Negotiating Dispute Settlement terms in Bilateral Investment Treaties (BITS) and Economic Partnership Agreements (EPAs)

Kariuki Muigua

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Kariuki Muigua*

Abstract

This paper critically discusses the investor-state dispute settlement and other aspects of investment treaties or agreements that are likely to defeat the original purpose of BITs, that is, promoting trade and investment for national development for both the domestic and host states. The discussion is mainly in the context of developing world and focuses on the main aspects that negotiators should look out for in order to ensure that such treaties facilitate trade and investment in a mutual way between contracting states, especially where the host country is from the developing world.

1. Introduction

Bilateral treaties on the promotion and protection of investments of investors of one contracting party in the territory of the other contracting party can be traced back to 1959, when the first BIT was signed between the Federal Republic of Germany and Pakistan.[1] It is estimated that the international investment framework consists today of a web of roughly 3,000 investment treaties, including bilateral investment treaties between two states, regional agreements, and investment protection provisions in free trade agreements between two or more countries.[2] A key driver of these instruments has historically been the desire of developed, capital-exporting states to ensure that their nationals are financially and legally protected when investing in developing, capital-

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[1] United Nations Conference on Trade and Development, 'Bilateral Investment Treaties 1995–2006: Trends In Investment Rulemaking,' (United Nations, New York and Geneva, 2007), p. 1. Available at http://unctad.org/en/docs/iteiia20065_en.pdf [Accessed on 9/11/2016].

[2] International Institute for Sustainable Development, 'Investment Treaties,' available at http://www.iisd.org/investment/law/treaties.aspx [Accessed on 2/11/2016].

importing states. Consequently, the majority of investment treaties are between developed countries and developing countries or economies in transition, though this is slowly changing.[3]

It has been observed that since the first BIT, they had a relatively uniform content that had not changed markedly, apart from the introduction of provisions on national treatment and investor–State dispute resolution in the 1960s.[4] These treaties are not mere friendly diplomatic instruments, as some countries had first expected, but are actual treaties setting out hard legal obligations for the state hosting the investment and enforceable rights for the foreign investor.[5] Indeed, performance of the arising obligations and rights is buttressed by the provision for dispute settlement clauses in these treaties, to deal with any violation or breach. This is evidenced by the fact that one of the key provisions to be captured in these agreements is the Investor-State Dispute Settlement (ISDS) mechanism. The implication is that negotiating parties must take the contents of these treaties or agreements very seriously considering that their performance is not optional and could lead to legal action. The majority of the investment protection treaties still include potentially broad and vague standards, providing little legal certainty and allowing tribunals to interpret the standard in ways that significantly limit the governments' regulatory powers.[6]

It is therefore possible to have unintended outcomes from the interpretation and enforcement of dispute settlement clauses. This paper mainly focuses on this aspect of investment treaties or agreements. It discusses the ISDS factors that are likely to defeat the original purpose of BITs, that is, promoting trade and investment for national development for both the domestic and host states.

2. Need for Bilateral Investment Treaties (BITS) and Investment Agreements in the Developing World

Generally, investment treaties are concluded between two or more governments to offer covered foreign investors protection for their investments from host government conduct in violation of

[3] Ibid.

[4] United Nations Conference on Trade and Development, 'Bilateral Investment Treaties 1995–2006: Trends In Investment Rulemaking,' op cit. p.1.

[5] Ibid; See also generally Potesta, M., 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept' (July 9, 2012). Society of International Economic Law (SIEL), 3rd Biennial Global Conference. Available at SSRN: https://ssrn.com/abstract=2102771 [Accessed on 2/11/2016].

[6] International Institute for Sustainable Development, 'Investment Treaties,' available at http://www.iisd.org/investment/law/treaties.aspx [Accessed on 2/11/2016].

the treaty such as expropriation without compensation, discrimination or treatment that is not in accordance with "fair and equitable treatment" obligations.[7] They include both stand-alone investment treaties (often referred to as bilateral investment treaties or BITs) and investment chapters in broader trade and investment agreements such as the North American Free Trade Agreement (NAFTA), the Transpacific Partnership agreement (TPP) or the Economic Partnership Agreement (EPA) in our case.[8]

BITs are negotiated with two very distant interests: on the one hand, one state aims to protect its investors with money in another state against any incidental changes to the legislation of the host country, while the recipient state wishes to achieve a high economic growth.[9] This is especially so with reference to BITs agreed between either capital exporting or capital importing countries.[10]

BITs are also meant to reduce the risk of unfair treatment where a host state can give preference to nationals to the detriment of international investors.[11] Furthermore, BITs are also designed to minimise political or economic instability that are likely to arise in relation to such processes as building a plant, hiring people and transferring technology.[12] This may especially arise where the investors' obligations does not meet the local people's expectations as per such national policies as benefit sharing arrangements and other local initiatives that are geared towards promoting equitable national development.

