KENYA'S BILATERAL INVESTMENT TREATIES:
RETHINKING THE VAGUELY DRAFTED SUBSTANTIVE PROVISIONS

PHYLLIS W. WARUHIU

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DECLARATION

This thesis is my original work and has not been presented for a degree at the University of Nairobi or any other university or examination body.

Signed...

Date:...

Phyllis Waruhiu G62/88399/2016

Declaration by the Supervisor:

This Thesis has been submitted for examination with my approval as University Supervisor.

Signature:..

Date:...

Dr. Bosire Nyamori

School of Law

University of Nairobi

ABSTRACT

This study examines the language of the substantive provisions of the BITs in force in Kenya and argues that they are vaguely drafted with language that is broad and highly generalised. Specifically, the study looks at the "Most-Favoured Nation", "Fair and equitable treatment", "Full protection and security", and "Expropriation" provisions in the BITs. These protections limit the kind of measures that can be imposed on investments and are enforceable against the State through Investor State Dispute Settlement system at international tribunals. The study argues that the vague language of these substantive provisions makes the expanse of investment protection very broad. Additionally, because the BITs confer protection on investors according to their relation to the other contracting States, the definitions of "investor" and "investment" are a critical element in determining the scope of application of the substantive protections. The definitions of "investor" and "investment", similarly, are couched in language that is broad. Drawing from international tribunal awards, the study demonstrates how such language is prone to potentially expansive interpretation by international tribunals simply because there isn't sufficient interpretative guidance from the BITs. It advocates for possible rethinking of the substantive provisions of the BITs.

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The Energy Charter Treaty, 1994

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"Holiday Inns S.A., Occidental Petroleum Corporation and others. v. Government of Morocco", (Case No. ARB /72/1), Award on Jurisdiction delivered on 12th May 1974"

"Gold Reserve Inc. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB (AF)/09/1)", Award (22/09/2014)

"Saluka Investments v. Czech Republic" (UNCITRAL), Partial Award (17/03/2006)

"TecnicasMedioambientalesTecmed v. The United Mexican States (ICSID Case No. ARB (AF)/00/2)", Award of 29/05/03)

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"Wena Hotels Ltd v Arab Republic of Egypt (ICSID Case No. ARB/98/4)," Award, 8/12/2000

"Azurix Corp v. The Argentine Republic, (ICSID Case No. ARB/01/12)" Award (23/06/2006)

"BiwaterGauff (Tanzania) Ltd v. Tanzania (ICSID Case No. ARB/05/22)" Award, 2008

"Vivendi Universal S.A and others v. Argentine Republic, (ICSID Case No. ARB/97/3) Award", (26/03/2015)

"Agustin Maffezini v. the Kingdom of Spain, (ICSID Case No. ARB/97/7)" Award of 9/11/2000)

"Siemens vs the Argentine Republic, (ICSID Case No. ARB/02/8)" Award, (17/01/2007)

"Philip Morris Products S.A. and others v. Oriental Republic of Uruguay, (ICSID Case No. ARB/10/7)" Award, (6/07/2016)

"Philip Morris Asia Limited v. The Commonwealth of Australia (UNCITRAL, PCA Case No.2012-12) Award", (17/12/2015)

“Ethyl Corporation v. The Government of Canada (UNCITRAL)” Award,
“Vattenfall v. Germany (ICSID Case No. ARB/09/6)”, Award (March 11, 2011)

“Chevron Corporation and another v. The Republic of Ecuador” (UNCITRAL PCA Case No.2009-23)

“Occidental Petroleum Corporation and others v. The Republic of Ecuador” (ICSID Case No. ARB/06/11)

“BiwaterGauff (Tanzania) Ltd v. United Republic of Tanzania, ICSID Case No.ARB/05/22)”

LIST OF KENYA'S BILATERAL INVESTMENT TREATIES (BITS)

"Agreement on economic co-operation between the Government of the Republic of Kenya and the Government of the Kingdom of the Netherlands (1970)."

"Agreement between the Government of the Republic of Kenya and United Kingdom of Great Britain and Northern Ireland for the promotion and protection of investments (1999)."

"Agreement between the Government of Kenya and Government of the Italian Republic on the promotion and protection of investments (1996)."

"Treaty between the Government of Republic of Kenya and the Federal Republic of Germany concerning the encouragement and reciprocal protection of investments (1996)."

"Agreement between the Government of the Republic of Kenya and the Government of Republic of Burundi for the Reciprocal Promotion and Protection of Investments (2001)."

"Agreement between the Government of Republic of Kenya and the Government of Republic of Finland for the Reciprocal Promotion and Protection of Investments (2008)."

"Agreement between the Government of Republic of Kenya and the Government of Republic of France for the Reciprocal Promotion and Protection of Investment (2009)"

"Agreement between the Government of Japan and the Government of Republic of Kenya for the Reciprocal Promotion and Protection of Investment (2016)"

"Agreement between the Government of Republic of Korea and the Government of Republic of Kenya for the Promotion and Protection of Investments (2014)"

"Agreement between the Government of Republic of Kenya and the Government of the State of Kuwait for the Reciprocal Promotion and Protection of Investments (2013)"

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

LIST OF ABBREVIATIONS AND ACRONYMS

AfCTA	"African Continental Free Trade Area"
BITs	"Bilateral Investment Treaties"
COMESA	"Common Market for Eastern and Southern Africa"
CoK	"Constitution of Kenya"
EAC	"East African Community"
ECT	"Energy Charter Treaty"
FCN	"Friendship, Commerce and Navigation Treaties"
FET	"Fair and Equitable Treatment"
FDI	"Foreign Direct Investments"
FTAs	"Free Trade Agreements"
ICSID	"International Centre for Settlement of Investment Disputed"
IIAs	"International Investment Agreements"
ISDS	"Investor- State Dispute Settlement"
GATT	"General Agreement of Trade Tariffs"
GDP	"Gross Domestic Product"
MFN treatment	"Most- Favoured Nation treatment"
MNCs	"Multinational Corporations"
NAFTA	"North American Free Trade Agreement"
OECD	"Organisation for Economic Cooperation and Development"
SADC	"South African Development Community"
UNCITRAL	"United Nations Commission on International Trade Law"
UNCTAD	"United Nations Conference on Trade and Development"
USA	"United States of America"

USD	“United States Dollars”
VCLT	“Vienna Convention on the Law of Treaties”

CHAPTER ONE

INTRODUCTION AND BACKGROUND

1.0 Introduction

The private sector has played a significant role in Kenya's economy since attainment of independence. Foreign investment is seen as a driver of private investment and Kenya, like other developing countries, has been at the forefront of improving its competitiveness as a preferred destination for foreign investment. Foreign investment discourse amongst those responsible for policy making focuses on the most effective way of attracting foreign investments, and the government tries to provide a welcoming climate for foreign investment by, among others, establishing a legal framework that is favourable to FDI and one that assures foreign investors protection of their investments.

As part of government's effort to attract more foreign investments, a number of Bilateral Investment Treaties (BITs) have been signed with various countries. Kenya signed her first BIT with the Netherlands in 1970. Presently, according to the United Nations Conference on Trade and Development's (UNCTAD) database, eleven BITs are in force Kenya.[1] The preamble statement in all the BITs sets out their objective as the promotion and protection of investments. They also contain provisions on standards of protection of investments that guarantee standards of treatment that are enforceable through international arbitration. These standards include guarantee for "fair and equitable", "national" and "most-favoured nation" treatment. Also included are provisions for protection against unlawful expropriation of investments.

Globally, there were 2,946 BITs in existence by the end of 2017.[2] Of the total investment disputes initiated in 2017, 80 per cent were initiated under BITs[3] and the amounts claimed

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[1] These include BITs with Burundi, Finland, France, Germany, Italy, Japan, Korea, Kuwait, Netherlands, Switzerland and United Kingdom.

[2]UNCTAD, "Recent Developments In The International Investment Regime", (United Nations 2018)

[3] Ibid

ranged from USD15 million to USD1.5 billion.[4] Investors have used BITs to seek compensation for government actions aimed at tobacco-control,[5] regulations touching on the environment,[6] delays in domestic court proceedings,[7] and on performance of contractual obligations[8] among others.

In 2015, a claim was initiated by an investor against Kenya: *Cortec Mining Kenya Ltd and Others v Republic of Kenya.*[9] The claim was brought under the Kenya-UK BIT alleging unlawful expropriation of investments and failure to accord "fair and equitable" treatment to the investment. This followed revocation of the claimants' mining licence by the government on grounds that it had been irregularly acquired. Though the case was dismissed by the tribunal on 22nd October 2018 for the reason that the mining licence had been irregularly obtained, hence *void ab initio*, the case goes to show that Investor-State Dispute Settlement (ISDS) is no longer an idle threat for Kenya.

The language of the provisions of the BITs is a key determinant in arbitration tribunal outcomes. Arbitral tribunals refer to the provisions of the BITs in making determinations as to whether there are violations by the States in investment disputes. It is against this backdrop that this study examines and analysis the language of the substantive provisions and standards of treatment in Kenya's BITs. The substantive protections and standards of treatment in the BITs which this study seeks to examine are; guarantees for "Fair and Equitable" (FET) treatment, "Full protection and Security", "Most- Favoured Nation(MFN) treatment", and protection from unlawful expropriation. These protections limit the kind of measures that can be imposed on investments. It argues that these substantive provisions are vaguely drafted, with language that is broad and highly generalised. The effect of these broad substantive provisions is that they expose the country to potentially high levels of liability. Using the broad protections in the

[4] Ibid
[5] For example in "Phillip Morris v. Australia, UNCITRAL Case No.2012-12"
[6] For example in "Tecmed v. Mexico, ICSID Case No. ARB(AF)/00/2"
[7] For example in "Chevron v. Ecuador, UNCITRAL Case No.2009-23"
[8] For example in "Occidental v. Ecuador II, ICSID Case No. ARB/06/11"
[9] ICSID Case No. ARB/15/29, Award, 22/10/2018

substantive provisions of the BITs, private investors can successfully challenge government measures meant for public good and obtain monetary compensation through arbitral tribunals.

Additionally, because the system of the BITs confers protection on investors according to their relation to the other contracting States, the definitions of "investor" and "investments" are key in determining the expanse of the application of the standards of treatment. All the BITs contain a broad "asset-based" definition of investments to mean 'every kind of asset.' As a background, the details of the problems that these broad definitions pose are discussed in Chapter III.

Among the BITs protection elements, the "FET" standard of treatment has become popular as it has often been invoked by investor claimants in ISDS proceedings with a considerable rate of success[10]. Claims for alleged breaches of FET standard were about 80 per cent of ISDS cases initiated in 2017.[11]Virtually, all the Kenya's BITs require "fair and equitable" treatment of foreign investments. The Italy- Kenya BIT requires "just and fair"[12] treatment of investments. None of the BITs in force defines what the FET standard of treatment comprises and its scope is therefore unlimited. Additionally, the standard is not conditioned on investor's compliance with domestic laws.

In addition, almost all of the Kenya BITs require that investments be accorded "full protection and security."[13] There is no reference in any of the BITs as to the standard to be applied in interpreting "full protection and security." Such language that lacks specificity may be expansively interpreted by arbitral tribunals because there is no guidance on interpretation from the BITs. Tribunals have interpreted the obligation to go beyond the physical integrity of the investment to all types of protection, including legal protection.[14]

"The basic thrust of the MFN provision is non-discriminating character among foreign investors investing in a host State."[15]The MFN standard in the Kenya BITs requires treatment of investments that is no less favourable than that given to investments of third States. Though the language of the MFN clauses is not identical in the Kenya BITs, they show the same basic

[10] United Nations Conference on Trade and Development(UNCTAD), "Fair And Equitable Treatment: Series on Issues in International Investment Agreements II" (United Nations 2012)
[11]United Nations Conference on Trade and Development, "Special Update On Investor–State Dispute Settlement: Facts And Figures :IIA Issues Note 3 "(United Nations 2017)
[12] Art 2(2) of the Kenya- Italy BIT
[13] Save for Kenya-Italy, Kenya-Netherlands, Kenya-Mauritius and Kenya-Qatar BITs.
[14] The tribunal in its award in *Biwater v. Tanzania,*, at Par. 729 stated that "full protection and security implies a State's guarantee of stability in a secure environment, both physical, commercial and legal"
[15] UNCTAD, 'Most-Favoured-Nation Treatment': Series on issues in international investment agreements (United Nations 1999)6

structure by requiring "no less favourable treatment" than that given to investments by investors of third States. The MFN provisions do so without giving a criteria for determining what circumstances should exist for it to be invoked. The problem then is determining in what circumstances an investor should be allowed to use the MFN standard in the BIT to establish jurisdiction for an arbitral tribunal as this is not explicitly addressed in the BIT texts.

In 2017, 75% of the all ISDS claims initiated alleged indirect expropriation of investments by host States. [16]All the Kenya BITs contain expropriation clauses. Though the language of the clauses is not identical, the clauses basically prohibit expropriation without following due process and without providing adequate compensation. The clauses do not only cover direct seizure of property but extend to "any measures the effect of which would be tantamount to expropriation"[17] and "any measure which might limit the right of ownership, possession, control or enjoyment of the investments, permanently or temporarily."[18] Moreover, these provisions fail to distinguish between compensable and non-compensable regulatory actions, and only centre around the effect of government action on an investment. This then means that any government action that may diminish the value of an investment may be construed to amount to expropriation. There has not been a clear articulation of the distinction between government actions that constitute indirect expropriation and governmental regulatory measures that are non- compensable in arbitral awards.[19] The study argues that the potential controversies in the expropriation clauses can be minimized through specificity in language and by clarifying the text in the BITs.

Chapter 3 of the study describes and analysis, in detail, the weaknesses in the specific language of the highlighted substantive protections and standards of treatments in the Kenya BITs.

Throughout this paper, the term "BITs" will be used to refer to the eleven BITs that are in force Kenya.[20] They include: "Agreement on economic co-operation between the Government of the Republic of Kenya and the Government of the Kingdom of the Netherlands(1970)" ;"Agreement between the Government of the Republic of Kenya and United Kingdom of Great Britain and Northern Ireland for the promotion and protection of investments (1999)";

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[16] UNCTAD, "Special update on Investor–State Dispute Settlement: Facts and figures, (United Nations 2017)

[17] For example Article 5(2) Kenya- Germany BIT

[18] For example Article 5(1)of the Kenya- Italy BIT

[19]Organisation for Economic Cooperation and Development(OECD), "Indirect Expropriation" and the "right to regulate" in international investment law, (OECD 2004)2

[20]UNCTAD, "Investment Policy Hub" available at <https://investmentpolicyhub.unctad.org/IIA/CountryBits/108#iiaInnerMenu> accessed on 16/01/2019

"Agreement between the Government of Kenya and Government of the Italian Republic on the promotion and protection of investments (1996)"; "Treaty between the Government of Republic of Kenya and the Federal Republic of Germany concerning the encouragement and reciprocal protection of investments (1996)"; "Agreement between the Government of the Republic of Kenya and the Government of Republic of Burundi for the Reciprocal Promotion and Protection of Investments (2001)"; "Agreement between the Government of Republic of Kenya and the Government of Republic of Finland for the Reciprocal Promotion and Protection of Investments (2008)"; "Agreement between the Government of Republic of Kenya and the Government of Republic of France for the Reciprocal Promotion and Protection of Investment (2009)"; "Agreement between the Government of Japan and the Government of Republic of Kenya for the Reciprocal Promotion and Protection of Investment (2016)"; "Agreement between the Government of Republic of Korea and the Government of Republic of Kenya for the Promotion and Protection of Investments (2014)"; "Agreement between the Government of Republic of Kenya and the Government of the State of Kuwait for the Reciprocal Promotion and Protection of Investments (2013)", and "Agreement between the Swiss Confederation and Government of Republic of Kenya on the Promotion and Reciprocal Protection of Investments (2006)."

