



UNIVERSITY OF NAIROBI

**THE EFFECT OF FAIR AND EQUITABLE TREATMENT PRINCIPLE UPON STATE
SOVEREIGNTY: A STUDY OF KENYA - SWITZERLAND BILATERAL INVESTMENT
TREATY**

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**A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR
THE AWARD OF THE DEGREE OF MASTERS OF LAW (LL.M) OF THE UNIVERSITY
OF NAIROBI.**

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NOVEMBER 2018

DECLARATION

I do declare that, save for information sources of which have been duly acknowledge, this research project is my original work and has not been submitted to other institution of higher learning for any academic purposes.

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DEDICATION

This thesis is dedicated to my father Stephen Ng'ang'a Muigai, my mother Hilda Wanjiru Ng'ang'a, other relatives and friends, without their encouragement and support, I could not have made it this far.

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ABBREVIATION AND ACRONYMS

FET- Fair and Equitable Treatment

BIT- Bilateral Investment Treaties

ICSID- International Centre for the Settlement of Investment Disputes

IMF-International Monetary Fund

NAFTA-North America Free Trade Agreement

OECD-Organization for Economic Cooperation and Development

LIST OF CASES

1. Alex Genin et al v Estonia, ICSID Case No ARB/99/2, Final Award, 25 June 2001.
2. Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award (July 24, 2008)
3. CME Czech Republic B.V. v. The Czech Republic. Final Award, 14 March 2003
<http://ita.law.uvic.ca/documents/CME-2001PartialAward.pdf>
4. CMS Gas Transmission Company vs. the Republic of Argentina. Decision on Jurisdiction, 17 July 2003, 42 ILM 788 (2003).
5. Duke Energy Electroquil Partners and Electroquil S.A. v Republic of Ecuador 18 August 2008.
6. Elettronica Sicula S.p.A (ELSI) (United States of America) v Italy 1989.
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8. Genin, Alex, Eastern Credit Ltd Inc asn AS Baltoil v Republic of Estonia. Award, 25 June 2001
<http://ita.law.uvic.ca/documents/Genin-Award.pdf>
9. L.F.H. Neer and Pauline Neer (USA) v United Mexican States, Reports of international Arbitral Awards (15 October 1926) 21.
10. LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v Argentine Republic ICSID Case No. ARB/02/1 <http://www.italaw.com/cases/961>
11. Loewen Group, Inc. and Raymond L. Loewen v. United States. Final Award, 26 June 2003
<http://ita.law.uvic.ca/documents/Loewen-Award-2.pdf>
12. Metalclad Corp. v. United Mexican States. 30 August 2000
<http://ita.law.uvic.ca/documents/MetalcladAward-English.pdf>
13. Methanex Corporation v. United States of America. Final Award, 3 August 2005
<http://ita.law.uvic.ca/documents/MethanexFinalAward.pdf>
14. Mondev International Limited v United States of America. Award 11 October 2002
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15. MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile. 25 May 2004
<http://www.asil.org/ilib/MTDvChile.pdf>
16. “Myers”, S.D. Myers Inc. v Canada. Partial Award (Final Award on the Merits), 13 November 2000 <http://naftaclaims.com/Disputes/Canada/SDMyers/SDMyersFinalAwardMerits.pdf>
17. National Grid PLC v The Argentine Republic, UNICITRAL award 3 November 2008
<http://www.italaw.com>
18. Oil Platforms case (Iran v US) 1996 ICJ 803, 853.
19. Parkerings-Compagniet AS v. Republic of Lithuania ICSID Case No. ARB/05/8. Award 11 September 2007.

20. Saluka Investments BV v The Czech Republic IIC 210 (2006)
<http://www.italaw.com/cases/961>
21. Sempra Energy International V The Argentine Republic, ICSID Case No. ARB/02/16. Award
28 September, 2007. <http://www.italaw.com>.
22. Tecnicas Medioambientales Tecmed, S.A. v The United Mexican States, ICSID Case No. ARB
(AF)/00/2. Award, 29 May 2003. <http://www.italaw.com>.
23. Waste Management Inc v. United Mexican States. Award, 30 April 2004

ABSTRACT

As the Kenyan Government pursues its policy of attracting more Foreign Direct Investment, more investors will seek to invest especially in the natural resource and mining sector. Fair and Equitable Treatment guarantees investors that their investments will be protected from arbitral and discriminatory treatment by the state.

The research seeks to analyze Article 4 of the Kenya– Switzerland Bilateral Investment Treaty of 2006 (Kenya-Switzerland BIT) on the Fair and Equitable treatment with a view to bring fore the challenges posed by the broadness, vagueness and ambiguity in this provision. The vagueness of the fair and equitable treatment standard has contributed to the lack of consistency in the application and interpretation by arbitral tribunals. Indeed, such consistency is difficult to expect where different one-off arbitral tribunals adjudicate disputes under a variety of formulated standards and factual situations and furthermore, where there is absence of an effective appellate review.

The consequence of the vagueness and ambiguity of the Fair Equitable Treatment Standard, is to expose developing states like Kenya to potential, unnecessary litigation before the arbitral tribunals. The research proposes recommendations to be included in the Fair and Equitable Treatment clauses to ensure they are clear and precise to balance the interest of both the foreign investor and the host state.

CHAPTER ONE

INTRODUCTION

1.0 Introduction and Background to the study

1.1 Introduction

Historically, Bilateral Investment Treaties were conceived as diplomatic, friendship pacts promoting investment opportunities. In 1959, the first Bilateral Investment Treaty was between Germany and Pakistan.¹

Bilateral Investment Treaties are agreements made by two states, mostly developed and developing state. They guarantee protection of investments made by an investor in a contracting country at the other's territory.² A typical structure of a Bilateral Investment Treaty begins with a statement as to the aim of the treaty. This is usually the protection of investment flows and reciprocal encouragement between the two states. The identification of the types of property to be protected which is basically the investment, follows next. Hence, the standard and treatment to be accorded to the investor's investment is established. The assertion of the right of repatriation of profits, followed by the standard of compensation. This is in the event of takeover of foreign investor's property. Finally, the procedure as well as mechanisms for settling disputes by arbitration is stated.³

The distinctive feature of many Bilateral Investment Treaties is that they allow for a foreign investor to sue the host state before an international tribunal, without first exhausting local remedies in the host state.⁴ The disputes are often under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID).

¹Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff 1995) at 6.

² Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (2nded, Cambridge University Press 2004) at 56.

³ Supra note 2 at 215

⁴ Supra note 3

The premise on which Bilateral Investment Treaties are signed, is that they will attract more foreign investment to the host country.⁵ It is against this background that many developing states, such as Kenya sign the Bilateral Investment Treaties. However, this has been questioned by institutions formerly advocating for the Bilateral Investment Treaties. They have studies indicating that Bilateral Investment Treaties leading to positive flow of foreign investment is none-existent and conjectural.⁶

On May 24, 1966, Kenya signed the ICSID Convention and became a contracting state on February 2, 1967.⁷ Kenya has ratified a number of Bilateral Investment Treaties and those currently in force include those between Kenya and Germany, France, Italy, Switzerland and the Netherlands.⁸ The provisions in the treaties guarantee against expropriation, repatriation of capital and profits, assure the investors of fair and equitable treatment as domestic investors in Kenya.

There was a sudden upsurge of Bilateral Investment Treaty among states in the 1990s. This is attributed to a variety of factors.

First, was the limited funds for economic development which caused sovereign lending by International Monetary Fund banks to dry up due to the balance of payments difficulties and foreign exchange difficulties. Second, was the dwindling of flow of foreign aid from developed states to developing countries due to the recession in the developed economies. Thirdly, there was a change of policy in Europe and America to promote free market and liberalization of international

⁵Supra note 2.

⁶Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* Supra note 2 at 262; Mary Hallward – Dreimeier, ‘Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit- and they could bite (English)’ Policy, Research working paper series no; WPS 3121: <[⁷<<https://icsid.worldbank.org>>](http://documents.worldbank.org/curated/en/113541468761706209/Do-bilateral-investment-treaties-attract-foreign-direct-investment-Only-a-bit- and-they-could-bite.></p></div><div data-bbox=)

⁸<<https://unctad.org>>

economy. Fourthly, at around the same time, attempts to have a multilateral treaty on foreign investment protection had been unsuccessful. This is because developing states were not ready to cede sovereignty. All these led to the increment of Bilateral Investment Treaties which were viewed as an alternative source of financing in developing states.

In the 1990s, ICSID experienced a multiplier effect in new arbitration filings.⁹ The surge of these type of cases was made possible by the availability of numerous new treaty instruments. Bilateral Investment Treaties created by states offered foreign investors access to international arbitration against the host state with jurisdiction in ICSID.¹⁰

Foreign investors have discovered that these agreements are an effective instrument for challenging legal or policy developments which are disagreeable from the investor's perspective. They therefore, invoked the Bilateral Investment Treaty provisions which are ambiguous and vague and the international arbitrators more often make awards in their favour.¹¹

The subject section of this thesis, Article 4(1) of Kenya – Switzerland Bilateral Investment Treaty, is an example of ambiguous provisions in this treaties, which have been subject for debate and arbitration procedures. It provides that:

Investments and returns of investors of each contracting party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of

⁹ As of June 30, 2011, ICSID had registered 351 cases under the ICSID Convention and Additional Facility Rules out of which 313 cases had been filed since 1997. International Centre for Settlement of Investment Disputes, ICSID Caseload-Statistics, Issue 2011-2 at 7, available at <<https://icsid.worldbank.org/ICSID/Index.jsp>> SEE ALSO United Nations Conference on Trade and Development reported almost 2,500 international investment agreements at the end of 2005.

¹⁰ Jane Y. Willems, 'The Settlement of Investor State Disputes and China New Developments on ICSID Jurisdiction' (2011) 8(1) South Carolina Journal of International Law and Business 2. Available at: <<http://scholarcommons.sc.edu/scjilb/vol8/iss1/2>>

¹¹ Luke E Peterson, 'Bilateral Investment Treaties-Implications for Sustainable Development and Options for Regulation' [2007] FES Conference Report 3

the other contracting party. Neither contracting party shall in any way impair by unreasonable discriminatory measures the management, maintenance, use, enjoyment or disposal of such investment.

Further, the Bilateral Investment Treaty negotiations between the developed and developing states posed several challenges. One such challenge, was the tussle between the two states to provide effective guarantees to the foreign investor and the developing state ensuring the treaty is consistent with its foreign investment laws and its international interests. The problem that results as a consequence of the above, is that in the reconciliation of these competing interests, vague terms are used in the treaties.

This study aims to analyse the provisions on Fair and Equitable Treatment as stipulated in the Kenya – Switzerland Bilateral Investment Treaty with a view to demonstrating how broad and ambiguous the provision is.

1.2 Background to the study

Bilateral investment treaties include general treatment articles. They are commonly categorized into two groups; the contingent, which include the article on national treatment and most favoured nation treatment and the non-contingent, which include fair and equitable treatment, full protection and security.¹² In most cases, fair and equitable treatment and full protection are usually included in the same provision. The study will mainly focus on fair and equitable treatment article in Kenya – Switzerland Bilateral Investment Treaty.

Investment protection treaties include a clause on fair and equitable treatment, to ensure an investor

¹² Stephen Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 70 BRIT. Y.B. INT'L L. 99.

from one of the contracting state is accorded minimum level of treatment in the territory of the other. The fair equitable treatment standard is intrinsically connected to the international minimum standard in customary international law.¹³ However, the study will mainly focus on fair and equitable treatment standard.

Many states consider fairness and equity as fundamental values of a legal system. A provision of fair and equitable treatment in a bilateral investment agreement is aimed at safeguarding a foreign investor against subjective arbitrariness and misuse of power by the authorities.¹⁴ The standard is presumed to reflect a common international level of treatment which parties to a treaty accept as positive law.¹⁵

The provision of fair and equitable treatment has been difficult to define and interpret. Case law elaborating further on the standard has been substantial in the last decade. This is because fair equitable treatment standard poses political, ethical and legal problem inherent in investment protection treaties.¹⁶ The challenge is balancing the foreign investor interests with the sovereign right of the host country to regulate and govern its own territory. A wider interpretation of Fair Equitable Treatment Standard results in limitation on sovereign power and legislative will of the host state.¹⁷

The development of Fair Equitable Treatment Standard has led to alternative means of providing protection, in disputes where there are no clear grounds for expropriation. According to Reinisch¹⁸ Fair Equitable Treatment Standard is invoked in almost every investor–state arbitration. Summarize

¹³ Kenneth J. Vandevelde, 'A Unified Theory of Fair and Equitable Treatment' (2010) 43 New York University Journal of International Law and Politics 43.

¹⁴ Jan Wouters, Sanderijn Duquet and Nicolas Hachez 'International Investment Law: The Perpetual Search for Consensus' (2012). <<https://ssrn.com/abstract=2031552>>

¹⁵ Supra note 14.

¹⁶ Stephen Vasciannie, The Fair and Equitable Treatment Standard in International Investment Law and Practice, 70 Brit. Y.B. Int'l l. 99 (1999).

¹⁷ Supra note 16.