It has been observed that while some commentators view bilateral investment treaties as a development tool, arguing that BITs channel much needed capital to poor countries, others fear

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[7] OECD, 'Chapter 8: The impact of investment treaties on companies, shareholders and creditors,' *OECD Business and Finance Outlook 2016*, P. 224. Available At http://www.oecd.org/daf/inv/investment-policy/BFO-2016-Ch8-Investment-Treaties.pdf [Accessed on 2/11/2016].

[8] Ibid, p. 224.

[9] Martins, A.M.S., 'The Principle of Non-Discrimination in the Bilateral Investment Treaties: Lessons for Brazil,' op cit., p. 16; See also Yackee, J.W., 'Conceptual Difficulties In The Empirical Study Of Bilateral Investment Treaties,' *Brooklyn Journal of International Law*, Vol. 33, 2008, p. 405.

[10] See generally, Balassa, B., 'Trade between Developed and developing Countries: The Decade Ahead,' available at http://www.oecd.org/eco/growth/2501905.pdf [Accessed on 2/11/2016].

[11] Martins, A.M.S., 'The Principle of Non-Discrimination in the Bilateral Investment Treaties: Lessons for Brazil,' op cit., p. 16; See also generally, Mahmood, N., 'Democratizing Investment Laws: Ensuring 'Minimum Standards' for Host States,' *The Journal of World Investment & Trade*, Vol. 14, 2013, pp.79–113; See also Falsafi, A., 'The International Minimum Standard Of Treatment Of Foreign Investors' Property: A Contingent Standard,' *Suffolk Transnational Law Review*, No. 30, 2007, p.317.

[12] Martins, A.M.S., 'The Principle of Non-Discrimination in the Bilateral Investment Treaties: Lessons for Brazil,' op cit., p. 16.

that the favourable treatment given to foreign investors through BITs can worsen the environmental or human rights practices of states amongst a number of other negative effects.[13]

Generally, EPAs are said to be designed to 'lock-in' policy reforms by establishing binding regulations in the areas of trade, investment and other trade-related issues.[14] The *Cotonou Agreement*[15] set the stage for Economic partnership agreements to be negotiated during the preparatory period which was to end by 31 December 2007 at the latest. The Cotonou Agreement's main objectives are the reduction and eventual eradication of poverty and the gradual integration of African, Caribbean and Pacific States into the global economy, whilst adhering to the aims of sustainable development.

Formal negotiations of the new trading arrangements were to start in September 2002 and the new trading arrangements were to enter into force by 1 January 2008, unless earlier dates were agreed between the Parties.[16] Negotiations of the economic partnership agreements was to be undertaken with ACP (African, Caribbean and Pacific Group of States) countries which consider themselves in a position to do so, at the level they consider appropriate and in accordance with the procedures agreed by the ACP Group, taking into account regional integration process within the ACP.[17]

According to the Cotonou Agreement, negotiations of the economic partnership agreements were to aim notably at establishing the timetable for the progressive removal of barriers to trade between the Parties, in accordance with the relevant WTO rules. On the Community side trade liberalisation was meant to build on the acquis and was aimed at improving current market

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[13] Bodea, C. & Ye, F., 'Bilateral Investment Treaties (BITs): The Global Investment Regime and Human Rights,' 2015, p.1, available at http://wp.peio.me/wpcontent/uploads/PEIO9/102_80_1432544970788_Bodea_Ye_25_05_2015_peio.pdf [Accessed on 2/11/2016]; See also Kerner, A., 'Why Should I Believe You? The Costs and Consequences of Bilateral Investment Treaties,' *International Studies Quarterly*, Vol.53, 2009, pp.73–102; See also Bodea, C. & Ye, F., 'Bilateral Investment Treaties (BITs): The Global Investment Regime and Human Rights,' (2015). Available at http://wp.peio.me/wp-content/uploads/PEIO9/102_80_1432544970788_Bodea_Ye_25_05_2015_peio.pdf [Accessed on 2/11/2016]

[14] Meyn, M., Economic Partnership Agreements: A 'historic step' towards a 'partnership of equals'? Overseas Development Institute Working Paper 288, March 2008, p.2. Available at https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/1714.pdf [Accessed on 2/11/2016].

[15] 2000/483/EC: Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, *Official Journal of the European Communities*, OJ L 317, 15.12.2000.

[16] Ibid, Art. 37(1).