These BITs can be categorised as first generation treaties in that they contain broad and vague formulations.[21]In addition, they are heavily skewed in favour of investors as they fail to safeguard the government's right to regulate while providing protection for investments.[22] The study argues that the substantive provisions of the BITs need to be modernised with a view to narrowing the vague formulations, assuring responsible investment as well as safeguarding the right to regulate.

1.1 Background to the problem

Foreign investors are usually faced with unknown and unfamiliar environment of the host States ranging from different culture, different legal system and political structures, to the risk of the interference by the host State.[23]As a way to mitigate upon the vulnerability of foreign investor from the challenges that they may be faced with in a foreign country, various structures

[21] UNCTAD, "Reform of the international investment agreement regime: Phase 2" (United Nations, 2017)
[22] Ibid
[23]Norbert Horn, "Arbitration and the Protection of Foreign Investment: Concepts and Means", (2004)*7 Kluwer Law International*

have been put in place by States over time. One of such measures is the negotiation and signing of BITs by countries as tools for protection of foreign investors and their investments.

The BITs regime emerged in the post-colonial era. After the Second World War, the process of decolonization led to the creation of newly independent but economically undeveloped countries that were "fiercely protective of their independence."[24] The newly independent States regarded foreign investment as an extended form of colonialism and they harboured concerns that there would be interference by foreign investors in the domestic affairs of the States. As a result, most newly independent States began to nationalize the existing foreign investments, and frowned upon new investment by foreigners. "Developed countries responded to the threat of uncompensated expropriation by creating the BIT."[25]In 1959, Germany became the first country to sign a BIT with Pakistan. The BIT programs therefore originated in Europe and other countries looked to European treaty practice for inspiration.[26]

Initially, BITs were principally concluded between developed and developing countries. The BITs thus emerged in the context of "asymmetric investment relations."[27] Developed countries were determined to secure protection for their nationals investing in the capital importing host States, together with their investments. The developing countries, on the other hand, were keen on attracting foreign investment in return for promising protection in a BIT.[28] Presently, however, the practice has changed and various BITs have been concluded between developing countries. The BITs language has nevertheless continued to be inspired by the European treaty practice.

Like with other international agreements, a bargaining process by the State parties precedes the conclusion of BITs. Presently, Kenya does not have an official Model BIT. "The BIT negotiations are reactive to requests received and are based on models presented by negotiating partners."[29] Typically, the developed country drafted the BIT that would then be given to the

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[24]Kennedy J Vandeveld, "A brief history of International Investment Agreements" [2005] *12 U.C Davis Journal of International Law and Policy,* 168
[25] Ibid
[26]Wolfgang A. & Dmitriy Skougarevskiy: "Rule-takers or rule-makers? A new look at African bilateral investment treaty practice" available at <https://www.tralac.org/images/docs/9871/rule-takers-or-rule-makers-a-new-look-at-african-bit-practice-wti-june-2016.pdf>accessed on 10/03/2018
[27]Ibid
[28]Ibid
[29] Ibid

developing country for signature.[30] Research suggests that many developing countries thought that BITs 'were simple ink on paper without any meaningful effect on the real world.'[31] They considered BITs as "pure signals" or "a symbolic gesture" rather than "real and serious legal instruments with teeth."[32]Developed countries on the other hand "had little incentive to explicitly include public policy exceptions into BITs since unidirectional foreign investment flows made BIT claims against them unlikely."[33]

Given the rise in investor claims, and as arbitral awards continue to shed light on interpretation of IIA provisions, this paper argues that Kenya needs to revisit the language of the vaguely drafted provisions of the BITs. The thrust of this paper therefore is that Kenya BITs are vaguely drafted with language that is ambiguous and highly generalised.

1.2 Problem statement

The substantive provisions of the first generation BITs are vaguely drafted with language that is broad and highly generalised. As a result, they expose the country to potentially high levels of liability as private investors can use the broad provisions to successfully challenge

[30] Ibid n36,168
[31] Ibid
[32] Ibid
[33]Ibid

government measures meant for public good and obtain monetary compensation through arbitral tribunals.

1.3 Objectives of the study

The main objective of the study is to highlight the weaknesses in the language of Kenya's BITs. The specific objectives of the study are;

1. To identify the weaknesses in the language of the substantive provisions of the Kenya BITs.
2. To establish the legal implications, if any, of the weaknesses in the language of the substantive provisions of Kenya BITs.
3. To recommend options available in addressing the shortcomings in the language of Kenya BITs.

1.4 Research questions

The paper will seek to answer the following questions:

1. What are the weaknesses in the language of Kenya's BITs?
2. What are the implications, if any, of such weaknesses in the language of the BITs?
3. What are the options available to Kenya in remedying the weaknesses in language of the BITs?

1.5 Hypothesis

This paper is guided by the hypothesis that the substantive provisions of Kenya's BITs are vaguely drafted and contain language that is ambiguous and with highly generalised terms. There is therefore need to revisit the substantive provisions of the BITs with a view to clarifying the language.

1.6 Theoretical framework

This paper is based on the middle path theory on FDI which attempts to analyse FDI from the perspective of both host countries and foreign investors. The middle path theory falls in between the "classical theory," which views all FDI as desirable, and the "dependency theory," which views all FDI as harmful. According to the "classical theory", FDI is perceived as

extremely helpful to developing States and contributes to the development of the host countries.[34] The "dependency theory" on the other hand posits that the cause of the low levels of development in less economically developed countries is their reliance and dependence on more economically developed countries.[35] The "dependency theory" firmly believes that foreign investment does not bring any good to the economy of any nation. The "middle path theory" takes into account both the beneficial effects and the recognised harmful effects of FDI on host countries, and supports the regulation of investments by the host States.[36]

FDI has remarkably grown since the early 1980s and there has been increased competition for it in the global market.[37] It is beneficial to the global economy, the foreign investors and the host States. It is considered a significant contributor to the economic growth of developing countries. The potential for "technology spill overs", "external funding", "transfer of managerial and organizational skills", "increased jobs", "growth in infrastructure and access to foreign markets" are all benefits that FDI confers. FDI also has a significant potential to transform economies through innovation and enhanced productivity. The benefits of FDI are however dependent of the States' national policies and the international investment structures.[38] "Investment protection guarantees are critical for retaining and expanding investments in the long term across all types of FDI."[39]

FDI inflows, however, can also have detrimental effects. Firstly, Multinational Corporations (MNCs) regularly repatriate profits in the form of dividends to shareholders resulting in huge capital outflows, as their main objective in making investments is to maximize profits. Secondly, MNCs have no reason to be loyal to any country which in turn results in uncertainty for the stakeholders, such as the employees and consumers. Thirdly, a large volume of FDI is concentrated in natural resource sectors and the desire by MNCs to operate at the least cost conflicts with healthy environmental practices. In case a host country is economically disadvantaged, the drive for increased revenue may blur the need to put in place measures towards regulating environmental impacts. The negative effects of the MNCs on the ecosystems and environment might bring disaster in the long run. Fourthly, MNCs have been

[34] Rebecca Trent, "Implications for Foreign Direct Investment in Sub-Saharan Africa under the African Growth Opportunity Act" (2002) 23(1) North Western Journal of International Law and Business.
[35] Ibid
[36] Samuel G. Edoumiekumo **, "**Foreign Direct Investment and Economic Growth in Nigeria: A Granger Causality Test" (2009)7(2) Journal of Research in National Development
[37] World Bank, "Global Investment Competitiveness Report"(World Bank 2018)19
[38] Ibid
[39] Ibid

accused of perpetrating gross human rights injustices upon their workers and the local community, which take the form of subjecting workers to inhumane working conditions, poor pay, and denial of rights to form or join trade unions. In addition, not all investment activities conducted by foreign investors have contributed to the host country's sustainable development. Some investment activities have not increased jobs, nor led to the growth in infrastructure. Moreover, foreign investors have successfully challenged regulatory measures by States aimed at ensuring sustainable development before international arbitral tribunals. States thus require sufficient policy space to take regulatory measures in order to foster sustainable development.

It is with this understanding of both the beneficial and harmful effects of FDI that the proponents of the "middle path theory" conjecture that foreign investment should be accorded protection to the extent that it is beneficial to the host state and to the extent that the foreign investors have discharged their obligation to act as socially responsible corporate citizens.[40] It is also for this reason that this paper has adopted the middle path theory as its theoretical frame of reference.

1.7 Significance of the study

By pointing out the weaknesses in the language of the substantive provisions of the BITs, this study will prove useful to policy makers and treaty drafters responsible for reviewing and negotiating BITs. As the country looks into developing a model BIT,[41] the study provides helpful insights into the language of the substantive provisions that may be used for the model BIT. The study will also prove useful to scholars in international investment law.

1.8 Limitations of the study

It will be a disservice to attempt to address the challenges of all the provisions of Kenya's BIT framework in such a short study. The study will only be limited to analysing and highlighting the limitations in the language of the substantive provisions of the BITs.

1.9 Literature review

Globally, law scholars "for long" have been interested in BITs, particularly since the profound proliferation of agreements in the 1990s. The most heavily-studied question is whether BITs increase FDI and this is sensible in that FDI promotion is the rationale behind the treaties and

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[40] Ibid n35

[41] Development of Kenya's Model BIT is one of the policy measures proposed to be adopted by the government in the draft Kenya Investment Policy.

is explicitly stated in most BIT preambles. This study will not however address the effect of first generation BITs on investment flows.

The BIT provisions' critiques seem to narrow down to procedural and substantive provisions' categories. Regarding the substantive provisions' category, Zachary, Andrew, and Beth[42] argue that BITs allow States to explicitly make credible commitments by clarifying the scope of host state's obligations that would not otherwise be the case if there is no treaty in place. As such, they discourage non-compliance with the obligations. They further argue that as compared to customary international law, BITs obligations are more precise and as a consequence, clear non-compliance implies higher reputational costs on the host government.

Harten[43] on the other hand examines the justifications for treaty based investment law regime and concludes that the promised protections in the substantive provisions of the treaties put a strain on governments' regulatory space on measures taken "in good faith" and that are "non-discriminatory."

Claudia[44] examines investment treaty provisions and argues that they are drafted in language that is broad and ambiguous. He examines IIA treaty provisions and the interpretations given to them by arbitral tribunals and concludes that they are both "unhelpful" and are an impediment to contracting States in pursuing sustainable development goals.

Wakgari[45] examines provisions of BITs with repercussions on environmental protection. He specifically singles out the FET and expropriation clauses as key problematic provisions as relates regulation on environment protection. Because of the broad and ambiguous language of the BITs, he argues, it is hard to determine what the appropriate threshold of liability is for the

[42]Zachary Elkins et al , "Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000" [2006] 60 *Cambridge University Press Journal*

[43]Gus Van Harten et al, "A Critique of Investment Treaties: Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices", [2016] SOMO , 41

[44]Claudia Salgado Levy, "Drafting and Interpreting International Investment Agreements from a Sustainable Development Perspective" *Groningen Journal of International Law*, Vol 3(1), 59- 84

[45]Wakgari Kebeta, "The adequacy of Ethiopia's Bilateral Investment Treaties in protecting the environment: Race to the bottom" [2017] 6 *Haramaya Law Review*, 67-90

host States. This in turn has an indirect consequence of limiting the government's ability to regulate in public interest on environmental matters.

Fiona Marshall[46] examines "the extent to which international investment treaties may help or hinder host States' efforts to mitigate and adapt to climate change." He argues that the MFN clause contained in a majority of the IIAs may be used by foreign investors to circumvent "climate-friendly" provisions by importing more favourable "investor-friendly" provisions from other IIAs. The FET standard of treatment, he argues, may also obstruct measures aimed at mitigating climate change as it has been interpreted by arbitral tribunals to include the breach of an investor's "legitimate expectations."[47] As regards expropriation, he argues that the failure by some IIAs to specifically exclude "legitimate non-discriminatory regulatory measures" from compensable expropriation could further hinder measures aimed at climate change mitigation. He concludes the study by making a case for the redrafting of the standard IIA provisions in language that preserves States' policy space.

Katsenga N.N[48] examines Zimbabwe's BITs and concludes that they are characterised by generally short texts and loose imprecise language that lacks "neither explanation nor qualification." The study specifically examines the standards of protection provisions in the BITs and argues that they place obligations on the State without assigning corresponding responsibilities on investors. He concludes by making a case for reform of the Zimbabwe's BITs framework.

Chege[49]examines the current Kenyan BIT regime and observes that it curtails governments' regulatory autonomy. She argues that historical nuances are "majorly" to blame for the current BIT regime that is heavily skewed in favour of the investor.

Bottini Gabriel[50] focuses on the absence of investor obligations in IIAs. As a result absence of investor obligations, he argues, there lacks a mechanism for addressing cases of illegalities

[46] Fiona Marshall, "Climate Change and International Investment Agreements: Obstacles or opportunities?" (International Institute for Sustainable Development, 2010) available at <http://www.fao.org/fileadmin/user_upload/rome2007/docs/Climate%20Change%20and%20International%20Investment%20Agreements.pdf> accessed on 15/01/2019.

[47] Tecmed v. Mexico (ICSID Case No. ARB (AF)/00/2)

[48] Katsenga N.N, "Revisiting Zimbabwe's First Generation BITS: A case for Balancing Rights and Obligations" (Masters Thesis, University of the Western Cape, 2017)

[49]Chege Esther, "*Safeguarding the States Regulatory Autonomy: Rethinking Bilateral Investment Treaties"* (Masters Thesis, University of Nairobi School of Law, 2015)

[50] Gabriel Bottini, "Extending Responsibilities in International Investment Law"(International Centre for Trade and Sustainable Development (ICTSD) 2015)

committed by foreign investors in relation to their investments as there is a mechanism for enforcing breach by a State of its obligations under the IIAs. This then leaves such matters to be adjudicated upon by national courts as opposed to international institutions. He advocates for the inclusion of investor obligations in the treaties. This, he argues, would allow the use of IIAs as tools to further international public interest in addition to promotion of investments.

Federico Ortino[51] examines substantive provisions contained in the old generation IIAs and identifies three key challenges in them. He sets the key challenges out as: "limited object", "broad investment protection", and legal uncertainty." To address the legal uncertainty, he makes a case for clarification of the language and the scope of the substantive provisions in investment treaties. To remedy the broad protections, he recommends, inclusion of substantive provisions that require host states "to behave in a non-discriminatory and reasonable manner" as well as limitation of compensation only to cases of "direct expropriation." He further advocates for the inclusion of "sustainable development objectives" in the IIAs pre-ambles, in addition to "investment promotion" and "protection" in addressing the IIAs' limited objects.

