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Original Research Paper

Critical Analysis of the Standard of Treatment of Foreign Investors Compared to Local Investors in Tanzania

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The study explains the standard of treatment of foreign investors compared to local investors in Tanzania. It analyses the importance of standard of treatment, it categorizes standard of treatment, trade agreement (bilateral trade agreement BITs and Multilateral trade agreement), how foreigners are treated in Tanzania (the point of law and practice) limitations and challenges of standard of treatment between foreign investors and local investors. The study is based on data collected through a review of available literature including journal, articles, reports, papers, textbooks and thesis. The researcher visited Different institutional libraries and intensively used online resources in undertaking this study. Findings reveal that foreign investors in Tanzania are treated in the same way local investors are treated as though there is differentiation especially in terms of capital required for investment. However, such differentiation brings no any critical significance. Also, foreigners are protected under BITs where Tanzania has an agreement with the send state. Furthermore, there is no recognized International Instrument providing for standard of treatment of foreign investors, the protection has been according to the national law of the hosting states or according to BITs. The study realized that foreign investors are not able to invest in a small business which is said to be reserved for local investors. This is according to the policy and law of the hosting country good example is in Uganda and Zanzibar. Therefore, it is recommended that for proper promotion and protection of the standard of treatment of foreign investors, there is a need for having a harmonized international instrument providing for protection of foreign investors rather than depending on local laws of the hosting states and BITs entered among states.

Key words: Tanzania, Investors, Justice.

INTRODUCTION

The protection of foreign investment and investors started when people went abroad to invest and engage in business. When European traders started to go to Asia, Africa and Latin America to trade with local communities, it was held that the local law could not be applied to them as they were subjected to the law of their home country and they believed to have good treatment and protection.

Foreigners coming from European countries sought special and superior treatment from the local population in much Asia, Africa and Latin America. The implication of this idea was that their asset could not be expropriated or nationalized through legislation enacted by the local population. Many treaties concluded by European powers with Asia and African states provided that the Europeans remained under the jurisdiction of their home states and their consuls exercised jurisdiction over their fellow nationals. For instance, the treaty concluded between the sheikdom of Bahrain and the British government in 1861 stated in article 4 that *"The*

British subjects and dependants in Bahrain shall receive the treatment and consideration of the most favored people."

It was understood that no state could expropriate or nationalize foreign assets. And a state could not invoke national laws as a reason for avoiding their international obligations arising from the notion of an international minimum standard.

The foreign investment law has its origins in the international law concerning the protection of aliens; a legal regime based both on international human rights law and on public international law principles of fairness, equity, justice and non-discrimination.

After independence, when colonial territories gained independence started challenging the concept of foreigners residing and doing business in those countries of not being governed by the law enacted by the local population. Relying on the doctrine of sovereignty and sovereign equality, they asserted that every sovereign state had the right to expropriate

or nationalize foreign assets provided that, the foreign investors were provided with compensation.

For instance, article 9 of the convention on the rights and duties of states, one of the first international instruments to support the idea of national treatment signed at the seventh Pan-American conference, provided that;

*"The jurisdiction of states within the limits of national territory applies to all the inhabitants. Nationals and foreigners are under the same protection of the law and the national authorities and the foreigner may not claim rights of other or more extensive than those of the nationals"*²

These newly independent states began to assert that foreign investor were not entitled to any greater protection than those accorded to the nationals of the country under the law of the land. If the host states treated foreign investors on a par with nationals of the country, the host states were acting within the norms of international law. However, it is argued that if the local law failed to meet the standards of justice and equity, the international minimum standard rather than national law would

1.1 Meaning of terms

Investment means the creation or acquisition of new business assets and includes the expansion, restructuring or rehabilitation of an existing business enterprise.⁵

Investor: means a person, whether natural or body corporate who seeks to make, is making or has made an investment.⁶

Local investor: means a natural person who is a citizen of Tanzania; a Company incorporated under the laws of Tanzania in which the majority of the shares are held by a person who is a citizen of Tanzania, or a partnership in which the partnership controlling interest is owned by a person who is a citizen of Tanzania.⁷

Foreign investor: in the case of a natural person means a person who is not a citizen of Tanzania, and in the case of a company, a company incorporated under the laws of any country other than Tanzania in which more than fifty percent of the shares are held by a person who is not it a citizen of Tanzania, and in the case of partnerships, means a partnership in which the partnership controlling interest is owned by a person who is not a citizen of Tanzania.⁸

Standard of Treatment: refers to the legal regime that applies to investors and their investments while in the host state market.⁹

2.0 Types of investment

There are mainly two types of investment

- a) Foreign direct investment
- b) Portfolio investment

2.1 Why standard of treatment of foreign investors

The aim of standard of treatment of investors is for the promotion and protection of foreign direct investment, investors by way of setting agreement, which will guarantee investment treatment standards with regard to compensation and dispute settlements. However, it has been a way of effecting mutual reciprocal treatment between states through multilateral or bilateral treaties. This aspect of standard of treatment is very

apply to foreign investors. The assertion was that all states had to accept the international minimum standards by bringing their national laws up to this standard.

