

**ANALYSIS OF THE IMPORTANCE OF BILATERAL
INVESTMENT TREATIES AS A TOOL FOR PROMOTION
OF FOREIGN DIRECT INVESTMENT AND THE
PROTECTION OF FDI AGAINST EXPROPRIATION**

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Abstract

This article explores the contribution and relevance of Bilateral Investment Treaties (BITs) in promoting and protecting Foreign Direct investment (FDI) from expropriation. This is achieved by analysing data on the impact of the BITS in protecting FDI amongst contracting parties around the world. In addition to the benefits of BITs that have been discussed in the paper, it has also been rightly put that the BITs are not devoid of challenges and limitations in achieving its objectives which form part of the discussions of this paper. Adopting the doctrinal method, the paper finds that BITs have contributed positively towards the protection of FDI in the global market scene. As will be demonstrated in this article, it has been discovered that most BITs are entered into by less developed countries and more developed countries, and so may be difficult to maintain a balance between contracting parties as there is usually a disproportion in their bargaining powers. To this end, the author suggests that There must be a reform in the BITs standard structure to address the issue of developed countries abuse of domestic laws of host LDCs though the Bits

Key words: FDI, BIT, Expropriation, Treaty, International Laws

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1. Introduction

From time immemorial, trade among nations has always been credited with promoting economic, social and even diplomatic relations among nations and has hence been encouraged by all and sundry. Foreign Direct Investment (FDI) developed and has since gained prominence in the international community and with the raising growth of inflations being witnessed all across the world, from the most developed countries like the United States and United Kingdom, to the Less Developed Countries (LDCs) like Nigeria, all the way down to global south. There has never been a better time for the global community to come together and promote business relations among each other in order to escape the glooming doom brought about by this inflation. This cannot be done in an avenue where there exists looming distrust between investors and host states especially as it concerns the status of the business of investors. In the same vein, most countries would like to benefit from the numerous blessings that accompany foreign investment. However, no country will be willing to invite upon itself any foreign investor that will blatantly undermine its sovereignty and bring upon it, the usual disadvantages that accompany rapid industrialization without much to show for that sacrifice that are usually associated with largescale investment such as the oil and gas industry, and the likes. On the other hand, the investors will like to feel a sense of security and that they will be accorded a conducive environment for their business to thrive and above all be assured of the safety of their investment from being ultimately expropriated and nationalised all in the name of expanding their business. To this end, numerous options are being explored to check and balance these advantages and risks from both angles and one which stands in terms of general acceptance is the option of Bilateral Investment Treaties.

The slow pace of development in the establishment of International Law norms protecting FDIs, or arguably the perceived non-existence of legal protection for Foreign Investors (FIs) under Customary International Law has no doubt influenced the development of BITs by states.¹ The professed non-existence of established international law norm for the protection of Foreign Direct Investment

¹Patrick D., "Are BITs Representing the "New" Customary International Law in International Investment Law?" (2010) 28 *Penn State I.L.R* p675

(FDI) had resulted to the creation of numerous volumes of BITs between states to promote and sustain the global economies.²

Through BITs, state parties strive to reciprocally³ protect the economic interest of their nationals in other states with the aim of forming reliable economic blocs.⁴ This is usually achieved by establishing a free-trade zone, creating an agreed policy on international trade tariff or a joint market economy.⁵ Parties to BITs establish rules regulating the host's state treatment of investors while having a dispute resolution mechanism for consequent violation of such.⁶ It is imperative to note the fact that those situations which may warrant expropriation (interference, confiscation or seizure) of foreign

²*ibid*

³This could be seen in the South Africa Netherland and Zambia –Netherlands agreements where they contained provisions which provide that parties to the agreement must advance equitable and fair treatment of investors other contracting parties while according reciprocal physical protection and security to investors. SEE: Victor M., “Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between?” (2006)26 N.J.I.L.B p. 119