On procedural provisions, Waibel[52] makes claims of a crisis revolving around the inconsistency of investor-state arbitration rulings on interpretation of investor protection provisions in Ethiopia's IIAs. The recommended solutions that emerge from the study centre around reforming the investment dispute resolution mechanisms. They propose the creation of an appeals mechanism to determine appeals arising from arbitral tribunals or the creation of a permanent court to determine investment disputes thus enhancing consistency of legal decisions.

Thomas Fritz[53] examines European Union (EU) IIAs and concludes that they pose a threat to the "rule of the law." He singles out the dispute resolution clauses routinely included in EU IIAs and argues that the ISDS system advances discrimination as only foreign investors have recourse to it. In addition, he points out, the arbitral tribunals lack transparency and are prone to conflicts of interests as they are dominated by a small group lawyers acting as "counsels" or "expert witnesses" in one case and as "arbitrators" in another. He concludes the study by

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[51] Federico Ortino, "Substantive Provisions in IIAs and Future Treaty-Making: Addressing three challenges" (International Centre for Trade and Sustainable Development (ICTSD) 2015)

[52] Michael Waibel, et al, "The Backlash against Investment Arbitration: Perceptions and Reality" 2010 The Peter A. Allard School of Law.

[53] Thomas Fritz, "International Investment Agreements Under Scrutiny, Bilateral Investment Treaties, EU Investment Policy and International Development" (Traidcraft,2015) available at http://www.s2bnetwork.org/wp-content/uploads/2015/03/IIAs-report-Feb-2015-2.pdf accessed on 15/01/2019

making recommendations for exclusion of ISDS provisions in IIAs and the exploration of alternative remedies like the use of local court systems.

Federico Ortino[54] makes a case for a more holistic approach to the regulation of international investment flows whereby IIAs are drafted so as to maximize the positive economic and social spill-overs of foreign direct investment. He argues that the IIAs are drafted with a lot emphasis on economic development, while making little or no emphasis on their social implications.

This study will add on to the growing literature by examining and highlighting the weaknesses in the specific language of the substantive provisions of the Kenya's BITs. It argues that clarifying the BIT provisions can help reduce the uncertainty arising from interpretations given by arbitral tribunals.

1.10 Research methodology

The study will primarily rely on desk review based on various primary and secondary sources. In terms of primary sources, the study will examine the first generation BIT treaty texts, other relevant international treaties, government policies as well as various relevant legislations. The review will also examine secondary sources of information, including books, journal articles, institutional websites, published literature reviews and other sources deemed relevant.

1.11 Chapter breakdown

This study is organized in five chapters.

CHAPTER ONE

1.0 INTRODUCTION AND BACK GROUND

This chapter lays the basis for the discussion of the research topic. It addresses the background to the research problem, and provides in detail the objectives to be achieved by the study.

CHAPTER TWO

This chapter will examine the historical development of international investment protection in Kenya as well as the current legal framework on protection of foreign investments.

[54] Federico Ortino, "The social dimension of international investment agreements: Drafting a new BIT/MIT model?" Paper presented at OECD Global Forum on International Investment held on 27-28th March 2008, available at <http://www.oecd.org/investment/globalforum/40311350.pdf> accessed on 15/01/2019

CHAPTER THREE

Chapter 3 will provide a comprehensive critique of the loose language of specific provisions in the first generation BITs. Drawing from international arbitral decisions, the author will examine the specific problematic provisions in the first generation BITs and their effect.

CHAPTER FOUR

This chapter will explore the options available to Kenya in addressing the flaws and gaps in the language of the substantive provisions of the BITs. It will examine in detail the prospects and limitations of the BIT reform options adopted by other select countries.

CHAPTER FIVE

This chapter will conclude the study by making recommendations for reform of the substantive provisions of the BITs.

CHAPTER TWO

HISTORICAL DEVELOPMENT OF KENYA'S FOREIGN INVESTMENT PROTECTION LAW

2.0 Introduction

To understand the first generation BITs, it is helpful to begin with a look at the historical development of the law on protection of foreign investments in Kenya. This Chapter will examine the pre-independence and post-independent Kenya's foreign investments' legal regime. It will then look at the current legal framework governing protection of foreign investments in Kenya.

2.1 Historical development of foreign investment protection regime in Kenya

2.1.1 Pre- independence investment regime

Kenya was declared a British protectorate in 1895 and was under British rule until 1963. During this period, European settlement was encouraged to create an agricultural export industry. Under colonialism the "nation's natural resources were organized and developed mainly for the benefit of non-Africans."[55] Like with many other colonies, investments were protected by colonial laws which afforded protection to all economic activities in the country.[56] In 1902 for example, the Crown Lands Ordinance was enacted alienating native land to British settlers on 99 year leases and all the natives in occupation were rendered tenants at the will of the Crown.[57]

The British colonial economic policy in Kenya included "land alienation for European settlers, African taxation, African forced labour and the development of settler dominated agricultural production."[58]The economic policies implemented in Kenya as designed by the British government were aimed at feeding British needs for raw materials for its home industries with the local population in the colony not only serving as cheap labour but also a market for finished British products.[59]

Before 1945, few Multinational Corporations (MNCs) had operations in Kenya, dealing mainly in agriculture and mining.[60] The existence of a non-African population both as producers and

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[55] Republic of Kenya, Sessional Paper No. 10 of 1965, African Socialism and its Application to Kenya.
[56] Ibid
[57] Ibid
[58] Peter O Ndege , "Colonialism and its Legacies in Kenya" Lecture delivered at the Fulbright – Hays Group project abroad program held on 6th August 2009 at the Moi University, Eldoret.
[59]Sornarajah M, "The International Law on Foreign Investment" (2010)20
[60] Ibid

consumers provided the initial stimulus for the development of manufacturing and processing industries in Kenya by foreign capital."[61] It was foreign capital that led the way in exerting pressure upon the government to provide protection against competition as an inducement to the investment of capital in Kenyan production facilities.[62] The Industrial Development Council created by the Industrial Development Council Ordinance of 1954 was tasked with facilitating industrial and economic development of the colony.[63]

In the late 1950s, political independence was imminent and a new constitutional dispensation had to be negotiated between the British government, the declining settler-based colonial order, and the African nationalists.[64] As a result an extensive chapter on fundamental human rights was included in the country's independence constitution. It provided a constitutional guarantee from deprivation of private property without compensation.[65]

2.1.2 Post- independence Investment regime

Following attainment of independence, Kenya had a choice as to which type of law it would adopt. The government settled on a policy of foreign investment attraction. At independence, however, there was a decline in the flow of private foreign investment to Kenya. Foreign investors were reluctant to invest in the newly independent country as they were unsure of the treatment that their investments would receive from the State. With the end of the Second World War, some newly independent States had closed their economies to new foreign investments and had nationalized the existing foreign investments.[66]

To attract foreign investment and to assure foreign investors of the security of their investments, the government had to provide a new legal framework within which foreigners could invest in the country.[67] This led to the enactment of the Foreign Investment Protection

[61] Ibid
[62] Gichuki D.W: "Regulation of Foreign Investment in Kenya 1963-81: An Empirical Study" (PhD Thesis, University of Warwick, Coventry 1982)
[63] Act No.63 of 1954
[64] Ibid n8
[65] Republic of Kenya, Constitution 1963 (Repealed), Art 14(c)
[66] Andrew Newcombe, "Law and Practice of Investment Treaties Standards of Treatment"[2009]18 Kluwer Law International
[67] Valentine Nde Fru; "The International law on foreign investments and host economies in sub-Saharan Africa: Cameroon, Nigeria, and Kenya," (Lit Verlag, 2011)

Act in 1964.[68] The Foreign Investment Protection Act, 1964 put in place basic foreign investment protections and became the principal Act governing foreign investments in Kenya.

In 1965, Parliament adopted Sessional Paper No. 10 of 1965.[69] Under the Sessional paper, government's policy on expropriation was that nationalization of foreign investments was only to happen "where the national security was threatened, higher social benefits could be obtained, where productive resources were seriously misused, when other means of control were ineffective or where the a service was vital to the people and had to be provided by the government as part of its responsibility to the nation."[70] A system of traders licensing was to be adopted restricting some types of trades and business to the citizens.[71] The Industrial Protection Committee was to examine and recommend changes to encourage investment and eliminate excessive protection.[72]

In 1982, the Investment Advisory and Promotion Centre was set up under the Ministry of Finance. It was later replaced by the Investment Promotion Centre which was established by the Investment Promotion Centre Act, Cap 485 of 1986.[73] Its mandate was to assist and facilitate both domestic and foreign investments in Kenya. The Investment Promotion Centre Act was later repealed by the Investment Promotion Act, 2004.[74]

The Kenyan economy performed poorly in the 1980s and 1990s due to poor economic governance.[75]To improve trade, the government initiated export promotion policies with a view to doing away with tariffs levied on processed exports. The "manufacturing-under-bond" program, which began in 1988, was the first of such policies.[76]

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[68] Cap 518, Laws of Kenya
[69] Shem Ochola, Assessment of Sessional Paper No 10, 1965 in the context of equity and development in Kenya available at https://www.internationalbudget.org/wp-content/uploads/ibpkenya-equity-week-2016-sessional-paper-10-critique-shem-ochola-9-19.pdf accessed on 16/10/2018
[70] Art 142(6), Sessional Paper No. 10 of 1965
[71] Ibid, (10)
[72] Ibid,(23)
[73] Republic of Kenya, Investment Promotion Centre Act, Cap 485 of 1986(Repealed)
[74] Republic of Kenya, Investment Promotion Act, Cap 485B
[75] Republic of Kenya, Economic Recovery Strategy for Wealth and Employment Creation 2000- 2005, Preamble
[76]Geoffrey Gertz, "Kenya's Trade Liberalization of the 1980s and 1990s: Policies, Impacts, and Implications" a background paper for the Impact of the Doha Round report on Kenya published by the Carnegie Endowment for International Peace, available at <https://carnegieendowment.org/files/kenya_background.pdf> accessed on 16/10/2018.

The NARC administration that was elected in December 2002 adopted the "Economic Recovery Strategy for Wealth and Employment Creation,2003- 2007", a five year government plan aimed at achieving economic recovery.[77] The government undertook to improve the investment environment by, among other things, putting in place an Investment Code to act as a guide on all investment related activities, as well as reduce the cost of bureaucracy. It was to provide, also, for the establishment of an investment Authority.

In 2004, the Investment Promotion Act[78] was enacted with a view to encouraging foreign investment in Kenya. The act was aimed at easing the pre-establishment processes for foreign investors. The Act also created the Kenya Investments Authority (KenInvest) to market the country's foreign investment opportunities, facilitate investors and ensure aftercare.[79]

Generally, Kenya's investment climate has been positive endearing it to MNCs desirous of setting up regional operations. The legal environment is positive with few distinctions between investments by locals and those by foreign investors. In 2018, the World Bank Groups' Ease of Doing Business Report ranked Kenya 61 out of 190 economies in ease of doing business.[80]

However, Kenya's regulatory and institutional framework for investment-related activities has not been harmonized. The government has at different times put in place various policy strategies aimed at investment promotion as seen above. The investment legal framework is contained in a myriad of laws that have an impact on investments. These include: The Constitution of Kenya, 2010, Investments Promotion Act[81], Foreign Investments Protection Act,[82] Companies Act[83], Competition Act,[84] Business Registration Act[85], Public-Private Partnerships Act,[86] Capital Markets Act[87], Investments Disputes Conventions Act[88],

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[77] "Economic Recovery Strategy for Wealth and Employment Creation,2003- 2007",
[78] Republic of Kenya, Cap 518
[79] Investment Promotion Act, S.50
[80] World Bank, "Doing Business Report 2018' available at
< http://www.doingbusiness.org/~/media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB17-Full-Report.pdf> accessed on 22/11/2018
[81] Ibid n 80
[82] Republic of Kenya, Cap 485
[83] Republic of Kenya ,Cap 486
[84] Republic of Kenya ,Act No 12 of 2010
[85] Republic of Kenya, Cap 499
[86] Republic of Kenya, Act No. 13 of 2013
[87] Republic of Kenya, Cap 485A
[88] Republic of Kenya ,Cap 522

Arbitration Act[89], Anti-counterfeit Act[90], Special Economic Zones Act[91], and Proceeds of Crime and Anti-Money Laundering Act[92] and the Insolvency Act [93] among others.

In turn, the legislative framework governing international foreign investments establishes multiple institutions and enforcement mechanisms intended to bring about efficient implementation of the international foreign investments regime. The main institutions include the National and County Governments, the Kenya Investment Authority (KenInvest) and the Special Economic Zones Authority[94]among others

Recently, Kenya has repealed some old commercial laws enacted soon after attainment of independence and has enacted new ones that are more compatible with current global trends. Examples include the repeal of the Companies Act, (Cap. 486) by the Companies Act, 2015 and the repeal of the Bankruptcy Act (Cap. 53) by the Insolvency Act No 18 of 2015.

Kenya has also signed various BITs and Double Taxation Agreements with a view to promoting Investments. According to UNCTAD's database, presently, Kenya has signed and ratified eleven BITs.[95] Kenya has signed double taxation agreements with Canada, Denmark, France, Germany, India, Italy, Norway, South Africa, Sweden, Thailand, United Kingdom and Zambia, with a view to attracting investments from those countries.[96]

In a bid to attract more FDI's, Kenya is a member global bodies and regional organizations as well as a signatory to multilateral treaties. It is a signatory to the "Convention on the Settlement of Investment Disputes" between States and nationals of other States[97] as well as the "Multilateral Investment Guarantee Agency"[98] Kenya is also a member of the regional economic blocs like the "Common Market for Eastern and Southern Africa",[99] "African

[89] Republic of Kenya ,Cap 49
[90] Republic of Kenya, Act No. 13 of 2008
[91] Republic of Kenya, Act No. 16 of 2015
[92] Republic of Kenya ,Act No. 9 of 2009
[93] Republic of Kenya , Act No. 18 of 2015
[94] Kenya Draft Investment Policy
[95] Ibid
[96] Republic of Kenya, National Treasury, "List of Double Taxation Agreements" available at http://www.treasury.go.ke/avoidance-of-double-taxation.html accessed on 22/11/2018
[97] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Covention) 1966.
[98] The Convention establishing the Multilateral Investment Guarantee Agency (MIGA)
[99] Treaty establishing the Common Market for Eastern and Southern Africa(COMESA)

Continental Free Trade Area"[100] and the "East African Community."[101] These affiliations are expected to increase Kenya's interactions with the world and thereby attract more investments.

2.2 Current legal framework governing protection of foreign investments in Kenya

Kenya has valued the role of foreign investment since independence. The legislative framework governing international foreign investments is anchored in various legislations. These include: Constitution of Kenya, 2010, Investments Promotion Act, Foreign Investments Protection Act, Companies Act, Competition Act, Business Registration Act, Public-Private Partnerships Act, Capital Markets Act, Investments Disputes Conventions Act, Arbitration Act, Nairobi Centre for International Arbitration Act, Anti-counterfeit Act , Special Economic Zones Act, and Proceeds of Crime and Anti-Money Laundering Act and the Insolvency Act among others.

