stated that:

Unless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise, most-favoured-nation provision in BITs should be understood to be applicable in dispute resolution.<sup>348</sup>

This means, for example, that the foreign investor may claim shorted waiting periods granted to other investors before challenging any action of the state, favourable rules of procedure, or, in the extreme scenario, this may lead to the creation of jurisdiction which would otherwise not be present.<sup>349</sup>

It is therefore tenable that the host country gratuitously ends up extending additional rights to foreign investors; further constricting its room for manoeuvre and curbing its regulatory autonomy in the process. Ideally, the MFN Clause should be concisely drawn to clearly outline the matters to which it relates to.<sup>350</sup> This way, such ‘free-rider’ situations can be avoided.

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<sup>346</sup> *ibid.*

<sup>347</sup> *Emilio Agustín Maffezini v. The Kingdom of Spain* ICSID Case No. ARB/97/7. The investor in Spain was allowed to use a more beneficial time requirement in the arbitration process found in the Chile-Spain BIT as opposed to the Argentina-Spain BIT under which the claim was filed.

<sup>348</sup> *ibid.*

<sup>349</sup> *ibid* (n 48) 132.

<sup>350</sup> For example, the BIT between Japan and Egypt (Agreement between Japan and the Arab Republic of Egypt Concerning the Encouragement and Reciprocal Protection of Investment) delineates the application of the

Therefore, even though on a basic level BITs are feted to lead to a win-win situation for the parties involved, this is a falsity. Any unprecedented metamorphosis of a BIT obligation to an obligation *erga omnes* can only lead to a further shrinkage of the host state's policy space and regulatory autonomy.

### **4.3 The fair and equitable treatment principle: A catch all interpretation?**

The fair and equitable treatment principle is a standard deeply rooted in customary international law.<sup>351</sup>Initially, it was envisaged to apply to administrative and adjudicatory proceedings to which the foreign investor was involved.<sup>352</sup>Notably, these terms were not set in concrete form. They are therefore in constant need of elaboration. Investors, seemingly aware of this, have continuously sought to have new interpretations and push the envelope even further beyond its customary origins. Foreign investors are now using the principle to bring forth claims over a 'multitude of wrongs' committed by the host state. For example, in *Tecnicas Medioambientales Tecmed SA v The United Mexican States*,<sup>353</sup> the principle was relied upon to challenge policy decisions made by the executive arm of the government. The arbitral tribunal held that:

The fair and equitable treatment standard requires good faith, which in turn requires states to provide to investments, treatment that does not affect the basic expectations the investor took into account to make the investment. The host state, in making and implementing laws and policies, must act in a manner that is consistently free from ambiguity and arbitrariness, and totally transparent.<sup>354</sup>

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MFN Standard to certain specific business activities, being, (a) the maintenance branches, agencies, offices, factories and other establishments appropriate to the conduct of business activities, (b) the control and management of companies which they have established or acquired (c) the employment of accountants and other technical experts, executive personnel, attorneys, agents and other specialists (d) the making and performance of contracts. Available at <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1083>> last accessed 23<sup>rd</sup> September, 2016.

<sup>351</sup>ibid (n 37) 68.

<sup>352</sup> ibid. The principle required that any treatment accorded to foreign investors should measure up on the element of fairness and equity.

<sup>353</sup> ICSID Case No. ARB (AF)/00/2.

<sup>354</sup>ibid.

This expansive interpretative trend, sought in arbitral tribunals, adds a new dimension in the protection of foreign investments. By submitting the matter to arbitration, the parties, in effect “delegate the function of establishing the specific rules by which they will be bound”<sup>355</sup> to the tribunal. A decision emanating from the arbitral tribunal must therefore be looked upon as “part of the treaty law binding the parties.”<sup>356</sup> As it was succinctly affirmed in the *Martini Case*:<sup>357</sup>

An international arbitral award constitutes a direct legal relationship between the two States. The arbitral award is rather of the nature of an international treaty than of a decision of a national court...It may be technically correct to say that an arbitral award creates a sort of conventional relation between the parties...the persuasiveness of an arbitral award derives from the fact that a third party has declared the law.<sup>358</sup>