⁴ Khalid S.A, “GCC’S Economic Cooperation and Integration: Achievements and Hurdles” (Aljazeera Centre for Studies March 2015), <<https://studies.aljazeera.net/en/dossiers/2015/03/20153316186783839.html>>, accessed on 11th January, 2023

The benefit of BIT could be seen in the 1999 Bilateral Treaty entered between Egypt and Qatar when Aljazeera served Egypt with a compensation notice of \$150 million on the basis of damage to the investment of Aljazeera in Egypt as a news outlet. Claims of Aljazeera hinged on the facts that its journalists and staff have been subjected to abuse as a result of military crackdown on supporters of Morsi. See: Aljazeera, “Aljazeera Demands \$150m damages from Egypt”, <www.aljazeera.com/pressoffice/2014/04/al-jazeera-demands-150m-damages-from-egypt-20144281320872282.html> (April 2014), accessed 7th December 2022.

expropriation. See: UNCTAD, “What are BITs?” <<https://unngls.org/...un/un.../127-united-nations-conference-on-trade-and-developme...>> accessed 10th January 2023

⁵*ibid*

⁶Kenneth J.V., “The Economics of Bilateral Investment Treaties” (2000)41 H.I.L.Jpp. 469-470. However, in the agreement between the United Kingdom and Nigeria, it was emphasized that even though parties to the agreement can resort to arbitration for any disagreement, they are strongly recommended to explore diplomatic means before doing so. SEE: *ibid*(n 4 p. 122) and the December 11, 1990 Agreement between United Kingdom and Nigeria for the Promotion and Protection of Investments, particularly article. 9, <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/153>> accessed 9th December 2022

investment and the possibility of consequent compensation making such investor to be divested of his rights in an investment in a host state differs from state to state.⁷ Hence, BITs aim to protect foreign investors from domestic laws of host countries that posed existential risk to their investment.⁸

The forgoing is no doubt premised on the facts that the global economy at present had attained an increased level of interdependence between states, and more importantly, leading global economies attained their present state by engaging substantially in FDI, hence, for the purpose of maintaining an admirable level of development, states largely depend on importation of goods and services from other countries.⁹ The importance of FDI became apparent when the UNCTAD reiterated the position that substantial flow of external resources is seriously required by developing economies to solve the problem of foreign exchange rate and the promotion of the required development needed for sustainable economic development.¹⁰ Quite a reasonable number of countries, particularly in Africa and Latin America largely depend on the importation of goods, services, and foreign investment and must strive to pursue policies that reflect their will and intentions to cater to those peculiar needs .¹¹

However, despite the fact that the requirement of conducive environment for Foreign Investment in government policies is a prerequisite for the free flow of FDI,¹² BITs are not devoid of challenges associated with the difference existing between the host state and the level of development of the investors.¹³ Due to this reason, States exhibit a preference to reserve absolute right and control over the access of foreign investors, and are at liberty through domestic legislations to control the inflow of foreign investors.¹⁴

⁷Ibid (n3) p. 222

⁸SEE also Piero, B “Investment Protection under Bilateral Investment and Investment Contract” (2001)2(2) J.W.I p.235-236

⁹Anderson, R. J “Towards Global Citizenship: Reframing Foreign Direct Investment Law” (2009)18(1) J.I.L pp 1-32 at 4

¹⁰ibid, Khalid (n 4 at p. 97)

¹¹Ibid

¹²Ibid, Khalid (n 4 p 103)

¹³ Julius, C” Can Tanzania Adequately Fulfil its Public Health Obligations Alongside Bilateral Investment Treaties Obligation” (2015)8(2) J.P.L p. 126

¹⁴Ibid, p. 100

Third world countries on several occasions, insist on maintaining substantial control on FDIs particularly as it affects matters that are most concerning to them like profit repatriation, and technology transfer.¹⁵This is however, albeit the fact that a reasonable number of African countries exhibit serious desire for FDI which on several occasions consequently affects the likelihood of maintaining fair judgment by eliminating the crucial stage of thorough analysis of the social, political and economic gains and disadvantages that might provide informed guidelines to shape the laws and policies to promote sustainable foreign investment¹⁶and thus a complex dilemma is created for these countries who must balance their desire to promote FDI for their economic development and to maintain their primary obligation to their people of ensuring social, political and economic security.