Protection of foreign investors is however primarily governed by the Constitution of Kenya (2010), the Foreign Investment Protection Act [102] and BITs. In addition, Kenya is a party to various multilateral treaties that contain investment protection provisions. It may be fairly said that BITs are the primary source of international law on promotion and protection of foreign investments.

2.2.1 Constitution of Kenya, 2010

The Constitution, 2010 is the supreme law of Kenya.[103]It lays down a strong legal foundation upon which policy, legislative and institutional framework on FDI is anchored.

To start with, the Constitution recognises the general rules of international law, and treaties ratified by Kenya as part of the laws of Kenya. [104] This gives effect to the BITs and multilateral treaties, with investment protection provisions, that Kenya has ratified.

At Article 27, the Constitution guarantees "equal treatment, protection and benefit of the law" of persons. It guarantees non-discrimination by the State against persons on any ground, including nationality. It confers on all persons the right to acquire and own property, and prohibits arbitrary deprivation of a person of "any interest in, or right over any property."[105] It further prohibits limitation or restriction of enjoyment of interest or right over property. A

[100] Agreement Establishing the African Continental Free Trade Area
[101] Treaty for the establishment of the East African Community
[102] Republic of Kenya, Cap 518
[103] Republic of Kenya, Constitution of Kenya, 2010,Art.2(1)
[104] Ibid, Art. 2(5) and 2(6).
[105] Ibid, Art. 40 (1) and 40(2).

limitation to nation treatment in terms of land holding by non-citizens is however contained in Article 66(1) of the Constitution. Non- citizens can only hold land under a leasehold tenure to a maximum 99 years.

At Article 40(3), the Constitution provides for protection against the expropriation of private property, "except for a public purpose, in accordance with due process of the law, and against prompt payment in full, of just compensation."

The State is vested with the responsibility to ensure access to justice for all persons.[106] At Article 47(1), "every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair." Article 159 further mandates the Judiciary "to promote alternative mechanisms of alternative dispute resolution (ADR) in the administration of justice."

Under the Constitution of Kenya, 2010 therefore, foreign investors and investments are entitled to the same treatment as nationals, save for the limitation on land ownership.

2.2.2 Foreign Investment Protection Act

The Foreign Investments Protection Act[107]contains guarantees for the protection of approved foreign investments. It guarantees a foreign investor with regard to the capital repatriation and remittance of interests.[108]

The Act further provides for protection against the expropriation of private property, "except for a public purpose, in accordance with due process of the law, and against prompt payment in full of just compensation."[109]

2.2.3 Multilateral Treaties with Investment Protection Provisions

Multilateral treaties are international agreements to which more than two sovereign States are parties. Kenya is a signatory to various multilateral treaties that contain investment protection provisions. These include "Treaty establishing the Common Market for Eastern and Southern Africa (COMESA)", "Treaty for the establishment of the East African Community (EAC)" and recently the "Agreement establishing the Africa Continental Free Trade Area (AfCTA)."

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[106] Ibid, Art.48
[107] Republic of Kenya, Cap 518
[108]Ibid, S.7
[109] Ibid, S.8

At Article 159(1) (a), the treaty establishing COMESA requires that Member States accord FET treatment to investments by investors of member States. It also requires Member States to refrain from expropriating private property, save on public interest grounds.[110] It grants private investors rights to repatriate capital and profits.[111]

The treaty establishing the EAC requires protection of private property as part of provision of an enabling environment for private investment.[112]The Agreement establishing the Africa Continental Free Trade Area, on the other hand, in its Article 4 of the Protocol on Trade in Services requires MFN treatment "of services and service suppliers."

Kenya is also a signatory to the Energy Charter Treaty (ECT), a multilateral treaty establishing a legal framework for cooperation amongst member States in the energy industry. The treaty contains foreign investment protection provisions in its Part III. The protections include protection from unlawful expropriation, guarantees on "MFN treatment", "FET", and "most constant protection and security."

Kenya is also a signatory to the "Convention on the Settlement of Investment Disputes (ICSID) between States and Nationals of other States." This provides for a favourable legal framework for foreign investment protection by availing to investors an independent mechanism for the settlement of investment disputes with host States.

Kenya is also a member of the "United Nations Commission on International Trade Law (UNCITRAL)." The "UNCITRAL" offers a forum and rules for settlement of investment disputes where specific concession agreements or dispute settlement provisions in IIAs identify it as the forum for settlement of investment disputes.

In addition, Kenya is also a signatory to the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention, 1958)" which provides for the recognition and enforcement of foreign arbitral awards.

2.2.4 Bilateral Investment Treaties

Bilateral investment treaties are investment agreements that are entered into by two sovereign states with each State party undertaking to act in a way that is not prejudicial or injurious to

[110] COMESA, Treaty establishing the Common Market for Eastern and Southern Africa, Art 159(3)(b)
[111] Ibid, Art. 159(5)
[112] EAC, Treaty for the establishment of the East African Community,1999, Art.127

investments by investors from the other contracting State. They exclusively cover investments by investors of the contracting parties.

As seen in Chapter I, the historical origins of BITs as they are today can best be traced to the post-colonial times of developing countries. After the Second World War, the process of decolonization led to the creation of newly independent countries that "were fiercely protective of their independence."[113]The BIT emerged as a tool to guarantee foreign investment protection in the developing countries. Germany was the first to conclude a BIT with Pakistan in 1959.

Kenya signed her first BIT with the Republic of Netherlands in 1970. This was followed by BITs with Germany and Italy signed in 1996, and with the United Kingdom in 1999. Subsequently, various other BITs have been signed, both with developing and developing countries, as part of government's policy to attract foreign investment. According to UNCTAD's database, eleven BITs are in force in Kenya.[114]

The Kenyan BITs contain both substantive and procedural provisions. By and large, the substantive protections and procedural provisions in the BITs are similar. They contain a preamble statement which gives the objective of the treaty as investment promotion and protection between the state parties. The standards of protection of investments in the BITs include guarantees for "fair and equitable treatment", "national treatment", "most favoured nation treatment" and protection from unlawful expropriation. These standards of protection are enforceable through ISDS system provided for in the BITs.

2.3 Conclusion

This Chapter has examined the evolution of Kenya's legal regime on foreign investment protection both before and after independence. It then looked at the current legal framework on protection of foreign investments. It may be fairly said that BITs are the primary source of international law on foreign investments protection. They exclusively deal with foreign investment promotion and protection amongst member States. The Chapter that follows examines the weaknesses in the substantive provisions of Kenya's BITs.

[113]Kennedy J Vandeveld, 'A brief history of International Investment Agreements' [2005], *12 U.C Davis Journal of International Law and Policy,* 168
[114] Ibid

CHAPTER THREE

AN ANALYSIS OF THE SUBSTANTIVE PROVISIONS IN KENYA's BITs

3.0 Introduction

As has been highlighted in Chapter 2, Bilateral Investment Treaties (BITs) are investment agreements that are entered into by two sovereign states with each State party undertaking to act in a way that is not prejudicial or injurious to investments by investors from the other contracting State. They exclusively cover investments by investors of the contracting party States. They are regarded as a means of drumming up investor confidence by signalling that the legal and political structures are not injurious to foreign investors and investments, thus providing a welcoming climate for FDI.

The historical origins of BITs as they are today can best be traced to the post-colonial times of developing countries. The BITs emerged as tools to guarantee foreign investment protection in the developing countries following attainment of independence.[115] Germany was the first to conclude a BIT with Pakistan in 1959.

Kenya signed her first BIT with the Netherlands in 1970. This was followed by BITs with Germany and Italy signed in 1996, and with the United Kingdom in 1999. Subsequently, various other BITs have been signed, both with developed and developing countries, as part of government's policy to attract foreign investment. According to UNCTAD's database, presently, there are eleven BITs in force in Kenya.[116]

The Kenyan BITs contain both substantive and procedural provisions. They also contain a preamble statement which gives the objective of the treaty as investment promotion and protection between the State parties. The standards of protection of investments in the BITs include guarantees for "fair and equitable treatment", "national treatment", "most favoured nation treatment" and protection from unlawful expropriation. These standards of protection are enforceable through ISDS system provided for in the BITs.

This Chapter seeks to examine the specific substantive protections and standards of treatment in the BITs. Specifically, the Chapter will examine the language of guarantees for "fair and equitable treatment", "full protection and security", "Most- Favoured Nation treatment", and

[115] Kennedy J Vandeveld, "A brief history of International Investment Agreements" [2005]*12 Davis Journal of International Law and Policy,* 168

[116] Ibid n1

"protection from unlawful expropriation." While acknowledging that arbitration tribunals are not mandated to develop jurisprudence, the Chapter will look at how arbitral tribunals have interpreted these protections in their awards as, in reality, ad hoc tribunals do refer to previous decisions whenever they can.

In addition, as the system of first generation BITs confer protection on investors according to their relation to the other contracting States, the definitions of "investor" and "investments" are a key element in determining the scope of application of the substantive protections under the BITs. To begin with, the Chapter, therefore, examines the definitions of 'investor' and 'investments' in the BITs, exposes the problems in the definitions, and also looks at how arbitral tribunals have interpreted these terms.

3.1 Definitions of 'Investments' and 'Investor'

3.1.1 Investments

The definitions of "investor" and "investment" are a key element in determining the scope of application of the substantive protections under the BIT. For the Capital importing countries, the definition identifies the types of investments they wish to attract while for the capital exporting countries, it identifies the types of investments they wish to protect.[117]

Globally, there is no uniform definition of 'investments' across the BITs. States negotiating a BIT are free to determine its scope. Historically, broad asset-based definitions as 'all kinds of assets' "were created by capital exporting States to provide protection to an extensive range of their investors' assets."[118]

Save for the Kenya- Netherlands BIT which does not define the term, all the other first generation BITs adopt a broad and open-ended definition of 'investment'. They define "investment" is as "every kind of asset" or "any kind of property". In addition, a non-exhaustive list of examples of covered assets is provided. The Kenya-Italy BIT for example defines the term "investment" as follows;

[117] Barton Legum, "Defining Investment and Investor: Who Is Entitled to Claim?" Paper presented at symposium co-organised by ICSID, OECD and UNCTAD held on 12 December 2005 at Paris OECD headquarters.
[118] Ibid.
[118] Republic of Kenya, Cap 485B

"The Term "investment" shall be construed to mean any kind of property invested, before or after the entry into force of this Agreement, by a natural or legal person of a Contracting Party, in conformity with the laws and regulations of that Party, irrespective of the legal form chosen, as well as of the legal framework. Without limiting the generality of the foregoing, the term "investment" comprises in particular, but not exclusively:

a) movable and immovable property and any ownership right "in rem", including real guarantee rights on property of a Third Party, to the extent that it can be invested.

b) shares, debentures equity holdings or any other instruments of credit, as well as Government and public securities in general.

c) credits for sums of money or any service right having an economic value connected with an investment, as well as reinvested income and capital gains.

d) copyright, commercial trademarks, patents, industrial designs and other intellectual and industrial property rights, know-how, trade secrets, trade names and goodwill;

e) any economic right accruing by law or by contract and any license and franchise granted in accordance with the provisions in force on economic activities, including the right to prospect for, extract and exploit natural resources;

f) any increase in value of the original investment."[119]

All the other Kenya BITs adopt a similar approach.

These definitions reflect a desire to encourage all forms of foreign investment, given that investment of capital takes a multitude of forms.[120] These definitions however make the expanse of the BIT protection very vast, and problematic because the government may not always tell what investments are likely to be affected by regulatory decisions. Under the broad

[119] Ibid, Art.1

[120] Ibid, n 108

definition of investment, the benefits relating to non-discrimination, and investment protection apply to "investments" covered in the definition.

Additionally, the definition of investments contained in the BITs does not reflect what constitutes and qualifies as foreign investments in the Kenya local statutes. Under the Investment Promotion Act,[121] one of the conditions for the issuance of an investment certificate is that "the investment and the activity related to the investment be lawful and beneficial to Kenya."[122] In determining if an investment is beneficial under the Act, regard is to be had to "the extent to which the investment or activity will contribute to creation of employment"[123], and "acquisition of new skills or technology for Kenyans"[124], as well as "its contribution to tax revenues or other Government revenues."[125] Other factors to be considered are the extent of the investment's contribution to: "a transfer of technology"[126]; "an increase in foreign exchange"[127]; "utilization of domestic raw materials, supplies and services"[128]; "adoption of value addition in the processing of local, natural and agricultural resources"[129]; "utilization, promotion, development and implementation of information and communication technology"[130]; and "any other factors that the Kenya Investment Authority (KenInvest) considers beneficial to the country."[131] None of the BITs requires that an activity be beneficial to qualify for protection as an investment. Moreover, none adopts these characteristics in describing a covered "investment."

In addition, the BITs cover Intellectual Property Rights (IPRs) without requiring that the IPRs be associated with some other form of investment for it to qualify for protection. Having IPRs in the definition of investment could expose the host State to claims by foreign investor alleging failure by government to protect their intellectual property. Furthermore, the term intellectual property is not defined in any of the first generation BITs and neither is the scope of IP limited.

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[121] Republic of Kenya, Cap 485
[122] Ibid, S. 4(1)(d)
[123] Ibid, S.4(2)(c)
[124] Ibid, S.4(2)(b)
[125] Ibid, S.4(2)(c)
[126] Ibid, S.4(2)(d)
[127] Ibid, S.4(2)(e)
[128] Ibid, S.4(2)(f)
[129] Ibid, S.4(2)(g)
[130] Ibid, S.4(2)(h)
[131] Ibid, S.4(2)(i)

There have been unsuccessful attempts by scholars and arbitral tribunals to reach a consensus on the proper meaning to ascribe to the term "investment."[132] Under Article 25[133] of the ICSID Convention, only disputes relating to 'investments' are the subject of ISDS system under the treaty. The Convention, however, does not define what constitutes investments. In an ICSID arbitration[134], the "definitional threshold" must be met under both the BIT and the ICSID Convention.[135] Non-ICSID arbitrations[136] only require the test in the IIA to be completed.[137]

3.1.1.1 Interpretation of 'Investments' by arbitral tribunals

Objections challenging the jurisdiction of international tribunals have been variously raised by respondent States in ISDS cases on the basis that claimants' assets do not constitute investments. In *Fedax v. Republic of Venezuela*[138] the dispute arose out of debt instruments issued by Venezuela and assigned to the Claimant .The Republic of Venezuela disputed the existence of an "investment" qualifying for protection under Article 25 (1)[139]ICSID Convention arguing that the transaction was not a "direct foreign investment" involving "a long term transfer of financial resources." The tribunal held that the definition of "investment" is determined by the specific BIT in question. The tribunal found the definition of the Netherland-Venezuela BIT to extend to include; "titles to money, to other assets or to any performance having an economic value" and as such promissory notes constituted covered investments.

