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BILATERAL INVESTMENT TREATIES: A CASE STUDY OF KENYA

BY

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DECLARATION

I the undersigned declare that this is my original work and has not been submitted to any college, institution or university other than the University of Nairobi for academic credit.

Signature.................................... Date. 13/12/2017

OKIRO MERCY AKEYO

R50/82397/2015

This thesis has been presented for examination with my approval as the appointed supervisor.

Signature.................................... Date. December 13th 2017

DR. FELIX ODIMMASI

DEDICATION

To my precious family, not just the one that I was born into but also the one I have chosen in the form of friends.

ACKNOWLEDGEMENT

Above all, I thank God for none of this would have been possible without Him.

My sincere gratitude goes to my parents and siblings for their unconditional love and support throughout all my academic endeavours thus far.

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ABSTRACT

Bilateral investment treaties have been for long used by States in an attempt to increase flow of foreign direct investment to their economies. Whereas whether these treaties lead to increased FDI is a subjective issue, what is most important is the actual BITs. BITs as legal instruments must favour both parties to the treaty for each to achieve its desired outcome. It is then paramount that they are examined in light of their provisions by States o that they can negotiate them from a position of knowledge and further bargain for favourable provisions. This paper will analyse BITs signed between Kenya and other countries with the aim of demonstrating that most of her BITs need review. Further, it will show areas where Kenya can improve in negotiating its BITs and which provisions she should focus on. It will also make suggestions on legal and policy areas Kenya needs to re-evaluate in order to strengthen its BIT regime and subsequently reap the benefits economically.

LIST OF ACRONYMS

ADR	American Depositary Receipt
BITs	Bilateral Investment Treaties
FDI	Foreign Direct Investment
FET	Fair and Equitable treatment
FTA	Free Trade Area
ICC	Chamber of Commerce
ICSID	International Centre for the Settlement of Investment Disputes
IIAs	International Investment Agreements
IISD	International Institute for Sustainable Development
ISDS	Investor-State Dispute Settlement
MFN	Most Favoured Nation
NT	National Treatment
SADC	Southern Africa Development Community
SSDS	State-State Dispute Settlement
TRIMs	Trade Related Investment Measures
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference for Trade and Development
US	United States
VAT	Value Added Tax
WTO	World Trade Organization's

CHAPTER ONE

1.0 Introduction

The end of the Cold War had many effects on developing countries specifically on the African continent. From the 1960s and 1990s, many African countries relied on aid in the form of grants, humanitarian and emergency aid, charity-based aid and systematic aid to boost their economies.[1] The end of the Cold War portended a decrease in flows of foreign aid to these countries. Developing country governments, which by this point had in any case already largely rejected the outright expropriations witnessed in the early post-Colonial period, were eager to accept the trade-off of greater flows of FDI in exchange for not interfering with the property rights of foreign investors.[2] BITs were specially designed by Western nations in the wake of decolonization in the 1950s and 1960s to protect their investors and the investment of their investors in developing countries.[3] Many Bilateral Investment Treaties (BITs) were signed by development countries over fifty years ago but investment treaties only became more widespread in the late 1980s and 1990s. This was a result of the need by developing countries realizing the need to attract private capital and the switch to neoliberal economic thinking by these countries.

Most countries get into these bilateral investment treaties with the expectation that they will improve the investment climate of their countries and therefore attract more

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[1]Dambisa,M, *Dead Aid: Why Aid is Not Working and How there is a Better Way for Africa(*Farrar, Straus and Giroux, First American Edition(2009)pg 28-29.
[2]Poulsen, L, *Bounded Rationality and the Diffusion of Modern Investment Treaties,International Studies Quarterly,* forthcoming.
[3]Vandevelde. K.J, *A Brief History of International Investment Agreements, in* The Effect Of Treaties On Foreign Direct Investment: Bilateral InvestmentTreaties, Double Taxation Treaties, And Investment Flows 3,13-35 (Karl P. Sauvant& Lisa E. Sachs eds., 2009).

investors. This research concerns itself primarily with bilateral investment treaties. Bilateral investment treaties have greatly infiltrated the international trade and investment regime in the last two decades and play an increasingly significant role in global trade and investment protection. Proponents argue that BITs, like multilateral investment agreements serve to broaden global economic security and development.[4]

1.1 Background of Study

Countries enter into BITs to attract FDI with the host country aiming to increase economic growth whereas the investor does this with the belief that the BIT will protect them from the risks associated with investing in a foreign country.[5] The first BIT was signed between Germany and Pakistan in 1959 and entered into force in 1962.[6] The initial trend involved BITs being entered between developed and developing countries but over time there have been BITs entered into between developing countries.[7] It is noteworthy that most African countries entered into BITs after gaining independence from their colonial masters.[8] As documented by the International Centre for the Settlement of Investment Disputes (ICSID), there has been a marked increase in the number of cases referred to the Centre in the last decade for resolution. By 2013, investors had initiated at least 57 known investor-state dispute settlement cases pursuant

[4]Mahnaz Malik, IV Annual Forum for Developing Country Investment Negotiators Background papers (South-South Bilateral Investment Treaties: The same old story?) New Delhi,October 27-29, 2010, p.1.
[5]Ginsburg.T, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance' *International Review of Law and Economic*Vol 25 (2005) pp.108.
[6]Ghouri. A.A 'The Evolution Of Bilateral Investment Treaties, Investment Treaty Arbitration and International Investment Law' International Arbitration Law Review (2011) Vol 14 (6)196.
[7] Masamba.M, 'Africa and Bilateral Investment Treaties: To "BIT" Or Not?' Available At *http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=1697:africa-and-bilateral-investment-treaties-to-bit-or-not&catid=82:african-industry-a-business&Itemid=266* (Accessed 2 October 2017).
[8]Ibid.

to International Investment Agreements (IIAs).[9]The most prevalent disputes related to investment incentive schemes, alleged breaches of contracts, alleged direct or *de facto* expropriation, revocation of licenses or permits, regulation of energy tariffs, allegedly wrongful criminal prosecution, land zoning decisions and invalidation of patents.[10] Dispute resolution cost parties a lot of money. High costs were identified as one of the two greatest disadvantages of international arbitration in a recent survey of in-house counsel at leading corporations.[11] Due in part to perceived problems with ISDS arbitration including high costs, there is growing interest in dispute prevention and alternative dispute resolution (ADR) in ISDS and UNCTAD in particular has recently examined these issues.[12] Awards in many cases have been in their millions of dollars which would impact any developing country's economy. Most of the disputes arising from BITs are settled in international tribunals which may be viewed as an infringement of the host nation's sovereignty. Over time, there has been increased non-compliance by parties in both ICSID and non-ISCID awards.[13]

As a result of the above issues and especially those related to disputes arising from BITs and settlement of disputes arising from them, some States such as Bolivia and Brazil have terminated their BITs and some withdrawn from ICSID altogether.[14] Most States however have reviewed their BITs with an aim to address the above issues by making

[9]UNCTAD, 'Recent developments in investor-state disputes ISDS' Issue note number 1 April 2014 available at *http://unctad.org/en/publicationslibrary/webdiaepcb2014d3_en.pdf*(accessed 2 October 2017).
[10]Ibid.
[11]Reed. L, 'More on Corporate Criticism of International Arbitration,' Kluwer Arbitration Blog (16 July 2010)
[12]UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration* (2010)
[13]Parra.A.R, *The Enforcement of ICSID Arbitral Awards*, (16 November 2007)
[14]Cotula L 'Is the tide turning for Africa's investment treaties?' available at *http://www.iied.org/tide-turning-for-africa-s-investment-treaties(*accessed 2 October 2017)

policy and legal adjustments to suit them. In Africa, South Africa has re-examined its BITs and done away with those BITs that favoured investors at the expense of local industries. Kenya has not been in any major dispute arising from any of its BITs so far and still keeps negotiating and signing others. None of these BITs by Kenya have been reconsidered as yet to ascertain the pros and cons were there a dispute to arise as well as alignment of the BITs to the changing trends in international treaty agreements.

1.2 Statement of the Problem

Countries should not get into BITs that create consequences that they did not envision at the time of signing the agreement. Given the critique and assessment of emerging issues of BITs given above, States need to reassess BITs they have signed to ensure that they serve the same purpose for which they were intended for. Although there has been much opposition to multilateral agreements by civil society and most countries, BITs have largely avoided similar scrutiny in Kenya. In Kenya, there has been little discourse around BITs entered by government especially with the aim of reviewing them. There is need to review these BITs with the aim of addressing any problems that may be created in future by these agreements. Kenya needs to learn from countries aforementioned in carrying out this review of its BITs. The author seeks to draw attention to the problem with Kenya's BITs, highlight major lessons that we can learn from other countries who have reviewed their BITs while recommending the way forward.

1.3 Research Objectives

The main objective of this study is to re-examine BITs signed by Kenya and determine a way forward for the country to ensure maximum benefit for the economy.

In order to realise this aim, the research is based on the following specific objectives:

- To document the legal problems arising from the BITs signed by Kenya
- To document the issues that led countries such as Canada, South Africa and the United States to review their BITs
- To document the steps taken by the above countries in reviewing their BITs and implementation of the findings.

1.4 Hypotheses

- There is a problem with BITs entered by Kenya
- There is need for a re-examination of Kenya's BITs
- An analysis of Kenya's BITs is necessary to chart a way forward for policy and legal reform in BITs

1.5 Research Questions

The study seeks to answer the following questions:

- What are the legal problems arising from BITs signed by Kenya?
- What led countries such as Canada, South Africa and the United States to review their BITs?
- What were the steps taken by the above countries in reviewing their BITs and how did they implement their findings?

1.6 Justification of Study

This thesis is a valid input in informing the policy-making by governments regarding BITs especially in assisting them to understand their part in treaty making/signing and the dispute resolution as well as consequences that may follow thereafter. The thesis' recommendations may also be used as a guide by other countries seeking to review their BITs. The paper will also provide professionals in the field of investment law and policy with insight as they seek to understand this fairly new area in Kenyan jurisprudence. It will also contribute valuable literature in this area for scholars interested in BITs and investment treaty law as a rapidly growing area of international law.

1.7 Literature Review

There have been several publications in the area of investment treaties by various institutions over time. The United Nations Conference for Trade and Development (UNCTAD) and International Institute for Sustainable Development (IISD) have conducted the most documented research on BITs. The UNCTAD international investment agreement monitor provides the latest development in international investment agreements on various issues such as dispute resolution between investors and States. UNCTAD reports further analyze the nature and development impact of international investment agreements to developing countries.[15]

The UNCTAD international investment agreement monitor provides the latest development in international investment agreements on various issues such as dispute

[15]UNCTAD,*Trends in International Investment Agreements: An Overview. UNCTAD Series on Issues in International Investment Agreements,* (United Nations, New York and Geneva 1999).

resolution between investors and States. UNCTAD reports further analyze the nature and development impact of international investment agreements to developing countries.[16]

As is well known, there is currently no comprehensive multilateral instrument for the regulation of foreign investment. Foreign investment is therefore only subject to varied BITs, regional investment treaties and at the multilateral level, the World Trade Organization's (WTO) limited scope *Agreement on Trade Related Investment Measures* (TRIMs) and the *General Agreement on Trade in Services* (GATS).[17] In the Southern Africa Development Community (SADC) for example, the trade protocol provides rather vaguely that 'Member States shall adopt policies and implement measures within the Community to promote an open cross border investment regime, thereby enhancing economic development, diversification and industrialization.'[18]

Over time, developing countries have realized that they may need to revisit their investment treaty agreements. They have maintained preference for a narrower definition of investment particularly at the WTO Working Group on Trade and Investment. They prefer investment that allows them to exercise some control and sets up lasting economic relations. Beginning the mid-2000s, more developing countries became more proactive in taking steps to review their BITs which they found to be unfair to their interests; Ecuador and Bolivia withdrew from the International Centre for the Settlement of Investment

[16]UNCTAD, *Economic Development in Africa: Rethinking the Role of Foreign Direct Investment*, (United Nations Publication UNCTAD/GDS/AFRICA/2005/1, 2005).
[17]UNCTAD, *General Agreement on Trade in Services*, (Apr. 15, 1994).
[18]Rose Thomas, NEPAD Opportunities for Africa's Business, Entrepreneurs and SME Communities , Why Increasing Investment into SADC is Critical for Improving the Region's Ability to Trade, presentation (April 22, 2002).

Disputes Convention (ICSID Convention) in 2009 and 2007 respectively.[19] According to South Africa's Department of Trade and Industry:

> Major issues of concern for developing countries are not being addressed in the BIT negotiating processes. BITs extend far into developing countries' policy space, imposing damaging binding investment rules with far-reaching consequences for sustainable development. New investment rules in BITs prevent developing country governments from requiring foreign companies to transfer technology, train local workers, or source inputs locally. Under such conditions, investment fails to encourage or enhance sustainable development.[20]

Dr. Uche Ewelukwa Ofodile states that unstated assumption in all the BITs reviewed including South Africa's is that the contracting parties are at the same level of development and will reap equal benefit from the agreement, although a few of the BITs mention economic development as an indirect by-product of foreign investment.[21] This has placed most developing countries at a disadvantage. Kenya is one of them. She has entered into multiple BITs with developed countries using standard form BIT templates without pausing to assess her interests and the implications of such unbalanced agreements.