This decision reflects that by the operation of the fair and equitable principle, the host countries lose their discretion on policy matters and by extension, their regulatory autonomy. This is because, with the legitimacy of the host country’s action being determined by a third party, it is conceivable that such measures would be pegged on the expectations of the foreign investor. Put differently, the foreign investor’s right to predictability of the laws and regulations in the host state would undoubtedly reign supreme. The happenings in the Republic of Argentina prove to be instructive here. In 2001, the Argentinian government faced a currency crisis.<sup>359</sup> Through its executive arm, the government made policy pronouncements aimed at remedying this situation.<sup>360</sup> Shortly thereafter, the country was faced with an arbitral onslaught running into billions of dollars.<sup>361</sup> The foreign investors,

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<sup>355</sup>ibid (n 8) 339.

<sup>356</sup>ibid.

<sup>357</sup> (1930) 2 R.I.A.A. 975.

<sup>358</sup>ibid.

<sup>359</sup>ibid (n 223) 404. Quoting Charity L. Goodman, ‘Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina’ (2007) 28 U. PA. J. INT’L ECON. L. 449.

<sup>360</sup>ibid.

<sup>361</sup>ibid.

disgruntled by the policy decisions of the government, challenged its propriety.<sup>362</sup> They sought protection under the different BITs, claiming lack of fairness in the policy decisions taken by the Argentinian government.<sup>363</sup> The Argentinian arbitral cases received significant public attention because they raised important questions about the host country's ability to regulate its affairs for public interest, or in this case, in response to an economic emergency. Not only would the propriety of such policy measures be determined by a third party, but also, that the standard of test applied in such a determination is the international standard. This was settled in the *Neer*<sup>364</sup> case, where it was opined that:

In deciding claims predicated on a denial of justice, the propriety of governmental acts should be put to the test of international standards. The treatment of an alien, in order to constitute an international delinquency, should amount 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. Whether the insufficiency proceeds from deficient execution of an intelligent law, or from the fact that laws of the country do not empower the authorities to measure up to international standards, is immaterial.<sup>365</sup>

Similar happenings have been experienced in Kenya. In *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited vs. Republic of Kenya*<sup>366</sup> the claimants, relying on the principle of fair and equitable treatment, assert that Kenya carried out unlawful expropriation of their investments by cancelling their mining licences and by so doing, breached the BITs provisions.<sup>367</sup> The cancellation and revocation of the said mining licences was done by the Kenyan Cabinet Secretary for Mining following the discovery of a rare earth mineral in Kwale, Kenya by the foreign investor. Interestingly, the foreign investor first utilized the mechanism of the national courts in Kenya to challenge the decision of the

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<sup>362</sup> *ibid.*

<sup>363</sup> *ibid.*

<sup>364</sup> L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States (1927) 21 (3) AJIL 555-57.

<sup>365</sup> *ibid.*

<sup>366</sup> ICSID Case No. ARB/15/29. Information available at <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/15/29> last accessed 5<sup>th</sup> December, 2017.

<sup>367</sup> *ibid.* The relevant BIT is the Bit between Kenya and the United Kingdom.

Cabinet Secretary.<sup>368</sup> The Kenyan High Court, persuaded by the provisions of Article 62 (1) (f)<sup>369</sup> of the Constitution and Section 6 of the Mining Act,<sup>370</sup> upheld the decision of the Cabinet Secretary. The foreign investor then submitted the dispute to ICSID for arbitration.

The occurrences in Argentina and Kenya demonstrate that, in practical terms, a host country that is “willing to accept a treaty clause on fair and equitable treatment, but that is not prepared to offer the international standard”<sup>371</sup> may find that its policy making space is clouded by a lot of uncertainties. Therefore, if the host country want the “free will and space to regulate, it has to reconsider whether the terms of investment treaties to which they agree are the most reasonable and appropriate way to guarantee investment protection.”<sup>372</sup> Notably, in 2007, when Bolivia withdrew from ICSID, one of the reasons given was the expansion on scope of the fair and equitable principle.<sup>373</sup>

#### **4.4 The challenges of the National Treatment principle**

The operationalization of the National Treatment principle is not without its challenges. Indeed, it has been opined that “the principle is perhaps the most difficult standard to achieve as it touches upon economically and politically sensitive issues.”<sup>374</sup> Using the Kenyan BIT with Switzerland as an example, even though an exception to the general rule has been extended, Kenya still has to manoeuvre through this exception with caution. This is because, the exception is based on very subjective conditions. What would be deemed to amount to a special incentive as envisaged in the BIT is subject to contention. Therefore, even though the government may be quick to assert its regulatory autonomy on the basis of the exception, the

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<sup>368</sup> See *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others*. ELC NO. 195 OF 2014 (Formerly Misc. Application No. 298 of 2013. Information available at <http://kenyalaw.org/caselaw/cases/view/109485>) last accessed 6<sup>th</sup> December, 2017.