¹⁸ August Reinisch, *Standards of Investment Protection* (Oxford: Oxford University Press, 2008) at 2.

the words of Justice Higgins¹⁹, ‘*the terms of fair and equitable treatment to companies are terms of art well known in the field of investment protection.*’

The history of Fair Equitable Treatment Standard can be traced back to Article 11(2) of the Havana Charter 1948 which provided that foreign investments should be of just and equitable treatment. This informed the need for inclusion of the standard in subsequent Friendship, Commerce and Navigation Treaties (FCN)²⁰ and Bilateral Investment Treaties. The standard is included in Multilateral Agreement on Investment (MAI)²¹, North America Free Trade Agreement (NAFTA)²², The Energy Charter Treaty (ECT)²³ and United Nations draft Code of Conduct on Transnational Corporations.²⁴

Fair Equitable Treatment Standard is considered an absolute standard which ensures that investors are accorded the minimum level of protection regardless of the host country. The independence of this standard from National Treatment (NT) and Most Favoured Nation (MFN) was highlighted in the case of *Genin v Estonia*.²⁵ It was held that an investor may be treated inequitably and unfairly even though it is unable to benefit from MFN and NT clause.

¹⁹Judge Higgins, Oil Platforms case (Iran v US) 1996 ICJ 803 at 853.

²⁰ These are treaties that facilitate trade and investment between the state parties and reciprocally to protect individuals and businesses. An example is the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of China, Nov 4, 1946, U.S.- China. See also Gerald D. Silver, ‘Friendship, Commerce and Navigation Treaties and United States Discrimination Law; The Right of Branches of Foreign Companies to hire executives “Of Their Choice” (1989) 57 (5) Fordham Law Review 765.

²¹ This was a draft agreement negotiated in secret by the Organization for Economic Co-operation and Development (OECD). It established a new body of universal investment laws granting corporations unconditional rights to engage in worldwide financial operations without any regard to national laws and citizens’ rights. See Jane Skanderup and Stephen J. Canner, *The OECD Multilateral Agreement on Investment Problems and Issues for the United States and South Korea* (Pacific Forum CSIS 1998)

²² This is an agreement between the United States of America, Canada and Mexico.

²³ It is an international agreement is a multilateral treaty limited in scope to the energy industry. It establishes legal rights and obligations with respect to a broad range of investment, trade and other matters within that sector. It also provides for their enforcement. See Thomas Walde, *The energy charter treaty; an east-west gateway for investment and trade* (Kluwer Law International 1996).

²⁴ It basically stipulates the attempts the United Nations have made to ensure responsible conduct of transnational corporations and of business in general. ‘United Nations Commission On Transnational Corporations: Report Of The Secretariat On The Outstanding Issues In The Draft Code Of Conduct On Transnational Corporations’ (1984) 23 (3) International Legal Materials

²⁵Alex Genin et al v Estonia, ICSID Case No ARB/99/2, Final Award, 25 June 2001

The Fair Equitable Treatment Standard is included in Bilateral Investment Treaties to cover government actions which do not fall under the scope of other provisions in the treaty.²⁶ Hence, its essence is to ensure that minimum standard of investment protection exists even in circumstances not contemplated by specific treaty articles. This objective is well captured and acknowledged in Article 4(1) of Kenya – Switzerland Bilateral Investment Treaty which provides:

Investments and returns of investors of each contracting party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other contracting party. Neither contracting party shall in any way impair by unreasonable discriminatory measures the management, maintenance, use, enjoyment or disposal of such investment.

The significance of the way the clause is phrased lies in the interpretation of what Fair Equitable Treatment Standard entails in case a dispute arises.²⁷ The absence of a link to international law, arbitral tribunals adopt a literal interpretation in determining the unfairness of a governmental action. This often leads to divergent results as arbitral awards are based on the arbitrator's opinion of fairness and equity. In cases where there is a link to international law, arbitral tribunals usually adopt to opinions in interpretation namely; that the Fair Equitable Treatment Standard does not require addition to customary international law minimum standard and Fair Equitable Treatment Standard is an expansion of the customary international law minimum standard.²⁸

As the arbitral tribunals continue to interpret the normative content of Fair Equitable Treatment Standard, the standard continues to expand and new elements are created in new situations of unfair treatment. It is safe to say that Fair Equitable Treatment Standard has acquired a certain amount of

²⁶Stephen Vasciannie, The Fair and Equitable Treatment Standard in International Investment Law and Practice, 70 (1999) BRIT. Y.B. INT'L L. 99.

²⁷Marcela K Bronfman, 'Fair and Equitable Treatment: an evolving Standard' (2006) 10 Max Planck Yearbook of United Nations Law Online 609.

²⁸Supra Note 16.

elasticity. However, when there is a link of the standard to international law in formation of the clause, the elasticity of the standard appears to be limited.²⁹

1.3 Statement of the Problem

Investors are interested in protecting their investment while the host State is concerned with regulation of certain public policy issues. For the Fair Equitable Treatment Standard to be fully applicable, sovereign rights of host country will be constrained as well as control over the intrusive process of foreign investment.³⁰

Proportionality of interests also dictate the extent to which power of state to enact laws that can interfere with investment of foreigners is permissible under the principle.

It is not clear what is considered reasonable when it comes to application of Fair Equitable Treatment Standard. This is informed by the fact that tribunals consider consistency and stability as absolute principles constituting breach of Bilateral Investment Treaties when enacting legislation in public interest. Therefore, the state cannot act in case of a crisis situation as it is bound by this strict interpretation.

1.4 Justification of the StudyThe study will provide critical information which will prove vital to scholars who are trying to recommend a uniform interpretation and application of the fair equitable standard. It will revive scholarly interests and as a result motivate them to conduct further studies. In addition, the research will prove important to future researchers as the recommendations in chapter five, will help them in boosting their knowledge.

The study will be an additional voice in the ongoing debate, on how best to frame Fair Equitable

²⁹Supra Note 28.

³⁰Supra note 2 at 7.

Treatment Standard in foreign investment treaties.

It is also aimed to ensure they are clear and precise, to balance the interest of both the foreign investor and the host state. Hence, the assessment of the reasonableness or legitimacy should take into account all circumstances, including those prevailing in the host State.

The study will highlight the need of non-interference of the right of the host state to regulate especially in cases of economic crisis. The host State should be allowed to have control of development policies without its actions being unnecessarily challenged by foreign investors.

1.5 Theoretical Framework

The research is informed by purposivist theory advanced by Ronald Dworkin. According to Dworkin, judicial interpretation is crucial in delineating the difference between rules, policy and principle.³² The argument advanced by Dworkin is that judicial officers are obliged to consider principles. That means that judicial officers when interpreting the law, need to take into account all relevant principles, consider their weights and determine which principles are dominant.³³

Purposivist theory provides that regulatory statutes not only grant powers, but also impose a duty on judicial officers to carry out those powers in accordance with the purpose or principle that the law was established. In order for judicial officers to comply with the duties imposed by the law, they develop a conception of the purposes that the law requires them to pursue and select the best course of action that advances the purpose permitted by the statute.³⁴

The reason for adopting the purposivist theory is that the study, focuses on interpretation of statutes and exercise of discretion by judges or arbitral tribunals. This research is concerned on how far should judges and arbitral tribunals go in interpreting treaties that are ambiguous or vague. How far

³²Ronald Dworkin, *Taking Rights Seriously* (Duckworth London 1977).

³³Supra note 32

³⁴John F. Manning, 'What Divides Textualists from Purposivists?' (2006) 106 Colum. L. Rev. 70, 99–101.

should their discretion be exercised and what factors should they consider while exercising such discretion.³⁵

The research will not focus on positive law theories mainly because they consider the law as it is. Positivist theory does not offer alternative in cases where there are difficulty or ambiguous statutes. In difficult cases, judges should consider the purpose or objective which makes the law the best it could be, cases should be decided in a way that makes the law more coherent.

1.6 Literature Review

There is a wide range of literature available on the Bilateral Investment Treaties that is relevant to this discussion. As will be shown below, there are still voids in this literature, which this research seeks to fill.

1.6.1 Relations between Foreign Investors and States.

Vasciannie, in his book advances the argument that traditionally, international investment law was affiliated to the movement of money or capital flows from developed to developing countries. However, currently the focus has shifted to attracting major international investment flows and multinationals from developing countries. The book is relevant to the research as the author discusses the principle of fair and equitable treatment. Vasciannie argues that fair and equitable treatment principle provides a useful yardstick by which relations between foreign investors and governments of capital importing countries may be assessed.³⁶

Calvin notes that developing countries open up their borders and allow utilization of their resources by the foreign investors, while they grant the same investors numerous concessions which reduce

³⁵Supra note 35

³⁶Supra note 16.

the gains of the developing country to a minimal.³⁷ The writer notes that the resultant effect is scales tipping in favor of the foreign investor. This creates an imbalance which she proposes needs to be balanced. The study further associates with the middle path theory, which proposes a balance between the foreign investor and the host country, in that both parties achieve a win situation.

The shortcomings of the article are several. First, it approaches the issue from the developed state perspective and does not balance the focus on both states and the impact of the concessions the developing state gives to the foreign investor. Secondly, it does not analyze the provisions of the Bilateral Investment Treaties so as to demonstrate how giving more concessions entices more foreign direct investment.

Mary Hallward Driemier addresses the issue from a different angle. She criticizes previous literature on the subject on two instances. One, for failure to address whether the strength of the rights enshrined in a Bilateral Investment Treaty would provide adverse incentives to potential investors. Two, to provide insurance beyond what domestic investors enjoy, or that foreign investors would require to enter with the consequence that could potentially have enormous impact on the feasible policy choices available to host governments³⁸.

Biswajit Dhar and Sachin Chaturvedi in their article, believe that Bilateral Investment Treaties create an iron wall around FDI keeping out Government intervention. This leads to misappropriate protection extended to foreign investments by limiting policy space that governments had³⁹.

The article argues that the reason for the increased disputes on investment is due to the reduction in growth rates. This, they believe strained the investor's profit margins. As a result, the investors

³⁷ Calvin. A Hamilton & Paula I Rochwerger, 'Trade and Investment: Foreign Direct Investment through Bilateral and Multilateral Treaties' (2005) 18 (1) New York International Law Review, winter 1

³⁸ Supra note 6

³⁹ Biswajit Dhar and Sachin chaturvedi, 'Multilateral Agreement on Investment-An Analysis' (1998) 33 Economic and Political Weekly at 837-848

search for loopholes in Bilateral Investment Treaties to enhance profits through arbitral awards. This therefore makes a strong case for review.

1.6.2 Fair Equitable Standard and International Investment Law.

OECD (2004) is a working paper on international investment. The paper provides factual elements of information on jurisprudence, state practice and literature related to the fair and equitable treatment standard. The paper examines the origin of Fair Equitable Treatment Standard and its usage in international agreements and state practice. It also discusses Fair Equitable Treatment Standard relationship with minimum standard of international customary law and the elements of its normative content as identified by arbitral tribunals⁴³. The paper is relevant to the research because it attempts to clarify the normative content of Fair Equitable Treatment Standard.

Wouters, Sanderijn and Hachez in their article examine how the growing network of Bilateral Investment Treaty and arbitral practice has shaped international investment law.⁴⁴ The argument advanced is that the mere repetition of like clauses or articles in bilateral investments agreements is not by itself evidence of formation of customary rules of international investment. This is because the elements of consistent state of practice and opinio juris is lacking in many respects.⁴⁵ The article further explores the emerging 'new generation' Bilateral Investment Treaties which include progressive convergence in interests of host states resulting in a rebalance of respective responsibilities and rights. The article is relevant to the research because it examines Fair Equitable Treatment Standard principle and evaluates whether it could offer a wider consensus in the future.

Bronfman in his article argues that states have formulated legal structures in an attempt to

⁴³ 'Fair and Equitable Treatment Standard in International Investment Law' (2006) OECD Working Papers on International Investment, 2004/03, OECD Publishing. <<http://dx.doi.org/10.1787/675702255435>> Accessed on 20th

⁴⁴ Jan Wouters, Sanderijn Duquet and Nicolas Hachez 'International Investment Law: The Perpetual Search for Consensus' (2012).<<https://ssrn.com/abstract=2031552>>

⁴⁵ Supra note 38

encourage investment, by granting a secure and stable environment for the investor in the host country. He argues that at the core of this legal structure is the Fair Equitable Treatment Standard which constitutes an independent and reliable system for the protection of the investor. The author notes that the application of the true fairness concept underlying the standard, seems to be in jeopardy due to lack of precision regarding its true meaning. He is of the opinion that scholars have wondered from one interpretation to another, trying to fit the standard in existing legal concepts such as international minimum standard of customary international law⁴⁶. The article is relevant to the research because it examines the latest attempts to define the Fair Equitable Treatment Standard within modern international law. This has contributed to a dynamic and controversial discussion of the topic.

Klager in his book argues that breach of fair and equitable treatment is alleged in almost every investor state dispute. He is of the opinion that the principle has become a controversial norm which touches the heart of international investment law. The author shed light on the controversies surrounding Fair Equitable Treatment Standard by exploring deeper doctrinal foundations of the principle. The author also discusses the norm in light of fragmentation of international law, theories of international justice and constitutionalism in international law⁴⁷. The book is relevant to the study because it sheds into the existing lines of Fair Equitable Treatment Standard jurisprudence and introduces new conceptual ideas into the discussion.

1.6.3 Constraints of Sovereignty.

Sornarajah in his article argues that all Bilateral Investment Treaties constrain sovereignty.

⁴⁶ Supra note 27 at 609

⁴⁷ Roland Klager, *Fair and Equitable Treatment in International Investment Law* (Cambridge: Cambridge University Press 2011).