Getahun Seifu examines foreign direct investment in Ethiopia and the emergence of bilateral investment treaties and regulatory space of the respective country. He is of the view that the fundamental rights related to non-discriminatory treatments, that are national treatment and most favored nation treatment of foreign investments are relative rights. They are granted, limited or denied depending on treatments that a country gives

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[19] Ecuador also terminated nine of its BITs. The nine BITs were with Cuba, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay.

[20] South African Department of Trade and Industry, Bilateral Investment Treaty Policy Framework Review [Hereinafter Department Of Trade And Industry], Available at http://www.pmg.org.za/node/17313 (Accessed 8th October 2017).

[21] Ofodile, U.E, Africa-China Bilateral Investment Treaties: A Critique Michigan Journal of International Law Vol 35 issue 1(2013) pp 31-54.

to either its own nationals or investors of third country. Thus, it is for the concerned country to appropriately regulate how much treatment it should give to its own nationals and third country nationals.[22]

The International Institute for Sustainable Development Advisory Committee noted that countries such as Canada, the United States and Sweden reviewed their treaties while targeting specific aspects.[23] The United States for instance focused on the dispute settlement provisions, the state-owned enterprises and financial services issues.[24]Carrim documents that South Africa on the other hand focused on assessing the role of foreign investment in the country, the levels of protection afforded to investment, and the risks and benefits of BITs.[25]

This paper argues that as Kenya struggles to attract FDI, they have signed BITs in which they have made commitments that are inconsistent with objectives they desired. There is need for a strategic review of Kenya's BITs. Strategic to mean that there needs to be a focus on the specific aspects that need to be reviewed and the desired effect of this review. BITs arise as a result of diplomatic relations between States and this need to be taken account into as well in the review process.

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[22]Seifu, G, 'Regulatory Space in the Treatment of Foreign Investment in Ethiopians Laws.' The Journal of World Investment and Trade, South Africa (2008) pp 54-90.

[23] Vis-Dunbar D 'Advisory Committee Submits report on the United States Model Bilateral Investment Treaty' available at *http://www.iisd.org/itn/2009/10/01/advisory-committee-submits-report-on-the-united-states-model-bilateral-investment-treaty/*(accessed 2 October 2017).

[24]Ibid.

[25]Carrim X 'Lessons from South Africa's Bilateral Investment Treaties Review' available at *http://ccsi.columbia.edu/files/2013/10/No_109_-_Carim_-_FINAL.pdf*(accessed 8 October, 2017).

1.8 Theoretical Framework

1.8.1Constructivism

The advent of constructivism has to be seen in the light of IR's regime debate of the late 1970s and early 1980s.[26] The term constructivism was coined by Nicholas Greenwood Onuf but some of the key tenets of the constructivist world view were present as early as the 1950's in the security communities work undertaken by Karl Deutsch and his students.[27] Proponents of this theory seek to challenge the other theories on international relations by challenging the perspectives that anarchy is a system for the world order and that sovereignty is the most fundamental component in that order. While classical realists such as Hans Morgenthau believed that law was the most essential component in addressing vagueness in international relations, other realists believed that law, power and state interests were more essential components. Constructivist scholars typically emphasize ideational and cultural factors in their explanatory accounts of international outcomes. Constructivism acknowledges the possibility of transforming world politics from a realist Hobbesian existence to a more cooperative globalist phenomenon. This theory further posits that where States cannot act according to a rational-choice utility maximization, international outcomes will be determined by cultural factors as posited by Samuel Huntington.

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[26]Holland, J, 'Foreign Policy and Political Possibility,' European Journal of International Relations, Vol. 19, No.1, (2011) pp. 49-68.
[27]Deutsch, Karl W., Sidney A. Burrell, Robert A. Kann, Maurice Lee, Jr., Martin Lichterman, Raymond E. Lindgren, Francis L. Loewenheim, and Richard W. van Wagenen, *Political Community and the North Atlantic Area: International Organisation in the Light of Historical Experience,* (Princeton, NJ: Princeton University Press, 1957)

In the current international system (with its emerging multi- or non-polar order) wherein the influence of non-State actors like multinational corporations has grown exponentially, claims of the State as the ultimate actor are hard to sustain.[28] The most unique feature of constructivism is the claim that the interests of States in their international relationships are influenced by social interactions[29]and that 'international reality is socially constructed by cognitive structures that give meaning to the material world.'[30] As Banchoff puts it, 'at the core of constructivism is the concern with the mutual constitution of agents and structure, States and the international system.'[31] The acceptance, by constructivism, that States in the international system have different identities, puts constructivism at variance with realism, the latter claiming that the only identity of States is 'that of self-interested States.' [32] Constructivist scholarship has added greatly to our understanding of compliance with international law. Through its emphasis on the inter-subjective nature of shared understandings, norms and practices, constructivism provides new explanations for the expanding category of participants that international law has seen an over the last 50 years or so.

South Africa's corporate identity and interests are complemented by its social identities and interests which are multiple and intersect with other States, China among them. The two countries are regional actors which, during the Cold War did not receive much

[28]Hopf.T, The Promise of Constructivism in International Relations Theory, in International Security, Vol. 23, No. 1, (1998) pp. 171–200.
[29]Hurd, I, Constructivism" in Reus-Smit, C and Snidal, D (eds) Oxford Handbook of International Relations, Oxford: Oxford University Press, (2008) pp. 298-316.
[30]Ibid.
[31]Banchoff, T, German Identity and European Integration, European Journal of International Relations, Vol. 5, No. 3, (1999) pp. 259-291.
[32]Supra Note 30.

attention but now have an opportunity to influence global politics to some extent.[33] South Africa has reviewed its BITs over the last few years comprehensively. Based on constructivism, South Africa appreciated that its identity is complemented by its social identities and interests which are multiple and intersect with other States. A review of its BITs would therefore only serve to improve its opportunities in not only global politics, but also in trade and economics. Kenya also needs to apply this theory and despite concerns about its sovereignty consider a review of its BITs. Constructivism does not completely ignore the sovereignty of the State or its personality; it recognizes the place of emerging areas of international law and new actors as discussed above. Investment treaties are a fairly new area of international law but they can be exploited by States with similar interests for their individual prosperity.

1.9 Research Methodology

To develop answers to the research question, this research will use qualitative case study design. This research will utilize both primary and secondary sources. Books, journal articles, administrative regulations, policy documents, statutes, treaties, the Kenyan Constitution, government publications, court decisions and reports on the investment law will be obtained from the libraries, resource centres and the internet. These sources will be instrumental in informing the conclusions of this study.

[33] Essuman-Johnson, A, Regional Conflict Resolution Mechanisms: A Comparative Analysis of Two African Security Complexes, African Journal of Political Science and International Relations, Vol. 3, No. 10, (2009) pp. 409-422.

1.10 Scope and Limitations of Research

There is inadequate literature on the subject especially in the Kenyan context. Most of the literature in Kenya covers the investment treaty regime from a purely economic perspective without looking at the role of BITs as the starting point in any investment treaty agreements. Further, BITs still form part of newer jurisprudence in the Kenyan legal system and are yet to be fully understood by many scholars and policy makers.

1.11 Chapter Outline

Chapter One is the introductory chapter. The researcher presents information on the background to the study, statement of the problem, the research objectives, research questions, research methodology, and justifications for the study, limitations of the study and literature review.

Chapter Two will dissect specific BITs signed by Kenya against Kenya's legal framework and policies. This analysis will bring out problems and issues that arise from the BITs with the aim of highlighting the impact of these problems on Kenya in future.

Chapter Three will examine the factors that led other countries to review their BITs and the process followed in the review. Further, it will examine manner in which these countries reviewed their BITs and implementation of their findings. The countries in question here are the United Kingdom, India and South Africa. This will form a foundation for comparative analysis.

Chapter Four specifically explores the current legal and policy situation in Kenya with the intention of identifying aspects that could trigger the reassessment process of its BITs. There will be a suggestion of lessons Kenya can learn from the countries in the aforementioned Chapter.

Chapter Five covers the conclusion of this paper while offering recommendations on how Kenya can rethink her BITs to attain the best for her economic benefit.

CHAPTER TWO

2.0 Introduction

This chapter will dissect specific BITs signed by Kenya against Kenya's legal framework and policies. This analysis will bring out problems and issues that arise from the BITs with the aim of highlighting the impact of these problems on Kenya in future. The focus in this chapter will be on BITs signed between Kenya and the United Kingdom (UK), Netherlands, Germany and Italy. The author will focus on the main provisions in these BITs while looking at potential legal drawbacks that may be problematic for the country in future. Kenya signed its BIT with Netherlands in 1996, with the United Kingdom of Great Britain and Northern Ireland in 1999, with Italy in 1996 and entered the BIT with Germany in 1996.

Currently, all the above BITs are in force. The author will look at the main provisions in these BITs with a focus on key definition of terms in these agreements. The author will focus on the fair and equitable treatment clause, definition of terms, the protection and security standard, the national treatment and most favoured nation clause and the investor-state dispute resolution provision. The analysis will flesh out legal gaps that may affect Kenya in future. Further, she will explore Kenya's legal and regulatory framework affecting BITs. Lastly there will be a conclusion of this Chapter which will set the tone for the next Chapter.

2.1 Fair and Equitable Treatment

Over time, the most successful claims by investors in disputes arising out of BITs have been hinged on Fair and Equitable treatment (FET).[34] FET is not just a preserve of BITs but has also been adopted in regional and multilateral treaties.[35] FET is a legal standard and from the 2000s, more tribunals have sought to recognize it through their decisions. Over time, this standard has gained status over expropriation in BITs. Particularly, the Tribunal in *PSEG v Turkey* stated:[36]

> The standard of fair and equitable treatment has acquired prominence in investment arbitration as a consequence of the fact that other standards traditionally provided by international law might not in the circumstances of each case be entirely appropriate. This is particularly the case when the facts of the disputes do not clearly support the claim for direct expropriation, but when there are notwithstanding events that need to be assessed under a different standard to provide redress in the event that the rights of the investor have been breached.

The BIT between Kenya and the Netherlands provides that 'each contracting party shall ensure fair and equitable treatment to the investments, goods, rights and interests of nationals of the other contracting party and shall not impair the management, maintenance, use, enjoyment or disposal thereof by those nationals, by unjustified or discriminatory measures.'[37] Article 2 of the Germany, Italy and UK BITs are similar in wording to the above. The four BITs fail to elaborate what the term fair and equitable treatment means which should be a major cause for alarm.

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[34]Christopher Scheurer Journal of Journal of International Investment and Trade Geneva 2005 pg 357-389 Vol 6 no 3.

[35]The North American Free Trade Agreement (*NAFTA*) Article 1105 and the Energy Charter Treaty (Article 10 (1)) make specific reference to Free and Equitable Provisions.

[36]*PSEG* Global Incorporated and Konya Ilgin Elektrik Üretim ve Ticaret Limited Širketi *v* Turkey, Award and Annex, ICSID Case No ARB/02/5 (2007).

[37]Article 7 of the Agreement on Economic Co-operation between the Government of the Kingdom of the Netherlands and the Government of the Republic of Kenya of 1970.

As noted above, most investors have succeeded in their claims against home countries in recent times based on FET. There is need for Kenya to define this term with more clarity in not just the aforementioned BITs but all her BITs generally. According to Scheurer, the meaning will often depend on the specific circumstances of the case at hand.[38] This was evident in the fundamentally different interpretations of the same clause of the North American Free Trade Agreement (NAFTA) by the tribunals in *S.D Myers v Canada, Metalclad v Mexico and Pope and Talbot v Canada.* In an effort to clarify this concept, tribunals have attempted to be guided by certain principles. These principles include transparency and the protection of the investors' legitimate expectation, freedom from coercion and harassment, procedural propriety and good faith. In *GAMI,*[39] the Tribunal held that the failure by a government to abide by its own law in a manner adversely affecting the investor may lead to a violation of this standard. With the lack of clarity regarding FET in the BITs between Kenya and the four countries above, this poses a ticking time bomb for the country if a dispute ever arose from the four agreements. Awards in BIT disputes are unusually high and it is paramount that the clause is clear and unambiguous.

2.2 The National Treatment and Most Favoured Nation Principle

A Most Favoured Nation (MFN) clause in an investment treaty may be defined as a promise between the two States party to the treaty that neither State will give to investors from any third State more favorable treatment than that given to investors from the other

[38]Sarcedoti G, *Bilateral Treaties And Multilateral Instruments On Investment Protection* 269 Recueil de Cours 251, 1997 at 346.
[39]*GAMI Investments Incorporated vs United Mexican States* (GAMI) Award, 15th November 2004 at para. 96

State party to the treaty.[40] The inclusion of an MFN clause has been seen as an ancient practice by States. MFN may be a stand-alone clause, attached to a national treatment clause or attached to another clause in the BIT. The National Treatment (NT) provision in the aforementioned BITs requires the contracting parties to provide no less favourable treatment to foreign investors than it accords to its nationals.