[17] Ibid, Art. 37(5).

access for the ACP countries through inter alia, a review of the rules of origin. Negotiations were to take account of the level of development and the socioeconomic impact of trade measures on ACP countries, and their capacity to adapt and adjust their economies to the liberalisation process. Negotiations are therefore meant to be as flexible as possible in establishing the duration of a sufficient transitional period, the final product coverage, taking into account sensitive sectors, and the degree of asymmetry in terms of timetable for tariff dismantlement, while remaining in conformity with WTO rules then prevailing.[18]

It is noteworthy that the East African Community (EAC) is yet to agree on a number of issues concerning the signing of the foregoing EPA with the European Union. While Kenya and Rwanda had already signed the deal, other EAC member states have been adamant to do the same.[19]

It is noteworthy that Kenya has in the past concluded Investment Promotion and Protection Agreements with France, Finland, Germany, Italy, Netherlands, Switzerland, China, Libya, The Islamic Republic of Iran, Burundi and the United Kingdom, and is currently negotiating a number of others with various countries.[20] The most recent BIT was with Japan and it was signed on 28th August 2016 although it is yet to come into force. Kenya is also a member of the Multilateral Investment Guarantee Agency (MIGA) and the African Trade Insurance Agency (ATIA), which guarantees investors against non-commercial risks, and the International Centre for Settlement of Investment Disputes (ICSID).[21] These are meant to make Kenya an attractive foreign investments destination.

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[18] Ibid, Art. 37(7).

[19] Crawford, R., 'Tanzania & Uganda stand up against unfair EU-East Africa trade deal,' (Stronger Unions, 29 Jul 2016). Available at http://strongerunions.org/2016/07/29/tanzania-and-uganda-stand-up-against-unfair-eu-east-africa-economic-partnership-agreement/ [Accessed on 4/11/2016].

[20] Kenya Investment Authority, 'Frequently Asked Questions,' available at http://investmentkenya.com/index.php?option=com_content&view=article&id=33&Itemid=161

[21] United Nations Conference on Trade and Development, *Kenya: Report on the Implementation of the Investment Policy Review*, UNCTAD/DIAE/PCB/2012/6 (United Nations, 2013), p.5.
Available at http://unctad.org/en/docs/iteipc20061_en.pdf [Accessed on 2/11/2016].

3. Investor-State Dispute Settlement mechanism (ISDS) And the International Centre for Settlement of Investment Disputes

One of the arguments in favour of BITs is that they aim to guarantee standards of protections for investors such as compensation for expropriation, national treatment of foreign investors or most favored nation treatment.[22] Even more, it has been argued, investors can enforce their rights in a timely manner and through investor chosen venues that are unlikely to favor host states: Early BITs provided investor protection through state to state dispute resolution, via the establishment of tribunals or submission to the International Court of Justice. However, more recent BITs grant foreign investors the right to adjudicate alleged violation of rights in international tribunals, without the need to exhaust local remedies, and, in case of non-compliance with the arbitration decisions, broad rights to request the confiscation of host government's property from around the world.[23]

One such international tribunal that is preferred in settlement of state investment disputes is the International Centre for Settlement of Investment Disputes (the Centre). The Centre was established in order to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.[24]

Since Investor-State Dispute Settlement (ISDS) is a mechanism that allows foreign individuals and foreign companies to sue host-country governments through ad hoc arbitration proceedings rather than through normal domestic administrative and judicial channels, it has been argued that the ISDS provision in trade and investment agreements poses a risk to the development,

[22] International Institute for Sustainable Development, 'Investment Treaties,' op cit, p.6; See also Mestral A.D., 'Investor-State Arbitration Between Developed Democratic Countries,' CIGI Investor-State Arbitration Series Paper No. 1 — September 2015. Available at https://www.cigionline.org/sites/default/files/isa_paper_series_no.1.pdf [Accessed on 2/11/2016].

[23] International Institute for Sustainable Development, 'Investment Treaties,' op cit, p.6; See also Ngobeni, L. & Fagbayibo, B., 'The Investor-State Dispute Resolution Forum under the SADC Protocol on Finance and Investment: Challenges and opportunities for effective harmonization,' *Law, Democracy and Development,* Vol.19, 2015, pp.175-192. https://dx.doi.org/10.4314/LDD.V19I1.9 [Accessed on 2/11/2016]; See also Junngam, N., 'An MFN Clause and Bit Dispute Settlement: A Host State's Implied Consent to Arbitration by Reference,' *UCLA Journal of International Law and Foreign Affairs*, Vol. 15, 2010, p. 399.

[24] Art. 1, *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes* [ICSID]) 575 UNTS 159 (Came into force on 14 October 1966).

enforcement and application of domestic law.[25] In respect of this, it has been argued that access to international arbitration, as opposed to access to municipal courts in the host state, is essentially because investors typically assume that municipal courts in developing countries will lack the technical competence or neutrality to adequately and fairly resolve investment disputes.[26]

It has been observed that whereas Bilateral Investment Treaties (BITs) have become the dominant source of rules on foreign direct investment (FDI), they vary significantly in at least one important respect: whether they allow investment disputes to be settled through the International Centre for the Settlement of Investment Disputes (ICSID).[27] Indeed, among the issues that are carefully negotiated by BIT signatories are procedures for the settlement of any future disputes that might arise between foreign firms and the governments in which they invest.[28]