Investment treaties constrain sovereign rights of control over the intrusive process of foreign investment, which take place at the host state territory. This results in erosion of sovereignty of the host state.⁴⁹ However, Johnson is of the opinion that limiting state's room to regulate is a crucial component of reducing investor risk and thus promoting foreign investment. Johnson is of the view that investors have the right to enforce a treaty provisions through international arbitration in order to promote protection of investors which facilitates greater inflows of foreign direct investments.⁵⁰

Trackman in his article argues that though conflicts between state and investor interests appear significant, these interests are compatible. Sovereign states are interested in regulating foreign investment, and in avoiding flight of investor capital from states whose regulations are considered to be unclear and arbitrary. The investors are only interested in protecting their rights and establishing long term relationships with host's states⁵¹. Therefore, accommodating Fair Equitable Treatment Standard principle and other public interests require careful balancing. The article is relevant to the research because it highlights how Fair Equitable Treatment Standard principle can be used to balance the interest of host's state and the investor.

Sacerdoti, Acconti, Vallenti and De Luca argue that there is conflict between investor quest for stability and hosts state sovereignty to legislate. Investors are interested in stability, in order to plan their business while host states need flexibility in policy regulation in order to meet societal demands⁵².

1.6.4 Balance of Interests of state and investors.

Fair Equitable Treatment Standard is suitable in striking a balance between the investor and the host

⁴⁹ Supra note 2 at 7.

⁵⁰ Alec Johnson, 'Rethinking Bilateral Investment Treaties in Sub-Saharan Africa' (2009-2010) 59 Emory Law Journal 919.

⁵¹ Leon Trakman 'Foreign Direct Investment Hazard or Opportunity?' (2009) 41 George Washington International Law review 19

⁵² Giorgio Sacerdoti, Pia Acconci, Mara Valenti, and Anna De Luca, *General Interests of Host States in International Investment Law* (Cambridge University Press 2014) at 79.

country. The article makes reference to Parkerings Compagniet AS v. Republic of Lithuania case where it was held:

A state has a right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of stabilization clauses or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made an investment...what is prohibited is for a state to act unfairly or unreasonably in the exercise of its legislative power⁵³.

The article is relevant to the research because it illustrates the need to strike a balance between foreign investor's interests and host country right to regulate for public interest.

1.6.5 Interpretation of Fair Equitable Standard.

Vandevelde argues that fair and equitable treatment is the most important standard under which states are held liable for the actions they take towards foreign investors. He argues that there is a need to develop a 'unified theory' of Fair Equitable Treatment Standard because there is conflicting opinion on what it means. He argues as a result, Fair Equitable Treatment Standard is uniformly invoked in every investment. The article is relevant to the research because it reflects on decisions on Fair Equitable Treatment Standard delivered by tribunals. The shortcoming of the article is that the author fails to argue what Fair Equitable Treatment Standard should be, instead he brings up coherence to arbitral scholarship demonstrating that the standard corresponds to an obligation to adhere to an international concept of "rule of law".⁵⁷

Paparinskis in his book argues that Fair Equitable Treatment Standard is an important principle in

⁵³ ICSID Case No. ARB/05/8.

⁵⁷ Kenneth J. Vandevelde, A Unified Theory of Fair and Equitable Treatment, (2010) 43 New York University Journal of International Law and Politics 43

international investment law, though the vagueness of its textual expression causes challenges in interpretation and application. The author is of the opinion that absence of clear textual guidance on Fair Equitable Treatment Standard, scholars and tribunals have turned to more general concepts such as good faith and abuse of rights. He argues that good faith plays a critical role in reasoning about fair and equitable treatment⁵⁸. Therefore, good faith informs structures of reasoning and interpretation thus providing a broader background of Fair Equitable Treatment Standard. The book is relevant to the research because it highlights the vagueness in Fair Equitable Treatment Standard.

Yannaca in her article examines the fair and equitable treatment standard in investment treaties based on elements identified by arbitral tribunals as forming part of the standard. She is of the opinion that the principle has acquired prominence in investment arbitration. As a result, other standards traditionally used by international law might not be applicable in each case⁵⁹. The article is relevant to the research because it examines applicability of fair and equitable treatment in cases that involve non-traditional breaches of international law.

Tudor in his book explores classical sources of international law as possible source of fair and equitable treatment standard. His argument is based on empirical research on Bilateral Investment Treaties. The argument is that there is no uniformity in drafting formulations of Fair Equitable Treatment Standard clauses, which means wording of each clause has to be carefully interpreted⁶⁰. The book is relevant to the research because it looks into the nature of the principle. The book further discusses the role of arbitrators in establishing the threshold at which Fair Equitable Treatment Standard is applied in each case and different situations in which the standard has already been applied, based on thorough analysis of existing case law.

⁵⁸ Martins Paparinskis, *Good Faith and Fair and Equitable Treatment in International Investment Law* (2014) In: Mitchell A, and Muthucumaraswamy Sornarajah, and Voon, T, (eds.) *Good Faith and International Economic Law* (Oxford University Press: Oxford. 2015)

⁵⁹Katia Yannaca-Small, *Fair and Equitable Treatment Standard: Recent Developments* in Reinisch A, (ed.), *Standards of Investment Protection* (Oxford University Press 2008).119.

⁶⁰Ioana Tudor, *The Fair and Equitable Standard in International Law of Foreign Investment* (Oxford University Press 2008) at 73–85.

Schreuer in his article argues that it is possible to identify fact situations to which the standard of Fair Equitable Treatment Standard principle has been applied by tribunals. Thus, based on the factual situations, there are certain principles that have evolved such as transparency, stability, consistency and protection of the investor legitimate expectations, due process, freedom from coercion and action in good faith. The article is relevant to the research because it highlights standards to be applied when examining Fair Equitable Treatment Standard principle.⁶¹

1.6.6 Arbitrariness

Picherack in his article argues that one of the common features of international investment treaties is the obligation of a host state to grant fair and equitable treatment to investors and their investments. He argues that treatment giving rise to allegations of breach in Fair Equitable Treatment Standard has taken many forms such as bad faith, discrimination and denial of justice. He is of the opinion that arbitrariness has not been explored in scholarly work and thus it is difficult to ascertain what amounts to arbitrariness⁶². The article is relevant to the study because he explores what amounts to arbitrariness. Arbitrariness is one of the legitimate basis for claims under fair and equitable treatment standard. This will further be discussed in chapter two.

1.7 Objectives of the Study

The broad objective of this study is to analyze the Fair and Equitable Treatment in the Kenya – Switzerland Bilateral Investment Treaty. The study seeks to achieve the following specific research objectives:

- I. To evaluate the ambiguity of Fair and Equitable Treatment provision of Kenya – Switzerland Bilateral Investment Treaty.

⁶¹Christoph Schreuer ‘Investments, International Protection’ [2013] Max Planck Encyclopedia of Public International Law at para 48-80

⁶² Roman J Picherack, ‘The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far?’ (2008) 9 Journal of World Investment & Trade 255.

- II. To propose reforms and reviews addressing Fair and Equitable Treatment principle.

1.8 Research Questions

The study attempts to answer the following questions:

- I. Is the Fair and Equitable Treatment provision in the Kenya – Switzerland Bilateral Investment Treaty vague, broad and ambiguous?
- II. What modifications or review to the Fair Equitable Treatment Standard provision, are needed to address the challenges raised?

1.9 Hypothesis

The study is premised on the assumption that the Fair Equitable Treatment Standard provision in the Kenya – Switzerland Bilateral Investment Treaty is vague and broad. The study is also grounded on assumption that there is need to review Fair Equitable Treatment Standard in the Bilateral Investment Treaty to make it more definite and certain while being interpreted.

1.10 Research Methodology

The research will employ descriptive and analytical mode of research. Both secondary and primary data will be used. Primary sources will include the Kenya – Switzerland Bilateral Investment Treaty, Treaties and Case Law. The study intends to use secondary sources of information including inter alia online libraries (the internet), Conference manual, Textbooks, Journal articles.

I am aware of other methods of research. However, I adopted desktop research as The National Commission of Law Reporting has created an online treaties and agreements database. All the information that relates to my thesis has been made public and available through this database. It is

a collection of various external sources such as the United Nations Treaties Collection, the African Union Treaties database, physical collection of treaties and agreements from various high commissions and embassies in the Republic of Kenya.

The treaties office in Nairobi were also helpful in guiding me through this database and how the treaty negotiation and ratification process is undertaken in Kenya.

1.11 Limitations of the Study.

Funds to enable me register for the project unit was a major constraint to me, as I enrolled to the program in 2015. However, I managed to avail them this year and continue with the LL.M program. Due to the delay, time was of essence as the university has a policy to discontinue students who have been enrolled for more than three years.

Chapter Break down

Chapter One: Introduction and Background

Chapter one lays down the background of the study and it sets out the research question to be answered, the objective of the study, hypothesis, and significance of the study, the theoretical framework, literature review and the research methodology.

Chapter Two: Historical Perspective of International Investment Law and its Application in Kenya

This chapter will highlight the historical perspective on how foreigners and their investments were treated in host states. It also discusses the investment policy in Kenya and how it developed from the time Kenya gained independence.

The chapter will also discuss the process of negotiation of these treaties by the Kenyan government, the number of Bilateral Investment Treaties that Kenya has ratified and finally, it briefly highlights

the provisions found in the Kenya – Switzerland Bilateral Investment Treaty highlighting Article 3 of the treaty which forms the basis of this thesis.

Chapter Three: Core Elements of Fair and Equitable Standard

The chapter will discuss what the Fair Equitable Treatment Standard encompasses. The main elements that form the normative content of the standard will be highlighted. They include: the protection of the investor's legitimate expectations, due process, obligation of protection, transparency, lack of arbitrariness, proportionality and abuse of authority.

Chapter Four: Analytical Study of the Fair Equitable Treatment Standard in the Kenya-Switzerland Bilateral Investment Treaty

The chapter analyses the Fair Equitable Treatment Standard generally. Specifically, it analyses the Fair Equitable Treatment Standard in the Kenya – Switzerland Bilateral Investment Treaty. The chapter also analyses how arbitral tribunals have interpreted the Fair Equitable Treatment Standard provision and the consequences thereof. It further examines how different states have formulated the principle in their Bilateral Investment Treaties.

Chapter Five: Conclusion and Recommendations

The chapter will attempt to give recommendations on the review of Kenya – Switzerland Bilateral Investment Treaty to ensure both parties mutually benefit from the Treaty.

CHAPTER TWO

HISTORICAL PERSPECTIVE OF INTERNATIONAL INVESTMENT LAW AND ITS APPLICATION IN KENYA

2.0 Introduction

This chapter shall highlight the historical perspective of international investment law and how it has developed over the years. The chapter also discusses investment legal framework in Kenya and how it has developed since independence.

In addition, the chapter will discuss treaty negotiations, the number of Bilateral Investment Treaties ratified by Kenyan government and briefly highlight the provisions found in Kenya - Switzerland Bilateral Investment Treaty Article 4(2) which form the basis of this project.

2.1 Development of International Investment law

Historically, foreign nationals were treated as outsiders. They did not share equal status with the nationals, and were denied legal capacity in host state. Foreign investors were left with little remedy.⁶⁸ However, they sought compensation in domestic courts for expropriation. This meant that the home state had to exercise their right for diplomatic protection of its injured national against host state. The Permanent Court of International Justice recognized this as a right under public international law.⁶⁹

In the nineteenth century, international legal scholars considered that international law protected the rights of aliens to travel and trade. During this period, there was no need for the colonialists to have

⁶⁸A Newcomb, and L Paradell, *Law and Practice of Investment Treaties: Standard of Treatment* (Kluwer Law International 2010) at 1.

⁶⁹Emer de Vattel, *Law of Nations: Or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns. A Work Tending to Display the True Interest of Powers* (Thomas M. Pomroy 1805) at 100.

recourse to international law, since colonial political and military power protected colonialists and their property from local interference or control.⁷⁰ It was only after the dissolution of colonial empires that the need for a system of protection of foreign investment came to be felt by the imperial powers which now became the exporters of capital to the former colonies and elsewhere.⁷¹

The period following the end of colonialism was faced with hostilities towards foreign investment generated by nationalist fervour.⁷² The anti-colonial movement spread throughout colonised parts of the world. The result was a wave of nationalisation of foreign property. This nationalisation resulted in intense debates as to what the international law on foreign investment protection was. Each opposing group was contending for a different set of norms. The capital exporting nations argued for an external international law standard protecting foreign investment, whereas, the newly independent nations argued for national control over the process of foreign investment.⁷³

By early 1900, there was a general agreement amongst international lawyers in Europe and US that there existed a minimum standard of justice in the treatment of foreigners. At the same time, there was an emerging body on international law on state responsibility for the treatment of aliens being developed through various commercial treaties, decisions of tribunals and mixed commissions and state practice.⁷⁴ In the twentieth century, the major powers and capital exporting states took the position that foreign nationals and their property were entitled under customary international law to a minimum standard of treatment. This standard was similar to standards of justice and treatment accepted by 'civilized states'.⁷⁵

Several attempts to develop a multilateral agreement on protection of foreign investment were

⁷⁰Supra note 2 at 19-20.