Article 3 of the Germany-Kenya and Italy-Kenya BITs indicate that treatment that is awarded to nationals of third countries should also be awarded to investors from the respective BIT signatories. Further, both these treaties further indicate that the MFN principle does not refer to 'the advantages and privileges which one contracting party may grant to investors of third States by virtue of membership of a customs or economic union, of a common market, of a Free Trade Area (FTA), of a multilateral economic agreement or under agreement signed in order to prevent double taxation or to facilitate cross-border trade.'[41] The Netherlands BIT with Kenya states that investors of the signatory States should not be treated less favourably than citizens of third States.[42] The UK BIT indicates that the MFN provision applies but does not have an exhaustive list of exceptions as in the Italy and Germany BITs.[43]

The MFN clause has ended up becoming one of the most controversial clauses in investment treaties. Tribunals have interpreted it differently and in unforeseen ways. The

[40]Fietta S, *Most Favoured Nation Treatment and Dispute Resolution Under Bilateral Investment Treaties: A Turning Point?*, 8 International Arbitration Law Review, 131 (2005)

[41]Article 3 (3) Italy BIT and Article 3 (3) & (4) Germany BIT.
[42]Article 3 of Netherlands BIT.
[43]Article 3 UK BIT.

dispute in *Maffezini v. Spain*[44] involved concerned a dispute arising from the treatment allegedly received by the Argentine investor Emilio Agustin Maffezini from Spanish entities in connection with his investment in an enterprise for the production and distribution of chemical products in the Spanish region of Galicia. Spain (the Respondent) objected to the tribunal's jurisdiction since Mr. Maffezini (the Claimant) had failed to comply with an exhaustion of local remedies requirements set forth in the Argentine-Spain BIT. Mr. Maffezini admitted that the dispute had not been referred to the Spanish courts prior to its submission to ICSID, but he argued that the MFN clause in the Argentine-Spain BIT would allow him to invoke Spain's acceptance of ICSID arbitration contained in the Chile-Spain BIT and that none of the exceptions from MFN in the Argentine-Spain BIT applied to the dispute settlement provisions at issue in the case. The Tribunal in its award stated that with reference to the MFN clause of the 1991 Argentine-Spain Bilateral Investment Treaty, the claimant had the right to import the more favourable jurisdictional provisions of the 1991 Chile-Spain Agreement and as a result to resort to international arbitration without being obliged to submit its dispute to Spanish courts for a period of eighteen months beforehand.[45] Spain was caught flat footed as it had not anticipated this interpretation of the MFN clause by the tribunal. This award brought in a shift in international investment law as investors could bring in more favourable provisions from a third party BIT made by their host State. Tribunals after this upheld the same position as the one in *Maffezini* which has been criticized by many host States. The gist of all the awards emanating from the tribunals can be summarized as

[44]Stephen D. Sutton, *Emilio Augustin Maffezini v. Kingdom of Spain and the ICSID Secretary-General's Screening Power*, 21 Arbitration International Review 113 (2005).
[45]Emilio Agustin Maffezini v. Kingdom of Spain (ICSID No. Apr/97/7), Decision on Jurisdiction of 25 January 2000 and Award of the Tribunal of 13 November 2000.

follows: there is more leeway given to foreign investors to bring together elements from various BITs between the host States while ignoring the bilateral character of the commitments made by States in the context of specific negotiations.[46]

On the other hand, some tribunals have not followed *Maffezini* case law and have decided that MFN cannot be used to import procedural rules unless if clearly and expressly indicated to the contrary. An example is the tribunal in *Daimler v. Argentina*[47] which stated in paragraph 280 that:

> The most-favoured-nation clauses … of the BIT … do not authorize the Claimant to circumvent the conditions precedent to arbitration laid down in Article 10 of the BIT. The Treaty's MFN guarantees do not presently apply in any event, as the Claimant has not shown that the dispute resolution process prescribed by Article 10 of the German-Argentine BIT is objectively less favourable to the Claimant than that of any comparator treaty.

Looking at the above interpretations, one can then draw the conclusion that most States including Kenya while signing most BITs before 2000 did not foresee that the MFN provision could be used to introduce whether substantively or procedurally provisions from their BITs with other countries. Most made the assumption that this 'treatment' referred to that treatment which is granted directly by the host State. More importantly, States did not envisage a wide interpretation of this provision in a way that was not included in the specific BIT giving rise to a dispute.

One may argue that the conflicting interpretations of this clause by tribunals should not make states steer away from not clarifying the clause in their BITs. This of course is

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[46]Suzy H. Nikièma 2017 International Institute for Sustainable Development IISD Best Practices Series: The Most-Favoured-Nation Clause in Investment Treaties.

[47]Daimler Financial Services AG v. The Argentine Republic, ICSID, ARB/05/1, award of August 22, 2012, Retrieved from http://www. italaw.com/sites/default/files/case-documents/ita1082.pdf (Accessed 10 October 2017)

hinged on the provisions of the Vienna Convention on the Laws of Treaties which provides that treaties must be interpreted in good faith and in accordance with the ordinary meaning given to the terms of the treaty in their context and in light of its object and purpose. [48] Based on this, tribunals have generally returned contradictory judgments.[49] This is not a complete reprieve therefore for States such as Kenya who have not reviewed their BITs with respect to this clause. As stated by Cole,[50]

> A full understanding of MFN clauses makes clear that they are enormously powerful instruments that can impede significantly a state's otherwise legitimate regulatory activities. Nonetheless, despite the power of MFN clauses, they are almost routinely incorporated into contemporary BITs, as though they constitute little more than a political statement of friendship with no legal consequences.

2.3 Protection and Security Clause

This clause has been one of the most widespread in BITs. The gist of this provision is to accord protection for investments. The wording of this clause may vary depending on the treaty but the overall implication is that a host State is under an obligation under the treaty to protect the investment from any undesirable effects.[51]

The Germany-Kenya and the UK-Kenya BITs provide for the *full protection and security* of investments by nationals or companies of either contracting party in the territory of the other.[52] There is no clause on (full) protection and security in both the Italy-Kenya and Netherlands-Kenya BITs.

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[48]Article 31(1) of the Vienna Convention on the Laws of Treaties.
[49]Ukpe A 'Applicability of the Most-Favoured-Nation Clause to Dispute Settlement Provisions in Bilateral Investment Treaties: A Uniform Approach?' (2011-2012) *CEPMLP Annual Review* 8.
[50]Tony C, The Boundaries of Most Favored Nation Treatment in International Investment Law, Michigan Journey of International Law, 2012, Vol 33 issue 3 pp.32-50.
[51] Moss G C, 'Full Protection and Security' in A Reinisch (ed) Standards of Investment Protection 133–6 Oxford University Press (Oxford 2008).
[52]Germany BIT in Article 4 (1) and the UK BIT in Article 2 (2).

It is trite that the standard of full protection and security means the physical protection of the investor and its assets. This standard has been applied by tribunals exclusively to mean that a host State has the duty to protect investors against violence directed to persons and property and specifically where such violence originates from State organs and/or private persons/parties.[53] The tribunals in *Rumeli v. Kazakhstan*[54] and *Saluka v. Czech Republic*[55] limited the application of this standard to physical security. In the former the tribunal stated 'The Arbitral Tribunal agrees with Respondent that the full protection and security standard...obliges the State to provide a certain level of protection to foreign investment from physical damage.'[56] In the latter, the tribunal stated:

> The 'full protection and security' standard applies essentially when the foreign investment has been affected by civil strife and physical violence.. . . the 'full security and protection' clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force.

Further, States have been held previously liable for actions arising out of their organs or other authorities violating this standard. The Tribunal in *Wena Hotels v Egypt*[57] found that Egypt had violated the commitment to accord full protection and security despite the fact that government did not participate in the forcible seizure of the hotels. This was because Egypt was aware of the imminent seizure but did not take any measure to stop or prevent it. Other tribunals such as the one in *Biwater v. Tanzania*[58] are clear in recognizing that the scope extends to legal as well as commercial security.

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[53]Zeitler HE, 'The Guarantee of "Full Protection and Security"in Investment Treaties Regarding Harm Caused by Private Actors' (2005) 3 Stockholm International Arbitration Review.
[54]Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v. Kazakhstan, ICSID case no. ARB/05/16, IIC 344 (July 21, 2008).
[55]Saluka Investments BV v. Czech Republic, IIC 210 (March 17, 2006).
[56]Ibid, para 668
[57]Wena Hotels v Egypt, Award, 8 December 2000 (2002) 41 ILM 896.
[58]Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID case no. ARB/05/02 (July 24, 2008).

Further, this principle has been extended to include protection of legal rights which includes a judicial system that protects the investor's interests. This was the tribunal's award in *CSOB v Slovakia.*[59] The State also bears an obligation to put in place an operational judicial system with legal remedies available to the investor as stated by the tribunal *in Parkerings v Lithuania.*[60] A further interpretation of this standard was in *Azurix v Argentina*[61] where the Tribunal confirmed that 'full protection and security may be breached even if no physical violence or damage occurs.'

As regards the standard of liability, there is general consensus by tribunals that liability is not absolute rather it is one of due diligence. The relationship between FET and the standard of full protection and security has also come under scrutiny. There has been generally no consensus by tribunals whether full protection and security offers an independent standard or if it is a part of the wider FET standard under international customary law. The acceptable position by most tribunals is that the onus as regards protection and security is probably greater on States with limited resources and marred with conflict situations.

States such as Kenya by including this standard are at a disadvantage in light of the above potential areas of legal difficulty or complications in future. The country has been marred with terror attacks and the porous border with Somalia has increased these attacks in

[59]Ceskoslovenska' Obchodni' Banka A.S. v The Slovak Republic, Award, (29 December 2004)
[60]Parkerings v Lithuania, Award, 11 September 2007 para 355.
[61]Azurix Corp. v The Argentine Republic, Award, 14 July 2006. Para 486.

recent times.[62] Needless to say, these security concerns may cause unprecedented issues for its investors. There is also a lot of uncertainty regarding the future in almost every election year with increased civilian unrest, demonstrations and institutional uncertainties. Kenya needs to review its BITs by clause either excluding this provision altogether or define the standard with care and specify its scope. A broad clause will open the avenue for tribunals to include legal, commercial and other protections which Kenya may not have envisaged while signing the treaty. Such an interpretation will cost the State highly in terms of hefty awards against it.

2.4 Dispute Resolution Clause

Dispute resolution clauses are a critical component of most BITs. This clause can be traced back to the oldest treaties. A dispute resolution mechanism is important as it plays a vital role in dictating how a dispute will be resolved. BITs have a State-State Dispute Settlement (SSDS) and/or Investor-State Dispute Settlement (ISDS) clause.

The SSDS clause is found in the Germany, Netherlands, Italy and United Kingdom BITs with Kenya. The ISDS clause is found in all four of Kenya's BITs that were signed prior to the 21st century. In the four BITs, the clause covers any dispute related to investment. Further, neither limits the scope of ISDS nor excludes any policy areas from the jurisdiction of the ISDS. It is noteworthy however that apart from the Netherlands BIT, the other three provide for express or implied consent to arbitration. The Netherlands' will refer disputes to arbitration depending on a case by case analysis. The four of them

[62]Momanyi SM, The Impact of Al-Shabab Terrorist Attacks in Kenya Master's Programme for Peace and Conflict Transformation December 2015 Arctic University of Norway unpublished thesis.

allow referral to ICSID arbitration but only the Italy BIT includes United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration as an alternative. Regarding the issue of domestic courts, only the Italy and United Kingdom BITs allow any reference to domestic courts. The investor is vested with the power to decide if the parties will go to arbitration in all with the exclusion of the UK BIT.

Having highlighted the above provisions; it is prudent to state that ICSID has been mostly involved in most of the BIT arbitrations and may be said to enjoy some practical advantages over other arbitral mechanisms, such as ad hoc arbitration under the UNCITRAL Arbitration Rules or institutional arbitration managed by private organizations like the International Chamber of Commerce (ICC).[63] Most BIT bargaining takes place around this clause and most investors would prefer a strong ISDS in order to protect their interests while host States on the other hand are more interested in not 'sacrificing' their sovereignty to dispute resolution tribunals. Further, it is more favourable for a home State/investor to have provisions that contain consent to ICSID as compared to those that do not. The worst kinds of clauses for the investor are those that do not have any comprehensive ISDS clause or include consent to ICC and UNCITRAL arbitration but exclude ICSID.[64]

More and more States are moving away from ISDS to exclusively SSDS as this is bound to protect the host State more than ISDS. States such as Brazil and South Africa have

[63]Yackee JW, *Do States Bargain Over Investor-State Dispute Settlement?* 12 Santa Clara J. International Law Review. 277 (2014).
[64]Ibid at pg 15

gone further to clarify the role of ISDS in dispute settlement by narrowing its scope.[65] Courtesy of the procedural issues and interpretive concerns arising from this clause by tribunals, it is paramount that Kenya rethinks its dispute resolution clause. Kenya should also look at the provision on exhaustion of local remedies before referral to SSDS either through following customary international law or diplomatic remedies. Essentially, there is need to rethink this clause with the aim of bargaining the best dispute resolution clause for Kenya in all its BITs.