Africa, being one of the main destinations of foreign direct investments, has also not been left out as far as investment disputes are concerned. For instance, out of all cases registered under the International Centre for Settlement of Investment Disputes (ICSID), Sub-Saharan Africa accounts for 16% of these cases.[29] It is also reported that in 2014, cases against Sub-Saharan Africa amounted to 20% of the overall number of new cases brought under ICSID during that year.[30]

International arbitration is preferred to domestic courts because: one, an investor in possession of a favourable international arbitral award has the very real ability to enforce the terms of the award even in the face of continued host state resistance due to a network of important

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[25] Johnson, L., et al, 'Investor-State Dispute Settlement, Public Interest and U.S. Domestic Law' (Columbia Center on Sustainable Investment, May 2015), p. 1. Available at http://ccsi.columbia.edu/files/2015/05/Investor-State-Dispute-Settlement-Public-Interest-and-U.S.-Domestic-Law-FINAL-May-19-8.pdf [Accessed on 2/11/2016].
[26] Martins, A.M.S., 'The Principle of Non-Discrimination in the Bilateral Investment Treaties: Lessons for Brazil,' (The George Washington University School of Business & Public Management Institute of Brazilian Issues – IBI, Spring 2011), p.11. Available at https://www2.gwu.edu/~ibi/minerva/Spring2011/Alexandre_Martins.pdf [Accessed on 3/11/2016].
[27] Allee, T., & Clint P., "Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions." *International Studies Quarterly*, vol. 54, no. 1, 2010, pp. 1–26. www.jstor.org/stable/40664235.
[28] Ibid, p. 2.
[29] Mohamadieh, K. & Uribe, D., 'The Rise of Investor-State Dispute Settlement in the Extractive Sectors,' March, 2016. Available at http://www.ipsnews.net/2016/03/the-rise-of-investor-state-dispute-settlement-in-the-extractive-sectors/ [Accessed on 2/11/2016].
[30] Ibid.

international treaties, including most prominently the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), which empowers investors to seek award enforcement against host state property located in third-party states.[31] Secondly, authoritative, impartial arbitration awards are believed to have the tremendous potential to increase the reputation costs of the host state's breach by publicly clarifying both the facts surrounding the dispute and the content of the relevant legal rules, and by applying those facts to the rules.[32]

Under international trade and investment, parties to treaties and agreements are bound by the non-discrimination principle which basically consists of two clauses: the most-favored nation (MFN) clause and the national treatment clause. Under these clauses, BITs require that a state should confer the other state-party's investors the same beneficial rights as the ones offered to third states' investors (most-favored nation clause), and should also mandatorily offer the other state-party's investors a treatment not less favourable than the one granted to national investors (national treatment clause).[33]

However, it has been argued that the final verdict in the case of investor-state litigation is oftentimes unpredictable if the core argument of the plaintiff is based on a violation of either the MFN clause or the national treatment clause.[34] Both in the trade and investment areas, the disputes submitted to arbitration reveal a constant friction between the trend to liberalize trade and investment flows and the state's right to regulate its tax system and public policies.[35]

[31] Martins, A.M.S., 'The Principle of Non-Discrimination in the Bilateral Investment Treaties: Lessons for Brazil,' op cit., p. 12; See also Puig, S., 'Investor-state tribunals and constitutional courts: The Mexican sweeteners saga,' *Mexican Law Review*, Volume 5, Issue 2, January–June 2013, pp. 199–243.

[32] Martins, A.M.S., 'The Principle of Non-Discrimination in the Bilateral Investment Treaties: Lessons for Brazil,' op cit., p.12.

[33] Ibid, p. 17; See also United Nations Conference On Trade And Development, *Most-Favoured Nation Treatment: A Sequel*, UNCTAD Series on Issues in International Investment Agreements II (United Nations, New York, 2010). Available at http://unctad.org/en/Docs/diaeia20101_en.pdf [Accessed on 2/11/2016].

[34] Martins, A.M.S., 'The Principle of Non-Discrimination in the Bilateral Investment Treaties: Lessons for Brazil,' op cit., p. 18.

[35] Ibid, p. 18.

4. EPAs and BITs: The Downside

Notably, bilateral investment treaties include provisions that guarantee investor rights as well as mechanisms that investors can use to legally enforce such provisions.[36] The world economy under a globalized market is run by a number of international economic institutions whose functions are policy formulation, managing and monitoring global markets. The main international economic institutions that impact on African policies are: World Bank, International Monetary Fund (IMF), the UN Conference on Trade and Development (UNCTAD), African Development Banks, European Bank for Reconstruction and Development and Canadian International Development Agency.[37]

Some of these institutions are specialized agents of the international community while others are a coalition of States drawing membership from State members. Whereas developing countries are part of the international economic institutions, decision making on policy is done by developed countries which enjoy international market dominance.

BITs and other investment agreements have thus been seen as instruments domination used by the developed world to secure economic fortunes for their people and countries in general, from the developing world. This is due to a number of negative factors that result from their implementation.