⁷¹Supra note 2 at 22

⁷²Supra note 61

⁷³Supra note 2 at 23

⁷⁴Supra note 1 at 12

⁷⁵Supra note 65

made. These included the attempted codification by the convention on treatment of foreigners (1929) draft under the auspices of the League of Nations, the Havana Charter, the International Trade organization and the OECD attempts on a multilateral agreement on investment. These attempts were not successful. This was mainly due to the disagreement or the difference in opinions between the capital-exporting and capital importing countries.⁷⁶ The capital importing states were of the view that foreign investors should be subject to the laws of the host state and should not be accorded better treatment than that given to the private sector in the host state. The capital exporting states on the other hand, held that foreigners should be treated differently.

2.2 Bilateral Investment Treaties

The development of Bilateral Investment Treaties was primarily a response to the uncertainties and inadequacies of the customary international law of state responsibility for injuries to aliens and their property.⁷⁷ Further, the developed states sought to obtain better market access commitment from developing states for their investors and to obtain progressive development in the standards of investment protection.⁷⁸

The first ever international investment Agreement was between Pakistan and Germany in 1959 for the promotion and protection of investments. It had many provisions that have become common in current Bilateral Investment Treaties. The efforts by Germany to conclude Bilateral Investment Treaties were followed by Switzerland and Tunisia 1961, Netherlands and Tunisia 1963, Italy and Guinea in 1964, Sweden and Denmark in 1965, UK and Egypt in 1975.⁷⁹

The characteristic of these treaties during this period were focussed on core protections such as

⁷⁶Supra note 66 at 22

⁷⁷Supra note 2 at 61

⁷⁸Supra note 2

⁷⁹ Supra note 69 at 43

National Treatment, Most Favoured Nation treatment, a general minimum standard of treatment, compensation for expropriation and rights to transfer capital and returns. They were majorly based on the OECD draft Convention.⁸⁰ Since then more than 3,000 such agreements have been concluded in the world.⁸¹

One of the factors that has motivated developing states to enter into investment treaties is due to the push for them by OECD and UNCTAD. This was on the premise that they added security to foreign investors which would spur increase in foreign investment.⁸² The other factor which is put forth by intergovernmental institution such as International Finance Corporation is that, investment treaties are seen as risk management tools. Finally, globalization has increased the proliferation of investment treaties.⁸³

The developed countries have ready capital to invest in developing countries thus the majority of the Bilateral Investment Treaties are concluded between developed and developing countries. The underlying principle behind Bilateral Investment Treaties is that, by granting foreign investors enhanced security and protection beyond that which is provided by the laws of the host state, will increase and attract foreign investment. Whether this is true still remains controversial.⁸⁴

2.3 Foreign Investment Law

The laws that govern foreign investment are three fold. These are the domestic laws of the host

⁸⁰Supra note 2

⁸¹Nathalie Bernasconi- Osterwalder, International Institute for Sustainable Development (2012)

⁸² Supra note 2

⁸³Supra note 2

⁸⁴ UNCTAD, *The role of international investment agreements in attracting foreign direct investment to developing countries* (Geneva: United Nations 2009) Susan Rose-Ackerman and Jeniffer Tobin, 'Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties, [2005] Yale Law & Economics Research Paper, No. 293; Eric Neumayer and Laura Spess, 'Do bilateral investment treaties Increase foreign direct investment to developing countries?' (2005) *World Development* 33(10) 1567–1585; Jason Yackee, 'Do Bilateral Investment Treaties promote FDI? Some Hints from Alternative Evidence' (2010) *Virginia Journal of International*

state, international treaties and international investment contracts.⁸⁵

The primary law is normally the domestic law of the state where the investment is made. This law includes taxation, property, financial regulation and environment. These contracts are signed in capital intensive investment such as extractive industry contract and the host government agrees to grant investor special rights while they receive royalties.⁸⁶ The third source is international treaties which are the subject of this research. They give the investor guarantees and protection which the domestic law may not grant.⁸⁷

2.4 Kenya History of Foreign Investment Policy

Kenya was a protectorate of the British since 1897 until 1963 when she gained independence.⁸⁸ After the Second World War, there was a great need to extract natural resources from former colonies, and Britain was not an exception. Therefore, the economic policy then were geared towards feeding the British market needs for raw materials for its home industries. The local population in the colony served not only as a source for cheap labor but also as a market for the British finished products. Therefore, investment was geared towards exploiting Kenya's locational advantage to the fullest.⁸⁹

In the 1950s, the colonial government adopted protective investment policies which led foreign firms setting up in Kenya so as to enjoy the protection. Capitalism was promoted.⁹⁰ During the negotiation of independence at the Lancaster house in the 1960s, British had three main interests to safeguard during the negotiations: their military bases, Kenya's economic ties to the UK and the

⁸⁵ Supra note 75

⁸⁶ Nathalie Bernasconi- Osterwalder International Institute for Sustainable Development (2012).

⁸⁷ Supra note 77

⁸⁸ David Gachuki, 'Regulation of foreign investment in Kenya' 1963-81: an Empirical, University of Warwick institutional repository: <http://go.warwick.ac.uk/wrap> accessed 20th March, 2018.

⁸⁹ Valentine Nde Fru, *The International Law on Foreign investment and Host Economies in Sub- Saharan Africa: Cameroon, Nigeria and Kenya* (LIT Verlag Munster 2011) 155

⁹⁰ Supra note 80

interests of the immigrant population.⁹¹ Therefore after independence the colonial influence persisted to protect these interests.

After independence, the government of Kenya was faced with the need to redefine an economic policy so as to serve the socio economic needs of the country. The new government had to principally deal with the land rights and land administration.⁹² It was in this regard that the presidents opted for africanisation or indigenization programme aimed at transferring land titles and rights to indigenous Kenyan.⁹³

In the 1970s, the state focused on creating an enabling environment for private firms to operate. This posed a challenge, in that, the dominant sector of the economy was private sector which was owned and controlled by foreign firms. It was not possible to impose restriction on the foreign firms as doing so, would deny the Government the capital needed for development.⁹⁴

Therefore, the country adopted a liberal foreign investment policy. In the mid-1970s, it was realised that despite the incentives to the foreign investors, the country did not gain much from their investment and therefore the need to regulate. However, the government continued reassuring foreign investors that they would continue enjoying protection. To date, the Kenyan policies on foreign investment have generally been favourable.⁹⁵

The Africanisation programme also restrained future foreign acquisition of agricultural land in Kenya. However, because of the profits and lucrateness of the colonial investment ventures, the desire of the colonial investors and foreign business interests to invest in Kenya subsisted even after independence. The government was compelled to provide a legal framework within which

⁹¹Laura Fenwick, 'British and French styles of influence in colonial and independent Africa: A Comparative Study of Kenya and Senegal' [2009]

⁹²Supra note 82.

⁹³Supra note 82

⁹⁴Supra note 82

⁹⁵Supra note 82

foreigners could invest in the country. It was for this reason that the Foreign Investment Protection Act was enacted in 1964. It became one of the principal laws governing the investment activities of foreigners in Kenya.⁹⁶

Other Legislation that dealt with foreign investment activities was the Land Control Act of 1967 and the Trade Licensing Act of 1967⁹⁷. The former specifically promoted the acquisition of land by locals and restricted foreign acquisition for agricultural purposes. The latter set up a licensing system which barred foreign firms from certain geographical locations which included Nairobi, Mombasa, Eldoret, Kisumu and Thika (section 5).

Further section 11 provided for what was termed as the 'principles of licensing'. One of which was that, in issuing licenses, the licensing officer was to be guided by the principle that businesses carried out in any place which was not within a general business area ought, where practicable, to be controlled by citizens of Kenya. It added that specified goods ought, where practicable, to be dealt in by citizens of Kenya.⁹⁸ These policies bore fruits as the general economy experienced gradual growth from independence up until 1980s.

In the same period, energy needs for sustained economic growth depended on importation of foreign oil. In the 1980s, there was a global fuel crisis which led to increased prices of petroleum products. As a result, Kenya began spending more on imported petroleum products than it was earning from its exports. This together with other factors plunged the country's economy into an economic crisis. Therefore, the government in a bid to secure funds to sponsor national socio economic development programme, turned to the Breton woods institution for financial support.⁹⁹

⁹⁶ Supra note 82 at 156

⁹⁷ Act 33 of 1967

⁹⁸ Supra note 27 at 158

⁹⁹ Supra note 89

In return, these institution imposed conditions on the government in exchange for funding. They included the requirement for Kenya to liberalism trade and investment regimes. This entailed Kenyan government instituting privatization and commercialization programmes which emphasized the development role of the private sector which included foreign business. It was in this regard that the IMF and World Bank approved Kenya's structural adjustment programme in 1996 after the Kenyan government acquiesced to the loan conditions.¹⁰⁰

The USA at the same time being a major sponsor of the Breton woods institutions, had enacted the African Growth and Opportunity Act (AGOA). It demanded that African countries adopt similar trade and investment liberisation programme in order to benefit from preferential non - reciprocal quota and tariff free exports into the USA's market. Kenya implemented these policies and therefore became AGOA eligible in 2000. From 2001, Kenya continued to liberalize the investment regime under the National Rainbow Coalition which took over in 2002.¹⁰¹

The NARC regime effectively ended the africanisation programme and officially asserted a new economic development strategy as advocated by the Breton woods institutions and the USA. The Economic Recovery Strategy was then born which incorporated private sector in development, and this included both indigenious Kenyan and foreign investors. Thus the government went about removing virtually all restrictions on foreign private sector to enable them undertake investment activities within the economy.¹⁰²

This was achieved by enacting the 2004 Kenyan Investment Promotion Act which repealed the Foreign Investment Protection Act and the core regulations of the Trade Licensing Act that restricted the activities of foreign investors. In addition to the above, the economic policy

¹⁰⁰IMF world bank, 'Kenya Economic Policy Reforms For 1996- 1998: The Policy Framework Paper' prepared by the Government of Kenya in collaboration with the IMF and the World Bank (1996) [http://IMF.org/ external/np/pfp/kenya/kenya.pdf](http://IMF.org/external/np/pfp/kenya/kenya.pdf) accessed 20th March 2018

¹⁰¹Supra note 91

¹⁰²Supra note 92 at 158.

particularly addressed foreign investors with incentives and guarantees to lure them to set up businesses in Kenya. This was a central issue in the economic recovery strategy which was given momentum in 2008 when the government launched the Kenya Vision 2030 development strategy. It was aimed at making the Kenyan economy more competitive to international foreign investment capital than the neighboring competing countries and to move the country's economy towards industrialization. The then Prime Minister, Raila Amollo Odinga, in his speech during the launch of the vision 2030, reaffirmed that the coalition government would do everything to ensure investors reap maximum benefit from their investment.¹⁰³

The Chinese lead with the number of investment companies in the Infrastructure and manufacturing sectors. Other countries that have invested in Kenya are Germany, United States of America and Netherlands.¹⁰⁴

In addition to the domestic legislation mentioned above, Kenya ratified several key international treaties. They include, The Washington Convention, the ICSID convention in January 1963,¹⁰⁵ and The New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.¹⁰⁶

Kenya also signed at least 12 known Bilateral Investment Treaties.¹⁰⁷ The first being between Kenya and Netherlands in 1970, Germany in 1996, Italy in 1996 the UK in 1999, Kenya - Switzerland in 2006, Burundi in 2009, Slovakia in 2011, Finland in 2008, Islamic republic of Iran in 2009, Libya in 2007, Switzerland in 2006 and France in 2007.

¹⁰³Supra note 91 at 159

¹⁰⁴Supra note 94

¹⁰⁵ICSID WEBSITE The Convention was domesticated by the Investment Disputes Convention Act of 1966¹⁰⁵.

¹⁰⁶The most important and successful treaty in the field of international trade law. See Reinmar Wolff (ed.), *New York Convention on Recognition and Enforcement of Foreign Arbitral Awards: A Commentary* (Beck/Hart 2012). Herbert Kronke, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*. (Kluwer Law International 2010)

¹⁰⁷<<http://unctad.org/SearchCenter/Pages/Results.aspx?k=kenya>> accessed 20th March, 2018

Apart from the Bilateral Investment Treaty, Kenya has also adopted regional investment agreements. For instance, the COMESA Investment Agreement¹⁰⁸ which was adopted for signature in 2007. In November 2012, Kenya became a member of East Africa Community (EAC) and the USA signed the EAC-U.S. Trade and Investment. The EAC-U.S Trade and Investment Partnership builds on the foundations of existing trade and investment relationship, including the African Growth and Opportunity Act (AGOA), and the U.S.-EAC Trade and Investment Framework Agreement (TIFA).

The new partnership aims at providing new business opportunities to U.S. and EAC firms by reducing trade barriers, improving the business environment, encouraging open investment regimes and enhancing two-way trade. The initial items that have been agreed upon to explore under this new umbrella partnership include a regional investment treaty, a trade facilitation agreement, continued trade capacity building assistance and a commercial dialogue. These agreements and other activities that will be pursued will help to promote EAC regional integration, economic growth, and expand and diversify U.S.-EAC trade and investment. They could also serve as building blocks towards a more comprehensive trade agreement over the long term.¹⁰⁹

2.5 The Process of Negotiation, Ratification of Bilateral Investment Treaty in Kenya

Article 2(6) of the Kenyan Constitution¹¹⁰ states that '*any treaty or convention ratified by Kenya shall form part of the Law of Kenya under this constitution.*' Hence, the Treaty Making and Ratification Act¹¹¹ gives effect to the provisions of the Constitution. In its preamble, it further states that it provides the procedure for the making and ratification of treaties and connected purposes.