2.5 Definition of Terms

The definition of terms is vital in any investment treaty. It is only a clear definition of terms that will then give rise to the specific obligations arising from the agreement including its scope. In the realm of BITs, provisions are included to define the term "investor" and "investment." The definition of these terms is key as they cover the the pre-establishment phase, the post-establishment phase of investment, or both.[66]

The Netherlands-Kenya, Germany-Kenya and Italy-Kenya BITs in their definition of an investor make reference to "natural persons," "nationals", "company" and "legal person." The UK BIT does not define this term. As regards the definition of an investment, the UK, Germany and Italy BITs define an investment widely by indicating that the term refers to any kind of asset and further lists the assets that are considered as investments. The list of what an investment encompasses is non-exhaustive.

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[65] Osterwalder B N, (2014), *State-State Dispute Settlement Clause in Investment Treaties* (IISD Best Practices Series.) Retrieved from http://www.iisd.org/sites/default/files/publications/ best-practices-state-state-dispute-settlement-investment-treaties.pdf. (Accessed 10 October 2017)

[66] Legum B, Defining Investment and Investor: Who Is Entitled to Claim at symposium on Making The Most of International Investment Agreements: A Common Agenda 12 December 2005, Paris.

In BITs, the definition of the term "investor", "national", or "company" is instrumental in determining who can claim the protections offered by the agreement for instance joint ventures, corporate entities etc. The definitions of these terms are vital not just for the investor as they seek to bring a claim but more importantly for the host States against who claims may be brought. Increasingly, States and multinationals have been involved in "BIT shopping" as they have come to know that definition of terms in some treaties will favour them more a against the host State should a dispute arise.[67]

A broad interpretation of terms as in the BITs Kenya has entered above causes problems for host States. Investors on most occasions make investment through subsidiary companies incorporated under the host State's local laws.[68] In this instance, the foreign shareholder can bring a claim under an applicable treaty but the locally incorporated subsidiary cannot do this without a specific agreement to the contrary.[69] In the case of *CMS Gas Transmission Co. v Argentina*[70] the ICSID Annulment Committee noted that 'the definition in the Argentina-US BIT which provided for 'every kind of investment...owned or controlled directly or indirectly...such as equity, debt...' was very broad and confirmed that investments made by minority shareholders are covered by the actual language of the definition as is also recognised by ICSID arbitral tribunals incomparable cases. Kenya may also have a similar award against her in future as a result of the broad definition of terms which is similar to the one in the Argentina-US BIT.

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[67]Chaisse J, The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration, 11 Hastings Business Law Journal. 225 (2015).
[68] Malik M 'Recent Developments in the Definitions of Investment in International Investment Agreements' 2008 *IISD*17.
[69]Ibid.
[70]*CMS Gas Transmission Company v Argentina*, {ICSID Case No. ARB/01/8) (Annulment Decision, September 25, 2007).

2.6 Legal and Regulatory Framework in Kenya affecting BITs

The four aforementioned BITs have all made provisions regarding the applicability of the parties' national laws to investments. Kenya has laws that apply to BITs by virtue of this despite the BIT being a separate agreement. The Constitution is the Supreme Court of the land and all treaties and law are subsidiary to it. Other major laws that govern investment treaties are the the Foreign Investment Protection Act[71] and the Investment Protection Act 2004.[72] The former is mandated to give protection to approved foreign investments.[73] The Act provides a platform through which and investor can conduct business through the application of certificate. The Investment Promotion Act was enacted in 2014 to promote and facilitate investment by assisting investors in obtaining the licenses necessary to conduct business.[74] The Act establishes the Kenya Investment Authority a body mandated to promote and create a suitable environment locally and internationally for opportunities for investments in Kenya.[75]

2.7 Legislative and Policy Framework in Kenya Related to the Mining Sector

Kenya is rich in mineral resources with known minerals such as soda ash, titanium and fluorspar amongst others. There have been trace discoveries of rare earth minerals such as gold. Further, there was a discovery of oil in Turkana's Lokichar basin in northwest Kenya in 2012 which has then opened the country up for oil exploration. The legal sector

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[71] *Foreign Investment Protection Act CAP. 518* (1964) Available at: http://www.kenyalaw.org/lex//actview.xql?actid=CAP.%20518 (Accessed: 15 October 2017
[72] *The Investment Promotion Act CAP. 485B* (1996) Available at: http://www.kenyalaw.org/lex//actview.xql?actid=CAP.%20485B (Accessed: 15 October 2017
[73] Section 3 and 4.
[74] Section 3 to 11.
[75] Section 14 to 16.

was for the longest time regulated by the Mining Act[76] which had been enacted in 1940. Increasingly, this statute was outdated and was not aligned to the newly enacted Constitution or international best practices in the sector. The new Constitution in allowing public, private and community land ownership by extension then required mineral right holders to obtain consent from owners or lawful occupiers of land in which their operations were to be undertaken. In this regard, land that was earmarked for mining purposes brought about issues such as relocation, compensation and resettlement of the affected occupiers which was not envisaged in the old Act.

Subsequently, the Minister of Mining revoked 42 mining licenses that had been granted between 14 January and 15 May 2013 on the grounds that the licenses had been improperly awarded by the previous administration during the transitional period between governments.[77] Royalties on minerals were to be increased, and the exploration drilling charges were also to be increased by more than tenfold as well.[78] These changes affected some investors who had signed BITs with Kenya. For instance, Article 5 (1) of the Italian BIT states that:

> The investment to which this agreement relates shall not be subject to any measure which might limit the right of ownership, possession, control or enjoyment of the investments, permanently or temporarily, save where specifically provided by current, national or local, legislation or regulations and orders handed down by courts or tribunals having jurisdiction.'

The new Mining Act may be seen to be in violation of Kenya's BIT with Italy since it limits the rights of ownership, possession, control or enjoyment of foreign investor's

[76]Cap 306 Laws of Kenya.
[77]Holman Fenwick Willan 'Kenya- Mining Update' available at *http://www.hfw.com/downloads/HFW-Kenya- Mining-September-2013.pdf*(accessed 15 October 2017).
[78]Ibid.

investment in Kenya's mining industry. This would thereby oblige the Kenyan government to compensate Italian foreign investors as the new Act's provisions are contrary to the provisions of the BIT. Further, those mining companies whose mining licenses were cancelled and suffered diminished revenues may bring compensation claims against Kenya.[79] These efforts to bring policy and legislative reforms to the mining industry might have been well meaning but could have some undesired effects on the BITs highlighted in this paper with Kenya. It is therefore paramount that Kenya looks at reviewing these BITs to avoid legal problems as a result of breach of her obligations under the BITs.

2.8 Kenya's Tax Regime and Policy Affecting BITs

Tax considerations are a key factor for investors when deciding a location for investment.[80] Tax incentives can be defined as any incentive that reduces the corporate or other tax liability of companies to stimulate investment in particular economic sectors.[81] Kenya provides tax incentives to businesses in order to attract increased levels of FDI into the country.[82] An example is through the Export Processing Zone Act.[83] This Act makes provision for benefits to Export Procession Zone Enterprises in the form of tax exemptions. Another incentive is in the form of ten year tax holidays, ten year

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[79]King and Spalding Client Alert 'Recent Developments: Kenya- What legal options are available to mining companies' available at *http://www.kslaw.com/imageserver/KSPublic/library/publication/ca082013.pdf* (accessed 20 October 2017).
[80]UN Conference on Trade and Development (UNCTAD), *World Investment Report 2015: Reforming International Investment Governance* Chapter V, "International Tax and Investment Policy Coherence", p. 177 (UN 2015).
[81]UNCTAD, *Tax Incentives and Foreign Direct Investment:A Global Survey*, ASIT Advisory Studies No. 16, p. 11 (UN 2000) pg 12.
[82]Tax Justice Network- Africa and ActionAid International 'Tax Competition in East Africa: A Race to the Bottom? Tax incentives and revenue losses in Kenya' available at *http://www.taxjustice.net/cms/upload/pdf/kenya_report_full.pdf* (accessed 20 October 2017).
[83]Chapter 157 of 1990.

withholding tax holiday and Value Added Tax (VAT) exemption on inputs as well as stamp duty exemptions especially to foreign companies engaged in the production of product for international export.[84] The current Secretary General of UNCTAD has called on Kenya to review its tax incentive policy for foreign investors as it is the Kenyan citizen who has to bear the tax burden after these incentives.[85] Pursuant to this, the government has in a letter to the International Monetary Fund expressed its intention to rationalising existing tax incentives, expanding the income base and removing tax exemptions in line with the need to share the tax burden equitably pursuant to Article 201 (b) (1) of the Constitution of Kenya.[86]

In *Spentex Netherlands B. V v the Republic of Uzbekistan,*[87] the investor brought a claim against the host State for revocation of an investment incentive (a VAT subsidy) which had been in place at the time they entered the treaty. Kenya needs to take measures to align its incentives to its Constitution while keeping in mind the potential of claims being brought against it. This is indeed a delicate balance but there really is need to balance investor attraction and the country's revenue. A strategic yet immediate review and adjustment would certainly help optimize the tax structure and mitigate any issues that could arise.

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[84]Supra note 83.
[85]National TV Kenya 'UNCTAD's Sec. Gen. Dr Mukhisa Kituyi calls for Kenya to review her Bilateral agreements' available at *http://mtaani.com/videochannel/43366/unctads-sec-gen-dr-mukhisa-kituyi-calls-for-kenya-to-review-her-bilateral-a/* (accessed 22 October 2017).
[86]Supra note 85.
[87]*Spentex Netherlands, B.V. v. Republic of Uzbekistan,* ICSID Case No. ARB/13/26. (2016).

2.9 Conclusion

The legal problems that could befall Kenya if she does not review her BITs have been highlighted above. It is noteworthy that the author's analysis is not conclusive. The analysis was restricted to the main legal and policy issues surrounding the BITs Kenya have entered into. This limited analysis is not conclusive but gives an idea of the looming problems that could arise given that the investment treaty spectrum is fluid and changes every other time. Based on the problems highlighted in this Chapter, the next Chapter will delve into a comparative analysis of other countries that have reviewed their BITs. This will focus on the factors that precipitated the need for the review, the manner of review and the implementation of the review. This will then form a basis for Kenya to benchmark against.

CHAPTER THREE: REVIEW OF BILATERAL INVESTMENT TREATIES BY UNITED KINGDOM, INDIA AND SOUTH AFRICA

3.1. Introduction

The review of BITs by States is essential to ensure they are in tandem with the prevailing economic and social conditions. As a matter of good practice and as stated in Chapter One, States review their BITs regularly to ensure that they meet the purpose for which they were intended for. Chapter Two of this study analysed the BITs entered into by Kenya vis-à-vis Kenya's Constitutional and legal framework. The challenges arising from the BIT's currently in force were outlined with specific focus being paid to the impact that disputes arising from them would have on Kenya. It emerged that Kenya is plagued by several challenges that arise due to the BITs being in force in their current state. The challenges were attributable to among other factors, the interpretation of the principles embodied within the clauses of the BITs, the mode adopted for settling of disputes and the subjective definition of terms within the BITs.

Evidently, it is imperative for Kenya to review her BITs. The solution to reviewing the BITs does not exclusively rest in either the domestic or international legal framework. It is important to analyse how chosen jurisdictions have successfully reviewed their BITs. This Chapter examines the factors that led United Kingdom, India and South Africa to review their BITs and the process followed in the review.

The United Kingdom has signed BITs with 110 states[88] out of 193 countries in the world today.[89] This puts the United Kingdom in a unique position as a pace setter on BITs especially in light of the fact that the UK maintains one of the largest BIT networks in the world.[90] As such, the United Kingdom is ideal for a comparative study on the review of BITs.

Relevant to this study also are India and South Africa. These two countries have demonstrated significant progress in the area of BITs relative to Kenya. Further, India, being a former colony of Britain, offers a unique insight on the challenges it underwent prior to and during the process of the review of the BITs. Due to the geographical proximity of Kenya and South Africa, South Africa offers a keen insight on the challenges that plague a progressive African jurisdiction in its quest to review its BITs. Notably however, both India[91] and South Africa[92] have been prompted to revisit their BITs upon exposure to international investment arbitration.