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[132] Felix O. Okpe, "The Definition Of Investment And The ICSID Convention: Matters Arising Under The Nigerian Investment Promotion Act and International Investment Law" [2017]8(2) *AfeBabalola University Journal of Sustainable Development Law & Policy*

[133]Art. 25 (1) of the ICSID Convention provides that;
"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre……"

[134] Kenya- UK BIT, Art. 8 and Kenya- Germany BIT, Art. 11(2) allow for reference of disputes to ICSID. Kenya-Netherlands BIT at Article 11 requires a contracting party "to give sympathetic consideration to a request on the part of such national to submit for conciliation or arbitration to ICSID."

[135] Ibid (n 132)

[136] Kenya- Italy BIT at Article 9(b) allows for reference to disputes to an adhoc tribunal under UNCITRAL rules

[137] Ibid

[138] ICSID Case No ARB/96/3

[139] Article 25(1) of the ICSID Convention establishes jurisdiction for investment disputes. It provides; "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

In *Salini v. Morocco*[140], the dispute arose out of non-performance of a construction contract. The Republic of Venezuela, in challenging the jurisdiction of the tribunal, argued that this being the case the Moroccan law should be invoked to define the notion of investment. The Morocco- Italy BIT under which the investor claim was brought contains a broad definition of investments as "all categories of assets invested."[141] At Article 1(c), of the BIT, one of the covered assets is: "capitalised debts, including reinvested income, as well as rights to any contractual benefit having an economic value." The claimant characterized the said contract as an investment under this Article. The tribunal acknowledged the existence of an objective criteria for determining what constitutes an investment for the purposes of the ICSID Convention as; "duration; regularity of profit and return; assumption of risk; substantial commitment; and significance for the host state's development."[142]

Though some tribunals have made reference to the *Salini* approach in establishing the existence of an investment, some subsequent tribunals have not followed this criteria. In *Saipem S.p.A. v. Bangladesh*[143], the tribunal relied on the general phrase "any kind of property" in arriving at a decision on whether the claimant's assets operations constituted an "investment". On this the tribunal stated:

> "Article 1(1) of the BIT gives a general definition of investment as any 'kind of property'. On its face this general definition is very broad. In the light of the conclusion reached above according to which Saipem made an investment within the meaning of Article 25 of the ICSID Convention, the Tribunal fails to see how the operation at issue could not be considered as a 'kind of property' protected by the BIT."[144]

It is apparent from the above cases that arbitral tribunals have adopted the broad asset-based definitions in arriving at what constitutes investments. It is therefore important that the definitions of investments in the BITs be drafted in language that is precise that is in harmony with the understanding of what constitutes investments under the national laws.

[140] ICSID Case No ARB/00/4
[141] Art 1 of the Morocco-Italy BIT
[142] Ibid n142, Par 52
[143] ICSID Case No ARB/05/07
[144] Ibid, par. 121 and par. 122

3.1.2 Investors

Foreign investors who are meant to benefit from the protections contained in the first generation BITs are identifiable through the definitions contained in the specific BIT, on a case-by case basis. A BIT, therefore, determines if an investor is sufficiently linked to the contracting state party to qualify for protection. This is particularly the case if the investor is an enterprise or other legal person.

Both natural and legal persons qualify as investors in all the BITs. The category of natural persons requires no elaboration. A natural person in all the BITs is defined to mean a national or citizen in accordance with the contracting party's laws. None of the BITs, however, addresses how natural persons with dual nationality shall be treated, despite the fact that the Constitution of Kenya recognises dual citizenship.[145]

In the Kenya-Italy BIT, an investor is defined to include, "foreign subsidiaries, affiliates and branches controlled in anyway by the natural and legal persons" of the contracting parties.[146] This broad definition presents the risk of multiple claims against the country by companies associated with a single investment. This definition also presents potential problems as corporate structures have become quite complex and consequently investor nationality has become less and less clear. The issue that is bound to arise is whether, within a chain of investors in the complex corporate structures, there is a point when an investor claiming protection may be said to be so remotely linked to an investment to qualify for protection under the BIT.

A legal person in the Kenya- Netherlands BIT is only required to be a "national of the contracting party in conformity with its laws."[147]Under the Kenya- Italy BIT, a legal person is any entity head quartered within the contracting States territory. It then goes ahead to give examples of protected entities to include, "public institutions, corporations, partnerships, foundations and associations, regardless of whether their liability is limited or otherwise."[148] There is no requirement for control or genuine connection with the contracting party State. In the Kenya-Germany BIT "not-for-profit" entities are covered investors provided they have

[145] Republic of Kenya, Constitution of Kenya 2010, Art. 16
[146] Kenya- Italy BIT, Art 1(2)
[147] Kenya- Netherlands BIT, Art 14(d)
[148] Ibid

their seat in the territory of the contracting party.[149] These broad clauses in the BITs present an open door to abusive practices by investors.

The broad definitions of investors present a further challenge as MNCs have been known to engage in 'treaty shopping.'[150]Corporate nationality may thus be misused by MNCs in their complex group structures. An unintended result is that while the first generation BITs are investment agreements between two contracting party States, they may indirectly benefit investors of many other nationalities through "treaty shopping". The BITs do not explicitly exclude certain investors, for example those organized under 'treaty shopping' from benefiting from the treaty protections.

3.1.2.1 Interpretation of 'investor' by arbitral tribunals

In *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*[151], the claimant initiated a claim for compensation arising from Venezuela's violations of the Canada- Venezuela BIT. Venezuela's argued that Gold Reserve was not a Canadian investor as its head offices were located in the US despite being incorporated in Canada, and as such was not a covered investor under the Canada-Venezuela BIT. In rejecting Venezuela's arguments, the tribunal concluded that:

> "….where the test for nationality (provided in the BIT) is "incorporation" as opposed to control or a "genuine connection", there is no need for the tribunal to enquire further unless some form of abuse has occurred"[152]

In *Saluka Investments v. Czech Republic*[153], the claimant company was of Dutch nationality but controlled by a Japanese company. It had invested in the Czech Republic. The Czech Republic argued that as the claimant company had no business links to Netherlands, it could not benefit from the Czech- Netherlands BIT. Despite the tribunal's condemnation of the pre-

[149] Kenya-Germany BIT, Article 1(4)
[150]It means "seeking to benefit from the most advantageous protection of a treaty that has been signed by the host State in which they have invested and another State of which they do not hold nationality."
[151] ICSID Case No. ARB(AF)/09/1, Award of 22nd Sept 2014
[152] Ibid, para 252
[153]*Saluka Investments v. Czech Republic* available at https://www.italaw.com/sites/default/files/case-documents/ita0739.pdf accessed on 2009/2018.

dispute treaty shopping, it nevertheless adopted the definition of investor given in the BIT which it found did not prohibit such practices.

This goes to show that tribunals rely on the definitions of investors explicitly provided in the BITs in interpreting who qualifies as an investor for protection under a specific BIT. It is therefore important that the definition of "investors" in the BITs are drafted with clarity and precision.

3.2 Fair & Equitable treatment

Historically, the FET standard came into existence as an expression of the minimum standard of treatment.[154] The clause first appeared in the Havana Charter of 1948.[155] The International Trade Organization (ITO) established under the Charter had been tasked with, among other obligations, making recommendations;

> "… to promote bilateral or multilateral agreements on measures designed;
>
> (i) to assure *just and equitable treatment* for the enterprise, skills, capital, arts and technology brought from one Member country to another." [156]

The FET standard is an absolute standard of treatment in that imposes on the host State the obligation to act in a certain way without reference to how other investors or investments are treated.[157]

All the BITs require "fair and equitable treatment" of investments. Article 2(3) of the Kenya-Italy BIT requires "just and fair treatment" of investments. There is no reference in any of the BITs as to the standard to be applied in interpreting what is "fair and equitable" or "just and fair" treatment. The scope of the standard is thus unlimited. The open ended language of "fair and equitable" treatment standard gives rise to speculation which assumes that "it will be possible to identify one or more aspects, individually or combined, which may amount to an act of violation"[158] in ISDS cases. Additionally, the standard is not conditioned on investor's compliance with domestic laws in the BITs.

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[154] UNCTAD, "Fair And Equitable Treatment: Series on Issues in International Investment Agreements II", [United Nations, 2012] xiv

[155] Havana Charter for an International Trade Organization

[156] Ibid Art 11(2)(i)

[157] Ibid n159

[158] Rudolf Dolzer, " Fair and Equitable Treatment: A Key Standard in Investment Treaties" available at https://files.pcacpa.org/bic/1.%20Investors/4.%20Legal%20Authorities/CA108.pdf

The vagueness of the phrase 'fair and equitable' lacking specific meaning presents key development and sovereignty-related issues to Kenya. It is impossible to predict exactly what actions or omissions by the State may lead to non-compliance with the obligation. The threshold of liability under the FET standard is therefore indeterminate.

3.2.1 Interpretation of FET by arbitral tribunals

Many tribunals have interpreted the FET standard broadly to include a variety of specific requirements including a "State's obligation to act consistently"[159]"without ambiguity, arbitrariness or discrimination to ensure due process in decision-making and respect investors' legitimate expectations."[160]The arbitrators have interpreted the standard based on their own notions of "fairness" and "equity."[161] The tribunal in *Tecmed Vs Mexico*[162], for example, found that it had to interpret the FET concept "autonomously according to its ordinary meaning, international law and 'good faith' principle." The tribunal in *MTD vs Republic of Chile*[163]adopted a similar approach.

Even in instances where the foreign investor is accorded treatment similar to nationals of the host State, the FET standard may nevertheless still be found to have been violated. The FET standard has been found to be independent of the Nation treatment and MFN standards. In this regard, the tribunal in *United Parcel Service of America, Inc vs Canada*[164]while addressing the MFN and NT obligations contained in the NAFTA held that;

> "Those obligations are relative. They depend simply and solely on the specifics of the treatment the party accords to its investors or investors of third party states. Article 1105 in contrast requires states a generally applicable minimum standard which, depending on the circumstances, may require more than the relative obligations of Article 1102 and 1103."

[159] UNCTAD, "Fair And Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II",[United Nations, 2012] xiv
[160] Ibid
[161] OECD, "Working Papers On International Investment Number 2004/3", [Organisation for Economic Cooperation and Development, 2004]
[162] ICSID Case No. ARB(AF)/00/2, Award of 29th May 2003, Par 155-156
[163] ICSID Case No. ARB/01/7, Par 110-112 award of 25th May 2004,
[164] An arbitration under UNCITRAL rules- Award delivered on 24th May 2007

It is apparent from the above that tribunals have interpreted the FET standard very broadly. It is therefore important the scope of the FET standard be narrowed through specificity in language in the Kenya's BITs.

3.3Full protection and security

The provision of protection to investors against physical harm has been viewed as an embodiment of customary international law standards relating to the protection of aliens.[165] It arose out of a need to protect foreign investors from physical damage resulting from armed conflict or war in host states.[166] The full protection and security standard was thus a common feature in the Treaties of Friendship, Commerce and Navigation entered into by the US in the 18th Century and the 19th Century. The Treaty of Amity Commerce and Navigation, between Britain and the United States of America signed in 1794, for example, provided that, "…the merchants and traders on each side, shall enjoy the most complete protection and security for their Commerce."[167]

The "full protection and security" standard found its way into the first BIT signed between Germany and Pakistan in 1959. The BIT required that "investments by nationals or companies of either party shall enjoy protection and security in the territory of the other party."[168] The "full protection and security" standard of treatment has subsequently been contained in many BITs concluded around the world.

Majority of the BITs signed by Kenya contain the "full protection and security" standard. The Kenya-Germany and Kenya-UK BITs, for example, require that covered investments be accorded "full protection and security."[169] The Kenya-Slovakia BIT requires "full and constant security" while the Kenya-Libya BIT requires "proper and sufficient protection." The BITs requires this treatment in addition to the FET treatment.[170] Save for Kenya-Japan BIT and

[165] M Sornarajah, "The International Law on Foreign Investment" (CUP, 2010) at 359
[166] Collins, D. A., "Applying the Full Protection and Security Standard of International Investment Law to Digital Assets"(2011) 12(2) *Journal of World Investment and Trade*
[167] Art. 3, Treaty of Amity Commerce and Navigation between His Britannic Majesty and The United States of America,1794
[168] Art 3(1) of Germany-Pakistan BIT
[169] Kenya- UK BIT Art. 2(2); Kenya- Germany BIT, Art. 4
[170] Kenya- UK BIT Art. 2(2) provides that; "Investments of nationals or companies of each contracting party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other contracting party."

Kenya- Korea BIT which link the standard to customary international law[171], there is no reference in the BITs as to the standard to be applied in interpreting what constitutes "full protection and security."

An inference may be drawn from the language of the clause that the country is duty bound to actively take measures aimed at protecting investments from any adverse effects stemming both from government and non-government actors. This exposes the country to potentially high levels of liability.

3.3.1 Interpretation of 'full protection and security' by arbitral tribunals

Tribunals have held that "full protection and security" relates to the physical protection of the investors and their investments. In *Saluka v Czech Republic*[172] the tribunal in this regard held that;

> "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"

Some tribunals have found no distinction between "full protection and security" and "FET". The tribunal in *Wena Hotels v Egypt*[173], for example, did not distinguish between the two standards. Other tribunals have stretched the standard beyond providing physical security of the investment. In *Azurix v. Argentina*[174], for example, the tribunal in extending the obligation beyond providing physical security held that;

> "When the terms 'protection' and 'security' are qualified by 'full' and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security"[175]

[171] Art 5(1) Kenya-Japan BIT and Art 2(2) Kenya-Korea BIT
[172] Ibid n159
[173]Wena Hotels Ltd v Arab Republic of Egypt, Award of 8 December 2000.
[174]*Azurix v. Argentina*, ICSID Case No. ARB/01/12 partial award
[175] Ibid

Some tribunals have even stretched the standard further to include legal protection.[176] The tribunal in *Biwater Gauff (Tanzania) Ltd v. Tanzania*[177] , for example, was of the view that "full protection and security";

> "…implies a State's guarantee of stability in a secure environment, both physical, commercial and legal. It would in the Arbitral Tribunal's view be unduly artificial to confine the notion of "full security" only to one aspect of security, particularly in light of the use of this term in a BIT, directed at the protection of commercial and financial investments."[178]

Similarly in *Vivendi v Argentina*[179], the tribunal in rejecting an argument that "full protection and security" only applied to the physical integrity of the investment noted that;

> "If the parties to the BIT had intended to limit the obligation to 'physical interferences', they could have done so by including words to that effect in the section. In the absence of such words of limitation, the scope of the Article 5(1) protection should be interpreted to apply to reach any act or measure which deprives an investor's investment of protection and full security, providing, in accordance with the Treaty's specific wording, the act or measure also constitutes unfair and inequitable treatment. Such actions or measures need not threaten physical possession or the legally protected terms of operation of the investment. Thus protection and full security (sometimes full protection and security) can apply to more than physical security of an investor or its property, because either could be subject to harassment without being physically harmed or seized."[180]

The scope of what constitutes "full protection and security" standard can be limited in the BITs by specificity and clarity in wording in the particular BIT.