<sup>369</sup> All minerals and mineral oils are classified as public land, which is vested in a country government in trust for the people.

<sup>370</sup> Act No. 12 of 2016, Laws of Kenya. Section 6 (1) provides that every mineral is the property of the Republic and such mineral vests in the national government in trust for the citizens.

<sup>371</sup> *ibid* (n 37).

<sup>372</sup> *ibid* (n 90).

<sup>373</sup> *ibid* (n 37).

<sup>374</sup> UNCTAD, National Treatment , UNCTAD Series on Issues in International Investment Agreements (1999) (New York and Geneva, United Nations)

coming to fruition of such a move would still be subject to the foreign investor because it is against his expectation that the legitimacy of such an action would be based.<sup>375</sup>

Further difficulty in the operationalization of the principle lies in the fact that it “raises difficult questions concerning the factual situations in which national treatment applies and the precise standard of comparison by which the treatment of national and foreign investors is to be compared.”<sup>376</sup> One such question is at what stage does the principle begin to apply? Should it be applied pre-entry or post-entry? Quite notably, Kenya’s Model BIT makes no mention of this. It simply provides that:

- a) Each Contracting Party shall accord in its territory to the investments or returns of investors of the other Contracting Party treatment that is not less favourable than that it accords to the investments or returns of its own investors.
- b) Each of the Contracting Parties shall extend to the investors of the other Contracting Party treatment that is not less favourable than that it accords to its own investors in regard to management, control, use enjoyment and disposal in relation to investments which have been received in its territory.

With such broad provisions, it is indeed conceivable that the National Treatment principle is taken to start applying from the pre-establishment stages. This is especially so given the discussion on the negotiation process and the relative positions of the parties in the negotiation. Following the law market, the capital-exporting state may assert that it is indeed in the interest of the capital importing state to ensure equal opportunities of market access to its foreign investors. That the capital importing country would agree to such a proposition is

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<sup>375</sup>ibid (n 90).

<sup>376</sup>ibid (n 37) 71.



therefore not quite far-fetched.<sup>377</sup> The implication of this is that the host country then loses some of its regulatory autonomy on such matters as the admission of foreign investors.

#### **4.5 Protection from expropriation**

The tenets of this principle were elaborated in Chapter 3. The semblance of certainty of the principle notwithstanding, it is noteworthy that the majority of the disputes referred to the International Centre for the Settlement of Investment Disputes (ICSID) under a BIT regime involve allegations of expropriation by the host country.<sup>378</sup> It has been opined that this situation is informed by the fact that the principle rests on very subjective pillars that lend themselves to acute controversy.<sup>379</sup> Questions such as what amounts to public purpose, what constitutes discrimination; what is the measure of compensation, are still subject to intense scholarly debate and form part of the ever growing jurisprudence in international investment law. For instance, in *EnCana Corporation v. Ecuador*,<sup>380</sup> it was the contention of the Claimant that denial of Value Added Tax (VAT) refunds by the government of Ecuador amounted to an act of expropriation.<sup>381</sup> Although this claim was eventually defeated, it nevertheless represents yet another form of the growing tendency by the foreign investors to seek an expansion in scope of the protection measures to their property. Interestingly, the scope of interpretation has only widened in latitude through the years.

Generally, there are two broad categorizations of expropriation: lawful and unlawful expropriation.<sup>382</sup> Lawful expropriation refers to expropriation carried out in accordance with the conditions set down in principle, or in accordance with any other provision set out under a BIT.<sup>383</sup> Unlawful expropriation refers to expropriation in violation of any or all of the

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<sup>377</sup> Besides, this has been a trend between BITs concluded by developed countries amongst themselves.