These foreign jurisdictions have been adopted in the study in order to provide insight on how a review of BITs is to be undertaken in Kenya and how best to apply their findings

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[88] Investment Policy Hub Website, at http://investmentpolicyhub.unctad.org/IIA/CountryBits/221#iiaInnerMenu (accessed 29 October 2017).
[89] See United Nations Website, at http://www.un.org/en/member-states/ (accessed 29 October 2017).
[90] Crowell & Moring LLP (2016) *Legal Considerations for the UKs Investment and Trade Treaties After Brexit*, All Alerts and Newsletters, at https://www.lexology.com/library/detail.aspx?g=b6bb459f-332a-4b4a-b2e4-8cc68ddf9ae4 (accessed 29 October 2017).
[91] United Nations (2005) "Latest Developments in Investor-State Dispute Settlement," IIA monitor No. 4, UN Conference on Trade and Development, Geneva, at http://unctad.org/en/docs/webiteiit20052_en.pdf (accessed 29 October 2017) Page 3.
[92] Engela C Schlemmer,(2015) An Overview of South Africa's Bilateral Investment Treaties and Investment Policy," in 31:1 *Foreign Investment Law Journal*, 167-193, page 168.

within the Kenyan context. The countries in question being United Kingdom, India and South Africa will form a foundation for comparative analysis.

It is important to note that the comparative analysis undertaken will address the research objectives of determining the issues that led United Kingdom, India and South Africa to review their BITs and the actual steps involved in the process of review.

3.2. United Kingdom

The United Kingdom is recognised as the top destination for foreign investment in Europe for which the BITs are part and parcel of.[93] The United Kingdom is also the 3rd largest receiver of foreign direct investment in the world after US and China.[94] Further, the United Kingdom is Kenya's former colonial master from which Kenya adopted a varied number of laws from and applies them directly with minor changes.

Investment in the UK is not governed by a specific singular statute.[95] Rather, investment in the UK is regulated by several statutory instruments that have domesticated the treaties

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[93]Ben Chapman (2017) "UK remains top destination for foreign investment but worrying signs gather of Brexit impact," in *Independent*, on May 22, 2017, at http://www.independent.co.uk/news/business/news/uk-remains-top-foreign-investment-destination-signs-brexit-impact-grow-ey-steve-varley-a7750031.html (accessed 29 October 2017).
[94]David Hamlett *et. al.*(2016) "Investing in the UK (England and Wales)" in *Practical Law: Global Guide*, Association of Corporate Counsel, London, at https://uk.practicallaw.thomsonreuters.com/2-602-9807?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1 (accessed 29/10/2017).
[95]James Harrison (2010) "United Kingdom National Report," XVII International Congress of Comparative Law Washington 2010, Section IV. A: The Protection of Foreign Investment, International Academy of ComparativeLaw,at http://www.law.ed.ac.uk/includes/remote_people_profile/remote_staff_profile?sq_content_src=%2BdXJsPWh0dHAlM0ElMkYlMkZ3d3cyLmxhdy5lZC5hYy51ayUyRmZpbGVfZG93bmxvYWQlMkZwdWJsaWNhdGlvbnMlMkYxXzYyOF91bml0ZWRraW5nZG9tcmVwb3J0b250aGVwcm90ZWN0aW9ub2Zmb3JlLnBkZiZhbGw9MQ%3D%3D (accessed 30 October 2017) page 1.

to which the UK has assented to.[96] Prior to Brexit,[97] foreign investment into the UK had to be in tandem with the provisions of the Treaty on the Functioning of the European Union. Part Four of the Treaty provided for how the members of the European Union were to associate with non-European countries.[98] The provisions of the Treaty on the Functioning of the European Union complicated the manner in which Britain entered into BITs and how they enacted their statutes in order to comply with the provisions of the Treaty on the Functioning of the European Union. Further, being a dualist State, the UK also has to incorporate any and all treaties that it has signed into its domestic laws.[99]

Currently, there is in force a BIT between Kenya and the UK for the promotion and protection of investments.[100] This is however not unique as UK currently has signed BITs with 114 Countries for the promotion of investment in the other's territory.[101]

The UK commenced reviewing of its BITs upon noting the challenges that plague BITs. As highlighted earlier in Chapter two of this Study, BITs contain broad definition clauses that have far-reaching implications. This was also evident in the BITs that the UK had

[96]Ibid.
[97]"Brexit" is a term coined from gelling together the terms, "Britain" and "Exit" implying the exit of Britain from the European Union. See Amanda Taub (2016) "Brexit, Explained: 7 questions About What It Means and Why It Matters," in *The New York Times*, on June 20, 2016, at https://www.nytimes.com/2016/06/21/world/europe/brexit-britain-eu-explained.html(accessed 29 October 2017).
[98]Ibid.
[99]UK Parliament website, at https://publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/633/63304.htm (accessed 31/10/2017).
[100]See, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the Promotion and Protection of Investments, at http://investmentpolicyhub.unctad.org/Download/TreatyFile/1795 (accessed 29 October 2017). This is a bilateral investment treaty between Kenya and UK that was entered into on September 13, 1999, for the creation of favourable conditions for investment by citizens of both states in the other's territory.
[101]Investment Policy Hub Website, at http://investmentpolicyhub.unctad.org/IIA/CountryBits/221 (accessed 29 October 2017).

entered into. The BITs contained provisions that limited the ability of the UK to control the private investor and their failure to acknowledge, respect and promote human rights.[102] For instance, the United Kingdom entered into a BIT with the Republic of Argentina.[103] The BIT amongst others, provided for the fair and equitable treatment of investment by nationals from the other State,[104] the protections from expropriation of the investor's property and the full protection and security of the investment.[105] Due to the said provisions in the BIT between UK and Argentina, an Argentinian company formed by a group of foreign investors including Suez Vivendi Universal S.A., Sociedad General de Aguas de Barcelona S.A. and Anglian Water Group Ltd, entered into a concession with the Argentinian government for the purposes of operating water and waste-water services in the Country. Ten years into the concession, the foreign investors initiated a claim against the government of Argentina since their concession had been terminated and awarded to a State entity once it was discovered that the water supplied had excess levels of nitrate and after the financial crisis experienced by Argentina during the period, the government of Argentina had turned down a proposal by the foreign investors to increase water tariffs.[106] The foreign investors specifically argued that that Argentina had breached the BIT treaties that it had entered into with UK, Spain and France.

[102]Ibid page 4.
[103]See *Agreement Between the Government of Great Britain and Northern Ireland and The Government of the Republic of Argentina for the Promotion and Protection of Investments*, signed on 11/12/1990 and entered into force on 19/02/1993, at http://investmentpolicyhub.unctad.org/Download/TreatyFile/126 (accessed October 2017).
[104]Ibid Article 3.
[105]Ibid Article 2.
[106]*Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A.* v.*The Argentine Republic* ICSID Case No. ARB/03/19, International Centre for Settlement of Investment Disputes, D.C, at https://www.italaw.com/documents/SuezVivendiAWGDecisiononLiability.pdf (accessed 29 October 2017).

The Argentinian government on the other hand argued that the concession dealt with water and hence impacted on human rights, thereby its actions were necessitated by the circumstances facing the country at that point in time. The tribunal before which the claim was brought before rejected the arguments by the Argentinian government stating that States must respect human rights and BITs obligations equally.

The challenge identified by issues in dispute in the case of *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A.* v. *The Argentine Republic* ICSID Case No. ARB/03/19, highlighted the challenges that come about with BITs. Notably however, the UK took an initiative to adopt and implement the United Nations Guiding Principles on Business and Human Rights.[107] This is a step in a positive direction as one of the guiding principles which apply to States that adopt the said Guide is, 'States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations." This then subjects the BITs that the UK has assented to the provisions of the United Nations Guiding Principles on Business and Human Rights.

Evidently, the UK is still in the process of reviewing its BITs to mitigate the challenges that encompass BITs. However, its efforts to ensure that the BITs are subject to the Guiding Principles on Business and Human Rights ensures that the challenges encompassing the BITs and highlighted under Chapter two of this study are addressed.

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[107]United Nations (2011) *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, HR/PUB/11/04, United Nations, New York, at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf(accessed 29 October 2017).

It is worth noting that the UK developed a Draft Model Text Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of X for the Promotion and Protection of Investments which serves to limit the differences between the BITs signed by the UK as it is the standard document for which further BITs are enacted. This ensures uniformity between the BITs signed by the UK and further ensures predictability in the nature of clauses found within the BITs. It also ensures that BITs are similar thereby eliminating the challenge of "Most Favoured Nation," principle since all the companies of any third State are bound by a similar treaty and in essence receive fair and equitable treatment.

The reluctance by the UK to implement further amendments to its BITs may be attributed to the fact that since the UK commenced the signing of BITs only one matter has been brought against it by an investor from another State. The case of *Ashok Sancheti v. United Kingdom*, where the investor Ashok Sancheti was from India and had invested in a lease of a commercial space owned by the City of London. The claim arose from the irregular increment in the rent price for the investor's lease of a commercial space owned by the City of London.[108] The details for the matter are unavailable implying that the parties to the dispute agreed to have the records of the said arbitration kept confidential. This stands in great comparison to the 69 BIT cases in which the home State of the investor was the United Kingdom.[109]

[108]Investment Policy Hub website, at http://investmentpolicyhub.unctad.org/ISDS/Details/234 (accessed 29 October 2017).
[109]Ibid.

This study notes that there may be subsequent changes to the modality of review and enactment of the BITs signed by the UK upon its exit from the European Union. The actual effect of *Brexit*, however, is yet to be established as at the point of this study.

3.3 India

Kenya and India share similarities in their legal systems which were modelled on the common law system imposed upon them by their common former colonial master. Further, Kenya adopted the Indian Transfer of Property Act 1882, and the Indian Land Acquisition Act, 1894 from India. This demonstrates the degree of similarity between the said jurisdictions.

Regarding BITs, India is ideal for this study due to the high number of investment disputes that India is a Respondent to[110] and given that Indian has signed 84 BITs since 1994.[111]

India faced the challenges identified under Chapter two of this study in the following cases:

a. In *White Industries Australia Limited* v. *The Republic of India*[112] where the investor was claiming for damages under indirect expropriation, the fair and equitable treatment and the most favoured nation principles found in the BIT between India and Australia. The claim by the investor arose from the alleged judicial delays by the Government of India that rendered the claimant unable to enforce an ICC award for over a period of nine years

[110] Ibid. India is a Respondent to 22 cases by foreign investors some of which have been concluded as some of which are still pending.

[111] Ibid.

[112] See *In the Matter of an UNCITRAL Arbitration in Singapore under the Agreement Between The Government of Australia and The Government of the Republic of India on the Promotion and Protection of Investments Between White Industries Australia Limited* v. *The Republic of India*, at https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf (Accessed 29 October 2017).

since the award. The ICC award concerned a contractual dispute with a State-owned entity known as Coal India. The tribunal decided against India finding that India had breached the Most Favoured Nation clause.

b. In *ABN Amrov. The Republic of India*[113] the investor was claiming for damages under full protection and security and the Most Favoured Nation principles found in the BIT between India and Netherlands. The claim by the investor arose from the alleged failure by India to protect the investor's loan in the Dabhol Energy Project in Maharashtra, India resulting in default and losses incurred by the investor. India settled the matter through awarding a non-pecuniary relief.

c. In *Louis Dreyfus Armateurs SAS* v. *The Republic of India*[114] which matter is still pending before the Permanent Court of Arbitration, the investor is claiming under the principle of full protection and security due to the actions of India that are allegedly in breach of the BIT between India and France. The claim by the investor arose from the alleged measures undertaken by the Indian Government which frustrated the implementation of a joint venture agreement for the modernization of a port at Haldia. The matter is yet to be determined.

Upon noting the increased disputes being brought against it, India undertook to overhaul its investment regime. It admitted to the problems that encumbered its legal regime and set out to review the same in the following manner:

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[113] *ABN Amrov. The Republic of India* ICSID Case No.223 of 2004.

[114] See *Louis Dreyfus Armateurs SAS* v.*The Republic of India*, PVA Case No. 2014-26, before the Permanent Court of Arbitration (Arbitral Tribunal: Kalicki, J.E., Lew, J. D.M. & Thomas, J. C).

1. India undertook to develop a Model BIT.[115] The said Model BIT dropped the Most Favoured Nation principle from its provisions. Further, the Model BIT narrowed down on the scope of the clauses especially on the principle of Fair and Equitable treatment.
2. Further to developing the said Model BIT and narrowing down on the scope of the principle of Fair and Equitable Treatment, India then mandated that any such disputes between the investor and India would first be resolved through exhausting local remedies and only after exhausting all local remedies would the investor refer the dispute to arbitration.[116]
3. Termination of BITs.[117] India undertook an extensive initiative to terminate the BITs it had signed in order to allow for the renegotiation of the BITs based on the Model BIT developed. This affected 84 countries with which India had signed BITs.[118] Termination of the BITs was undertaken through issuance of notices of termination to the contracting partner countries.
4. Clarification of ambiguous terms in the BITs.[119] India engaged 25 Countries which it had signed BITs with for the purposes of clarifying ambiguous terms. The purpose of seeking clarification on ambiguous terms was to avoid further disputes as to the interpretation of terms that had broad and vague meanings. This also aided India in

[115]See *Model Text for the Indian Bilateral Investment Treaty: Bilateral Investment Treaty between at,* https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf (accessed 29/10/2017).
[116]Ibid, Article 14 on Settlement of Disputes between an Investor and a Party.
[117]Pramit Pal Chaudhuri (2016) "India's bilateral investment treaties: Once bitten, 57 times more shy," in *Hundustantimes*, on November 25, 2016, at http://www.hindustantimes.com/analysis/india-s-bilateral-investment-treaties-once-bitten-57-times-more-shy/story-2d0VyByBuCC55TYz0zDzNK.html(accessed 29 October 2017).
[118]PrabhashRanjan(2017) "The 2016 Indian Model Bilateral Investment Treaty: A Critical Deconstruction," in 28 *Northwestern Journal of International Law and Business*, 1-45, page 6.
[119]PrabhashRanjan (2017) "As India's New Bilateral Investment Strategy Sputters out, the Secrecy and Opaqueness Must Go," in *The Wire*, on May 1, 2017, at https://thewire.in/130524/bits-investment-strategy-failure/ (accessed 29 October 2017).

limiting the extent of such principles as the Fair and Equitable Treatment principle and in essence re-balancing BITs to which India had assented to.