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[176] The tribunal in *Biwater v. Tanzania (2008)* stated that full protection and security "implies a State's guarantee of stability in a secure environment, both physical, commercial and legal" par 729.
[177] *BiwaterGauff (Tanzania) Ltd v. Tanzania, ICSID Case No.ARB/05/22, Award*, 2008
[178] Ibid, Par. 729
[179] *Vivendi v Argentina,* ICSID Case No. ARB/97/3
[180] Ibid, Para 7.4.17.

3.4 Most Favoured Nation Treatment (MFN)

Most-Favoured-Nation (MFN) treatment is "treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State."[181] It is a relative standard of treatment in that it requires objective comparison of treatment granted to two foreign investors in like circumstances.[182] Historically, the clause was contained in trade agreements to assure preferential treatment of goods and services regarding market access.[183] It was a common feature of the Friendship Commerce and Navigation (FCN) agreements concluded by the US in the 18th and 19th Century. The first Treaty of Amity and Commerce between the United States of America and France signed in February 1778, for example, required that:

> "The most Christian King, and the United States engage mutually not to grant any particular favour to other nations in respect of commerce and navigation, which shall not immediately become common to the other Party, who shall enjoy the same favour freely, if the concession was freer made, or on allowing the same compensation, if the concession was conditional."[184]

The Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Costa Rica signed in 1851, required that:

> "….any favour, privilege or immunity whatever, in matters of commerce and navigation, which either contracting party has actually granted, or may hereafter grant, to the subjects or citizens of any other state shall be extended to the citizens or subjects of the other contracting party…."[185]

[181] Article 5, Draft Articles on Most-Favoured-Nation Clauses, 1978 [United Nations, 2005]
[182] UNCTAD, "Most-Favoured-Nation Treatment: A Sequel" Series on International Investments Agreement II, [United Nations,2010]
[183] Ibid
[184] Art 2 of the Treaty of Amity and Commerce between the United States of America and France signed in February 1778
[185] Art. III of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Costa Rica signed in 1851

The first BIT signed between Germany and Pakistan in 1959 contained the MFN clause.[186] Most of the subsequent BITs contained the MFN clause and all the BITs signed by Kenya contain it. The clause is meant to assure non-discriminatory treatment amongst foreign investors in a host State. It prevents competition between investors from being distorted by discrimination based on nationality considerations.[187]

All the Kenya BITs contain the MFN clause. The majority of the first generation BITs combine the MFN obligation with the national treatment obligation and are very broad. The Kenya-Germany BIT for example contains an MFN provision which requires both contracting parties "not to subject investments by either party's investors to treatment less favourable than it accords to investments of its own nationals or companies or to investments of nationals or companies of any third party State."[188]

The scope of application of the MFN treatment is not limited to any specific provisions of the BITs containing it. In the Kenya- Germany BIT, for example, the MFN treatment applies to nationals and companies of contracting parties, 'as regards their activity in connection with investments.[189]The term 'activity' is both vague and broad. This kind of language leaves room for broad interpretations by arbitral tribunals as to the activities covered under the MFN clause.

While some BITs, for example, the Kenya-Germany and Kenya- Italy BITs expressly exclude from MFN treatment "privileges accorded to investors and investments of third party countries on account of its membership of, or association with a custom union, economic union, common market or free trade area; or by virtue of double taxation agreements or other agreements relating to matters of taxation"[190] , others like the Kenya-UK BIT do not expressly exclude these privileges.

In addition, the MFN clauses do not provide a comparative criteria for assessing the standard of treatment. They do not explicitly refer to 'likeness of circumstances' as the comparative context. The comparative context is then left to the determination by the international tribunals.

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[186] Art. 3(3), Germany-Pakistan BIT, 1959
[187] Ibid,14
[188] Kenya- Germany BIT, Art. 3(1)
[189] Ibid, Art. 3(2)
[190] Kenya- Germany BIT, Art.3 (2) & Art. 3); Kenya- Italy BIT, Art 3(3)

3.4.1 Interpretation of MFN treatment by arbitral tribunals

In *Maffezini v the Kingdom of Spain*,[191] the claimant invoked the MFN clause contained in the Argentina- Spain BIT and benefitted from a more favourable dispute settlement clause contained in the Chile-Spain BIT. In this case, the claimant had failed to comply with a clause in the Argentina- Spain BIT that required that local remedies be exhausted before resort was had to international arbitration. The Tribunal concluded that:

> "…if a third-party treaty contains provisions for the settlement of disputes that are more favourable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favoured nation clause as they are fully compatible with the *ejusdem generis* principle…"

In *Siemens v the Argentine Republic*[192] the ICSID tribunal held that "the language of the MFN clause is expanse to the extent that investors can import dispute settlement clauses of third party treaties which are more favourable."[193]

The potential challenges posed by the MFN clause in the BITs may be addressed by removal/omission of the standard from the BITs.

3.5 Expropriation

Expropriation may be either direct or indirect. Direct expropriation occurs when the state directly transfers legal title to the asset to the State, such as through nationalisation. Indirect expropriation, on the other hand, occurs without a direct transfer of legal title when actions by the state have the effect of diminishing the value of an investment. There is no commonly accepted definition of indirect expropriation and therefore ascertaining whether it has occurred will depend on the treaty language and the facts of the particular case.

The indirect expropriation provisions in the BITs contain minimalist and generalised language that does not draw a line between actions that diminish the value of an investment that are

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[191] ICSID Case No. ARB/97/7
[192] ICSID Case No. ARB/02/8
[193] Ibid

compensable and non-discriminatory government regulatory measures that are not compensable. The expropriation provisions are further characterised by unclear texts and vague language. They, for example, reference measures "tantamount to" or "equivalent to" expropriation as part of compensable expropriations without clearly defining the scope of such measures. A lawful exercise of police powers by the state, may have the effect of diminishing the value of an investment without amounting to expropriation.

The potential effect of this is that foreign investors can challenge governments' regulatory measures put in place for the public good, and obtain monetary compensation through an arbitration tribunal. Broad interpretations of what constitutes indirect expropriation may further lead to "regulatory chill," on part of the government which may limit the environmental, health and safety regulations for fear of ISDS challenge.

3.5.1 Interpretation of 'indirect expropriation' by arbitral tribunals

According to UNCTAD, 75% of the all ISDS Claims initiated in 2017 alleged indirect expropriation of investments by host States. [194]Investors have initiated claims against governments challenging various regulatory actions. In *Philip Morris v. Uruguay*,[195] for example, the claimant initiated a claim against Uruguay arguing that the cigarette control regulations enacted by the government expropriated "several of its brand variants, including the associated goodwill and the intellectual property rights" thus breaching the provisions of the Switzerland–Uruguay BIT. Uruguay had enacted tobacco control regulations requiring, among others, the printing of health warnings on the cigarette packaging. While the claimant ultimately lost in the case, this goes to show that while the expropriation provisions were not designed to limit legitimate regulatory behaviour, investors have indeed used the provisions to challenge governments' legitimate regulatory actions.

In *Ethyl v. Canada*[196], Ethyl Corporation, initiated a claim against Canada following a ban of MMT, a toxic gasoline additive, arguing that it constituted "indirect" expropriation of its assets under NAFTA. The government of Canada entered into a settlement with the claimant which

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[194] UNCTAD, "Special Update On Investor–State Dispute Settlement: Facts And Figures", IIA Issues Note Issue 3, [United Nations, 2017]
[195] ICSID Case No. ARB/10/7
[196] NAFTA/UNCITRAL Case available at <https://www.italaw.com/cases/409> accessed on 9/10/2018

saw it lift the prohibition on the use of MMT. In addition Canada paid the $13 million to the claimant in compensation.[197]

In *Vattenfall v. Germany*[198], Vattenfall, a Swedish energy firm, initiated a USD 1.9 billion investor claim against Germany arguing that the environmental rules established by the Ministry of Environment, with clear requirements for the establishment of the claimant's energy plant amounted to, among other violations, an indirect expropriation. To avoid the uncertainty of a possible runaway award by a tribunal, Germany opted to settle the dispute with the claimant. In addition, Germany had to abandon the new environmental rules and subsequently issued the contested permits to the claimant.

Tribunals have been faced with the challenge of differentiating between indirect expropriation and legitimate regulatory action by government that is non-compensable. In *Saluka Investments v. Czech* Republic[199] , for example, the tribunal in this regard stated that;

> "international law has yet to identify, in a comprehensive and definitive fashion, precisely what regulations are considered 'permissible' and 'commonly accepted' as falling within the police or regulatory power of States and, thus, non-compensable."[200]

Different tribunals have adopted different criteria to establish indirect expropriation. Some tribunals have looked at the severity of the loss on the investment and the impact on the economic rights of the investor.[201]

The potential controversies in the expropriation clauses of the first generation BITs can however be minimized through adopting specificity in language and by clarifying the text in the first generation BITs.

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[197] Ray Minjares, "Update: MMT," The International Council on Clean Transportation, February 16, 2012. available at <http://www.theicct.org/blogs/staff/update-mmt> accessed on 9/10/2018

[198] ICSID Case No. ARB/09/6, Award, March 11, 2011, at par 17

[199]Saluka Investments v. Czech *(*UNCITRAL*)1976*

[200]Ibid, Para 263

[201]Metalclad Corp. v. Mexico, ("Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.")

3.6 Conclusion

As demonstrated in this Chapter, the language of the substantive provisions of the first generation is vague with language that is broad, ambiguous and highly generalised. Further, and as demonstrated by arbitral tribunals' decisions, this may lead to legal uncertainty as tribunals have no guidance from the texts of the respective BITs.

Using the broad protections in the first generation BITs, private investors can successfully challenge regulatory measures taken by the government meant for the public good, and obtain monetary compensation through arbitration tribunals. The potential broad interpretations of what, for example, constitutes "indirect" expropriation may in turn lead to "regulatory chill," on part of the government. This may in turn limit regulatory measures, by the government, for the public good.

The Chapter that follows explores the language that has been adopted in select progressive BITs, and recommends language that may be adopted to address the problematic substantive provisions of the BITs.

CHAPTER FOUR

APPROACHES TO PROBLEMATIC SUBSTANTIVE PROVISIONS IN BILATERAL INVESTMENT TREATIES

4.0 Introduction

As demonstrated in Chapter III, conflicting interpretations by international tribunals of the various standards of protections in the BITs may have a 'regulatory chill' effect on the government as there lacks clarity on what actions or measures would offend foreign investments. This raises concerns regarding the interface between BITs and investment protection on the one hand, and public policy concerns of the state on the other hand. Countries faced with this predicament have made attempts at addressing these concerns by adopting language that is clear and specific. The recent trend in newer investment agreements has increasingly been the narrowing of the scope of these broad provisions.

This Chapter looks at the language that has been adopted in standard provisions of some select BITs and recommends preferred options for consideration in addressing the weaknesses in the language of the BITs discussed in Chapter III. Specifically, the Chapter will look at "2012 US Model Bilateral Investment Treaty(US Model BIT)", "Model Text for the Indian Bilateral Investment Treaty, 2015"(India Model BIT), "The Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria(Nigeria-Morocco BIT)", and "Agreement between the republic of Rwanda and the United Arab Emirates on the Promotion and the Reciprocal Protection of Investments" (Rwanda-UAE BIT) which the author believes are important reference texts.

The US policy on foreign investments has for long been positive and by the 20th Century, it was the world's main engine of overseas investment.[202] Investor claims initiated under NAFTA by Canadian companies against USA led to NAFTA member countries issuing interpretation notes on the broad investment protection provisions in the NAFTA. It also led to the devising

[202] Stephen M. J, "Investment Treaties at 50: Host State Perspectives" discussion paper presented at Twelfth ITF Public Conference on 15 May 2009 British Institute of International & Comparative Law, London available at <https://www.biicl.org/files/4253_schwebel-biicl15may2009speech_cor2.pdf> accessed on 11/10/2018

and publishing of the US Model BIT. This background makes the 2012 US Model BIT an important reference text.

The ISDS cases against India led to a fundamental rethink and review of BITs in India.[203] Faced with a number of investor claims initiated against it, the government of India realised that the broad and vague investment protection standards undermined the government's right to regulate, while giving precedence to investors rights. As a result India began terminating the existing BITs and has presently terminated 58 of its BITs. The India Model BIT was thus drafted as a reaction to, and with a view to narrowing the scope of the investor rights and clarifying the language of the standards of treatment of investments in its BITs, making it an important text to refer to.

The Nigeria-Morocco BIT was signed in December 2016.[204] It is an innovative new generation, reform-oriented BIT that seeks to strike a balance between the need for protection of foreign investment and the government's right to regulate. One of the objectives of the BIT as stated in its preamble is "seeking an overall balance of the rights and obligations among the State parties, the investors, and the investments." The BIT thus departs from the traditional investment treaties by imposing a broad range of obligations on both the investors and State parties. It also has "sustainable development" as its overarching theme. This makes it an important reference text for the study.

The Rwanda-United Arab Emirates BIT was signed in 2017.205 It is also a modern reform-oriented BIT that, among others, contains provisions aimed at ensuring responsible investment while at the same time preserving the contracting States' regulatory space. It is aligned with modern IIA treaty practice by safeguarding sustainable development while preserving the State's right to regulate. One of the objectives of the BIT is "seeking an overall balance of the

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[203]Prabhash Ranjan et al, "India's Model Bilateral Investment Treaty: Is India too Risk Averse?" available at https://www.brookings.edu/wp-content/uploads/2018/08/India%E2%80%99s-Model-Bilateral-Investment-Treaty-2018.pdf accessed on 15/10/2018

[204] The Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and The Government of the Federal Republic of Nigeria.

[205] The Agreement between the Republic of Rwanda and The United Arab Emirates on the Promotion and Reciprocal Protection of Investments

rights and obligations among the contracting parties, the investors and the investments." [206]This makes it an important reference text.

4.1 Definition of 'Investments' and 'Investors'

4.1.1 Investments

As discussed in Chapter III, all the first generation BITs adopt a "broad asset- based" definition of investments to include "every kind of asset." These definitions make the expanse of the BIT protection very vast and problematic.

Owing to the broad interpretations given to the term 'investments' by international tribunals, countries have sought to narrow the scope of the protected investments in their IIAs. According to UNCTAD, the narrowing techniques that have been adopted in the definition of investments include: "applying the protection of the treaty only to investments made in accordance with host country law,"[207] "using a closed-list definition instead of an open-ended one,"[208] "exclusion of portfolio investments by restricting the asset-based approach to direct investment only,"[209] "introducing investment risk and other objective factors to determine when an asset should be protected under the treaty,"[210] "excluding certain types of assets such as certain commercial contracts, certain loans and debt securities and assets used for non-business purposes,"[211] "a more selective approach to intellectual property rights as protected assets,"[212] and "dealing with the special problems of defining the investment in the case of complex group enterprises as investors."[213]

The US Model BIT contains an open-ended definition which is accompanied by explanatory footnotes. Article 1 defines "investment" as "every asset that has the characteristic of an investment…" The footnotes provide for the characteristics that are required of the investments and specific exclusions.