4.1 Human Rights Violation

It has been argued that BITs have the potential to negatively influence human rights practices because they lock in legally enforceable conditions attractive to investors, both retrospectively and into the future. Further, the lock-in effect of BITs can force the hand of the government to favour multi-national corporations or foreign investors even at the cost of violating the rights of their own citizenry.[38]

[36] Bodea, C. & Ye, F., 'Bilateral Investment Treaties (BITs): The Global Investment Regime and Human Rights,' 2015, p.1, available at http://wp.peio.me/wpcontent/uploads/PEIO9/102_80_1432544970788_Bodea_Ye_25_05_2015_peio.pdf [Accessed on 2/11/2016].

[37] The WTO and other organizations - World Trade Organization, www.wto.org › ... › wto & other organizations

[38] Bodea, C. & Ye, F., 'Bilateral Investment Treaties (BITs): The Global Investment Regime and Human Rights,' 2015, p.2, available at http://wp.peio.me/wpcontent/uploads/PEIO9/102_80_1432544970788_Bodea_Ye_25_05_2015_peio.pdf [Accessed on 2/11/2016];cf. Fry, J.D., 'International Human Rights Law In Investment Arbitration: Evidence Of International

4.2 Hindered National Development

It was recently reported that Tanzania and Uganda refused to sign the Economic Partnership Agreement between the EU and East African Community countries — Kenya, Uganda, Tanzania, Burundi and Rwanda —partly due to concerns about the negative impact of the agreement on democracy and development.[39] This has been attributed to the argument that EPAs require countries to remove tariffs from all but a few products, depriving them of a key source of income and undermining their ability to protect their industries that are not able to compete with European goods.[40]

Africa has lost huge revenues to fraudsters. For example, Democratic Republic of Congo has in the past lost an estimated US$ 1.36 billion through a protracted systematic undervaluation and sale of mineral assets to unknown buyers.[41] Members of the international community should put in place measures to deal with false companies in their jurisdictions.

4.3 Unfair Trade Practices and Unequal Bargaining Power

There has been a contention that international arbitration through ICSID is not a substitute for poor domestic institutions in host countries, but rather is a commonly preferred course of action for powerful countries, who often, but not always, attain their preferred outcomes in BIT negotiations.[42]

The African continent arguably lies on the greatest percentage of earth's natural resources comprising rare minerals, huge oil deposits and a variety of physical features. This also makes Africa become possibly one of the biggest contributors to the percentage of the world's natural resources.[43] The result of this is that the rest of the world seeks to have a stake in the exploration and exploitation of these resources.

Law's Unity,' (2007). Available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1077&context=djcil [Accessed on 4/11/2016].

[39] Crawford, R., 'Tanzania & Uganda stand up against unfair EU-East Africa trade deal,' (Stronger Unions, 29 Jul 2016). Available at http://strongerunions.org/2016/07/29/tanzania-and-uganda-stand-up-against-unfair-eu-east-africa-economic-partnership-agreement/ [Accessed on 4/11/2016].

[40] Ibid.

[41] Rajaram, A., "*Rich Countries, Poor People; Will Africa's Commodity Boom Benefit the Poor"* available on http://blogs.worldbank.org/africacan/rich-countries-poor-people-will-africa-s-commodity-boom-benefit-poor

[42] Allee, T., & Clint P., "Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions," op cit., p. 3.

[43] Global Policy Forum, *Poverty and Development in Africa*, Available at http://www.globalpolicy.org/social-and-economic-policy/poverty-and-development/poverty-and-development-in-africa.html [Accessed on 17/11/2016].

Economic talks about African economy observe that Africa's resources have fueled economic growth but most Africans have not benefited.[44] While Africa is recognised as rich in unexploited natural resources, the same may not be said for governance structures. Some of the channels through which opportunities to benefits from these resources are lost include skewed economic agreements where investors from the developed world may get away with huge returns from their investments but giving little or nothing to the host states. Any attempts by host governments to go after such violators of national laws and policies come with the potentially high cost risk of complaint and dispute before international tribunals. It cannot also be ruled out that some African governments have arguably played a role in making the continent poor. There has been collusion between dishonest leaders and foreign companies to sell out resources and manipulate national laws for easy access by the foreign companies.[45] It is noteworthy that many at times African governments do not uphold the key principles of democracy, transparency and accountability in governance especially during negotiation of key international treaties.[46]

5. Dispute Settlement terms in Bilateral Investment Treaties (BITS) and Economic Partnership Agreements (EPAs)

Over the years, there has been a shift in negotiations where some BITs have undertaken to address *investor–State dispute settlement* procedures in greater detail, providing more guidance to the disputing parties concerning the conduct of arbitration and strengthening the rule orientation of adjudication mechanisms.[47] This is unlike the traditional approach of only sketching out the main features of investor–State dispute settlement, relying on specific arbitration conventions to regulate the details.[48]