5. Negotiating of the BITs in line with the Indian Model BIT. The above four measures were intended to ensure that India has capacity to enter into balanced BITs. India's Model BIT ensured that any such investments were subjected to the law of India and especially on matters of labour and employment, information sharing, conservation of natural resources and similar to the UK, matters of human rights.

The above measures ensured that India appropriately dealt with the challenges of arising from its BITs. So far, the economic impact of the measures undertaken by India is yet to be determined. However, what is clear currently is that investors no longer rely on the provisions of the BITs to the detriment of India.

3.4 South Africa

Similar to the UK and India, South Africa has signed BITs with at least 49 Countries for the purposes of promoting investment in the territories of the contracting States.[120] Due to its geographical proximity to Kenya, South Africa forms an ideal candidate for the purposes of a comparative analysis addressing the research objectives of this Study.

[120] Investment Hub Policy Website, at http://investmentpolicyhub.unctad.org/IIA/CountryBits/195 (accessed 29 October 2017).

South Africa noted the exposure that it was subjected to due to the BITs, when the case of *Piero Foresti, Laura de Carli & Others* v. *Republic of South Africa*,[121] was lodged by foreign investors claiming alleged breached of the fair and equitable treatment and indirect expropriation contrary to the provisions of the BIT agreements between South Africa and the Belgium-Luxembourg Economic Union and South Africa and Italy. The investors claim arose from the alleged revocation by South Africa of mineral rights held by the foreign investors. South Africa had compulsorily acquired shares in certain operating rights of companies owned by the investors effectively extinguishing the interests held by the investors. The matter was however settled prior to the determination on liability by the arbitral tribunal.[122]

South Africa then undertook a review of its BITs in order to mitigate further problems associated with BITs. Specifically, it undertook the following actions:

1. Termination of BITs. South Africa terminated its BITs with Switzerland, Netherlands, Spain, Luxembourg, Belgium and Germany in order to allow for the review of any future BITs with these countries. Notably, this was a drastic knee-jerk reaction by South Africa in order to protect its interests.
2. Halting the signing of new BITs.[123] After the settlement in the *Piero Foresti, Laura de Carli & Others* v. *Republic of South Africa* case, South Africa halted the signing of the new BITs to enable the Country review it policies on investment. Specifically,

[121] *In the matter of an arbitration under the Additional Facility Rules of the International Centre for Settlement of Investment Disputes between PieroForesti, Ida Laura de Carli& 9 Others* v. *The Republic of SouthAfrica*.
[122] Ibid.
[123] Adam Robert Green (2012) "Bilateral Investment Treaties coming bank to bite," in *This is Africa*, on March 5, 2012, at http://www.thisisafricaonline.com/Business/Legal-Bulletin/Bilateral-investment-treaties-coming-back-to-bite?ct=true (accessed 29 October 2017).

South Africa noted that unless there are compelling reasons, any new BITs were to be signed upon a consultative review of the long term impacts of their provisions.

South Africa and Kenya are States that have entered into numerous BITs for the purposes of promoting investment in their territories. South Africa however has taken an initiative to halt the signing of new BITs and the termination of existing BITs that seemed to contained clauses deemed to be detrimental to the interests of the State. It is worth noting however, that the manner in which South Africa undertook the review of its BITs was the subject of debate. The actions of South Africa seemed to cast a blanket condemnation of all BITs that had been assented to. So far though, the above highlighted actions by South Africa have limited its exposure to further liability arising from BITs.

3.5 Lessons for Kenya

It is imperative for Kenya to review its BITs. The challenges analysed under Chapter two of this study do not have legal remedies within the domestic law of Kenya. Considering that BITs comprise part of the international legal framework to which Kenya is a party to, this study posits that the best way forward for Kenya would be to consider the following:

1. Issuing notices for the clarification of ambiguous terms to contracting partner States. As discussed above, India issued notices for the clarification of ambiguous terms found within its BITs with contracting partner states.
2. Issuing termination notices for overly bearing BITs. Where contracting partner States are unwilling to agree on ambiguous terms found in the BITs, Kenya should consider terminating the said BITs.

3. Developing a model BIT that will form the basis for future negotiations of BITs. Similar to India and the UK, Kenya should have in place a Model BIT that would form the basis for future negotiations between contracting partner States.
4. Narrowing down on the scope of the clauses embodied in the model BIT to be developed. This would ensure that no ambiguous clauses arise and that the future likely impact of any such clauses embodied in the Model BIT are easily determinable from the onset.
5. Assenting to and implementing the United Nations Guiding Principles on Business and Human Rights.

Emulating the lessons highlighted above would significantly reduce the exposure of Kenya to liability arising from the disputes arising out of BITs. The likely economic impact of emulating the aforementioned States is subject to debate. This study acknowledges that it is challenging to determine a cause and effect relationship between implementing the above lessons and the impact the same would have on the volume of foreign direct investment. However, it is clear that the above stated lessons would greatly mitigate the challenges encompassing BITs.

3.6 Conclusion

The aim of this Chapter was to determine the issues that led the UK, India and South Africa to review their BITs and the actual steps involved in the process of review. It is evident that the three jurisdictions looked to review their BITs after the challenges

discussed in Chapter two of this study materialised in form of disputes between the contracting States and investors.

Further, this Chapter has demonstrated how the said jurisdictions have undertaken the review of their BITs. The lessons for Kenya have been highlighted above based on the practice undertaken by the jurisdictions analysed.

The lessons are indicative on how best Kenya should undertake a review of its BITs in order to address potential challenges that could arise. The following Chapter analyses how Kenya should proceed in implementing the said lessons into the current prevailing domestic legal framework.

Chapter Four specifically explores the current legal and policy situation in Kenya with the intention of identifying aspects that could trigger the reassessment process of its BITs. There will be a suggestion of lessons Kenya can learn from the countries in the aforementioned Chapter.

CHAPTER FOUR: IMPLEMENTING THE LESSONS FOR KENYA

4.1. Introduction

Chapter three of this study analysed how the United Kingdom, India and South Africa reviewed their BITs. It identified the factors that led the selected jurisdictions to review their BITs, the steps undertaken by the said jurisdiction in the process of the review and drew out lessons from which Kenya can learn from.

The manner in which these lessons may be applied to the Kenya context was not analysed in Chapter three. Ergo, Chapter Four specifically explores the current legal and policy situation in Kenya with the intention of identifying aspects that could trigger the reassessment process of its BITs. It will then set out specifically how Kenya can contextualize and apply the lessons highlighted under Chapter three above.

4.2. Kenya's Constitutional and Legal Framework Governing BITs

4.2.1. Constitutional Framework

Kenya's has had three Constitutions that served as the applicable law of the land since its independence from its colonial masters. [124] These Constitutions guided the implementation of Kenya's international obligations from which BITs are brought forth.

The Constitution of Kenya 1963 provided under Section 68 the modality for which Kenya engaged in international treaties, for which BITs are part and parcel of.[125] The provisions of this section of the Constitution together with the influence Kenya's former

[124]They include: the Constitution of Kenya, 1963 cited as the Kenya Independence Order in Council 1963; the Constitution of Kenya1969 and the Constitution of Kenya 2010.
[125]Section 68 of the Kenya Independence Order in Council, 1963.

colonial masters[126] had set Kenya onto the path to being a dualist state. Specifically, the section provided that Kenya shall make laws for the implementation of its international obligations arising from any such treaty, convention or agreement between the government of Kenya and a foreign State.

At the onset of its independence, Kenya had not assented to any BITs for the promotion and protection of investment into Kenya's territory. The first BIT Kenya entered into was under the Constitution of Kenya, 1969, between Kenya and the Netherlands on September 11, 1970.[127] The Constitution of Kenya 1969 facilitated the assent and implementation of a further 11 BITs over the years prior to the promulgation of the Constitution of Kenya, 2010, on August 8, 2010.[128] It is worth noting that apart from the Constitution of Kenya 1963 setting Kenya down the path of being a dualist State, both the 1963 and 1969 Constitutions failed to provide specifically how Kenya should assent to BITs under its international obligations. Instead it was left to the Executive arm of the government to chart the way forward regarding BITs and the process of negotiating the said treaties.[129] The Executive was guided by the circumstances facing Kenya at the point

[126] J.B. Ojwang& Luis G. Franceschi (2002) "Constitutional Regulation of the Foreign Affairs Power in Kenya: A Comparative Assessment," 46:1 *Journal of African Law, 43-58*, page 47.
[127] See *Agreement on economic co-operation between the Government of the Kingdom of the Netherlands and the Government of the Republic of Kenya*, at http://investmentpolicyhub.unctad.org/Download/TreatyFile/1793 (accessed 31 October 2017).
[128] Investment Policy Hub website, at http://investmentpolicyhub.unctad.org/IIA/CountryBits/108 (accessed 31 October 2017).
[129] Kamau Mbugwa (2013) *Dualist or Monist: Intricacies of Treaty Practice in Kenya*, A Research Project in partial fulfilment of the Degree of Master of Arts in International Studies, University of Nairobi, Nairobi, at http://erepository.uonbi.ac.ke/bitstream/handle/11295/59756/Kamau_Dualist%20or%20Monist%3a%20Intricacies%20of%20treaty%20practice%20in%20Kenya.pdf?sequence=5&isAllowed=y (accessed 31/10/2017) page 35.

of independence, which circumstances revolved around the need to attract and promote foreign investment into Kenya.[130]

Due to lack of proper guidelines within the Constitution, the other arms of the government failed to participate in the process of assenting to and implementing the BITs to which Kenya was party to. This was attributed to the fact that the other arms of the government were unable to contribute to the policies developed by the Executive arm of the government on BITs due to the doctrine of separation of powers.[131]

As such, the Constitutions of Kenya 1963 and 1969 were ineffective in governing the manner in which 11 of the 19 BITs Kenya had already signed would be dealt with. What was clear however during the same said period is that Kenya adopted 11 BITs through the Executive arm of the government, while Parliament was reduced to the role of domesticating the said BITs.[132]

With the promulgation of the new Constitution of Kenya in 2010, there was a change in the manner in which treaties were to be adopted. Article 2 (6) in effect rendered Kenya a monist state while Article 94(5) prioritized the role of Parliament in enacting provisions having the force of law in Kenya by effectively mandating that any such treaties should be domesticated and hence adopting a dualist approach towards treaties signed by Kenya.

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[130]Ibid.

[131]Korwa G. Adar & Isaac M. Munyae (2001) "Human Rights Abuse in Kenya under Daniel Moi 1978 – 2001," 5(1):1 *African Studies Quarterly,* 1-19, at https://www.csbsju.edu/Documents/Peace%20Studies/pdf/Human%20Rights%20Abuse%20in%20Kenya%20Under%20Moi.pdf (accessed 31/10/2017) page 2.

[132]The Constitution of Kenya 1963 and Constitution of Kenya 1969,together with judicial interpretation has demonstrated in the case of *RM (Suing thro' Next Friend J.K.) & Cradle* v. *The Attorney General* High Court of Kenya Civil Case No. 1351 of 2002, at Nairobi.

With this in mind, the difference between the Constitution of Kenya 2010 and the repealed Constitutions on BITs becomes discernible. The Constitution of Kenya 2010 operationalised the doctrine of separation of powers and on hence roped in Parliament into the process of negotiating and assenting to BITs. Further, the Constitution of Kenya ushered in the requirement to have national legislation that enforces the BITs within the Kenyan jurisdiction, which national legislation was the purview of Parliament.

Relevant to this study then is the national legislative framework touching on BITs, which is analysed below.

4.2.2. Legislative Framework

4.2.2.1. Treaty Making and Ratification Act, No. 45 of 2012, Laws of Kenya

The Treaty Making and Ratification Act, was enacted 'to give effect to the provisions of Article 2(6) of the Constitution and to provide the procedure for the making and ratification of treaties.' The provisions in the Treaty Making and Ratification Act relevant to this study on BITs include;

Section 2 (1) defines "bilateral treaty" to mean 'an agreement between Kenya and any other State or between Kenya and an international organisation.' The extent to which this applies to BITs is debatable. Clearly, BITs are recognised as being agreements between the Kenya and other States but specific to investments. Section 3(2) (b) however indicates the extent of the applicability of the Act. Section 3(2) (b) of the Treaty making and Ratification Act does not mention "investments" as an area to which the Act would apply to. This study however posits that Section 3(2)(b)(iv) pressing on the relationship

between Kenya and any international organisation or similar body can be applied to the area of "investments" and as such, apply the provisions of the Treaty Making and Ratification Act on BITs.