In the Barcelona Traction case, the ICJ stated that

*"When a state admits into its territory, foreign investment of foreign nationals, whether natural or juristic persons its bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them"*³

In the Robert claim, the general claims commission held that, *"Facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of authorities in the lights of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization."*⁴

However, the international minimum standards of treatment of investors were determined by international customary law as there was no international negotiated treaty outlining the terms and conditions of protection of foreign investment.

important in modern international investment since we do not have an international recognized and accepted convention on investment.¹⁰

Much of the attention on standard of treatment of foreign investors has to be done through the domestic law of the host countries concerned. Therefore, when foreign investors look for the laws and regulations affecting their protection and actual investment they would also look for the domestic law provisions on the treatment of foreign investors.¹¹

3.0 The standard of treatment of investors is categorized under the following ways

- (i) National Treatment
- (ii) Most favored Nation
- (iii) Customary International law
- (iv) Fair and equitable standards of treatment (ie) Rules of non discrimination

These mentioned standards of treatment can be grouped in two forms, relative/ contingent, which carry national treatment and most favored nation treatment, absolute standard of treatment, which covers fair, and equitable treatment, and minimum standard of treatment of foreign investors.¹²

Under this part, each of the above-mentioned standards of treatment is explained in isolation by showing its international and national application in investment.

3.1 Trade Agreements

Since, we do not have the international convention on investment, providing for standard of treatment of investors anniversary, states finds themselves making an investment treaty/agreement on how to treat investors. It is within this investment, trade agreement, and standard of treatment of investors provided. Therefore, in most cases, states are bound to respect what they agreed in their treaties could be bilateral or multilateral

3.1.1 Bilateral investment treaty/ agreement

BITs are an international legal instrument through which two countries set down rules that will govern investment by their respective nationals in the other's territory. A bilateral investment treaty (BIT) is an agreement establishing the terms

and conditions for private investment by nationals and companies of one state in another state. Marking BITS are one of the most widely used types of international agreement for protecting and influencing foreign investment. Without BITS, international investors are forced to rely on host country law alone for protection, which entails a variety of risks to their investment. Host government can easily change their own domestic law after foreign investment is made, and host country, officials may not always act fairly or impartially towards foreign investors and their enterprise.¹³ Good example is the government of Zimbabwe and its land reallocation policy, which affected many of the foreign investors in Zimbabwe.

Therefore, BITS creates a stable legal framework to facilitate and protect investors and their investment in the host country. BITS as the most source of standard of treatment because of the lack consensus on the customary international law applicable to foreign investments. Also created uncertainty in the mind of investors as to the degree of protection they could expect under international law. To gain greater certainty and to counter the threat of adverse national law and regulation, the host countries of these investors sought to conclude a series of BITS that would provide clear rules and effective enforcement mechanisms, at least with regard to their treaty partners. Their primary goals were therefore protection of investments made by their nationals and companies in foreign countries.

BITS are generally, drafted to guarantee certain standards of treatment of foreign investment. Though, the guarantee of national and most favorable nation (MFN) treatment to foreign investors and their investment is a fundamental aim of BITS it is also a potential weapon with which they can challenge the regulatory power of the host states. National treatment requires that similar treatment and privileges should be accorded to both foreign and domestic investors. And most favored nations presuppose some favorable treatment to all foreign investors and their investment in the host country. In essence, foreign investors and their investments must not be put at a disadvantage due to the differences in treatment meted to them in comparison to domestic investors or other foreign investors.

Tanzania has entered into bilateral treaties for the promotion and protection of foreign investment with Denmark, Finland, Germany, India, Italy, Netherlands, Norway, Sweden, Switzerland, and the United Kingdom. Therefore, the best standard treatment of investors among nationals of different countries can be achieved through BITS.