5.1 Implications of Investment Disputes on States: Forestalling Trouble

It is at the negotiations stage that parties to treaty can agree whether or not the BIT in question should allow foreign investors to challenge a government's actions before ICSID. This is

[44] Robb, C.K., Executive Director of Africa Progress Panel "*How Africa's resources can Lift Millions out of Poverty."* Available at www.cnn.com/2013/07/25/opinion/africas-natural-resources-millions-overty/>[accessed on 14/11/2016]

45 Dare, S., 'A Continent in Crisis: Africa and Globalization,' *Third World Traveller, Dollars and Sense magazine*, July/August 2001, available at http://www.thirdworldtraveler.com/Africa/Continent_Crisis.html

[46] Akindele, S.T., et. al., Globalization, Its Implications and Consequences for Africa.

[47] United Nations Conference on Trade and Development, 'Bilateral Investment Treaties 1995–2006: Trends In Investment Rulemaking,' (United Nations, New York and Geneva, 2007), p. xiii. Available at http://unctad.org/en/docs/iteiia20065_en.pdf [Accessed on 9/11/2016].

[48] Ibid, p. xiii.

arguably driven by the particular parties interests.[49] For instance, it has been contended that governments whose firms engage in considerable outward FDI ("home" governments) typically prefer investment disputes to be settled through international arbitration, whereas governments that receive substantial inward FDI ("host" governments) generally prefer to have disputes over the treatment of foreign investment handled by domestic courts.[50]

The government's decision in the foregoing case has implications on its economic fortunes. On the one hand, a host government that allows its actions to be challenged before ICSID faces potential new costs, as it stands to lose the benefits of any "taking" if the action is deemed by an ICSID tribunal to be a breach of BIT obligations. Furthermore, being found "guilty" in one or more ICSID disputes could cause broader damage if outside investors then begin to question the environment within the host state.[51]

5.2 Dealing with Unintended Beneficiaries: Treaty Shopping

It is possible for countries from the developing world to sign treaties that may later impact them negatively and fail to achieve the main goals of development. This is attributable to the fact that the negotiators may not have fully grasped the full implications of the treaty at the time of signing. This is especially more pronounced where investors from non-signatory countries identify and exploit the existing loopholes for forum shopping.

It has been argued that treaty shopping violates the principle of reciprocity, where, investment treaties, like most bilateral treaties, establish reciprocal rights and obligations between the contracting states. Treaty shopping runs counter to this principle, in that an entity with no substantial ties to a contracting state could avail itself of the treaty protections that its own state may not be willing to reciprocate to investors from the host state.[52] For instance, whereas conditions related to human rights should be included in a reciprocal deal around investment protection, this could be undermined by investors who shop around for the most attractive

[49] Allee, T., & Clint P., "Delegating Differences: Bilateral Investment Treaties and Bargaining over Dispute Resolution Provisions," op cit., p. 3.
[50] Ibid, p. 3.
[51] Ibid, p. 3.
[52] Organisation for Economic Co-operation and Development, 'Investor-State Dispute Settlement Public Consultation: 16 May – 23 July 2012' Comments received as of 30 August 2012, (OECD, Paris, 2012), p. 77.

jurisdiction to invest from.[53] It has also been observed that treaty shopping can expose a host country to claims by companies to which it would not otherwise allow entry.[54]

It is therefore advisable that negotiators ensure that such loopholes are sealed to avoid unintended consequences of the treaty on the host country. It should be clear from the treaty or agreement who the covered parties are, especially through clear and substantive provisions on what entails investment and the contemplated meaning of investor under the legal instrument in question. This is the only way to ensure that any potential human rights violations are preempted, and that there are no social and environmental impacts of (foreign) investments in the host states.[55] The wording of these treaties is especially important considering that once a dispute arises, the host state's legal framework does not apply and interpretation is entirely left to the international tribunal.

5.3 Choice of Forum for Investment Disputes Settlement

Investor-state dispute settlement provisions in BITs vary, with some treaties providing investors with direct access to international arbitration through one or more permanent venues, some allowing for ad hoc arbitration, and others dictating the use of domestic courts to resolve disputes.[56] However, the most notable difference among treaties is believed to be whether they include dispute settlement via the International Centre for the Settlement of Investment Disputes (ICSID), an independent organization affiliated with the World Bank.[57]

It has been observed that access by foreign investors to international arbitration as provided by the ISDS clauses of a vast majority of IIAs is a specific feature that has no equivalent in other areas of international economic law, granted to foreign investors as one of extraordinary legal nature insofar as it derogates from customary international law, which requires that any acts or measures taken by the State must be challenged before the national jurisdictions of the State.[58]

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[53] Ibid, p.77.
[54] Ibid, p. 77.
[55] Organisation for Economic Co-operation and Development, 'Investor-State Dispute Settlement Public Consultation: 16 May – 23 July 2012' op cit. p.77.
[56] Allee, T., & Clint P., "Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions," op cit., p. 2.
[57] Ibid, p.2.
[58] United Nations Conference On Trade And Development, *Most-Favoured Nation Treatment: UNCTAD Series on Issues in International Investment Agreements II,* (United Nations, New York and Geneva, 2010), p.4.