The Executive arm of the government is recognised as playing a role in the process of negotiating of treaties under the Act. [133] The Act provides an outline as to the considerations that the Executive arm is to take into account when negotiating a treaty. The considerations relevant to BITs include: 'a. The need that the new treaty is to meet; b. the existing legal regime, including the extent of its applicability to the perceived problem; c. the probability of reaching the required measure of agreement on the solution aimed for; d. the relevant legislative efforts related to the perceived problem; e. the optimal form for the proposed treaty; g. the anticipated time schedule for completing the treaty-making process; and, h. the expected costs of formulating and adopting the treaty to Kenya.'[134]

Further, the Act mandates the approval of the National Assembly under Section 8 on the intended ratification of a treaty by the executive. Since its enactment, Kenya had entered into 7 BITs for the purpose of promoting investment into Kenya. Of concern however is that the BITs entered into by Kenya still have within them the challenges encompassing BITS as highlighted in Chapter two. For instance, the BIT between Kenya and the United

[133]Section 5 of the Treaty Making and Ratification Act, No. 45 of 2012.
[134]Ibid.

Arab Emirates[135] being the most recent BIT signed by Kenya, demonstrates the challenge of ambiguity on the definition of 'fair and equitable treatment' under Article 4(1) of the BIT. Further, the MFN clause within the BIT provides that the contracting party is to accord investors from the other contracting party no less favourable treatment that which it accords its own investors or investors from a third party. This is rather vague and subjective.

These provisions are still found within the clauses of BIT signed by Kenya under the Constitution of Kenya 2010 and the Treaty Making and Ratification Act 2012. It may be attributable to failure to have specific provisions under Section 5(2) of the Treaty Making and Ratification Act which should remove ambiguity in treaties for ratification by Kenya.

4.2.2.2. Foreign Investment Protection Act, Cap 518, Laws of Kenya

The Foreign Investment Protection Act is a statute enacted 'to give protection to certain approved foreign investments.' The Foreign Investment Protection Act has been the statute under which Kenya has implemented the BITs it has ratified and adopted.

Specifically, Kenya has incorporated the BITs with France, the Republic of Iran, the Republic of Burundi, Government of the State of Kuwait, the Slovak Republic and the Republic of Mauritius based on the provisions of the Foreign Investment Protection Act.

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[135]See *Agreement Between the Government of the Republic of Kenya and the Government of the United Arab Emirates on the Promotion and Protection of Investment*, athttp://investmentpolicyhub.unctad.org/Download/TreatyFile/5544 (accessed 31 October 2017).

The said BITs are recognised as subsidiary legislation under the Foreign Investment Protection Act.[136]

The provision of the Foreign Investment Protection Act most relevant to BITs and the challenges arising from BITs is Section 8 on compulsory acquisition. The section provides that no property shall be compulsorily acquired unless in accordance with the provisions of the Constitution of Kenya. This provision then ropes in Article 40 (3) of the Constitution of Kenya.[137]

Property is identified by Section 2(1) of the Foreign Investment Protection Act to include rights and benefits obtained through the expenditure of foreign currency. The interpretation of this section and the subjective interpretation of some of the terms in the brought about Kenya's first investment dispute arising from the alleged breach of the BIT between Kenya and United Kingdom as signed on September 13 1999. The dispute before the International Convention on the Settlement of Dispute known as *Cortec Mining Kenya Limited, Cortec (PTY) Limited and Stirling Capital Limited* v. *Republic of Kenya.*[138]

The filing of the claim at the ICSID followed the determination of the matter before the Kenyan Courts to the detriment of the investors in the case of *Cortec Mining Kenya*

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[136]See Foreign Investments Protections Act, Cap 518, Laws of Kenya, subsidiary legislation.
[137]The Study acknowledges that the Foreign Investment Protection Act was enacted prior to the promulgation of the Constitution of Kenya, 2010. Its provisions were in relation to Section 75 of the Constitution of Kenya, 1969 (Repealed) which are nonetheless similar to the provisions of Article 40(3) of the Constitution, 2010.
[138]*Cortec Mining Kenya Limited, Cortec (PTY) Limited and Stirling Captial Limited* v. *Republic of Kenya* ICSID Case No.ARB/15/29.

Limited v. *Cabinet Secretary Ministry of Mining and 9 Others.*[139] Cortec Mining Kenya Limited whose parent companies are Cortec (PTY) Limited and Stirling Capital, both companies incorporated in the United Kingdom[140] was requesting the Kenyan courts for an order of certiorari to quash the decision of the Cabinet Secretary Hon Najib Balala, Ministry of Mining which revoked their special mining licence Number 351 issued on 7th March 2013 and an order of prohibition halting further actions of the Ministry of Mining and its agents. During the hearing of the matter, the Hon Attorney General argued that the issuance of the licence to the applicant was illegal since the licence issued did not comply with provisions of the relevant law including the Forest Act Cap 365; Mining Act Cap 306; and the Environmental Management and Coordination Act (EMCA) Act No 8 of 1999 Laws of Kenya on the requirements for a mining license. Second, that it would be against public interest to allow the applicant to exploit the mineral resources based on the illegally acquired mining licence.

The Hon Attorney General argued further that the Ministry of Mining was acting within the confines of the law and the Constitution 2010, which promotes and protects the doctrines of public participation, public trust, and the environmental principles of sustainability and the precautionary principle. The Court held that;

> First, it is inappropriate for the applicant to seek judicial review redress prior to exploring alternative remedies. Judicial review should only be relied upon as the last resort where there is no alternative remedy and only in exceptional circumstances. In this case, section 93 (2) of the Mining Act, Laws of Kenya,

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[139] *Cortec Mining Kenya Limited* v.*The Cabinet Secretary Ministry of Mining, The Attorney General, National Environmental Management Authority, Basu Mining Limited, Kenya Forest Service, National Museums of Kenya, Mshenga Vuyaa Ruga, Benson Kioko Mulangili, Mutheaus Mutinda Mutua& County Government of Kwale* High Court of Kenya ELC No 195 of 2014, at Nairobi (Coram: J.M. Mutungi, J).

[140] Kennedy Senelwa (2015) "Canadian miner sues Kenya at US court for cancelling licence," in *Business Daily*, on Saturday, June 20, 2015, at http://www.businessdailyafrica.com/Canadian-miner-sues-Kenya-at-US-court-for-cancelling-licence/-/539546/2758632/-/146wij4/-/index.html (accessed 31 October 2017).

provides that a person aggrieved by the decision of the Minister to revoke a prospecting licence may appeal against such a decision at the High Court of Kenya. The applicant, Cortec Mining Limited, should have explored this redress mechanism first instead of seeking judicial review remedies from the court. The scope of judicial review is predetermined and looks at the decision making process instead of the merits of the decision arrived at. Second, the issuance of the licence to Cortec Mining Limited was in breach of section 7, 17 and 27 of the Mining Act; and section 42 of the Forest Act, Laws of Kenya, therefore illegal. The determination of the court on the matter was that the Minister's decision to issue the Mining license had contravened Article 71 of the Constitution therefore unlawful and unconstitutional.

The determination of the Kenyan Court in the above matter was done in accordance with the applicable law and prevailing circumstances. It however led to the institution of the *Cortec Mining Kenya Limited, Cortec (PTY) Limited and Stirling Capital Limited* v. *Republic of Kenya* at the ICSID. The foreign investors are alleging that the government of Kenya unlawfully revoked their mining licence which amounted to illegal compulsory acquisition of their property thereby breaching the principle of fair and equitable treatment found within the BIT signed between Kenya and the UK. The matter is yet to be determined. It however, demonstrates how foreign investors can benefit from disputes due to the lacunas found in the Foreign Investment Protection Act.

4.2.2.3 Investment Disputes Convention, Cap 522, Laws of Kenya

The Investment Disputes Convention is a statute enacted 'to give legal sanction to the provisions of the Convention on the Settlement of Investment Disputes between States and nationals of other States.'

The Investment Disputes Convention Act has allowed for the filing of matters by investors against States at the International Centre for Settlement of Investment

Disputes[141] established the Convention of the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention).[142]

There are debates as to the impact that the International Centre of the Settlement of Investment Disputes has on State sovereignty. What is clear however is that the ICSID promotes the employment of alternative dispute resolution mechanisms against States by investors instead of subjecting the investors to the domestic law of the State which the investor has a dispute with thereby effectively promoting foreign investment.

Kenya has been subjected to the jurisdiction of the ICSID on three occasions. These include: *Walam Energy Inc.* v. *Republic of Kenya*, ICSID Case No. ARB/15/7, *World Duty Free Company Limited* v. *Republic of Kenya*, ICSID Case No. ARB/00/7 and, as discussed above, in *Cortec Mining Kenya Limited, Cortec (PTY) Limited and Stirling Capital Limited* v. *Republic of Kenya*. The relation between the ICSID and BITs signed by Kenya overlap to the extent that foreign investors are able to subject Kenya to the jurisdiction of the ICSID, effectively threatening Kenya's sovereignty.

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

The Investment Promotion Act is a statute enacted, 'to promote and facilitate investment by assisting investors in obtaining the licences necessary to invest and by providing other assistance where necessary.'

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[141] International Centre for Settlement of Investment Disputes Website, at https://icsid.worldbank.org/en/ (accessed 02 November 2017).

[142] World Bank (1965) *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, World Bank, Washington, at https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx (accessed 01 November 2017).

The Investment Promotion Act is intended to regulate the manner in which investors in Kenya conduct their business by ensuring that the said foreign investors are subjected to the same requirements across board. These requirements are found under Section 4 of the Act. The Investment Promotion Act presses on BITs in that it facilitates the fair and equitable treatment of all foreign investors in Kenya. It ensures that the requirements to be met by an investor looking at investing into Kenya are the same for all investors, hence avoiding the challenge of arbitrariness in the treatment accorded by any such investor.

4.3. Modality for the implementation of the lessons for Kenya

In light of the analysis of the Constitutional and legal framework pressing on BITs and upon considering the lessons for Kenya from Chapter three of the study, this study posits that Kenya can best apply the lessons within its local context as follows:

1. Amendment of the Constitution of Kenya, 2010. The Constitution of Kenya forms the basis for which the BITs are currently entered into. The Constitution grants the BITs automatic recognition in Kenya once they are ratified. Considering that Kenya is a hybrid system of a monist and dualist state, it is essential to clarify that any such treaties are ratified in Kenya upon being subjected to a recognized process that ropes in Parliament as the arm of the government mandated with the power to create legally enforceable rules in Kenya. An amendment of the Constitution is essential to ensure that BITs are only enforced in Kenya once they are domesticated.
2. Since Kenya has in force 18 BITs with foreign States for the purpose of promoting investment in Kenya, it is essential to have notices issued for the clarification of the

term "fair and equitable treatment" to all the foreign partner states. The *Cortec Mining Kenya Limited, Cortec (PTY) Limited and Stirling Capital Limited* v. *Republic of Kenya* at the ICSID is hinged entirely on the interpretation of the clause, "fair and equitable treatment." Seeking clarification on the meaning of the clause would avoid similar future disputes. Further, any such ambiguous terms as "Most favoured Nation" should be clarified hence avoiding instances of subjective interpretation of such terms.

3. Terminate all 18 BITs currently in force. In light of the fact that all the BITs signed by Kenya have termination clauses, Kenya would be able to avoid the challenges encumbering BITs such as broad and ambiguous terms by terminating all BITs currently in place or issuing a notice for the non-renewal of the BITs upon their expiry. The termination of the BITs in force currently would allow for the proper renegotiation of BITs that are fair, stable and conducive for business in Kenya.
4. Suspend the signing of new BITs. Kenya's economic climate is bound to change significantly in light of the discovery of commercially viable oil deposits. As such, it is proper for Kenya to avoid rushing into new BITs that are likely to seek for the exploitation of such resources. Further, Kenya is likely to be able to absorb the shock of reduced foreign direct investment due to the halting of executing of new BITs if a proper economic policy is enacted.
5. Development of a model BIT as a subsidiary legislation under the Foreign Investment Protection Act. Currently, Kenya lacks a comprehensive model BIT. This exposes Kenya to the likelihood of negotiating varied BITs with separate foreign States setting Kenya up for exposure due to breach of the various provisions. Where a model BIT is

in place, subsequent negotiations on BITs would be conducted in tandem with the said model BIT.

6. Specifically defining the terms of the model BIT to avoid ambiguity. In light of the challenges highlighted under Chapter two, a model BIT would go a long way in protecting Kenya from liability through ensuring that there is certainty on the extent of scope of BIT clauses.