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[206] Preamble of the Rwanda-UAE BIT

[207] UNCTAD, "Scope and Definition: A Sequel", Series on International Investment Agreement II pp 5 & 6, [United Nations, 2011]5,6 Series on International Investment Agreement II

[208] Ibid

[209] Ibid

[210] Ibid

[211] Ibid

[212] Ibid

[213] Ibid

The India Model BIT, on the other hand, requires that an investment should be made in "accordance with the laws of the host State" for it to qualify as a covered investment. This then denies protection to investments that are non-compliant.[214] In addition, the investment must be "owned or controlled in good faith by an investor". Under the India Model BIT, an enterprise is deemed to be owned by an investor if "more than half of the capital in the enterprise is owned by it."[215] An enterprise is deemed to be controlled by an investor if such investor "has the right to appoint a majority of the directors or senior management officials or to control the management or policy decisions of such enterprise."[216] The India Model BIT goes ahead to explicitly provide a list of assets that are excluded from protection under the treaty. These include; "portfolio investments, goodwill, brand value, market share (or similar intangible rights), any interest in debt securities issued by the government or any pre-operational expenditure that is incurred before an enterprise has commenced substantial and real business operations in the host state."[217]

The Rwanda-UAE BIT contains a broad asset-based definition of investments to include "every kind of asset."[218] It requires that, "an asset must have the characteristics of an investment including certain duration, commitment of capital or other resources, the expectations of gain or profit, and the assumption of risk" for it to be qualify for protection.[219] It explicitly excludes "claims to money that arise solely from commercial contracts for sale of goods and services" , "the extension of credit in connection with a commercial transaction" and "an arbitration award or any order or judgement rendered with regard to the investment" from what constitute "investments" under the BIT.

A perfect definition of the term 'investment' is elusive and focus should be on drafting a good definition that is clear and consistent. The recommended preferred option for Kenya would be the definition contained in the India Model BIT with some modifications to incorporate the *Salini* test.[220] This includes incorporating additional requirements on "duration of the investment, the regularity of profit and return, the assumption of risk, requirement for

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[214] UNCTAD, "Scope and Definition", [United Nations, 1999]35, IIA issues paper series
[215] India Model BIT, Art 1.6.1(ii)
[216] Ibid, Art. 1.6.1(i)
[217] Ibid, Art 1.4(i-viii)
[218] Rwanda-UAE BIT, Art. 2
[219]Ibid
[220]The tribunal in *Salini v. Morocco* explicitly recognized the existence of an objective criteria that has to be met if a particular asset is to be considered an "investment" for the purposes of the ICSID Convention.

substantial commitment; and significance for the host State's development"[221] as contained in the Nigeria –Morocco BIT. Further, the definition should incorporate a requirement that the investment and the activity must be lawful and beneficial to Kenya to align it to the requirements contained in the Investments Promotion Act.[222]

4.1.2 Investor

As discussed in Chapter III, the definition of 'investor' is critical to determining the scope of the BIT as it provides for who qualifies for the BIT protection. The key issues that arise in the definition of an investor are the types of persons, both natural and legal, to be covered, and the criteria for determining that such persons are covered in the BIT.

To narrow the scope of covered investors under the BITs, legal persons may be defined by both express inclusion and exclusion of different types of entities. Generally speaking, legal entities may be excluded based on their legal form, their purpose or their ownership.[223] A BIT may for example exclude from coverage enterprises that are not-for-profit. The Convention establishing the Multilateral Investment Guarantee Agency, for example, requires that a legal person must "operate on a commercial basis" to be recognised as an investor.[224]

The US Model BIT defines both the terms "investor of a party" and "investor on a non-party". It also contains a "denial of benefits" clause to limit treaty-shopping. It requires "direct linkage and business activity" in the host State for an investor's investment to qualify for protection, thus excluding from protection "mail-box" companies. Article 17(2) of the Rwanda-United States BIT, for example provides that;

> "A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has

[221] Ibid, Par 52

[222] S.4(2) of the Investments Promotion Act provides that " In determining whether an investment and the activity related to the investment are beneficial to Kenya, the Authority shall consider the extent to which the investment or activity will contribute to (a) creation of employment for Kenyans; (b) acquisition of new skills or technology for Kenyans; (c) contribution to tax revenues or other Government revenues; (d) a transfer of technology to Kenya; (e) an increase in foreign exchange , either through exports or import substitution; (f) utilization of domestic raw materials, supplies and services; (g) adoption of value addition in the processing of local, natural and agricultural resources; (h) utilization, promotion, development and implementation of information and communication technology; (i) any other factors that the Authority considers beneficial to Kenya."

[223]UNCTAD, "Scope and Definition" IIA issues paper series (United Nations, 1999)32 available at <https://unctad.org/en/Docs/psiteiitd11v2.en.pdf> accessed on 30/1-0/2018

[224] Art. 13 (a) (iii) of the Convention establishing the Multilateral Investment Guarantee Agency

no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise."

The India Model BIT explicitly excludes "a branch or representative office" as investors. [225]It requires that a "juridical person" be constituted in accordance with the laws of the host State party and either "have substantial business activities" in the host State party's territory or "be directly or indirectly owned or controlled by a natural or legal person of that party."

The Rwanda-UAE BIT requires that a legal entity "has substantial business activities and is the owner, possessor or shareholder of an investment in the territory of the other contracting party." The Nigeria-Morocco BIT requires that an investor that is a legal entity "be established or constituted in accordance with the law of the host State" and "having its headquarters and centre of its economic activity or principal place of business" in the territory of the host State party.[226] The Rwanda-UAE and Nigeria-Morocco BITs do not however address the issue of dual nationality in case of natural persons.

The preferred recommended option for Kenya is the definition in the US Model BIT with modifications as relates to the definition of "legal persons" with a view to combining the concept of incorporation, the seat and control of the investment. The definition of a natural person should contain a clause addressing the issue of dual nationality as is the case in the US Model BIT to prohibit dual citizens from claiming protection for investments in a country for which they are citizens. It should also have a "denial of benefits" clause like in the US Model BIT to limit entities organised through "treaty-shopping" from benefiting from the BIT provisions.

4.2 Fair & Equitable Treatment

While acknowledging that it is impossible to devise ahead of time a comprehensive list of all government actions that may adversely and unfairly affect an investment, the uncertainty in the scope of the FET standard can be greatly minimised by greater specificity in the wording of the standard in the BITs. As noted in Chapter III, the BITs guarantee "fair and equitable" treatment of investments without defining what constitutes such treatment, and have left it to arbitral tribunals to interpret and apply the standard in specific cases.

[225] Art 1.5 India Model BIT
[226]Art 1(2),Nigeria-Morocco BIT

In newer investment agreements, States have made attempts at narrowing the scope of FET by adopting greater specificity in language. Some States have explicitly referred to the customary international minimum standard of treatment. The arbitral tribunals then use the customary minimum standard as a 'yardstick' for determining FET violation. The 2012 US Model BIT, for example, in its Article 5(1) requires that;

> "Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment……"

It goes further and attempts to define the customary international minimum standard of treatment as follows;

> "Fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world;"[227]

The Nigeria-Morocco BIT adopts a similar approach and language in defining the FET standard of treatment.

The Rwanda-UAE BIT explicitly outlines measures that would constitute the breach of the FET standard of treatment. It provides;

> "A contracting party breaches the obligation to fair and equitable treatment where a measure or series of measures constitute;
>
> a. Denial of justice in criminal, civil or administrative adjudicative proceedings
> b. Fundamental breach of due process in judicial and administrative proceedings;
> c. Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
> d. Abusive treatment such as coercion, abuse of power or similar bad faith conduct."[228]

The Model Indian BIT, on the other hand, avoids the use of the term 'fair and equitable treatment' altogether, but describes what is generally deemed as constituting the standard, and links it to the customary international law standard. In its Article 3, the Model Indian BIT requires that no party shall take;

> "…..measures which constitute a violation of customary international law, through:
>
> (i) Denial of justice in any judicial or administrative proceedings; or
>
> (ii) fundamental breach of due process; or
>
> (iii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or

[227] Art. 5(2), 2012 US Model BIT
[228] Art. 4(2), Rwanda-UAE BIT

(iv) Manifestly abusive treatment, such as coercion, duress and harassment."[229]

It further requires that a claimant exhausts local remedies before resort to the international tribunals for claims for breach of the standard.[230]

A preferred recommended option for Kenya would be the language in the Rwanda-UAE BIT. It adopts specificity in the language of the standard. It is an embodiment of Article 47(1) of the Constitution, entitling every person to "administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair", as well as Article 50 guaranteeing a fair hearing/trial before courts, tribunals or other impartial bodies. With the specificity in language, foreign investors and their investments will be entitled to the same treatment as is accorded to nationals.

4.3 Full protection and Security

As noted in Chapter III, majority of Kenya BITs guarantee 'full protection and security' of investments without defining what constitutes such treatment. Tribunals, as demonstrated in Chapter II, have given this literal meaning requiring the governments to actively protect investments from any potentially injurious acts by government and non-government actors.

Globally, newer IIAs have made attempts at narrowing the scope of the standard by adopting greater specificity. Some countries' BITs have explicitly linked the standard to the customary international minimum standard of treatment. The linking of the standard to the customary international law standard, to a certain degree, clarifies the meaning of the standard and provides guidance to arbitral tribunals on how to determine breach of the 'full protection and security' clause. The US Model BIT, for example, in its Article 5(1) provides that;

> "Each Party shall accord to covered investments treatment in accordance with customary international law, including ….full protection and security."[231]

In addition, the US Model BIT provides that "full protection and security requires each Party to provide the level of police protection required under customary international law thus

[229] Art 3, Model Indian BIT, 2015
[230] Article 3(4), Indian Model BIT
[231] Art 5(2) (b), US Model BIT

explicitly defining the confines of application of the standard."[232] The Nigeria-Morocco BIT adopts a similar approach.

The Indian Model BIT contains a "full protection and security" standard but expressly limits its application solely to "the physical security of the investors and their investments."[233] In addition, it requires that an investor first exhausts local remedies before initiating a claim at the international tribunals.[234]

The Rwanda-UAE BIT specifically limits the scope of the "full protection and security" standard. According to the Rwanda-UAE BIT, "full protection and security" refers to "the contracting Party's obligations to act as may be reasonably necessary to protect the physical security of investors and covered investments that do no create additional obligations other than those which it offers to its own nationals."[235] The standard of protection is thus the same as that accorded to nationals.

A preferred recommended option for Kenya is the approach in the Rwanda-UAE BIT which explicitly limits "full protection and security" to provision of physical security of an investment same as is offered to national investors. This aligns it to the Constitution which assures the protection of property, without creating any additional obligations on the State.

4.4 Most Favoured Nation Treatment

As highlighted in Chapter III, the MFN clauses in the BITs are very broad. The challenge with the clause is its ability to allow investors to create their own treaties with the goal of advancing their own interests.[236]

The US Model BIT contains a MFN Clause which is distinct from the Nation Treatment clause. It clearly spells out the context within which the standard is to be applied. It requires no less favourable treatment of investors and investments in "like circumstances" than that of investors and investments of a non- party[237] thereby giving a comparative context. It further spells out the scope of the application of the standard. The MFN standard of treatment is to be applied in

[232] US Model BIT (2012), Art 5(2)
[233] Indian Model BIT, Art 3(2)
[234] Ibid, Art 3(4)
[235] Article 4(3), Rwanda-UAE BIT
[236] UNCTAD "Most-favoured Nation Treatment" Series on Issues in International Investment Agreements II [United Nations, 2015]58-62 available at <*http://unctad.org/en/Docs/diaeia20101_en.pdf*> accessed on 18/10/2018
[237] Ibid n236, Art 4(1) and Art 4(2)

respect to "establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory."[238]

The Rwanda- UAE BIT contains a similar provision with similar wording and specifically excludes the application of the MFN standard to investor- state disputes settlement.239It also has carve-outs in respect of privileges or benefits accruing from custom and economic unions or free trade areas, or from double taxation agreements.[240]

In addition to providing a comparative context for application of the MFN (like circumstances), the Nigeria-Morocco BIT establishes a criteria for determination of "likeness of circumstances." It requires a "case-by-case" overall examination of the circumstances of an investment;

> "including, but not limited to;
>
> a. Its effect on third person and the local community;
> b. Its effect on the local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment;
> c. The sector in which the investor is in;
> d. The aim of the measure concerned
> e. The regulatory process generally applied in relation to the measure concerned; "[241]

In contrast, the Indian Model BIT excludes in its text the MFN standard of treatment.

A preferred recommendation for Kenya would be the exclusion of the MFN clause. The reason for this is the potential for abuse of the clause by investors and the possible broad interpretations by arbitral tribunals. The MFN clause as it is in the first generation has the potential unintended consequence of multilateralizing bilateral obligations. In any event, the Constitution of Kenya assures equal treatment of persons.

4.5 Expropriation

In recent investment agreements, countries have sought to clarify the scope of the standard by adopting specificity and clarity in the language of the clause. The 2012 US Model BIT, for

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[238] Ibid.
[239] Art. 6(3), Rwanda-UAE BIT
[240] Ibid, Art 6(4)
[241] Art 6(3), Nigeria-Morocco BIT

instance, is clear as to the compensation payable for expropriation as "the fair market value of the expropriated investment immediately before the expropriation took place."[242]The Nigeria-Morocco BIT contains a similar provision.[243] In its Annex B, the US BIT Model defines what constitutes an indirect expropriation and explicitly excludes "legitimate government actions aimed at the public welfare except in rare circumstances.[244]

While the Indian-Model BIT does not expressly define indirect expropriation, it does however recognise measures having an effect equivalent to expropriation as compensable.[245] Like the US Model BIT and the Nigeria-Morocco BIT, the India Model BIT requires a "case-by-case fact based inquiry" in determining if a measure constitutes indirect expropriation. It requires significant deprivation of the investor's right of management and control over the investment for indirect expropriation to be deemed to have occurred.[246] Like the US Model BIT, the India Model BIT also explicitly excludes from indirect expropriation "legitimate public welfare actions by the government" without making exceptions.[247] It goes further to expressly deny arbitral tribunals of the authority to determine if a measure taken by the government was for a public purpose or in compliance with its laws.[248] It also expressly defines a valuation criteria for the compensation payable. The compensation payable is, "the fair market value of the expropriated investment as reduced after application of relevant mitigating factors."[249] Among the relevant mitigating factors are: "any insurance pay-outs received by the investor or investment from other sources"[250], "liabilities owed in the Host State to the government as a result of the Investment's activities"[251], "any harm or damage that the Investor or its Investment has caused to the environment or local community that have not been remedied by the Investor

[242] Ibid n236, Art. 6(2)
[243] Art. 8(3) of the Nigeria- Morocco BIT
[244] Ibid, Annex B(4)(b)
[245] India Model BIT, Art 5.1
[246] Ibid, Art 5.2(ii)
[247] Ibid, Art 5.4
[248] Ibid, Art 5.5
[249] Ibid
[250] Ibid, Art 5.7(b)
[251] Ibid, Art 5.7(h)

or the Investment"[252] and "any other relevant considerations regarding the need to balance the public interest and the interests of the investment."[253]

Like the Indian Model BIT, the Rwanda-UAE BIT does not expressly define indirect expropriation, but it does recognise indirect expropriation as compensable. It requires that "compensation shall be paid without delay, be effectively realizable and freely transferable" where an investment is expropriated.[254] The Nigeria-Morocco BIT has a similar provision.[255] The preferred recommended option for the Kenya BITs would be the provision in the Indian Model BIT. The provision is detailed with language that is clear and precise. Unlike in the US Model BIT, Rwanda-UAE BIT and Nigeria-Morocco BIT, the exclusion of regulatory measures from compensable expropriation in the India Model BIT is specific and clear. It does not leave room for investors to argue otherwise. It also provides a compensation formula which also takes into account the conduct of the investor and other relevant circumstances in arriving at payable compensation. More importantly, it expressly takes away the authority of arbitral tribunals to determine if a measure taken by the government was for a public purpose or in compliance with its laws. The determination of the government on a measure is thus final.