It is premised on the above that this research seeks to critically analyse the importance of BITs as a tool for promotion of foreign investors against expropriation and nationalisation. In achieving this aim, the research is divided into phases; the first part shall examine the development of BITs as a tool for the protection of foreign investors alongside its importance for the promotion of foreign investment to the global economy, the second part shall discuss the challenges associated with BITs as a mechanism for enhancing global economy.

2.1 Basic Concepts in BITs

The United Nations Conference on Trade and Development (UNCTAD) has defined BITs to mean agreements between a state and another to reciprocally protect, promote and encourage investments in each other's territories by foreign investors (either companies or individual(s) based in the host state. The agreement traditionally deals with issues relating to areas which include but are not limited to: meaning and scope of investment, admission and establishment, national treatment, most-favored-nation treatment, fair and equitable treatment, issues covering compensation in circumstances of expropriation or damage to the investment, assurances of free transfers or repatriation of funds, mechanism for disputes resolution, between

¹⁵ Johnson, A R "Rethinking Bilateral Investment Treaties in Sub-Saharan Africa" (2010)59(4) E.L.J p. 919 SEE

¹⁶ibid

state and state, and investor(s) and state.¹⁷ “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. This type of investment is called FDI. BITs are established through trade pacts. A nineteenth-century forerunner of the BIT is the "friendship, commerce and navigation treaty" (FCN). This kind of treaty came in to prominence after World Wars when the developed countries wanted to guard their investments in developing countries against expropriation.¹⁸

UNCTAD defines FDI as follows “Foreign direct investment (FDI) is defined as an investment reflecting a lasting interest and control by a foreign direct investor, resident in one economy, in an enterprise resident in another economy (foreign affiliate)”¹⁹

Expropriation in the context of FDI is usually synonymous with several other words and can be used interchangeably albeit incorrectly to refer to the same term. Some words used instead of the term expropriation include but are not limited to ‘Nationalization’, ‘taking’, ‘deprivation’ ‘dispossession’ etc. depending on legal translation and tradition. However, expropriation more appropriately refers to mandatory transfer or taking of property, land or business of a foreign investor by a state where the business is legally operating for public use such as a road or hospital. Expropriation may be direct or indirect

Over the course of time, BITs have provided a, guarantee for foreign investors against the expropriation of their investments without adequate compensation. Today virtually all bilateral investment treaties (BITs) contain an expropriation provision and Customary

¹⁷Raju D and Al Kha A. “Hurdles in Way of Compulsory Licensing by Developing Nations: Multilateral Murder or Bilateral Suicide? An Empirical Analysis of Bilateral Investment Treaties of India, Bangladesh and Pakistan” (2009)2 NUJS Law Review p. 122

¹⁸Suranjali Tandon “ For Cairns Dispute, International Arbitration is not the way Forward” The Indian Express (21st July 2021) < <https://indianexpress.com/article/opinion/columns/for-cairns-dispute-international-arbitration-is-not-the-way-forward-7414260/>> assessed 10th January 2023

¹⁹ UNCTAD Handbook of statistics 2022, UNCTAD (2022). *World Investment Report 2022: International Tax Reforms and Sustainable Investment*. United Nations publication. Sales No. E.21.II.D.20. New York and Geneva.