3.1.2 Multilateral trade agreements

An agreement, which involves three or more parties, multilateral trade agreements, involves trade, economic integrations such European union (EU) East African community (EAC) SADC and COMESA. With these agreements, whether bilateral or multilateral states aim at controlling and promoting trade investment through trade agreements.

Example Tanzania is a member of several international organizations including; The International Centre for the Settlement of Investment Disputes (ICSID) and the Multilateral Investment Guarantee Agency (MIGA). Tanzania is also a signatory to the New York Convention on the recognition and enforcement of Arbitration Awards.

Membership of International and Regional Organizations Tanzania is a member of the United Nations Organization (UN), The African Union (AU), The East African Community (EAC) and the Southern African Development Community

(SADC). All these agreements have the provision of the standard of treatment of investors good example is EAC which Tanzania is a party under its Article 18 and 29 (1) (2)¹⁴ of the protocol provides for the protection of cross border investment that;

1. *The partner states undertake to protect cross border investments and returns of investors of other partner states within their territories*
2. *The state shall ensure:*
 - a. *Protection and security of cross border investments of investors of other partner states*
 - b. *Nondiscrimination of investors of other partner states, by according, to these investors treatment no less favorable than that accorded in like circumstances to the nationals of that partner state or third parties.*

3.2 National treatment

UNCTAD as defined it as principle whereby a host state or country extends to foreign investors treatment that is at least as favorable as the treatment that it accords to national investors in like circumstance.¹⁵ The principle imposes a duty to hosting state to treat investors in the similar manner it treats its nationals. National treatment under international agreement is often paired with most favored nation (MFN) treatment, which essentially ordains that foreign investors be treated similarly regardless of their origin

3.3 Most Favored Nation (MFN)

Most Favored Nation is a treaty provision whereby states undertake an obligation towards another state to accord most favored nation treatment in an agreed sphere of relations. The reasons why foreign investors seek protection under the MFN principle is to avoid any discrimination against them, which would put them at a competitive disadvantage compared to other investors from third countries. The underlying idea behind the MFN principle is to ensure equality of competitive opportunities between investors from different foreign countries. Tanzania have been adhering to standard of treatment of investors under national treatment and most favored nation basing on the investment treaties it has with foreign countries as mentioned therein above.

3.4 Customary international law on standard minimum standard of treatment and of treatment of investor

Customary international law requires states to have a minimum standard of treatment of investors and the traditional notion of diplomatic protection and treatment of aliens. It is the notion of diplomatic protection of citizens and their property abroad by home country that gave rise to modern rules of foreign investment law. Bilateral Investment Treaties or Multilateral Investment treaty that requires the host state to extend the international minimum standard of protection to both aliens and their property has extended the idea to the host state.

The international law require "minimum standard of treatment" the minimum standard referred here is that of the general international law on responsibility of a state on how to treat an aliens or nationals of other states and its properties (customary international law).¹⁶ The issue of standard of treatment of foreign investors has resulted to the inclusion of provisions in both national laws and international instrument agreement of the standard of treatment that provides protection against discrimination of investors in a foreign state.

3.5 Fair and equitable standards of treatment (i.e.) rules of non discrimination and customary international law

In modern treaties, a fair and equitable standard of treatment is to be provided to investors and investments in addition to the international minimum standard and full protection and security. Fair and equitable standard, expands the scope of the international minimum standards by allowing future tribunals to create new standards when the situation demands so that justice may be done for the foreign investors who suffer unfair treatment at the hand of the host state.¹⁷ Fair and equitable standard of treatment intends to eliminate discriminatory measures that the host state adopt against investors and could be regarded as offensive. This type of treatment gives the investors powers to institute the case against the host state where its law or policy provides discrimination in favor of its domestic investors.¹⁸

4.0 Treatments of foreign investors compared to local investors in Tanzania

The Tanzanian Government has a favorable attitude towards foreign investors and their investment and it has made significant efforts to encourage foreign investments. Generally, foreign investors receive the same treatment as local investors.¹⁹ This is proved by the words contained in the preamble of the Tanzania Investment Act, which provides that it is an act to make provision for investment in Tanzania, to provide for favorable conditions for investors, and related matters.