Only after the investor has exhausted local remedies can the State from which it derives its nationality file an action against the host State, but never the investor himself.

5.4 Scope of Issues for Investment Disputes Settlement

It is important that parties clarify during negotiations what issues or scope of breach is to be covered by the particular agreement or treaty since this can be contentious in future. For instance, in *Salini v Morocco,*[59] the dispute resolution clause of the applicable bilateral investment treaty (BIT) in that case allowed for international arbitration with respect to "[a]ll disputes or differences…between a Contracting Party and an investor of the other Contracting Party concerning an investment." The tribunal held that the terms of that provision were "very general" and that "[t]he reference to expropriation and nationalization measures, which are matters coming under the unilateral will of a State, cannot be interpreted to exclude a claim based in contract from the scope of application of this Article." The approach has been inconsistent considering that in *Vivendi v. Argentina* annulment decision of 2002, the ad hoc committee was called upon to determine—in the context of the exercise by the investor of its jurisdictional option under the treaty's fork in the road clause—the scope of a dispute resolution clause providing for international arbitration as regards disputes "relating to investments made under th[e] Agreement between one Contracting Party and an investor of the other Contracting Party." The committee held that that provision "does not use a narrower formulation, requiring that the investor's claim allege a breach of the BIT itself. Read literally, the requirements for arbitral jurisdiction in Article 8 do not necessitate that the claimant allege a breach of the BIT itself: it is sufficient that the dispute relate to an investment made under the BIT."[60]

Further, in 2004, the arbitral tribunal in *SGS v. Philippines*, also gave wide effect to the dispute resolution provision of the Swiss-Philippines BIT, which provided for ICSID arbitration as regards "disputes with respect to investments" between an investor and the host state. The tribunal held that "[t]he term 'disputes with respect to investments'…is not limited by reference to the legal classification of the claim that is made. A dispute about an alleged expropriation contrary to Article VI of the BIT would be a 'dispute with respect to investments;' so too would

[59] *Salini Costruttori S.p.A. & Italstrade S.p.A. v. Kingdom of Morocco,* Decision on jurisdiction, July 16, 2001, 42 ILM 606 (2003), para. 59

[60] Compañía de Aguas del Aconquija, S.A. et Compagnie Générale des Eaux (Vivendi Universal) v. Argentine Republic, Decision of July 3, 2002, 41 ILM 1135 (2002), para. 55.

a dispute arising from an investment contract such as the CISS Agreement."[61] It further held that "the phrase 'disputes with respect to investments' naturally includes contractual disputes."[62]

This is an important aspect that needs to be well articulated since it may create the impression of erosion of state sovereignty especially in the case of most African states which are the main recipients of these treaties and are more often than not included in these disputes as respondents. There is also little evidence of these states ever winning these disputes especially the ones before the ICSID.

Investment dispute clauses should clarify whether the same covers both treaty obligations and contractual obligations. However, it may be advisable only treaty obligations covered and exclude contractual obligations to other channels to minimise the number of possible instances when host governments may be dragged to the international tribunals such as ICSID.

5.5 BITs Enforcement Procedure

It has been argued that one of the most constraining elements of BITs are their enforcement procedures especially with regard to the procedures for investor-state dispute settlement.[63] Also relevant is the assertion that BITs that allow disputes to be resolved through ICSID impose the greatest constraints on signatories since they transfer the important functions of the treaty interpretation and enforcement from the domestic level to the international level.[64] In addition, by providing multinational corporations with direct recourse before ICSID, the host governments risk having their actions toward foreign investment reviewed by impartial legal tribunals, which could order them to pay billions of dollars in damages to aggrieved multinationals.[65]

5.6 Host states Before ICSID: Disturbing the Tilt

Oil and mineral extraction in Africa is carried out by multinational companies. These companies enter into agreements with African Governments for the extraction of resources. They have high bargaining power in the negotiations due to their influential position and backing from their governments. On the other hand, African governments have low bargaining power in these

[61] [SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, Decision on jurisdiction, Jan. 29, 2004, 19 MEALEY'S: INT'L ARB. REP. C1 (Feb. 2004), para. 131].
[62] Ibid, para. 132.
[63] Allee, T., & Clint P., "Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions," op cit., p. 4.
[64] Ibid, p.4.
[65] Ibid, p.4.

contracts or agreements because they are less influential. They are more flexible in negotiations than their foreign counterparts. In exchange, they end up giving what rightfully belongs to the people to foreigners.[66] For instance, there is a need to tackle tax avoidance and tax evasion by foreign companies carrying out resource extraction in Africa. Tax avoidance is one of the biggest problems bedeviling African economies because it is reported that the revenue lost in Africa through tax avoidance is greater than the combined revenue from international aid and direct foreign investment.