< <https://hbs.unctad.org/foreign-direct-investment/> > accessed December 12th 2022

¹⁹ibid

international law also contains rules on the expropriation of foreign owned property and continues to supplement BITs on those issues where the latter leave gaps or require interpretation.²⁰ BITs, just like law making treaties, are considered binding on the contracting parties. The provisions of such treaties help in the formation of international Law through the operations of the principles governing the development of customary rules²¹. When a similar rule is incorporated in a number of treaty contracts as is the case with the provision common in most BITs against the expropriation of investments of contracting members, it eventually crystallizes into to law by an independent process of development.²²

The binding nature of these agreements as well as the recognition of treaties as part of the sources of international law have made the BITs very important in the protection of FDI against Expropriation in the global business community.

The model contents of BIT agreements between Investors and Host countries are binding at international level. Noncompliance with the terms of such contracts indicates a violation of international Law which grants the investor a right to seek remedy through arbitration by an international tribunal as per the content of the BIT in question²³. On the issue of Expropriation, just like any other term of the agreements, when an investor feels that its rights have been breached as per the provision of its respective BIT, such an investor may approach the investment tribunal and lay its claim. And such claims as is evident in the records of the UNCTAD indicate that there are a lot of successful

²⁰ Expropriation, UNCTAD Series on Issues in International Investment Agreements II United Nations Publication, 2012 Sales no E 12.II D7 ISBN978-92-1-112847-5 <https://unctad.org/system/files/official-document/unctaddiaeia2011d7_en.pdf > accessed December 12th 2022

²¹ Kapoor S.K, International Law and Human Rights (21st edition, Central Law Agency 2017)

²² ibid

²³ Andrew T Guzman “Explaining the Popularity of Bilateral Investment Treaties: Why LDCs Sign Treaties That Hurt Them” Jean Monnet Center For International Law and Regional Economic Law and Justice 1997, <<https://jeanmonnetprogram.org/archive/papers/97/97-12.html#fn0> > accessed January 1, 2022

cases brought before the tribunals²⁴. That is to say that assuming the international tribunal grants relief similar to that which would be granted by a court in a domestic dispute (recall the BIT typically requires prompt, adequate and effective compensation for any "expropriation" which, because of the broad definition of investment, includes the breach of the terms of an agreement), the BIT regime will generate an incentive scheme that is reasonably efficient²⁵. "More important than the measurement of damages, however, is the fact that the BIT framework, by providing a binding contractual mechanism, allows the parties to avoid the dynamic inconsistency problem. Because the investor has access to an impartial dispute settlement mechanism that is capable of ensuring compliance by the host, the investor can be confident that any agreement made by the host will be honored. In essence, the treaty establishes a framework that resembles a domestic legal system -- contracting is possible and contracts will be upheld and enforced by a court. As a result, the cost of investing is reduced, and investment in developing countries is more attractive. As a result, BITs provide an efficient regulatory scheme for foreign direct investment decisions."²⁶

2.2 Historical Development of BITS

The development of BITs initially began with the lapses created by the trust reposed on the customary international law rules termed "Hull Rule" applicable to foreign investors as it affects the expropriation of the investment of foreign investment.²⁷ Following the declaration of sovereignty of states over their natural resources in 1962,²⁸ there came with it a wave of expropriation and nationalization all over the world that required some form of regulation to protect the various rights and obligations that emanated from these expropriation and nationalization processes to ensure that justice and fairness was accorded to the expropriated companies and that the host nations on the

²⁴ Investor–State Dispute Settlement Cases: Facts and Figures 2020, Issue 4 September 2021 available at: <https://unctad.org/system/files/official-document/diaepcbinf2021d7_en.pdf> accessed January 1, 2022

²⁵ *ibid*

²⁶ *ibid*

²⁷ Guzman A.T., "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties", (1998)38(4) V.J.I.L pp.641-642