The Tanzania Investment Centre (TIC) is the focal point for all investor inquiries and facilitates project start-up. The Tanzania Investment Centre (TIC): is a primary agency of government, which coordinates, encourage, promote investment in Tanzania and to advise the Government on investment related matters. All the Government departments and agencies are required by law to cooperate fully with TIC in facilitating investors.²⁰ It further provides for joint venture opportunities between local and foreign investors and disseminates investment information. The legal system gives investors equal right to access the court as it does to local investors. Investment laws provide almost similar treatment between foreign investors and local investors under the following legal grounds:-

4.1 Benefits

The provision, Section 19 (1) (2)²¹ provides for incentives which an investor may enjoy under the law, the section also prohibits the amendments of these sections for the detriment of the investor. The section cited above reads;

A business enterprise in respect of which a certificate is granted under this Act shall be entitled to the benefits which are applicable to that enterprise under the provisions of the Income Tax Act, the Customs Tariff Act, the Value Added Tax Act, or of any other written law for the time being in force.

(2) For the purposes of creating a predictable investment climate, the benefits referred to under subsection (1) shall not be amended or modified to the detriment of the investors enjoying those benefits

4.2 Investment guarantees, transfer of capital, profits and dividends also Guarantee against expropriation

The provision of section 21 and 22,²² which provides on how foreign investors and their investments protected, the section reads as follows;

1. Subject to subsection (2) and (3) of this section:
 - a. No business enterprises shall be nationalized or expropriated by the government
 - b. No person who owns, whether wholly or in part, the capital of any business enterprise shall be compelled by law to cede his interest in the capital to any other person.
2. There shall not be any acquisition, whether wholly or in part of a business enterprise to which this Act applies by the State unless the acquisition is under the due process of law which makes provision for- (a) payment of fair, adequate and prompt compensation, and
- c. A right of access to the Court or a right to arbitration for the determination of the investor's interest or right and the amount of compensation to which he is entitled.
3. Any compensation payable under this section shall be paid promptly and authorization for its repatriation in convertible currency, where applicable, shall be issued.

The section gives the investors all rights on the investment and he/she is free to enjoy the interests and in no way can be forced to leave without fair and equitable compensation. On the other hand, section 21²³ guarantees an investor unconditional transferability of capital and profits capable of being transferable.

4.3 Settlement of disputes

Also the law provides a neutral and a party autonomy method of dispute settlement, where it requires the investment disputes to be settled outside the court in an amicable way. The law provides for local institutions and foreign institutions for dispute settlements. The mechanism provided for settlements of disputes gives the investor confidence and assurance of his rights as he has an option to refer the dispute if any, to arbitrators, ad hoc or institutional or to have them entertained in the local court if he/she believes in them.

The law under its Section 23²⁴.

1. provides; where a dispute arises between a foreign investor and the Centre or the Government in respect of a business enterprise, all efforts shall be made to settle the dispute through negotiations for an amicable settlement.
2. A dispute between a foreign investor and the Centre or the Government in respect of a business enterprise which is not settled through negotiations may be submitted to arbitration in accordance with any of the following methods as may be mutually agreed by the parties, that is to say:
 - a. In accordance with arbitration laws of Tanzania for investors;
 - b. In accordance with the rules of procedure for arbitration of the International Centre for the Settlement of Investment Disputes;
 - c. Within the framework of any bilateral or multilateral agreement on investment protection agreed to by the Government of the United Republic and the Government of the Country the Investor originates.

In addition, the issues of loan capital investors are given equal opportunity to access local banks and financial institutions and have loans like local investors. A local investor has no chance to access ICSD and has no protection either under bilateral or multilateral agreement on investment protection as the law gives an opportunity only to foreign investors. A local investor in case of dispute may approach local court and the local arbitration institution despite of their weakness.

4.5 Obtaining credit from domestic sources by foreign investors

Section 25(1)²⁵ subject to section 2, a foreign investor may, in relation to the business enterprise which he operates, obtain credit from domestic bank and financial institutions up to the limit established by the Bank of Tanzania in consultation with the Centre having regard to the amount of foreign capital invested in the business enterprise. By allowing foreign investors to access loans in a similar way like a national investor, it demonstrates the reality that Tanzania treats investors similar to local investors.

Also the Act does not provide limitations on areas to invest; foreign investors are free to invest in any field the same as to local investors

5.0 Limitation to foreign investors

Foreign investors are not equally treated as local investors when it comes to the issue of capital for investment, as the law requires different capital for investing. The law reads, the provision of Section 2 (2)²⁶ the businesses specified for the purpose of this section which may enjoy the benefits and protection provided under this Act, are those which:

- a. If wholly owned by a foreign investor or if a joint venture, the minimum investment capital is not less than Tanzanian shillings equivalent to three hundred thousand US dollars (US\$300,000);
- b. If locally owned, the minimum investment capital is less than Tanzanian shillings equivalent to one hundred thousand US dollars (US\$100, 000).