<sup>378</sup> *ibid* (n 37). See Chapter 5.

<sup>379</sup> *ibid*.

<sup>380</sup> LCIA Case No. UN3481, UNCITRAL

<sup>381</sup> *ibid*.

<sup>382</sup> *ibid* (n 37). See Chapter 5

<sup>383</sup> *ibid*.

conditions set out.<sup>384</sup> Either forms of expropriations can be direct or indirect. Direct expropriation refers to the outright taking of the assets of an investment of foreign origin. Such expropriations are rare in the present world.<sup>385</sup> Indirect expropriation refers to “governmental actions that undermine the interests of the foreign companies and investors.”<sup>386</sup> The range of actions tantamount to indirect expropriation include:

Non-payment, non-reimbursement, cancellation, denial of judicial access, actual practice to exclude, constant harassment, non-conforming treatment, inconsistent legal blocks, imposition of discriminatory taxes, and other discriminatory treatment.<sup>387</sup>

The list above discloses some activities which by their very nature, would otherwise fall within the ambit of lawful regulatory activity by the state. However, they could be considered to constitute expropriation if they have a negative effect on the normal operations of the foreign company; the intention of the state notwithstanding. In *Certain German Interests in Polish Upper Silesia*<sup>388</sup> case, the PCIJ reiterated that:

A state may expropriate property, where it interferes with it, even though the State expressly disclaims any such intention [and] that even though a State may not purport to interfere with rights to property, it may, by its actions, render those rights so useless that it will be deemed to have expropriated them.<sup>389</sup>

It is because of this that claims of indirect expropriation have become commonplace in international investment sphere. Oftentimes, what would be deemed to amount to expropriation, has, as its initiation point, the characteristic of a governmental decree or order effecting a regulatory measure. It is not unusual that, after opening up its territory to foreign investment, the host country may change its mind and seek a reversal of the situation. This can be informed by a number of factors, including, “the exploitative nature of the business of

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<sup>384</sup> *ibid.*

<sup>385</sup> *ibid.*

<sup>386</sup> *ibid.*

<sup>387</sup> *ibid.*

<sup>388</sup> PCIJ Series A no 7, ICGJ 241 (PCIJ 1926).

<sup>389</sup> *ibid.*

the foreign investor; degradation of the local environment or violation of the rights of the host state by the investor; a political or economic rift between the home and host countries; a change of government or change in the priority of the host country; political revolution or regime change; or the election of a new government with policies, economically or otherwise, fundamentally different from those of the outgoing government.”<sup>390</sup>

Undeniably, all these are legitimate causes that may prompt the host country to exercise a regulatory function. However, a reversal of the situation is not an easy fete to achieve. Theoretically, there are a number of options open to the host country. However, the success rate of past claims on these grounds demonstrate the obligation against repatriation is placed on a higher echelon than most. The host country could, for example, seek a clean slate (*tabula rasa* principle) with the foreign investor.<sup>391</sup> Though allowable, past actions based on this principle have been unsuccessful in the negation of the BIT obligation.<sup>392</sup> Not even the argument that the BIT was concluded by a regime that was dictatorial or corrupt could discount this obligation.<sup>393</sup> The host country could also invoke the doctrine of necessity and assert that the impending situation is so dire that the essential interests of the state would be seriously impaired by continued acts of the foreign investors within its territory. Indeed, in *Enron Corporation and Ponderosa, LP v Argentine Republic*,<sup>394</sup> Argentina sought to rely on this principle. The Argentinian government demonstrated the severe economic crisis that it was going through. However, the ICSID tribunal was not sympathetic to the Argentinian claims, holding instead, that the events were very unfortunate, but “they do not themselves amount to a legal excuse.”<sup>395</sup> Lastly, the host country may seek to renegotiate its terms of engagement with the relevant entities in a bid to come up with favourable terms of departure.

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<sup>390</sup> *ibid* (n 37) 119.

<sup>391</sup> *ibid* 183.

<sup>392</sup> *ibid*.

<sup>393</sup> *ibid*.

<sup>394</sup> ICSID Case No. ARB/01/3

<sup>395</sup> *ibid*.

However, such renegotiations would still take place within the confines of a system shown to be skewed in favour of the foreign investor.