The right of a people to own, utilize and control natural resources within their countries is an internationally recognized right.[67] It is a right provided for in the various international legal instruments on human rights and this has since been adopted in the national legislation of various countries around the world including African countries. However, this right is likely to be defeated where investors use international tribunals such as ICSID to interfere with the host government's efforts to mainstream its international policy framework for the achievement of this right. It should be clarified during negotiations as to what actions amount to violation of treaty obligations and the ones that are merely state's exercise of their sovereign rights through the government.

6. Conclusion

Bilateral investment treaties and other investment treaties have the potential to promote mutual benefit between domestic states and host states as contracting states to a treaty. Equitable international trade can enable countries to achieve food security, generate decent employment opportunities for the poor, promote technology transfer[68], ensure national economic security and

[66] Africa Development Bank, "Resource companies ripping-off Africa"-AFDB Chief Available at http://uk.reuters.com/article/2013/06/16/uk-africa-economy-idUKBRE95F0EH20130616 [Accessed on 10 February, 2014]

[67] UDHR, ICCPR, ICESCR, Banjul Charter.

[68] Article 7 of the TRIPS states that: "The protection and enforcement of intellectual property should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

support infrastructure development, not only for moving goods to and from ports, but also for basic services such as health, education, water, sanitation and energy.[69]

The Agenda 2030 for Sustainable Development aims at ensuring that there is significant increase in the exports of developing countries, in particular with a view to doubling the least developed countries' share of global exports by 2020.[70] The Agenda 2030 also affirms that international trade is an engine for inclusive economic growth and poverty reduction, and contributes to the promotion of sustainable development.[71] As such, it seeks to continue to promote a universal, rules-based, open, transparent, predictable, inclusive, non-discriminatory and equitable multilateral trading system under the World Trade Organization, as well as meaningful trade liberalisation. It also calls upon all members of the World Trade Organization to redouble their efforts to promptly conclude the negotiations on the Doha Development Agenda.[72]

International trade and investment is one of the tools employed by national governments in their quest to improve the livelihoods of their people and eradication of poverty in general. Poverty does not merely mean lack of adequate income or inability to meet basic human needs. Notably, some people have good health and can live a productive life but are deprived of suitable opportunities.[73] The implied denial of opportunities pushes them into unemployment resulting in loss of income and finally inability to meet the basic human needs.[74] Lack of opportunity in

[69] Galmés, G.V., 'Trade as an enabler of sustainable development and poverty eradication,' in United Nations, *The Road from Rio+20*: *Towards Sustainable Development Goals*, Issue 4, September 2014, p. 10. UNCTAD/DITC/TED/2014/1 Available at *http://unctad.org/en/PublicationsLibrary/ditcted2014d1_en.*pdf [Accessed on 05/09/2016].

[70] United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, [without reference to a Main Committee (A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015, para. 17.11.

[71] Ibid, para. 68. This is a restatement of para. 281 of the Rio+20 Conference outcome document (The Future We Want) which reaffirmed that international trade is an engine for development and sustained economic growth, and also reaffirmed the critical role that a universal, rules-based, open, non-discriminatory and equitable multilateral trading system, as well as meaningful trade liberalisation, can play in stimulating economic growth and development worldwide, thereby benefiting all countries at all stages of development as they advance towards sustainable development. In this context, the participants in the conference expressed their focus on achieving progress in addressing a set of important issues, such as, inter alia, trade-distorting subsidies and trade in environmental goods and services.

[72] Ibid, para. 68.

[73] See Sarshar, M., 'Amartya Sen's Theory of Poverty', *From the Selected Works of Mubashshir Sarshar*, January 2010. Available at: http://works.bepress.com/mubashshir/16/ [Accessed on 20/11/2016].

[74]Ibid.

economic and political life is the root cause of poverty and therefore should not be neglected while defining poverty.[75]

Despite all the potential held by these treaties and other investment agreements, it is possible for a host government to lose all the opportunities that may come with foreign direct investments through unfair investment practices coupled with skewed investment dispute settlement provisions. Investor-state dispute mechanisms should be able to protect both the investor and the state from losses through such means as ensuring that while the investors may have recourse to international tribunals, the same are not used to defeat the right of host governments to hold these investors accountable.

It is suggested that developing countries especially in Africa should invest more time and resources in getting these BITs and other trade and investment agreements right considering that poor negotiations may lead to more adverse outcomes as against promotion of investments and development. States must ensure that its negotiators have the skills and the competence to safeguard the interests of their countries, since treaty negotiation is basically a skill that can and should be perfected. This is the only way to ensure that BITs become more of a blessing to the developing states than a curse to be shunned.

[75] Ibid.

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