The process to conclude a Bilateral Investment Treaty is not different from any other international

¹⁰⁸ Common Market for East and Southern Africa.

¹⁰⁹ <http://www.eac.int/index.php?option=com_content&view=article&id=1309:-eac-us-discuss-trade-matters&catid=146:press-releases&Itemid=194, EAC> website on 20th March, 2018

¹¹⁰ The Constitution of Kenya 2010.

¹¹¹ No. 45 of 2012.

treaty. Once the authorities of the two countries concerned decide to engage as trading partners, discussions are opened. The national executive shall be responsible for initiating the treaty making process, negotiating and ratifying treaties.¹¹² The relevant factors to consider include the existing legal regime, the expected costs of formulating and implementing the treaty, whether it solves the current problems in Kenya, the time it will take to conclude the treaty process and the optimal form of the proposed treaty.¹¹³

Once the national executive, in consultation with the Attorney General, confirm that the above conditions have been met, a proposal will be presented for approval by the Cabinet. Also, a memorandum outlining the objects and subject of the treaty giving in detail, its pros and cons, is given to the cabinet together with the proposal.¹¹⁴

Where the cabinet approves, the cabinet Secretary shall submit the treaty and a memorandum on the treaty to the speaker of the National Assembly.¹¹⁵ The relevant parliamentary committee shall ensure the correct procedure has been followed, including public participation.¹¹⁶ All instruments of ratification shall be signed, sealed and deposited by the Cabinet Secretary at the requisite international body and a copy filed with the registrar.¹¹⁷

A treaty can be disproved for reasons such as negating the provisions of the Constitution. Where this happens, the National Assembly submits a resolution of the House to the Cabinet Secretary within fourteen days.¹¹⁸

2.6 Model Bilateral Investment Treaty.

The Model Bilateral Investment Treaty is in line with the approach taken by many countries. That is, short provisions, without a lot of detail; broad definitions of investments; prohibitions on host governments from discriminating against foreign investments in favour of domestic investments or

¹¹² Supra note 102 at Section 4.

¹¹³ Supra note 102 at Section 5(2).

¹¹⁴ Supra note 102 at Section 7.

¹¹⁵ Supra note 102 at Section 8(1)

¹¹⁶ Supra note 102 at Section 8 (3)

¹¹⁷ Supra note 102 at Section 10

¹¹⁸ Supra note 102 at Section 8 (9)

investments from third states; requirements for governments to ensure fair and equitable treatment of foreign investments; obligations on host governments to allow foreign investors to transfer funds and repatriate capital; requirements for prompt, adequate compensation for expropriation of foreign investors property and, an endorsement for investors seeking relief for alleged harm by bringing direct claims against host states through international arbitration.

2.7 Conclusion

Kenya's foreign investment policy has been driven by western interest especially considering what happened in the 1990s. We have however seen a slight shift with subsequent governments who have embraced the East. The shift has mainly been attributed to the lack of conditionality's attached to the Kenya – Switzerland relations. There is none interference of the democratic space. This is a shift from the traditional Bilateral Investment Treaty entered between developed to developing countries Bilateral Investment Treaty.

CHAPTER THREE

CORE ELEMENTS OF FAIR AND EQUITABLE STANDARD

3.0 Introduction

The chapter will discuss Fair Equitable Treatment Standard by analyzing some of the literature and arbitration that has developed over the issue in the last ten years. The development of Fair Equitable Treatment Standard is likely to continue, as this provision is being used by investors. Therefore, it is safe to say that the discussion represents development of the standard at this stage.

Fair Equitable Treatment Standard definition depends on the circumstances of each case. In *Mondev Case*, it was stated that '*judgement of what is fair and equitable cannot be reached in abstract; it must depend on the facts of the particular case*'.¹¹⁹ This definition of Fair Equitable Treatment Standard is considered a problem by some scholars and jurists.

The argument is that the definition can imply that the test is whether the investor has been treated fairly and equitably by the host State. The challenge with the definition is that it invites an *ex aequo et bono* consideration. Although fair and equitable principles may be considered as legal concepts of fairness and equity, the same should not be confused with *ex aequo et bono*.¹²⁰

In *Mondev Case*, the tribunal noted that '*It may not simply adopt its own idiosyncratic standard of what is fair or equitable, without reference to established sources of law*'.¹²¹ This means that Article 1105(1) did not give NAFTA tribunal unfettered discretion to decide for itself on subjective basis, what was fair and equitable in circumstances of each case.

¹¹⁹ Supra note 30 at para 118.

¹²⁰ Christoph Schreuer 'Investments, International Protection' [2013] Max Planck Encyclopedia of Public International Law at para.48-80.

¹²¹ Supra note 101 at para 184

UNCTAD¹²² provides that the plain meaning approach of definition of Fair Equitable Treatment Standard is not devoid of content. This is because a third party called upon to apply an objective standard may derive it from international law in general. Thus, tribunals have to find equitable solutions within the framework of applicable law. It may seem the test to be applied while defining Fair Equitable Treatment Standard is more than discretionary in tribunals; it's not feasible to reduce fair and equitable treatment to objective and concrete terms. This is because fair and equitable treatment standard safeguards treatment of investors through shifting times in heterogeneous societies that have different political organizations. Hence, Fair Equitable Treatment Standard needs to exhibit flexibility and elasticity.¹²³

Higgins J. defines Fair Equitable Treatment Standard as '*legal terms of art well known in the field of international investment protection*'.¹²⁴ The definition is an overstatement but the Fair Equitable Treatment Standard is in the process of getting a clear content. There are many arbitral cases on Fair Equitable Treatment Standard that have elapsed since *Metalclad* case. The award was issued relating to NAFTA. However, it is not clear to what extent NAFTA and Bilateral Investment Treaties tribunals feel bound by the case law.¹²⁵ However, tribunals apply the precedent as a starting point of their deliberations. This is an indication of emerging legal norm giving reference to limitations. Therefore, each case should be considered beyond whether an investor has been treated fairly and equitably.

The content of the Fair Equitable Treatment Standard are not concurrent, but the notion of what constitutes an infringement on the investor seem to correspond. Schwebel J defines Fair Equitable Treatment Standard as '*a broad and widely accepted standard encompassing such fundamental*

¹²² *Fair and Equitable Treatment* UNCTAD Series on Issues in International Investment Agreements II, United Nations: New York and Geneva (2012).

¹²³ Roscoe Pound, *Introduction to the Philosophy of Law* (Yale University Press 1922), cited in Ragnar Knoph, *Legal Standards* (Oslo 1939) at 4.

¹²⁴ Judge Higgins, Oil Platforms case at para 39

¹²⁵ *Metaclad Corp. V. United Mexican States*. 30 August 2000.

standards such as good faith, due process, non-discrimination and proportionality.’¹²⁶ In *Myers* case¹²⁷, it provides that imports into NAFTA require international law requirements of due process, economic rights, natural justice and good faith.

In UNCTAD, one can distinguish state action that is inconsistent with Fair Equitable Treatment Standard by identifying behaviour that appears inconsistent with fairness and equity, such as ‘actions by State that are fraudulent or discriminate against a foreign investor.’¹²⁸

Recently, there has been an account of elements being identified from Fair Equitable Treatment Standard in case law. An example is found in *Waste Management (2004)* case which is frequently cited by tribunals. It was held that:

*There are emerging differences of emphasis on Fair Equitable Treatment Standard. Taken together, the Myers Case, Mondev Case and Loewen Case suggest that the minimum standard of Fair Equitable Treatment Standard is infringed by actions of the State that cause harm to the investor. The conduct of the State maybe arbitrary, unjust, idiosyncratic, discriminatory and exposes the investor to sectional prejudice or involve lack of due process leading an outcome which offends judicial propriety.*¹²⁹

In applying the Fair Equitable Treatment Standard it is crucial that the treatment is in breach of representation made by host State which were relied on by the foreign investor.

There are States that have gone further to define the content of the Fair Equitable Treatment Standard, by making the provision on the investment treaty more precise and exhaustive. An

¹²⁶MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile. 25 May 2004
<<http://www.asil.org/ilib/MTDvChile.pdf>>

¹²⁷Myers Inc. v Canada. Partial Award (Final Award on the Merits), 13 November 2000.

¹²⁸Supra note 109

¹²⁹Waste Management Inc v. United Mexican states. Award, 30 April 2004.

example is the Central American Free Trade Agreement¹³⁰ that binds USA and six other countries. In addition, other recent investment treaties which USA is a party, the provision of the Fair Equitable Treatment Standard is carefully defined and narrow. The only element included in their investment treaties is principle of due process.

There is an attempt to specify the core elements of Fair Equitable Treatment Standard by OECD. OECD identifies five elements: obligation of protection, due process, transparency, good faith and fairness and equity element.¹³¹ Schreuer summarizes the standard based on the threshold set by different tribunals. The threshold formulated in *Neer* case includes discrimination, injustice, idiosyncrasy, lack of good faith and lack of due process.¹³²

There seem to be emerging elements of Fair Equitable Treatment Standard that can be categorized in different ways. The reasoning of various elements is vague and to some extent overlapping. For example, Transparency can be seen as an element by its own right, as part of legitimate expectations of investors or included under denial of justice.

The research present elements that are relevant as the basis of the Fair Equitable Treatment Standard focusing on the following: the protection of the investor's legitimate expectations, good faith, transparency, lack of arbitrariness and discrimination.

3.1 Legitimate expectations

Legitimate expectation involves expression of protection of investors and their rights by granting

¹³⁰ CAFTA. The first free trade agreement between the United States and Central American Countries. They are Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic. Its purpose is to eliminate tariffs and trade barriers and expand regional opportunities.

¹³¹ OECD Draft Multilateral Agreement on Investment, OECD doc DAF/MAI (98)7.

¹³² Christoph Schreuer 'Fair and Equitable Treatment in Arbitral Practice' (2005) 7 Journal of World Investment and Trade 357.

them predictability of the legal environment in the host State.¹³³ The aim is to protect investors from legal changes in host State that would have a negative impact on the investment. The protection offered to investors is not unlimited since tribunals only offer protection of expectations reasonably relied on by the foreign investors.¹³⁴

The term legitimate expectation was defined in *Thunderbird* case as follows,

*A situation where a contracting party conduct creates reasonable and justifiable expectation on part of the investor to act in reliance on said conduct, such that failure by NAFTA party to honor those expectations could cause the investor to suffer damage.*¹³⁵

The extent of the concept of legitimate expectation is not clear and its content varies in arbitral practice. The ambiguity is created by the fact that legitimate expectation is interrelated with other elements of Fair Equitable Treatment Standard such as arbitrariness, due process and transparency.¹³⁶

The determination of the moment of emergence of legitimate expectation is conflicting. There are tribunals that support the idea that legitimate expectations arise at the time the investors is planning to invest in a host State. In *Duke Energy v Ecuador* the tribunal provided that legitimate expectation cannot arise at a later point of time other than the investor entry to the host State.¹³⁷

¹³³ Christoph Schreuer, and Ursula Kriebaum, *At What Time Must Legitimate Expectations Exist?* In Jacques Werner, Arif Hyder Ali, (eds.), *A Liber Amicorum: Thomas Walde - Law Beyond Conventional Thoughts* (CMP Publishing 2009) at 265-276.

¹³⁴ Supra note 115

¹³⁵ *International Thunderbird Gaming Corporation v. The United Mexican States*, Award of 26 January 2006, UNCITRAL Case at para 147

¹³⁶ Christoph Schreuer, 'Fair and Equitable Treatment in Arbitral Practice'. (2005) 7 *Journal of World Investment and Trade* at 357-386

¹³⁷ *Duke Energy v. Ecuador*, ICSID Case No. ARB/04/19.

According to Schreuer & Kriebaum,¹³⁸ most international investments involve complex operations and therefore, it is not possible to restrict creation of legitimate expectations at initial stage. Rather, they should be considered at every stage when a decisive step is taken by the investor.¹³⁹ The research agrees with the notion of the majority of the tribunals. Therefore, the legal framework existing when the investor is making the decision to invest is important in creating legitimate expectations.