The host country, then, cannot be too quick in the exercise of its regulatory function, as an action may be deemed to upset the principle against expropriation and therefore inviting to claims filed by foreign investors. This in itself becomes a bureaucratic hurdle in the exercise of the government's regulatory function. Further, the cost of meeting the obligation to pay compensation may be so high, that the host country may back down from any action aimed at regulatory taking of the property belonging to foreign investors.<sup>396</sup> It is not the contemplation of international investment law that once admitted, foreign investors be granted a right to remain in the host country indefinitely.<sup>397</sup> The challenge therefore lies in reconciling these realities with the very stringent measures against expropriation, and if a claim is brought against the host state, striking a balance between the claims of the host state and rights of the foreign investor in the adjudication process.

#### **4.6 Transfer of gains and capital**

The unrestricted right to transfer investment gains and repatriate capital in the event of disinvestment, would be the ideal arrangement. However, many BITs, conscious of the sensitivity of the matter, confer an unimpaired right to the host country to apply any restrictions necessary during periods of economic stringency.<sup>398</sup> In its exercise of this right, the host state is required to apply any measure adopted "equitably and in good faith as may be necessary to safeguard the integrity and independence of its currency, its external financial position and balance of payments."<sup>399</sup> The provision on transfer of gains and capital, is perhaps the only provision where the host country's rights are fully preserved without extraneous ramifications.

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<sup>396</sup>ibid (n 56) 921.

<sup>397</sup>ibid.

<sup>398</sup>ibid (n 8) 353.

<sup>399</sup>ibid.

## 4.7 Conclusion

The reality of a country inviting foreign investments within its territory is that, inevitably, it has to make strategic choices regarding the regulation of the said investments.<sup>400</sup> The choices to be made are diverse and far-reaching and may include, for example, necessary reform measures and the priority to be accorded to domestic interests.<sup>401</sup> Often, these choices may not necessarily be compatible with the purpose for which BITs lend themselves to.<sup>402</sup> When this happens, the host country has to carefully navigate through the regulatory restrictions in order to avoid dire repercussions under the BIT. However, as the discussion in this chapter has shown, the “tenuous relationship between maintaining a *laissez faire* international markets for FDI and preserving the country from the economic, social and political inroads”<sup>403</sup> in BITs, inevitably produces unfavourable results for the host country.

While this paper does not call for the wanton abuse of the host country’s sovereign power in the regulation of foreign investments, it nevertheless advocates for a principled regime that accommodates the interests of the host country and the foreign investor, equitably.<sup>404</sup> Indeed, the regulatory regime governing FDI needs to be, not only both even-handed and coherent, but also sensitive to domestic socio-cultural, economic and political demands.<sup>405</sup> In the absence of a structure that is consistent yet flexible, the process of international investment may degenerate into an unstable cycle of economic and social dislocation.<sup>406</sup>

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<sup>400</sup> *ibid* (n 18) 12-13.

<sup>401</sup> *ibid*.

<sup>402</sup> *ibid*. For example, they may encourage FDI to secure cheaper goods for sale in local markets, while recognizing the negative impact such FDI may have on domestic employment

<sup>403</sup> *ibid* (n 9) 32.

<sup>404</sup> *ibid*.

<sup>405</sup> *ibid*.

<sup>406</sup> *ibid*.

## **CHAPTER 5**

### **FINDINGS, CONCLUSION AND RECOMMENDATIONS**

Throughout its length, this paper has engaged in a discussion on the effect of BITs on the regulatory autonomy of a host country. It has been shown that the typical capital-importing host country, belonging to the developing nations category, is guided by the school of thought that FDI within its territory is the surest way of achieving the scale of economic development it aims at. This view leads to the acceptance and adoption of a pro-investor stance and often, the host country is all too willing to do anything possible to increase its chances of attracting foreign investments within its territory. The end result has been the conclusion of BITs, facially portraying a win-win situation, but in effect, leading to contrary results. This comes about because BITs come laced with formal trappings of the law, which though subtle and indirect, lead to chilling implications on the host country's regulatory autonomy as demonstrated in Chapter 4.<sup>407</sup> The dissatisfaction with the current regime is therefore not just a dogmatic hostility to private enterprise.