Likewise, section 11 (2)²⁷ of The Zanzibar Investment Promotion and Protection Act, the section provides that the small scale business or categories of small scale business to be a type that is engaged primarily in the provision of services or production of goods which can be provided or produced solely by Zanzibars, no foreign national or body corporate shall become engaged in or be permitted to become engaged in any business so specified.

6.0 Challenges relating to the standard of treatment of investors in Tanzania

- Domestic investor being put on the same playing ground with foreign investors by their own state investment system (laws and policies). They lack motivation and finds themselves, not connected with available natural resources. Therefore, in no way local investors may be proud of investing their capital within the country. (Section 19,17 and sect. 11 of the Zanzibar investment promotion Act)
- The rules on standard of treatment does not consider the level of technology, capital, expertise and competition level, the principle requires domestic investor and foreign investor to be treated in the same

way while the former is in no way may compete. The same is observed in the Act where no limitation is provided to foreign investors to invest and where not to invest left for local investors. On the other hand, The Zanzibar investment Act provides limitation on business to invest section 11 (2) reads;

The section provides that the small scale business or categories of small scale business to be a type that is engaged primarily in the provision of services or production of goods which can be provided or produced solely by Zanzibars... no foreign national or body corporate shall become engaged in or be permitted to become engaged in any business so specified.²⁸

The same position is provided under the Uganda investment code that restricts foreign investors not to invest in crop production, animal production rather to provide material assistance to Ugandan farmers in crop production and animal production.²⁹

- Host state fears of discouraging and breaching agreements between foreign investors whom their countries have a bilateral agreement on the standard of treatment that requires equal treatment to be given to domestic investor should be same for foreign investors.

Although, states are required by treaty investors in a way not discriminate or that favors nationals against foreigners still the state has a duty to compromise on how its nationals can enjoy the natural resources not only on revenue but also by having control and direct participation in terms of production and ownership.

7.0 Conclusion

The standard of treatment of investors in relation to the law and practice in Tanzania does not make the difference between local investors and foreign investors, as the level of treatment looks the same. The law treats both equally regardless of origin, the principles of standards of treatment of investors like national treatment, most favored nation treatment, fair and equitable treatment and minimum standard of treatment have been well adhered. The only point noticed is on the capital for investments required when a local investor is a bit favored. However, if you compare the situation in Uganda and Zanzibar still Tanzania (mainland) the best in promoting the standard of treatment of investors.

References

- [1] Surya p. Subedi International Investment Law Reconciling policy and Principles
- [2] The convention on the rights and duties of states(Montevideo convention, 1933) as quoted by Surya P. Subedi
- [3] Ibid
- [4] Ibid
- [5] Section 3 The Tanzania Investment act [cap 38 RE 2002]
- [6] Section 2 of the Zanzibar investment promotion and protection act no.11 of 2004
- [7] Ibid
- [8] Ibid
- [9] Ombella's SJ in is article Policy and concerns over the application of the relative/contingent standard of treatment of foreign investors: an analysis of selected LDC's
- [10] Ombella SJ in is article Policy and concerns over the application of the relative/ contingent standard of treatment of foreign investors: an analysis of selected LDC's
- [11] Surya P. Subedi, International Investment law Reconciling Policy and Principles.
- [12] opcit
- [13] zdenek brabek on A Multilateral Agreement on Investment: Convicting the skeptics WTO Feb.1998
- [14] East African common market protocol

- [15]UNCTAD Series on issues in international investment agreement II, NEWYORK and Geneva 2010
- [16]OMBELLA J.S(2009) key element of investment: an international and Tanzania perspectives, students' manual Mauritius
- [17]M. Sornarajah The International Law on Foreign Investment
- [18]Section 23 of the Tanzania investment act, 2002
- [19]www.tanzaniainvest.com visited 29/04/2015
- [20]Umyy Ally Mwalimu (2004) Patterns, Policy and Legal Issues on International Labour Migration in Tanzania
- [21]Investment Act [cap..RE 2002]
- [22]Tanzania investment act [cap 38 RE 2002]
- [23]The Tanzania investment act
- [24]Tanzania investment act [cap 38 RE 2002]
- [25]Ibid
- [26]The Tanzania investment act reserved 2002
- [27]Zanzibar investment promotion and protection Act no.11 of 2004
- [28]Section 10(2) of the Uganda investment code Act cap 92
- [29]No. 11 OF 2004