4.6 Conclusion

This Chapter has looked into the approaches adopted by select progressive BITs in addressing the broad definitions of "investor" and "investments", as well as "MFN treatment", "FET standard", "full protection and security" standard, and the "expropriation clause". The Chapter has specifically looked at the texts of the US Model BIT, the India Model BIT, the Rwanda-UAE BIT and the Nigeria- Morocco BIT.

It is clear from the analysis that these BITs have adopted various, but similar approaches, in redressing the language of the protection provisions, as well as the definitions of "investors" and "investments." All the four BITs have focused on clarifying the content and the scope of the investment protections. This has been achieved through specificity in texts for example through definitions of "investors" and "investments", and of "indirect expropriation." To limit

[252] Ibid, Art 5.7(i)
[253] Ibid, Art 5.7(j)
[254] Art 8(4), Rwanda-UAE BIT
[255] Art 8(4), Nigeria-Morocco BIT

the scope of the standards of protection, some of the BITs as demonstrated, have linked the FET and ‘full protection and security’ standards to customary international law.
The specificity in the texts means that arbitral tribunals get guidance from the text of the BITs themselves in case of disputes, and also leaves room for legitimate action by governments to regulate in public interest.

The following Chapter explores the options available, and makes recommendations for addressing the problematic language of the substantive provisions of the BITs.

CHAPTER FIVE

FINDINGS, CONCLUSION AND RECOMMENDATIONS.

5.0 Introduction

This paper has engaged in a discussion on the vaguely drafted substantive provisions of Kenya's BITs. The paper sought to expose the weaknesses in the language of the substantive provisions of the BITs in force in Kenya, as well as explore the implications of such weaknesses in language. As has been established in Chapter III, the substantive provisions of the BITs are couched in language that is vague. The definitions of what constitutes "investments" and "investors", to start with, is both broad and open ended. Investments are defined as "any kind of assets." There is no exclusion of legal entities organised by "nationality-planning" from protection as investors. The implication of such language is that it makes the expanse of application of the substantive protections contained in the BITs very broad.

The standards of protection are also drafted in language that is broad and open-ended in that while the standards of treatment that foreign investors and their investments are entitled to are expressly provided for in the BITs, no attempt is made at defining what those standards specifically constitute. The "FET" and "full protection and security" standards, for example, are not defined. In addition, the language of some of the substantive provisions, as has been discussed in Chapter III, is minimalist. As an example, "measures tantamount to expropriation" are deemed to constitute compensable expropriation, without elaboration in the BIT texts on what these measures are. This gives room for very broad interpretations by arbitral tribunals in the event that claims are initiated resulting in legal uncertainty as tribunals interpret the same obligations in different normative conceptions. The vagueness in the language also presents key development and sovereignty related challenges for the country as has been discussed in Chapter III. Private investors can initiate claims challenging legitimate government regulatory actions, and obtain monetary compensation through arbitral tribunals. It is impossible to predict exactly what actions or omissions by the government may lead to breach of the obligations contained in the BITs. This is turn may have an effect on the government's ability to regulate in public interest for fear of ISDS challenge.

Having found that the substantive provisions of the BITs contain language that is vague, Chapter IV of the study has explored the language adopted by select countries in the substantive

provisions of their BITs. It has looked at the language of the substantive provisions in the US Model BIT, India Model BIT, Nigeria-Morocco BIT and the Rwanda- UAE BIT, and recommended preferred language options for the Kenya BITs.

This Chapter concludes the study by looking at, and making recommendations on options available to Kenya in addressing the problematic substantive provisions of the BITs.

5.1 Options for reform for the first generation BITs

The following are options that may be explored for reform of the Kenya's BITs;

5.1.1 Joint interpretations

As drafters and masters of their treaties, States retain interpretive authority over them.[256] An interpretation clarifies the meaning of the original text. This reform option entails the least change as it merely focuses on clarifying the content and scope of the protection provisions.

Article 31(3) (a) of the Vienna Convention on Law of Treaties (VCLT) expressly requires consideration of subsequent agreements between treaty parties about "interpretation of the treaty or the application of its provisions." Joint interpretations would allow the contracting parties in the first generation BITs to clarify the specific problematic substantive provisions without amending or renegotiating the treaty. Provisions expressly contemplating the subsequent agreement of treaty parties on binding interpretations were initially introduced into the 1994 NAFTA Agreement. In 2001, the NAFTA Free Trade Commission adopted "Notes

[256] Ibid

of Interpretation of Certain Chapter 11 Provisions", clarifying, for example, NAFTA Article 1105(1) on the minimum standard of treatment.

One of the advantages of joint interpretation is that later interpretive agreements do not need to take the same form as the initial treaty.[257] No ratification is required for the joint interpretations and it is less costly compared to renegotiating the BITs.
With this option however, an entirely new meaning cannot be assigned to a provision[258] and is only limited to clarification of the existing provisions.

5.1.1 Amendments

Amendments constitutes a broader and more far-reaching tool than joint interpretation in that they can be "used to modify or suppress existing provisions in a treaty", as well as to introduce new rules.[259] The general rule under Article 39 of the VCLT is that parties to a treaty may amend it by consent, and therefore the amendment option is available for all the BITs.

In 2016, SADC member States amended Annex 1 of the "SADC Protocol on Finance and Investment" by omitting the FET provision and the ISDS mechanism.[260] The amendments also included the narrowing of the definitions of investment and investors.[261] With regards to compensation for expropriation, the amendment replaced the payment of "prompt, adequate and effective compensation" with "fair and adequate compensation to be assessed at fair market value."[262]

A similar approach could be adopted for the Kenya BITs. As regards the amended definition of "investments", focus should be on narrowing the scope of the covered investments, with language that is clear and consistent. Narrowing the scope may be achieved by adopting a "closed-list" definition as opposed to an "open-ended" one as is the case in the Nigeria-Morocco BIT.263 In addition, additional requirements such as "duration of the investment",

[257] Gaukrodger, D, "The legal framework applicable to joint interpretive agreements of investment treaties", Working Papers on International Investment [Organisation for Economic Development, 2016], available at. http://dx.doi.org/10.1787/5jm3xgt6f29w-en accessed on 10/10/2018.
[258] UNCTAD, "Phase 2 of IIA Reform: Modernizing the Existing Stock of old-generation Treaties", Issue 2 IIAs issues Notes, [United Nations, 2017]9
[259] Ibid, 10
[260] Agreement amending Annex 1(SADC Protocol on Finance & Investment) 2016
[261] Ibid, Art 1
[262] Ibid, Art 5
[263] Art 1(3), Nigeria-Morocco BIT

"the regularity of profit and return", "the assumption of risk", "requirement for substantial commitment", and "significance for the State's development" should be incorporated in the definition as characteristics of what constitutes an "investment."[264] The definition should incorporate a requirement that the investment and the activity must be lawful and beneficial to Kenya to align it with what qualifies as an investment under the local laws,[265] and should contribute to sustainable development of the country as is the case in the Nigeria-Morocco BIT.[266] The definition of investments should also, for clarity, exclude certain types of assets used for "non-business" purposes like is the case in the India Model BIT from protection as investments. These include "portfolio investments, goodwill, brand value, market share (or similar intangible rights), any interest in debt securities issued by the government or any pre-operational expenditure that is incurred before an enterprise has commenced substantial and real business operations in the host state."[267]

As regards the amended definition of "investors", focus should be on narrowing the scope of covered investors, both "legal" and "natural." Legal persons may be defined by both express inclusion and exclusion of different types of entities. This may be achieved through combining the requirements for incorporation, control, substantial business activity and the seat of the legal entity, thus excluding from protection "mail-box" companies. In addition, the definition of "investor" should include a "denial of benefits" clause to exclude companies organised through "nationality-planning" from protection under the BIT.[268] To prohibit dual citizens from claiming protection for investments in a country in which they are citizens, the definition should expressly address the issue of dual nationality. Like in the US Model BIT, a natural person with dual citizenship "should be deemed to be exclusively a national of the State of his or her dominant and effective nationality."[269]

The amendments to the standards of treatment should be aimed at narrowing the scope of application, by adopting specificity and clarity in language. The vague "FET" standard provisions contained in the BITs should be replaced with a provision that clearly defines what measures by the State would constitute breach of the "FET standard" as is the case in the

[264] The Salini test found in the case of
[265] S.4. of the Investment promotion Act requires that an investment be lawful and be beneficial to Kenya for an investment certificate to be issued.
[266] Art 1(3), Nigeria-Morocco BIT
[267] Art 1.4(i-viii), India Model BIT
[268] Article 17(2) , Rwanda-United States BIT
[269] Art 1, US Model BIT

Rwanda-UAE BIT. The FET standard should be aligned with the provisions of the Constitution on access to justice,[270] fair hearing[271]and fair administrative action.[272] In addition, the FET standard of treatment should not impose obligations on the government above that which is accorded to nationals.

Greater specificity in language should be the focus of the amended "full protection and security" standard of treatment. As discussed in Chapter III, the language of the "full protection and security" standard of treatment adopted by the BITs implies an obligation by the State to actively take measures to protect investments from any potentially injurious acts by government and non-government actors. The "full protection and security" standard of treatment should be limited to the physical security of the investor and its investments, same as accorded to nationals and investments by nationals, without creating additional obligations on the government. This is the approach taken in the Rwanda-UAE BIT.[273] This aligns it with the provisions of the Constitution assuring security of persons,274 and the protection of right to property.[275]

As seen in Chapter III, the MFN clause contained in the BITs has the potential unintended consequence of multilateralizing bilateral obligations. The recommendation for Kenya would be to exclude the provision in the BITs. The exclusion of the MFN clause may be achieved through amendments to the BITs.

The expropriation clauses in the BITs contain language that is minimalist and vague, as seen in Chapter III. Focus should be on drafting an expropriation clause that is detailed, with language that is clear and precise. "Indirect" expropriation should be explicitly defined as is the case in the US Model BIT.[276] An exclusion of regulatory measures by government from compensable expropriation should be introduced in language that is clear and specific as is the case in the India Model BIT.[277] Determination of what constitutes indirect expropriation should be based on a "case-by-case" facts based inquiry of the measures taken. The recommendations

[270] Art 48, Constitution of Kenya 2010(CoK)
[271] Art 50, CoK
[272] Art 47, CoK
[273] Art 4(3), Rwanda-UAE BIT
[274] Art 29, CoK
[275] Art 40, CoK
[276] Annex B(4)(b), US Model BIT
[277] Art 5.4 India Model BIT

for the expropriation clause go beyond clarification of the BITs language to additions on the language, as well as introduction of new rules.

The challenge with this reform option is that it requires domestic ratification of the amendments in order to take effect.[278] Countries involved may also complicate the amendment by making demands on further changes to BITs as a pre-condition for them acceding to the proposed amendments.

5.1.2 Terminating and replacing the BITs with new ones.

Under the Vienna Convention on the Law of Treaties ("VCLT"), a treaty may be terminated in conformity with its provisions[279] or by consent of all contracting States.[280] A BIT may thus be terminated unilaterally if it so provides. All the Kenya BITs provide for an option of unilateral termination by notice. The notice, which may only be given before the expiration of the initial or subsequent BITs' terms, must be provided in writing to the other State Party.

However, even if terminated, majority of the Kenya BITs include sunset clauses that bind the country for a further period. The further period contained in the BITs ranges from five to twenty years. Under the Kenya- Germany BIT, for example, the existing investments are protected for a period of 15 years after termination.[281] The Kenya-UK BIT similarly provides that investments made prior to the date of termination of the treaty are protected for a period of 20 years after termination.

Article 54(2) of the VCLT provides for termination of a treaty by consent of all the parties. This however can only happen after consultation with the other contracting State. An issue that then arises is whether, in the event of termination by consent, the Contracting States may agree to terminate the treaty together with its sunset clause or modify the latter with the effect of shortening the relevant sunset period. There are precedents indicating that States may seek to avoid the prolonging effects of sunset clauses. In 2011, for example, Denmark and the Czech Republic amended the BIT by consent removing the sunset clause then proceeded to terminate

[278] Ibid (n 294), 10
[279] Art. 54(a) of the Vienna Convention on the Law of Treaties(Concluded on 23rd May 1969)
[280] Ibid, Art 54(b)
[281] Kenya-Germany BIT, Art 13(3)

the entire BIT.[282] Whether or not such a termination or modification of a sunset clause would be effective towards investors protected under a BIT constitutes a point of contention, as investors could challenge it alleging a violation of their rights. Presently, countries that have terminated their BITs include Venezuela, Ecuador, India, South Africa among others.

The challenge with this option is that it can require a lot of capital and time resources. There is also no guarantee that contracting party States will agree to reform oriented provisions in the new renegotiated BITs.[283] In addition, the sunset clauses contained in the BITs have the effect that the country would still remain liable for treaty violations during the sunset period. Termination of BITs may also cause unease amongst existing foreign investors and as a consequence some may leave and those seeking to invest in the country may stay away.

While it may be argued that the BITs should be terminated without replacement since the local laws make little distinction between local and foreign investment, according to UNCTAD, countries are more receptive to termination when it is part of the process of concluding a new IIA.[284] Illustrative of this is the fact that of the 212 BITs that were terminated globally by March 2017, only 19 were jointly terminated without replacement.[285]

5.2 Recommendations

In light of the potential challenges paused by the problematic language of the substantive provisions in the BITs, this paper has put forward three options available to policy makers and public officers responsible for negotiating and concluding BITs in Kenya. While the three options can be pursued independent of each other, the preferred recommended option in the short term for Kenya would be amendment of the problematic substantive provisions of the first generation BITs as well as the definitions of "investor" and "investments." As discussed in Chapter IV, the recommendations on the new language in the substantive provisions go beyond clarity in text, to modification of the existing provisions by making additions to the substantive provisions, and thus joint interpretations would not comprehensively address the weaknesses in the substantive provisions.

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[282] Nikos Lavranos, "The end on intra-EU BITs is nearing" published on 13th May 2016 available at <http://arbitrationblog.practicallaw.com/the-end-of-intra-eu-bits-is-nearing/> accessed on 14/10/2018

[283] Ibid

[284] UNCTAD, "Phase 2 of IIA reform : Modernizing the existing stock of old generation treaties" (United Nations, 2017)11

[285] Ibid

For the long term, and since BITs expiration presents an opportunity where contracting party States may address any inconsistencies in the provisions, this paper suggests that policy makers and public officers responsible for negotiating and concluding BITs should consider terminating the BITs at the expiration of their respective current terms in line with their termination clauses, and renegotiate new ones with language for substantive provisions as has been recommended in this study.

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