This eventuality may be attributed to poor choices during negotiations – strategic miscalculations, if you may, except that is not the root cause of the problem. From the very onset, this paper has made the contention that for any meaningful analysis into the current BIT regime, regard has to be had to its historical context. This is because, throughout the incremental stages leading up to the actual BIT document, and the eventual operation of the BIT, it has emerged that the current regime is only favorable to the interests of the foreign investor. Put plainly, from the very beginning, the host country's interests has never driven this discourse. Instead, the discourse has been driven by foreign investors and their need to amass as much regulatory decontrol as the host country can cede. It is against this backdrop that this paper contends that the current structure in the negotiations of BITs has had little to

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<sup>407</sup>ibid (n 202) 828.

no regard to the concept of proportionality.<sup>408</sup> Indeed, to attract foreign investments, the capital-importing host country is called upon to cede controls which do not balance the other competing interests present in the host country. Put differently, there is seemingly no consideration or discernment of less intrusive measures through which the competing interests of the foreign investor and the host country can be achieved.

While the law relating to foreign investments has most definitely made progress through the years, say with the inclusion of robust principles or in the intricate interpretations of these principles, the reality is that such progress only lends itself to the needs of the foreign investor. Therefore, in its current state, the BIT regime cannot be expected to achieve congruence of foreign investors' interests and the interests of the host country. That is not what it was intended to achieve. It has been opined that in this sense "any criticism of investment treaty law as biased and lopsided might be said to be misplaced, not because it is not a legitimate argument, but because it fails to recognize that investment treaties are working to achieve their intended effects."<sup>409</sup> BITs cannot, therefore, achieve any different effect than to limit governmental actions aimed at regulating them.<sup>410</sup> Any reconstruction to this current regime, therefore, has to be alive to the role played by these historical nuances.

In charting the way forward, this paper makes the following propositions. First, given that the claims of reciprocity and bilateralism have sufficiently been debunked, the entire necessity of the country concluding BITs as the primary inducement for foreign investors ought to be called to question. If Kenya is far less likely to have its investors making investments in the territories of its BIT partners, then it should not be concluding BITs. That is akin to an act of benevolence – and a costly one at that. . Kenya should instead look into other structural arrangements through which foreign investments can be promoted. Countries such as Brazil

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<sup>408</sup> The principle of proportionality calls for a balance amongst the competing interests involved in actions taken by the state.

<sup>409</sup> *ibid* (n 90) 80.

<sup>410</sup> *ibid*.

attract high levels of foreign investments despite the glaring absence of BITs. The Brazilian government has innovatively adopted a more favorable approach to foreign investments known as the Cooperation and Facilitation Investment Agreements (hereinafter CFIAAs).<sup>411</sup>CFIAAs represent a more co-operative and pragmatic approach between the state and the foreign investor as they focus on the elements of mutual benefits to both parties.<sup>412</sup>The Brazilian Foreign Affairs Ministry has described CFIAAs as being:

A new kind of agreement, seeking to encourage reciprocal investment through intergovernmental dialogue, and supporting companies in the internationalization process. Through the CFIA, business opportunities will be publicized more widely, information will be exchanged regarding regulatory frameworks, and there will be an appropriate mechanism to prevent or, if necessary, resolve disputes. The new model provides a solid framework for two-way investment.<sup>413</sup>

The greatest departure of CFIAAs from BITs is their inclusion of requirements on regulatory transparency, the observance of undertakings, corporate social responsibilities obligations and the adoption of different avenues for the settlement of any arising disputes.<sup>414</sup> As BITs have no inherent value that makes them fundamentally better mechanisms for attracting foreign investments into a country's territory, Kenya should not hesitate to adopt such pro-nationalistic mechanisms in order to attract foreign investment.

This notwithstanding, if the Kenya enters into further BIT negotiations, another proposition would be that the parties should rely on their domestic legal systems for the governance of the foreign investments. First, the assumption that the domestic legal system of Kenya, as the host country, would not provide adequate protection to the foreign investor, was a product of

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<sup>411</sup> Brazil has since signed CFIAAs with Angola, Chile, Colombia, Mexico, Mozambique and Peru and has concluded negotiations with India, Jordan and Malawi. Information available at <<https://www.iisd.org/itn/2017/06/12/brazils-cooperation-facilitation-investment-agreements-cfia-recent-developments-jose-henrique-vieira-martins/>> last accessed 5<sup>th</sup> December, 2017.