In LG&E v Argentina Case, the tribunal summarized investors' expectations,

*They are based on the conditions offered by the host State at the time of investment; they may not be established unilaterally by one of the parties; they must exist and be enforceable by law; in the event of infringement by host State, a duty to compensate the investor for damages arises except for those caused in the event of state of necessity; however, the investor's fair expectations cannot fail to consider parameters such as business risk or industry's regular patterns.*¹⁴⁰

UNCTAD in 2012 reached a similar position regarding content of legitimate expectations. There are key elements that must be established in order to claim breach of legitimate expectation;

*Legitimate expectations may arise only from a State's specific representation made to the investor, on which the latter has relied; the investor is aware of regulatory framework in host State; investor expectation must be balanced against legitimate regulatory activities of host state.*¹⁴¹

¹³⁸ Supra note 116

¹³⁹ Supra note 116

¹⁴⁰ LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v Argentine Republic ICSID Case No. ARB/02/1

¹⁴¹ *Fair and Equitable Treatment* UNCTAD Series on Issues in International Investment Agreements II, United Nations: New York and Geneva (2012) at 68

3.1.1 Specific Assurance

The characteristics highlighted in *LG&E v Argentina* Tribunal emphasize the existence of specific assurances in order to establish legitimate expectations. The tribunal considered the regulatory framework that governed gas industry that fixed and regulated the tariff scheme ensuring the value of the investment. In this case, the specific assurance or representations were made by the State not to a particular investor but in a general manner.¹⁴²

In order to attract investors Argentina enacted several laws fixing Argentine peso at par with the USA dollar. Calculation of gas tariffs was in dollars and conversion to pesos at the time of billing. The legal framework was later amended during 2000-2002 economic crisis that negatively affected investors. This resulted in several claims against Argentina. The tribunal concluded that the regulatory framework governing gas industry created specific commitments. The tribunal stated that the regulatory framework was not a general legislation since it was designed to regulate foreign investors. Therefore, it was not a general law since it affected all investors in terms of fixing tariffs.¹⁴³

Specific assurances was further elaborated in *Parkerings v Lithuania* case where it was held that legitimate expectations cannot be established unilaterally ‘*not every hope amounts to an expectation under international law*’.¹⁴⁴

In *Duke Energy v Ecuador* case, it was held expectations must arise from conditions advanced by host State and the foreign investor must have relied upon them when making the decision to invest.¹⁴⁵ However, in *Tecmed*¹⁴⁶ case, there was a shift with regards to extension of legitimate

¹⁴²Supra note 122.

¹⁴³Supra note 124.

¹⁴⁴Supra note 47.

¹⁴⁵Supra note 119.

¹⁴⁶ ICSID Case No. ARB (AF)/00/2. Award, 29 May 2003.

expectations to be considered. Here, the state did not give any direct assurances nor implied assurances in their legal framework. The legitimate expectation of the investor was established since the investors were relying on return of their investment from the landfill which was expected to work for more than two years.

MTD v Chile arrived at a different conclusion and criticized the decision of *Tecmed Tribunal* on reliance on investor expectations as a source of host State obligation. *MTD v Chile* Tribunal held that;

*The obligations of the host state towards investors derive from the terms of the applicable investment treaty and not from any set expectations investors may have. A tribunal ought to generate such expectations as a set of rights different from what is contained in the Bilateral Investment Treaty may exceed its powers.*¹⁴⁷

The findings of the tribunal criticized the notion presented in *Tecmed* case which incorrectly held that legitimate expectation can be based on general regulatory framework.

There is need to differentiate between legitimate expectations created by specific assurances and those created by general regulatory framework. If there are specific assurances generated by general legal framework, legislative expectations only have marginal scope of application.¹⁴⁸ According to Schill, protection arising from general regulatory framework will only apply when newly introduced law is retroactive. In *Parkering v Lithuania*, it was held that assurances can be explicit in form of promise or implicit when the ‘*State make assurances that the investors took into account in*

¹⁴⁷ MTD v Chile, ICSID Case No. ARB/01/7, Annulment proceedings at para 67.

¹⁴⁸ Stephan, W. Schill, ‘Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law’ [2006] IILJ Working Paper 2006/6 New York University Law School, Global Administrative Law Series.32

*making the investment.*¹⁴⁹

Therefore, legitimate expectations can arise only for specific assurances offered by the host State. In addition, regulatory framework can be accounted for as specific assurances only if they have a specific connection to the investment. This may be such as when it provide investors with benefits without which the investor would not have invested in the host State.

3.1.2 Reasonableness of investor expectations

In *LG&E v Argentina* case¹⁵⁰, the tribunal held that foreign investors should take into account business risks and regulatory framework in their area of investment. This indicates connection between reasonableness and due diligence on the part of the investors. In the *Parkerings* Tribunal, it was held that:

*An investor has a right to a certain stability and predictability of the legal framework of the investment. The foreign investor has a right of protection of legitimate expectation provided they have exercised due diligence and its legitimate expectations were reasonable in light of the circumstances. However, the investor must be aware that the circumstances may change thus they ought to structure their investment in order to adapt to potential changes in the legal environment.*¹⁵¹

In *Duke Energy v Ecuador* case¹⁵², the tribunal pointed out that expectations of the investors must be reasonable and legitimate. Therefore, all circumstances must be taken into account when assessing reasonableness including ‘*political, social economic and cultural conditions of the host*

¹⁴⁹Supra note 47 at para 331.

¹⁵⁰ Supra note 122.

¹⁵¹Supra note 47 at para 331

¹⁵² Supra note 119 at para 340.

*State.*¹⁵³

In specific areas of law, investors need to be considerate and foresee possible changes in legislation based on external factors. The investors ought to be familiar with connected area of law. For example, in environmental law, there is regulation of use of chemicals that harm the environment. There are multilateral agreements that regulate investment in that field. In addition, investors consider the stability of the legal environment in the field of investment.

In *Methanex* case,¹⁵⁴ the investor entered in a regulated environment where restrictions on chemicals were typical. The claimant claim did not succeed against the USA. This was informed by the fact that USA did not provide investors with specific assurances that regulation of chemical industry would remain unchanged. The tribunal established that the ban in California State was non-discriminatory and did not breach the Bilateral Investment Treaty. It was held that the area of law was constantly being monitored by government authorities to safeguard public interests. Therefore, the changes could have been expected in the legal framework.

The research concludes that foreign investors cannot reasonably expect legal framework to remain unchanged. Therefore, claims based on breach of legitimate expectation that is connected to the stability of the legal system should not succeed if the regulation was non-discriminatory, reasonable and general.

3.1.3 Due diligence of the investor

To succeed in a claim for breach of legitimate expectations it is not sufficient for the foreign investor to prove specific assurances. The investor should conduct due diligence in order to estimate

¹⁵³ Supra note 134

¹⁵⁴ *Methanex v United States*, 2005.

the risks involved in the host state. In addition, the investor cannot rely on unlawful and unauthorized assurances.

In the case of *Thunderbird v Mexican States*,¹⁵⁵ it was held that the claimant could not rely on the opinion of the government because he knew that gambling was illegal in Mexico. The investor did not provide correct facts to the host State of the nature of his business when he requested for legal opinion from the government. Therefore, the investor's claim for breach of legitimate expectation failed since he did not act in good faith when he provided incorrect information.

In *Saluka* case,¹⁵⁶ the Czech Republic issued declaration on policy regulating the banking sector. The minister of finance declared that the government would not offer aid to investors in the banking sector. The tribunal held that the minister declaration could not be relied on because he cannot bind future governments.¹⁵⁷

In addition, the obligations of the foreign investors related to the investments are crucial in evaluating the responsibility of the state in case of breach. The investor is expected to fulfill certain conditions in order to be granted protection under Bilateral Investment Treaty. In *Muchlinski* case,¹⁵⁸ it was held that the investor must have good faith and conduct due diligence when making an investment. Investments bear certain level of risk and investments in developing countries require investors to be more careful due to the risks involved.¹⁵⁹

This means that the investor cannot rely on assurances given by host State. Investors should familiarize themselves with the legal framework governing a particular filed of investment.

¹⁵⁵Thunderbird v Mexico, 2006, Award, at para 148 and 164.

¹⁵⁶Saluka Investments BV v The Czech Republic IIC 210 (2006).

¹⁵⁷Supra note 138

¹⁵⁸ Peter Muchlinski, 'Caveat Investor'? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard.' (2006) 55 International & Comparative Law Quarterly 527-557, 531 Available at <<http://eprints.soas.ac.uk/3466/1/CaveatInvestor.pdf>>

¹⁵⁹Supra note 140

Investors cannot rely on the general framework that they encounter when they made the decision to invest in a host State. There is need to consider political, economic, social and legal changes that occur in a host State. The principle of good faith should be applied by the investor and any actions that negate the principle are not legally protected.¹⁶⁰

3.2 Good Faith

The principle of good faith is fundamental principle of international law. Tribunals have also considered good faith as a basic element of Fair Equitable Treatment Standard as well. Good faith principle is considered as ‘...a glue *that holds international investment together*.’¹⁶¹

In Saluka case, the tribunal outlined the requirement of good faith:

*A foreign investor protected by the Treaty may in any case properly expect that Czech Republic implements its policies bona fide conduct that is, as far as it affects the investors’ investment, reasonably justified by public policies and such conduct does not manifestly violate requirements of consistency, non-discrimination and transparency.*¹⁶²

The principle of good faith was also discussed by the tribunal in *Sempra Energy V Argentina* as:

The common guiding beacon that will orient understanding and interpretation of Bilateral Investment Treaty obligations. Good faith is at the heart of the concept of Fair Equitable Treatment Standard and permeates the whole approach to the protection of the foreign

¹⁶⁰ A Case Review and Analysis of the Legitimate Expectations Principle as it Applies within the Fair and Equitable Treatment Standard [online]. Social Science Research Network Legal Scholarship Network ANU College of Law Research Paper No. 09-01 at 45-52.

¹⁶¹ Todd J. Grierson-Weiler, and Ian Laird, *Standards of Treatment*. In: Peter Muchlinski, Federico Ortino and Christoph Schreuer, *The Oxford Handbook of International Investment Law*. (eds) (Oxford University Press 2008) at 270 263

¹⁶² *Supra* note 138

*investment.*¹⁶³

In *Frontier v CZ*¹⁶⁴ the tribunal summarizes good faith by trying to understand what bad faith is.

The tribunal held that:

*Bad faith action by the host State includes the use of legal instruments for purposes other than those which they were created. It also includes a conspiracy by state organs to inflict damage upon to defeat the investment, the termination of the investment for reasons other than the one put forth by the government, and expulsion of an investment based on local favoritism.*¹⁶⁵

State acting in bad faith results in breach of Fair Equitable Treatment Standard. This however does not mean that an action of bad faith is essential to breach of Fair Equitable Treatment Standard. There are instances where, a state can act and violate Fair Equitable Treatment Standard. This was highlighted in *Mondev* case, ‘*a state can treat foreign investment unfairly and inequitably without necessarily acting in bad faith.*’

Therefore, actions by host state carried out in bad faith will always be considered a breach of Fair Equitable Treatment Standard.

3.3 Transparency

Investors rely on the transparency of the legal framework in order to invest on a host State. According to Dolzer & Schreuer, transparency means ‘*the legal framework which the investors operate in is readily apparent and decisions affecting the investor can be traced to the legal*

¹⁶³ ICSID Case No. ARB/02/16.

¹⁶⁴ Supra note 30 at para 118

¹⁶⁵ *Frontier Petroleum Services Ltd. v Czech Republic* (2010)

*framework.*¹⁶⁶

There is no doubt that transparency is related to legitimate expectations. The host state has a responsibility *‘to make it clear what it wants from the investor and cannot hide behind ambiguity and contradictions.*¹⁶⁷ In cases where legal framework is not transparent, it can amount to breach of Fair Equitable Treatment Standard.

In addition, transparency is considered as part of Fair Equitable Treatment Standard even when not provided for in the Bilateral Investment Treaty. The obligation arising from transparency is that investors should be informed of state policies and changes that affect them. The state has no responsibility of informing each investor. However, it should provide adequate information with regards to legal changes. Investors should also be allowed to participate in discussions concerning intended legal changes.

In *Metaclad* case, the tribunal discussed transparency in details. *‘The state is required to provide potential investors with all relevant legal requirements for commencing and operating intended investment.*¹⁶⁸ In cases where there is uncertainty or changes in policy, the host state has a responsibility to state the correct position to the investor.

In *Tecmed* case,¹⁶⁹ the tribunal connected transparency with predictability of the legal environment of a host State. *‘The investor expects the host State to act in a consistent manner; free from ambiguity and total transparency in its relations with foreign investor.’*¹⁷⁰

¹⁶⁶ Rudolf Dolzer, and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2008) at 443.

¹⁶⁷ Thomas Walde, ‘Energy Charter Treaty-Based Investment Arbitration – controversial issues’ (2004) 5 (3) *The Journal of World Investment & Trade* 387

¹⁶⁸ *Metalclad Corp. v. United Mexican States*. 30 August 2000 MTD v Chile, ICSID Case No. ARB/01/7, Annulment proceedings

¹⁶⁹ *Supra* note 128

¹⁷⁰ *Supra* note 151

The research agrees that the investor should be informed beforehand of any changes in legal policy. However, the public and investors have an obligation to monitor proposed changes of the law and policies that affect their investment.

3.4 Arbitrariness and Discrimination

Arbitrariness is connected to lack of due process. Discrimination is different treatment of similar subjects without justification. There is conflicting opinion on whether the two elements should be considered as one or two because discriminative actions can be considered as arbitrary.¹⁷¹ For purpose of this research, they will be considered as two different elements.

Arbitrariness as an element of Fair Equitable Treatment Standard requires that host State enact laws and policies that are reasonable. The element is also referred as “non-impairment” substandard since host states are required not to impair the use and disposal of investments.¹⁷² In *Elettronica Sicula S.p.A v. Italy case*, the tribunal defined arbitrariness as conduct opposed to the rule of law. It held, ‘a wilful disregard of due process of law.’¹⁷³

In *Saluka case*, the tribunal scrutinized the legality of legal measures by examining the relationship of the measure and policy justification of a host State. Host States have a responsibility to justify their actions and show reasonable relationship between justification and reasonableness of the legal policy.¹⁷⁴

In *LG&E v Argentina case*¹⁷⁵, the tribunal did not consider actions of the host State to be arbitrary, even though their actions harmed investors. The host State had a responsibility to make economic

¹⁷¹Supra note 149

¹⁷²Supra note 153

¹⁷³*Elettronica Sicula S.p.A (ELSI) (United States of America) v Italy 1989.*

¹⁷⁴Supra note 138.