4.4. Conclusion

This Chapter sought to analyse Kenya's Constitutional and legal framework to determine aspects within the framework that could elicit the reassessment process of its BITs. The analysis noted that the deficiencies in both the Constitution and the legal framework touching on the signing and ratification of BITs. With the best practice lessons noted from various jurisdictions, the Chapter has set out how Kenya can apply the lessons highlighted under Chapter three to the Kenyan context.

The chapter that follows shall set out the summary of the findings, conclusion and recommendations on solving the challenges identified as accompanying BITs.

CHAPTER FIVE: PRECIS OF FINDINGS, CONCLUSIONS AND *RECOMMENDATIONS*

5.1. Introduction

This Chapter makes a summary of the findings of the research, draws a conclusion on the findings of the research and makes appropriate recommendations on the review of BITs in Kenya. This study has made a case for the review of BITs in Kenya. It has demonstrated that there are challenges in the BITs that Kenya has signed and without addressing those challenges, Kenya exposes herself to severe legal and financial liability. The study has proven the hypothesis in Chapter one that there are challenges with the BITs entered into by Kenya. As such, a re-examination of the BITs in force is required in order to chart a ward forward for policy and legal reform in BITs. The Constitutional and legal provisions regulating BITS have proven to be inadequate in resolving the challenges identified. This is majorly due to glaring lacunas in the provisions of the law. The said gaps have to be resolved in order to address all the challenges arising from the enforcement of BITs.

5.2. Précis of Findings

This study established that the BITs signed by Kenya have several terms that are subjective and open to interpretation. It was clear that the Kenya needs to define what amounts to "Fair and Equitable Treatment" as the same has been interpreted differently depending on the prevailing circumstances. This exposes Kenya to liability if and where foreign investors decide to lodge a claim hinged on the provision.

The National Treatment and MFN principles were noted to have the potential to expose Kenya to more legal liability in the event a dispute arose. These two principles granted leeway to foreign investors to bring together elements from various BITs to which Kenya is a contracting partner State while ignoring the bilateral character of the commitments made by the States in the context of specific negotiations. The study further found that despite the provisions of Article 31 (1) of the Vienna Convention on the Laws of Treaties, the actualization of the "National Treatment and Most Favoured Nation" Principle has given rise to disputes due to its wide interpretation.

The study noted that the "Protection and Security Clause" is intended to offer both physical protections, legal and commercial security. This is not limited to the physical assets of the foreign investors but to their legal rights as well including putting in place an operational system where the foreign investor can seek redress for infringement of any of the above rights. There was established a nexus between FET and the standard of full protection and security offered to foreign investors. The study established that this clause exposes Kenya to liability due to the increased incidents of insecurity in the country attributable to the porous Kenya-Somalia international border.

The "Dispute Resolution Clause" common in BITs also came under scrutiny within this study. It appeared that the BITs to which Kenya was a party to included dispute resolution clauses to provide for the manner in which disputes arising are resolved. Notably, the dispute settlement clauses in BITs signed by Kenya refer disputes expressly or by implication to arbitration. The study found that of all the BITs reviewed; only the

Kenya-UK BIT provided any reference to domestic courts. In the rest, it was at the discretion of the investor as to whether the dispute will be referred to arbitration or not. While considering the merits associated with alternative dispute resolution mechanisms, this study noted that alternative dispute resolution mechanisms, as included and relied upon in BITs, threaten the sovereignty of Kenya as a State.

The uncertainty of the clauses in BITs was further revealed upon the analysis of the definition of terms under the BITs. Terms such as "investor," "national," or "company," were just but a few of the terms that had broad and vague meanings. This ambiguity, the study noted, was further exacerbated by the intricacies and operations of the domestic law of Kenya vis-a-vis the ratification and operationalization of international law into Kenya. Further, it was noted that the terms allowed for their subjective interpretation. A specific example was given where the foreign investors formed subsidiary companies in the host States, thereby raising issues as to the definition of "foreign investments." Where the said investments are defined as "every kind of investment....owned or controlled directly or indirectly...such as equity, debt.....," this provides fertile ground for liability arising against Kenya due to the ambiguous nature of such terms. The unpredictability on the extent of application of such clauses renders Kenya vulnerable to litigation and payment of heavy damages.

In essence, the study revealed that the BITs that Kenya has entered into expose Kenya to liability before tribunals where foreign investors may institute claims.

The study also did a comparative analysis of the United Kingdom, India and South Africa to determine how the three jurisdictions undertook the review of their BITs. The comparative analysis yielded lessons for Kenya on how best to review its BITs. The comparative analysis served as a benchmark for Kenya on what to prioritize during the review of its BITs. The challenges that had been noted to encompass BITs were examined vis-a-vis the foreign jurisdictions and the steps involved in the process of review.

The comparative analysis established that the solution to dealing with the challenges associated with BITs lay in revamping the BITs currently in force. Whilst the UK opted to impose human rights considerations over and above their obligations in the BITs, India and South Africa opted for a more radical approach thereby providing the required guidance on combating the challenges of BITs. Notably, since the revamping of the BITs in the foreign jurisdictions examined, the number of disputes arising from BITs signed by the said foreign jurisdictions reduced remarkably. The practice in these foreign jurisdictions provides the way forward for Kenya regarding BITs.

In light of the unique cultural and economic factors facing Kenya and in tandem with the theory of constructivism, the comparative analysis established how Kenya can contextualize the lessons learned from the said foreign jurisdictions.

The study further examined the Constitutional and legal provisions facilitating BITs in Kenya. The Constitution of Kenya, 2010, the Treaty Making and Ratification Act, the

Foreign Investment Protection Act, the Investment Disputes Convention and the Investment Promotion Act are amongst the Constitutional and legal provisions that govern how the BITs are applied in Kenya. They provide the mechanisms for the actualization of the BIT provisions within Kenya. This study analysed the extent to which the existing Constitutional and legal framework deals with the challenges encompassing BITs. It has been established that the Constitutional and legal framework facilitating BITs is inadequate to deal appropriately with the challenges aforesaid.

5.3 Conclusion of the Study

BITs are essential instruments in investment. Foreign investors acknowledge BITs as one of the tools relied upon to protect their investment in the host State. The link as to whether BITs are pivotal to foreign investment is yet to be determined. From the analysis, it has been established that there are challenges that encompass BITs which mischievous parties may capitalise on to the detriment of the host State. The impact that these challenges could have has just started being felt especially by States in the developing world.

This study examined the Constitutional and legal framework in Kenya facilitating BITs. The objective of this study was to re-examine the BITs signed by Kenya and determine a way forward for the country to ensure maximum benefit for the economy. In order to meet this objective, the study documented the issues that led the United Kingdom, India and South Africa to review their BITs and to document the steps taken by the above

foreign jurisdictions in reviewing their BITs and implementation of their findings. The study has achieved these objectives.

The study had answered the following research questions as set out in Chapter One:

1. What are the legal problems arising from BITs signed by Kenya?
2. What led countries such as Canada, South Africa and the United States to review their BITs?
3. What were the steps taken by the above countries in reviewing their BITs and how did they implement their findings?

The hypotheses of the study were that:

1. There is a problem with BITs entered by Kenya
2. There is need for a re-examination of Kenya's BITs
3. An analysis of Kenya's BITs is necessary to chart a way forward for policy and legal reform in BITs.

This study has responded to the said hypotheses. There is indeed a problem with the BITs entered into by Kenya, which requires examination. This study has proven the hypothesis that an analysis of Kenya's BITs is necessary to chart a way forward for policy and legal reform in BITs.

Recommendations made below address the challenges encompassing BITs entered into by Kenya. The recommendations are based on the inadequacies exhibited by the provisions of the BITs which perpetuate the challenges examined.

Based on the above, it is clear that BITs have been skewed towards favouring investors. This study posits that Kenya can only reap the benefits intended on the signing of BITs where it fully addresses the challenges of Fair and Equitable Treatment, Most Favoured Nation Principle, the protection and security clause and the ambiguous definition of terms.

5.4. Recommendations

This study makes the following recommendations:

5.4.1. Amendments to the Constitution of Kenya, 2010

An amendment of the Constitution of Kenya is necessary to limit the application of International Law in Kenya. The monist approach implied by Article 2(6) of the Constitution of Kenya allows for the enforcement of BITs in Kenya despite Kenya's unique cultural and economic circumstances. This was noted as contributing to the challenges of BITs and their application to Kenya. Through the proper contextualization of BITs, the challenges discussed above would be avoided as a proper and predictable system would be in place to ensure that Kenya only enters into BITs that meet her needs on investment.

Further to this, the process of domestication of the BITs would allow for the participation of all stakeholders that may be directly or indirectly affected by any of the provisions in the BIT including the Kenyan public.

5.4.2. Review of the Foreign Investment Protection Act

There are lacunas in the Foreign Investment Protection Act that have perpetuated the challenges associated with BITs. These lacunas as established in the study serve as an avenue that exposes Kenya to liability. Ergo, it is essential to review the provisions of the Foreign Investment Protection Act to mitigate the challenges associated with BITs.

The Foreign Investment Protection Act should be amended to establish a dispute prevention mechanism that would reduce and limit the disputes that arise from BITs. This may be through incorporating stabilization clauses that offer a degree of predictability for both the foreign investor and Kenya that where circumstances change, the investment agreement between Kenya and the said foreign investor would be reviewed in a predetermined manner.

The Foreign Investment Protection Act should also be amended to compel foreign investors to first exhaust local remedies prior to resorting to arbitration at the International Centre for the Settlement of Investment Disputes. This will involve strengthening the judiciary through capacity building training being offered to the relevant judicial officers mandated to deal with disputes arising from BITs.

Lastly, the Foreign Investment Protection Act should be amended to impose a legal liability on companies for violation of the domestic law. This should include any domestic laws that touch on taxation, employment and ownership of property. To this extent, foreign investors will appreciate that despite the BITs facilitating their investment

in Kenya, Kenya is still a sovereign State that purposes to promote the welfare of its citizens.

5.4.3. Review of the BITs currently in place

Kenya should review all the 18 BITs that it is party to. The review should be to determine whether the BITs to see if they fall in line with her domestic legislative agenda and the goals of attracting FDI. Kenya should also issue notices for clarification of ambiguous terms to contracting partner States to avoid disputes on the subjective interpretation of ambiguous terms.

Where it is established that a BIT does not meet Kenya's agenda, Kenya should seek to renegotiate the said BIT. The renegotiation of BITs would aid in ensuring that the said BITs meet the current cultural and economic circumstances prevailing in Kenya. Specifically, the renegotiations should take into account and anticipate such changes in the economic climate of Kenya as the discovery of commercially viable petroleum deposits. Further, the renegotiation of the BITs would rebalance both the investors' rights and the rights of Kenya, thereby ensuring a holistic approach to investment in Kenya.

5.4.4. Halt the Signing of New BITs

It has been established that there are challenges that encompass BITs entered into by Kenya. Unless there are compelling economic reasons to do so, this study recommends that Kenya halts the signing of new BITs until the said challenges are dealt with adequately. The signing of new BITs will not only expose Kenya to further liability but it would also introduce further challenges not analysed within this study.

Once the challenges encompassing BITs have been dealt with, Kenya can proceed to negotiate further BITs.

5.4.5. Draft a Model BIT

Further to renegotiating of BITs, Kenya should undertake to terminate any such BITs that render it impossible to renegotiate the terms therein. This can be achieved by giving notice of termination or through mutual agreement between the contracting partner States. Terminating the said BITs would create room for the drafting of a model BIT.

The model BIT should be drafted differently trying as much as possible to limit liability. The wording of various substantive treaty obligations should be precise and unequivocal. This will involve deviating from the traditional open-ended, asset-based definition of investment. A clarification of the provisions dealing with absolute standards and any such vague terms would be necessary. This should also include narrowing the scope of the FET principle by specifically defining the rights that the foreign investors would enjoy. Further, this study recommends that the Model BIT should drop the "Most Favoured Nation Status" from its provisions. This shall ensure that Kenya is not stopped from negotiating further and better BITs with third party States. However, any subsequent BIT negotiations which Kenya engages in should be based on the model BIT.

5.4.6. Draft Model Investment Contracts

Kenya should consider implementing further creative solutions that are not BIT-model dependent such as investment contracts. The said investment contracts would then offer

sufficient security to the foreign investor and balance Kenya's rights without necessarily being hinged on BITs. Further to this, where such investment contracts are for Kenya's natural resources, they would have to be approved by Parliament in accordance with Article 71 of the Constitution of Kenya. This ropes in Parliament and public participation in the drafting and negotiating of such contracts.

Further, the said investment contracts would ensure that the foreign investor has recourse in the Kenyan judicial system against the government of Kenya where their rights are infringed or threatened thereby effectively upholding Kenya's sovereignty and protecting the foreign investor as well.

5.4.7. Implementation of an Investment Policy

This study recommends the implementation of a progressive investment policy that is reviewed regularly to ensure it matches the current economic needs of Kenya. Having an investment policy would ensure a more streamlined process of adoption of BITs by Kenya. Further, having an investment policy in place will ensure the process of review of the BITs is undertaken in a more organised manner.

The implementation of the said investment policy would incorporate public participation in the entire BIT process thereby incorporating stakeholders' input in the process of review.

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