<sup>412</sup> Bernasconi-Osterwalder, Nathalie and Martin Dietrich Brauch, 'Comparative Commentary to Brazil's Cooperation and Investment Facilitation Agreements (CIFAs) with Mozambique, Angola, Mexico, and Malawi' (2015) Winnipeg: International Institute for Sustainable Development.

<sup>413</sup> Information available at <<http://www.itamaraty.gov.br/en/component/tags/tag/cooperation-and-investment-facilitation-agreement>> last accessed 5<sup>th</sup> December, 2017.

<sup>414</sup> *ibid* (n 412).



its time. Since then, Kenya has come a long way in its appreciation for the protection of private property. There exists elaborate legislative instruments as highlighted in Chapter 3, whose provisions mirror the provisions found in BITs. There is therefore no reason why the country should not rely on its domestic legislation in its relations with foreign investors. The time has indeed come to reconsider the “ethnocentric and imperialistic claim that the judicial systems in Africa and the developing world are ineffective”<sup>415</sup> for the protection of property generally and foreign investments in particular.

Thirdly, if BITs live on as the instruments of investor protection, then, there is the need to undertake a fundamental restructuring in the practice and norms attendant to BITs. To be mutually protective of the interests of all parties concerned, then the BITs must spell out the duties and rights of all the parties. More particularly, there is need to incorporate the host country’s right to regulate. Additionally, the interpretation of BITs should be permissive enough to allow the state to invoke the greater expectation of all the stakeholders, and in so doing, exercise its inherent power to act as the rational-economic man. The host country ought to be allowed to exercise its right to control its developmental policies without the legitimacy of its actions being unnecessarily challenged by the foreign investors.

For this to happen, the host country has to consciously detach itself from the trappings of the current school of thought that leads it to making great concession to the foreign investor, and instead, rethink the terms, conditions and implementation challenges of BITs. Additionally, the host country has to place its sovereign right to regulate all activities within its territory at the forefront. As it has been opined, it is time that every treaty starts “with the notion that these inherent attributes of the State exist and are not to be surrendered.”<sup>416</sup> When this

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<sup>415</sup>ibid.

<sup>416</sup>ibid (n 90) 82.

happens, then, the interests of the host country will be integrated into the terms of the BITs concluded.

The viability of a system overhaul may be met with some pessimism, understandably so. However, as it was pointed out in the discussion, given the absence of a multilateral treaty governing the area of foreign investments, any best bet for change lies with individual countries. This process has been kicked off by countries such as Bolivia and Ecuador, which have gone ahead and denounced some of their BITs and South Africa, which has not only placed a moratorium on its engagement in BIT negotiations, but has also placed an emphasis on BITs that are more development friendly. Additionally, organizations such as the fifteen member South African Development Community (SADC) are now adopting Model BITs aimed at achieving to balance investor rights and obligations with the interests of the host country. The process may be slow, but it holds the potential of becoming a snowball and the overhaul of the system might just be witnessed. As it has been noted of treaties, that:

If treaties modifying an existing practice, or creating a new one, are found to grow in number, and to be made between States placed in circumstances of sufficient diversity; if they are found to become nearly universal for a while, and then to dwindle away, leaving a practice more or less confirmed, then it is known that a battle has taken place between new and old ideas, that the former called in the aid of special contracts till their victory was established, and that when they no longer needed external assistance, they no longer cared to express themselves in the form of so-called conventional law.<sup>417</sup>

Summarily, therefore, in light of all the above, the country should take a step back in the negotiation of BITs and aim to seek an awareness of the implication of obligations in these BITs. Policy makers and relevant government officials ought to think long and hard on the costs and benefits attendant to trading off the country's sovereign right to exercise regulatory control over all activities within its territory. With such an appreciation of issues, the country

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<sup>417</sup>ibid (n 8) 338. Quoting William F. Hall 'International Law' (8th ed. 1924).

will be able to consciously manage its BIT portfolio and effectively engage in the clamour for more equalitarian terms in its engagement with foreign investors.

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