¹⁷⁵Supra note 122.

decisions, bearing in mind the harsh economic crisis in an attempt to preserve the country's economy. Though the host State actions harmed investors, their actions reasoned and did not disregard rule of law.

In *Genin* case, the withdrawal of Genin's banking license by host State did not amount to arbitrariness since there was willful disregard of due process.¹⁷⁶The action by host state reflected reasonable public purposes.

Discrimination is providing different treatment to one specific group without reasonable justification. It is based on the nationality of the foreign investor. It is considered a comparative standard. This means that there should be a control group where the alleged discriminated investor can make comparison to.¹⁷⁷ Comparison can be on investors from the host State or foreign States in the same sector.

Independently of the way governments interpret the “fair and equitable treatment” standard, it is understood that the minimum standard refers to an evolving international customary law which is not “frozen” in time. It may evolve over time depending on the general and consistent practice of states and *opinio juris*, as may be reflected in jurisprudence related to the interpretation and application of these treaties. An analysis of the opinions of the arbitral tribunals which have attempted to interpret and apply the “fair and equitable treatment” standard identified a number of elements which, singly or in combination, have been treated as encompassed in the standard of treatment.

Most of the arbitral opinions mention due diligence and due process (including non-denial of justice and lack of arbitrariness), while only a few mention transparency and good faith. Due diligence and

¹⁷⁶*Genin, Alex, Eastern Credit ltd Inc asn AS Baltoil v Republic of Estonia*. Award, 25 June 2001 <http://ita.law.uvic.ca/documents/Genin-Award.pdf>

¹⁷⁷ Supra note 149

due process including non-denial of justice and lack of arbitrariness, are elements well-grounded in international customary law. Transparency on the other hand, is an element which is often defined in international agreements as an obligation under a separate provision.

Good faith seems to be considered more of a basic principle underlying an obligation, rather than a distinct obligation owed to investors pursuant to the fair and equitable treatment standard. The identified elements appear to have sufficient legal content to allow cases to be judged on the basis of law in accordance with the Vienna Convention on the Law of Treaties. Also, decisions are not made by a process approaching *ex aequo et bono*.

It would be inappropriate at this stage to establish a definitive interpretation of the fair and equitable treatment standard. The jurisprudence which has applied it and identified elements of its normative content is relatively recent but not uniform. Therefore, it does not allow for a firm and conclusive list. Hence, the fair and equitable provision remains ambiguous, vague and is subject to wide interpretation.

3.5 Conclusion

The chapter has discussed the manner in which Fair Equitable Treatment Standard elements are formulated and protected. These affect the scope of protection offered and threshold for breach of the Fair Equitable Treatment Standard. The collective reasoning of highlighted cases, indicates that in order for host State to mitigate breach of Fair Equitable Treatment Standard, the conduct must fulfill the investors' legitimate expectation. Actions must be transparent, carried out in good faith and follow due process of the law. The next chapter will analytically discuss the Fair Equitable Treatment Standard in Kenya - Switzerland-Kenya Bilateral Investment Treaty.

CHAPTER FOUR

ANALYTICAL STUDY OF THE FAIR EQUITABLE TREATMENT STANDARD IN KENYA- SWITZERLAND BILATERAL INVESTMENT TREATY

4.0 Introduction

The chapter analyses the Fair and Equitable Treatment provision in the Kenya-Switzerland Bilateral Investment Treaty. It demonstrates the vagueness of such provisions and the consequences thereof. In addition, the chapter highlights how different states have attempted to formulate the Fair Equitable Treatment Standard.

4.1 Analysis of Fair Equitable Treatment Standard in Kenya – Switzerland Bilateral Investment Treaty

The fair and equitable provision in the Bilateral Investment Treaty is found in Article 4(1) which states as follows:

*Investments and returns of investors of each contracting party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other contracting party. Neither contracting party shall in any way impair by unreasonable discriminatory measures the management, maintenance, use, enjoyment or disposal of such investment.*¹⁷⁸

The above provision is vague, broad and ambiguous. This is because it does not refer or indicate what standards of fairness and equitability are to be used. In addition, the provision fails to refer to international law. The implication is that the arbitral tribunal has the discretion to develop its own view of what is fair and equitable depending on the circumstances of the case.

¹⁷⁸Kenya – Switzerland Bilateral Investment Treaty.

The tribunal has discretion making it possible to arrive at a conclusion that resembles a decision *ex aequo et bono* i.e. a decision based solely on the arbitrators subjective view of fairness and equity. The challenge with the provision, is that the interpretation of Fair Equitable Treatment Standard is left to the tribunal. The plain meaning is subjective depending on the parties and tribunal understanding of what is fair and equitable.

The second challenge relates to what constitutes fairness and equity which is varied in different jurisdictions. A number of tribunals have considered the interpretation of the fair and equitable treatment standard found in the European countries Bilateral Investment Treaties. It is worth noting that the majority of the Bilateral Investment Treaties concluded by the European countries follow the same model of Bilateral Investment Treaty.

The research makes reference to *Biwater Gauff (Tanzania) Ltd V Tanzania*.¹⁷⁹ The case is relevant to the study because Article 2(2) of the Treaty between UK-Tanzania is similar to article 4(1) Kenya - Switzerland Bilateral Investment Treaty.

The Claimant, Biwater Gauff (Tanzania) Limited, a company incorporated under the laws of England and Wales and the Respondent, United Republic of Tanzania. Biwater Gauff based its claim on the Agreement between the United Kingdom of Great Britain and Northern Ireland and the United Republic of Tanzania, for the Promotion and Protection of Investments.¹⁸⁰ A series of events took place which, according to Biwater Gauff, Tanzania breached its obligations under International law.

¹⁷⁹ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (July 24, 2008) ("*Biwater Gauff*").

¹⁸⁰ Signed at Dar es Salaam on 7 January 1994, and entered into force on 2 August 1996.

The claimant contended that the Respondent had breached Article 2(2) of the Bilateral Investment Treaty by appointing a minister as an interim regulator. The minister was a member of parliament and his term of appointment as interim regulator was indefinite. The minister issued a public press statement stating that the lease with Biwater Gauff was terminated. The claim was that the minister had failed to act in good faith and according to legitimate expectation of an independent regulator. Therefore, Tanzania undermined Biwater Gauff investment by failing to manage the expectations of the public with regard to the speed of improvements to the water network.

The Arbitral Tribunal was of the opinion that failure to put in place an independent, impartial regulator, insulated from political influence, constitutes a breach of the fair and equitable treatment standard.¹⁸¹

The tribunal determined whether Article 2(2) of the UK-Tanzania Bilateral Investment Treaty created a standard which was distinct from the International minimum standard found in customary International law. The tribunal held that the contracting parties to the Bilateral Investment Treaty had intended to create an autonomous treaty standard.¹⁸²

The tribunal relied on the arguments advanced by professor Schreuer that '*if the parties to a treaty want to refer to customary international law, it must be presumed that they will refer to it as such rather than using a different expression.*'¹⁸³ The tribunal went on to separate the Fair Equitable Treatment Standard into three separate components: Protection of legitimate expectation, good faith, transparency, consistency and non-discrimination.¹⁸⁴

The tribunal adopted the ordinary meaning of the treaty. The use of the ordinary meaning gives

¹⁸¹Supra note 161

¹⁸²Supra note 24 at Para 591

¹⁸³ Christoph Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6 Journal of World Investment and Trade 360.

¹⁸⁴ Supra note 24 at Para 602

autonomy to the tribunal to widely consider what constitutes equitable treatment. Thus, the provision of the treaty is considered vague and ambiguous.

A Fair Equitable Treatment Standard provision that is vague and ambiguous is detrimental to both the investor and contracting state. The investor would want to know a host state has a predictable and consistent investment climate. This may not be achievable in cases where the provisions of Bilateral Investment Treaty are vague. This is because Fair Equitable Treatment Standard interpretation, is solely left to the arbitral tribunal's own understanding and application of the facts. The argument is that a particular conduct by the host State will automatically be deemed to be in breach of the Fair Equitable Treatment Standard.

Similarly, the contracting state cannot predict what kind of conduct the arbitral tribunal will find to be inconsistent with the Fair Equitable Treatment Standard. As discussed in chapter three, the Fair Equitable Treatment Standard evolves depending on the facts and the tribunal.

The Fair Equitable Treatment Standard in the UK-Tanzania Bilateral Investment Treaty gives autonomy to the tribunal in determining what constitutes breach. The tribunal held that the content of the standard of fair and equitable treatment is not materially different, from the content of the minimum standard of treatment in Customary International law.¹⁸⁵

The contents of Fair Equitable Treatment Standard have been extensively discussed in chapter three. The position does not resolve the issue, as there is no agreed definition under International Customary law. Also, different jurisdictions have different meaning of what constitutes fair and equitable treatment.

¹⁸⁵ Supra note 166

The decision as to what constitutes breach of Fair Equitable Treatment Standard is left to the subjective understanding and application of the tribunal. *Biwater Gauff (Tanzania) Ltd V Tanzania case* is a good example of complexity in interpreting what constitute Fair Equitable Treatment Standard. It is due to this vague and ambiguous nature of the provision that the arbitral tribunals are conferred with a broad degree of discretion to develop the fair and equitable treatment standard.¹⁸⁶

In *Cortec Mining Kenya Ltd & Stirling Capital Ltd vs Republic of Kenya*¹⁸⁷, the claimants relied on Fair Equitable Treatment Standard to assert that Kenya had carried out unlawful exportation of their investment by cancelling mining licenses. By doing so, they breached Bilateral Investment Treaty provision of Fair Equitable Treatment Standard. The case is similar to *Biwater Gauff* case because the cancellation of the mining licenses, was done by a Cabinet Secretary following discovery of minerals in Kwale by the foreign investor.

At first, the investor exhausted the local mechanism by filing a suit before the High Court to challenge the decision of the cabinet secretary.¹⁸⁸ The High Court relying of Article 62(1) of the constitution and Section 6 of Mining Act upheld the decision of the cabinet secretary. Later, the investors submitted the dispute before ICSID for arbitration.

This occurrence demonstrates that though a host State may be willing to accept a treaty clause on Fair Equitable Treatment Standard, in most cases, they are not prepared to offer the international standard.¹⁸⁹ This is because there is the fear of policy making space of host State being clouded by uncertainties. Thus, if a host State wants autonomy to regulate, they have to reconsider how they

¹⁸⁶ Dr. Harrison James, 'International Academy of Comparative Law, XVIII International Congress Of Comparative Law Washington 2010; The Protection Of Foreign Investment United Kingdom Report' at 11

¹⁸⁷ ICSID case No. ARB/15/29. www.icsid.worldbank.org/en/pages.casedetails.aspx?CaseNo=ARB/15/29. Accessed 2 July 2018.

¹⁸⁸ *Cortec Mining Kenya Ltd vs Cabinet Secretary Ministry of Mining & 9 Others*. ELC Case No. 195 of 2014. www.kenyalaw.org.caselaw/cses.view.108494 accessed 2nd June 2018.

¹⁸⁹ 'Regulatory Policy and the Road to Sustainable Growth.' Organization for Economic Cooperation and Development (OECD) Report 2010.

structure provisions of Fair Equitable Treatment Standard in investment treaties in order to guarantee investment protection.

4.2 Balancing the interest of the investor against regulatory goals of the host State

Several tribunals have held that it is necessary to balance the investor interest against legitimate regulatory goals of host state. This is because the Fair Equitable Treatment Standard, does not prevent host states from designing policy or regulation in public interest, even if it has a negative impact on the investment.

The application of Fair Equitable Treatment Standard, should allow a balance between the protection of investor's interests and host state autonomy to enact laws in public interest. The concept of fairness in Fair Equitable Treatment Standard requires balance of interests.¹⁹⁰ In addition, the principle of consistency and stability, should be conceptualized as being able to outweigh the power and duty of host state to regulate in public interests. Proportionality of interests play a role in regulating the extent to which power of state to enact laws that can interfere with investment of foreigners is permissible under the principle.

What is reasonable does not shed light on consistency and stability of legal framework. It is not clear what is considered reasonable when it comes to application of Fair Equitable Treatment Standard. This is informed by the fact that tribunals consider consistency and stability as absolute principles constituting breach of Bilateral Investment Treaties when enacting legislation in public interest. The position of the research is that, tribunals should move away from such strict interpretation and instead stability and consistency should be flexible. This is because a State must

¹⁹⁰ Muchlinski, P. *Multinational Enterprises and the Law*. (Oxford: Oxford University Press, 2nd ed., 2007 at 635-637.

be in a position to accommodate crisis situations that require stringent measures.¹⁹¹

Henckels argues that, *‘both proportionality and reasonableness suggest a balance of interest and a rational connection between a measurable and its objective and concept of reasonable itself may be understood as a search of equilibrium.’*¹⁹² Therefore, proportionality can be used to scrutinize reasonableness.

4.3 How do different states formulate the Fair Equitable Treatment Standard clauses

The position of the research is that Fair Equitable Treatment Standard has not become a rule of custom in International law. There is no doubt that the practice by States to include the principle in their Bilateral Investment Treaty can be considered general and widespread. However, the formulation of these clauses is not uniform and consistent.¹⁹³

There are different types of Fair Equitable Treatment Standard clauses and these variation influence interpretation of the Fair Equitable Treatment Standard in a Bilateral Investment Treaty. An overview of how different states formulate Fair Equitable Treatment Standard provisions in their Bilateral Investment Treaty is crucial in demonstrating the effect of variation in language in different treaties, which has an impact on the interpretive process. The degree of the generality or specificity of the wording affects the scope of discretion offered by the interpreting body.

The treaty practice is as follows:

¹⁹¹ Henckels, C. Proportionality and the Standard of Review in Fair and Equitable Treatment Claims: Balancing Stability and Consistency with the Public Interest [online]. Society of International Economic Law, Singapore, 2012.

¹⁹² Supra note 173

¹⁹³ Patrick Dumberry, ‘Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law?’ (2017) 8 (1) Journal of International Dispute Settlement 155<<https://doi.org/10.1093/jnlids/idw002>>

4.3.1 Provisions with No Fair Equitable Treatment Standard clause

The Albania –Croatia Bilateral Investment Treaty¹⁹⁴ , Pakistan –Turkey Bilateral Investment Treaty¹⁹⁵ and the Croatia-Ukraine Bilateral Investment Treaty¹⁹⁶ do not have an express provision of Fair and Equitable Treatment.¹⁹⁷ The implication is that the contracting parties diminish exposure to international responsibility. However, it may be viewed that the particular States are not ready to subject themselves to internationally enforceable standards and therefore diminish the level of attractiveness of foreign investors.

4.3.2 Fair Equitable Treatment Standard clause making reference to International law

This is referred to as unqualified, autonomous or self-standing Fair Equitable Treatment Standard clause. A good example is the Bilateral Investment Treaty between Belgium and Tajikistan. These kinds of clauses are given the plain meaning interpretation which in essence, gives the arbitral tribunal a wide discretion.¹⁹⁸ Thus, resulting to an over stretch of the conduct of the host States which result in the interference of the policy of host governments. This kind of clause provide for predictability on what the arbitral tribunal will determine as unfair and equitable.

4.3.3 Fair Equitable Treatment Standard clause linked to International law

The Croatia-Oman Bilateral Investment Treaty and the Bahrain –United States Bilateral Investment Treaty set the Fair Equitable Treatment principle, as the baseline for assessment of the protection. There being no international standard that has been agreed by the states, it still leaves a lot of room for the arbitrators to use discretion in interpretation of the provision. This kind of provision is broad, even though it is based on International law. It does not specify the source or area of international law to be considered and further it sets much higher level of protection to investments.

¹⁹⁴ Albania-Croatia Bilateral Investment Treaty of 1993

¹⁹⁵ Pakistan-turkey Bilateral Investment Treaty of 1995

¹⁹⁶ Croatia-Ukraine Bilateral Investment Treaty of 1997

¹⁹⁷ Patrick Dumberry, 'Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law?' (2017) 8 (1) Journal of International Dispute Settlement 155

¹⁹⁸ Supra note 179.

4.3.4 Fair Equitable Treatment Standard clause linked to the minimum standard of treatment of aliens under Customary International Law

The Rwanda –US Bilateral Investment Treaty¹⁹⁹. The parties have limited the Fair Equitable Treatment Standard to that of customary international law and they have gone ahead to clarify what constitutes the standard.

Fair Equitable Treatment Standard includes 'obligations not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.'²⁰⁰

The parties have attempted to limit the jurisdiction of the arbitral tribunal in interpreting the standard. The difficulty with the above provision is that it presupposes there is a general consensus as to what constitutes this minimum standard. Unfortunately, there is no such consensus by states (*opinion juris*) as to what constitutes minimum standard on the treatment of aliens.

This kind of wording limits the exposure of the breaching party to international responsibility since the standard of violation is much higher. There is also a level of predictability and legal certainty as there is a broader consensus on the content of customary international law.

4.3.5 Fair Equitable Treatment Standard clause with additional substantive content

Some Bilateral Investment Treaties such as the Netherlands-Oman Bilateral Investment Treaty²⁰¹ set out the general standard of fair and equitable treatment and specifically prohibit arbitrary,

¹⁹⁹Rwanda-US Bilateral Investment Treaty (2008) Article 5.

²⁰⁰Supra note 180 at 158.

²⁰¹Article 2(2) Netherlands-Oman Bilateral Investment Treaty (2009)

unreasonable or discriminatory measures.

The inherent ambiguity of the wording means that the substance of the fair and equitable treatment standard may evolve over time.²⁰² Indeed, this Approach confers a broad degree of discretion on tribunals to develop the fair and equitable treatment standard.

In this regard, it is important to note that one of the latest Bilateral Investment Treaties to be concluded by the United Kingdom deviates significantly, from the United Kingdom Model Bilateral Investment Treaty on the issue of fair and equitable treatment. In this regard, Article 3(1) of the United Kingdom- Mexico Bilateral Investment Treaty provides that:²⁰³

Investments of investors of each Contracting Party shall at all times be accorded Treatment in accordance with customary international law, including fair and equitable treatment in the territory of the other contracting party.

It is clear from the text of this provision that it is not intended to create an autonomous treaty standard. To avoid any doubt on this point, Article 3(2) confirms that:

*The Contracting Parties do not intend the obligations in paragraph 1 above in respect of fair and equitable treatment to require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. Moreover, it continues to state that 'a determination that there has been a breach of this Agreement or of a separate international agreement, does not, in and of itself, establish that there has been a breach of the provisions of this Article.'*²⁰⁴

²⁰²National Grid PLC v The Argentine Republic, UNICITRAL award 3 November 2008 at para 172.

²⁰³UK–Mexico Bilateral Investment Treaty UKTS No 22, 2007. Art 3(1).

²⁰⁴Supra note 185

The inclusion of an explicit reference to the international minimum standard in the fair and equitable treatment provision of the UK-Mexico Bilateral Investment Treaty, follows attempts by other states to ensure that this latter standard is not interpreted too broadly by arbitral tribunals.²⁰⁵

However, in light of the dicta of the arbitral tribunal in *Biwater Gauff (Tanzania) Ltd v Tanzania* that ‘*the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law*’²⁰⁶, the question is whether, the development in the UK–Mexico Bilateral Investment Treaty will make a significant difference to the scope of the protection offered.

4.4 Conclusion

There is diversity in the way the fair and equitable treatment standard is formulated in investment agreements. Certain agreements, in particular some Bilateral Investment Treaties, expressly define the standard by reference to International law while others do not make such reference to International law.

Due to differences in its formulation, the proper interpretation of the fair and equitable treatment standard depends on the specific wording of the particular treaty, its context, the object and purpose of the treaty, as well as on negotiating history or other indications of the parties’ intent. For example, some treaties include explicit language linking or, in some cases limiting, fair and equitable treatment to the minimum standard of international customary law. Other treaties, which either link the standard to international law without specifying custom, or lack any reference to

²⁰⁵ *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* UNCTAD Series on issues in international investment agreements (2010).

²⁰⁶Supra note 187

international law, could, depending on the context of the parties' intent. For example, be read as giving the standard a scope of application that is broader than the minimum standard as defined by international customary law.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 Conclusion

5.1 Introduction

As the Kenyan Government pursues its policy of attracting more Foreign Direct Investment, more investors will seek to invest especially in the natural resource sector. Investors need to have certain guarantees, that their investments will be protected from arbitral and discriminatory treatment by the state.

In order to give them this guarantee, Bilateral Investment Treaties are seen as one way of giving comfort or assurances to Foreign Direct Investment. Therefore, we are unlikely to see Kenya terminating or slowing down the process of signing Bilateral Investment Treaties. In order to ensure the country's interest are protected it is important to consider a review of the Bilateral Investment Treaties by incorporating provisions that will further its interest.

The purposivist theory which is relied on in this research, will aid in formulation of these provisions as interpretation is one of the powers of judicial officers. After delineating the difference between rules, policy and principle, the spirit of the parties will be identified. This will further bring out the interests of both parties, and arbitral tribunals will be able to make decisions that do not demean the sole reason for the mutual agreement.

The research had two objectives which included; to evaluate the ambiguity of Fair and Equitable Treatment provision of Kenya – Switzerland Bilateral Investment Treaty and to propose reforms and reviews need to address concerned on Fair and Equitable Treatment principle.

The research has been able to evaluate the ambiguity of the Fair Equitable Treatment Standard and propose reforms that need to be addressed. The vagueness of the fair and equitable treatment standard has contributed to the lack of consistency in the application and interpretation by arbitral tribunals.

Indeed, it would be difficult to expect such consistency in a system where numerous one-off arbitral tribunals adjudicate disputes under a variety of differently formulated standards and factual situations. Furthermore, in the absence of an effective appellate review.

The consequence of the vagueness and ambiguity of the Fair Equitable Treatment Standard is to expose developing states like Kenya to potential, unnecessary litigation before the arbitral tribunals. The awards that are made by these tribunals are very substantial in terms of the financial implications and they impede the legislative and administrative role of the state.

It would be inappropriate at this stage to establish a definitive interpretation of the fair and equitable treatment standard. However the following recommendations provide a way forward.

5.2 Recommendations

If Kenya is to enter into further Bilateral Investment Treaty negotiations, there is need to examine how Fair Equitable Treatment Standard is structured.

5.2.1 Legitimate Expectation.

There is need to incorporate the principle of legitimate expectation in the implementation of Bilateral Investment Treaty. To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment. The shortcoming of the articles by

various authors is that they only bring up coherence to arbitral scholarship demonstrating that the fair equitable standard corresponds to an obligation to adhere to an international concept of “rule of law”.²⁰⁷

The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State.

In addition, such ‘*expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest.*’²⁰⁸ These allows for a contextualization of what an investor can legitimately expect from the host country authorities.

It also requires looking closely at the causal link between the investment and a specific promise made by the State to the investor. This element must also be considered when it comes to balancing the interest of unequal parties to a Bilateral Investment Treaty.

5.2.2 Balanced Treaty Preamble.

There is need to have a balanced treaty preamble. A treaty preamble will basically set out the spirit of the parties and their objective. Arbitral tribunals when faced with vague and unqualified obligations are likely to rely on the preamble to make a determination. Therefore, in order to ensure that the Bilateral Investment Treaty does not single out investment protection as the only objective, there is need to incorporate in the preamble other legitimate and important policy consideration. The language used in preamble provides more details in order to support for treaty interpretation.²⁰⁹

²⁰⁷ Kenneth J. Vandeveld, A Unified Theory of Fair and Equitable Treatment, (2010) 43 New York University Journal of International Law and Politics 43

²⁰⁸ Duke Energy v. Ecuador, ICSID Case No. ARB/04/19, Award, August 18, 2008, para. 340.

²⁰⁹ *Fair and Equitable Treatment* UNCTAD Series on issues in international investment agreements (2010) at 110

5.2.3 State Sovereignty.

There is need to include the right of hosts State to regulate. The major issue is the interference by the arbitral tribunal on the right of the host state to regulate or change its legislative policies during the term of the investment. This has come out as one of the breaches of Fair Equitable Treatment Standard where the investor alleges breach of legitimate expectation.

There is need to restructure Fair Equitable Treatment Standard in Bilateral Investment Treaties. Interests of the host State and investors should be protected. Thus, the Bilateral Investment Treaty must spell out the duties and rights of all the parties involved. More importantly, the right of host State to regulate.

Further, the Fair Equitable Treatment Standard provision should be permissive enough to allow the host State to invoke greater expectation of all the stakeholder. In so doing, they should exercise the right to act as rationally in cases of economic crisis. The host State should be allowed to have control of development policies without its actions being unnecessarily challenged by foreign investors. It is therefore proposed as a recommendation, to have a clarification under the Fair Equitable Treatment Standard that does not preclude the host State from adopting regulatory or other measures that pursue legitimate policy objectives.²¹⁰

In addition, the host State can detach itself from the trappings of school thought that leads developing countries to make great concessions to foreign investors. This can be achieved by rethinking terms and conditions of implementations challenges associated with Fair Equitable Treatment Standard provisions. The host State must assert their sovereign right to regulate all activities within its territory.

²¹⁰ Supra note 190

5.2.4 Sustainable Development Principle.

There is need to include a sustainable development principle. Bilateral investment treaty between Kenya and any State should entail a detailed, comprehensive and integrated approach to economic, social and political processes aimed at the protection of the environment for social and economic development. The Bilateral Investment Treaties should be clear to the extent that they seek to allocate sustainable development responsibilities and objectives with that partner that Kenya is engaging. The importance of having clear objectives and responsibilities is that it widens the space for obligation and creates identifiable liabilities which would aid in enforcement whenever such provisions are breached.

5.2.5. Expertise and Policy Making Mechanism.

A further recommendation relates to the issue of policy making and expertise. The government of Kenya should be concerned about investing on the legal and investment expertise to aid her negotiation skills, when it comes to drafting Bilateral Investment Treaties. Kenya may have a strong reason for engaging other countries through Bilateral Investment Treaties. However, it cannot achieve goals unless there is intense expertise involved in the negotiation process. This is important because it opens the obligation and responsibilities of each party which are derived from the instrument that crafts the relationship. This is the stage where all parties are offered critical opportunity to bargain in writing and to make the position certain.

As it stands today, it is clear that Kenya has not invested heavily as it may be required in the sector of expertise so that it can strengthen her position. The omissions of critical details in Fair Equitable Treatment Standard clauses witnessed in the current treaties are as a result of poor representation given to the government during negotiations.

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