²⁸ General Assembly resolution 1803 (XVII) New York, 14 December 1962 <https://legal.un.org/avl/ha/ga_1803/ga_1803.html> accessed December 12th 2022

other hand were not unfairly exploited by these investors. The rule demanded prompt and adequate compensation from the expropriating state to the affected investor while recognizing the rights of the investors to seek redress through international arbitration.²⁹The “Hull Rule” was primarily objected to because countries, particularly developing states demanded absolute rights in relation to how to treat investors and the standard of compensation payable in any event. The objection to the Hull Rule proved successful hence ceased to be customary international law rules.³⁰ This is regardless of the view that the basis for the challenge to the Hull Rules was not in any way achieved by countries adopting the use of BITs to regulate FDI as virtually all BITs concluded in modern settings contain provisions regulating expropriation, and provides for compensation in any event that the host state opts to expropriate and nationalize the investment. In an event that the investor is dissatisfied with the outcome of the expropriation i.e., does not accept the compensation offered by the host, he will be given an option for arbitration for redress.³¹

With the fall of Hull Rules alongside the response to global economic development and the need for reliable security as it relates to foreign investment, countries then resorted to the need of securing binding and enforceable agreements safeguarding the interest of their investment in other states.³²In an effort to attract foreign investors, the rate of expropriation and nationalization among these developing countries rapidly declined and they began creating BITs in an effort to encourage foreign investment to boost their economy. The use of BITs as a mechanism for the promotion of foreign investment has presented varying degree of benefits which have helped in expanding the economic strength of states.

2.3 Characteristics of BITS

One major characteristic of BITS is the facts that they maintain to a greater extent remarkably uniform provisions without regards to the states negotiating same.³³ This unique feature of BITS is perhaps

²⁹ibid

³⁰ibid

³¹Ibid p. 642

³²ibid (n 10 p. 113)

³³Vandeveldel K. J, “The Economics of Bilateral Investment Treaties” (2000)41(2) H.L.J pp. 469-470

because state parties to BITs aim at reflecting major rules regulating the host party's laws as it affects foreign investors. This has further exposed the benefit that persistent adoption of similar and consistent terms in BITs will unavoidably create an avenue for further development of customary international law on the treatment of foreign investors.³⁴

Provisions dealing with payment of compensation and arbitration for expropriation of investment regardless of prior objections to the Hull Rule's principles on payment of compensation by developing states. Despite the fact that the attitude of states to BITs and the defunct Hull Rules appears ironical, it is important to state that the adoption of BITs has restored the confidence lost as it relates to the international law principles regulating foreign investment.³⁵ Perhaps this is because states find it convenient to be directly involved in negotiating BITs which in most cases contains provisions in variance with domestic laws, thereby making themselves bound by obligations made therein as opposed to being held liable by established customary international law norms regulating foreign investment, it is no doubt due to the notion of sovereignty of states.³⁶ This is evidenced by the attitude of not less than twenty states from Latin America who now reflect provisions on arbitration against a host states in BITs as opposed to their earlier position as originators/pioneers of the rules denying/rejecting the rights of the foreign investors for redress to international arbitration against host countries for expropriation.³⁷

Another benefit of BITs is that they serve as a tool for the promotion of foreign investment. This is hinged on the basis that BITs enhance and encourage foreign investment by minimizing political risk and disputes between states and above all protecting foreign investors against expropriation and bias actions by host states.³⁸ These are achieved because BITs create avenues where a state party binds itself to protect foreign investors in line with the agreed terms of the treaty

³⁴ibid

³⁵Okozie, C "Interpreting Most-Favoured-Nation in Investment Treaty Arbitrations" (2007)8(5) J.W.I.T p 597 at 600

³⁶Robbins, J "The Emergence of Positive Obligations in Bilateral Investment Treaties" (2006)13(2) C.L.J p. 412-15

³⁷ibid, (n23, p. 470)

³⁸Federic, G.S "Keep the Faith: Investment Protection Following the Denunciation of International Investment Agreements" (2013) 11(2) J.I.L p. 335 at 341 SEE also *Ibid*, p. 488

as opposed to the usual unilateral obligations by states to offer protection to foreign investment. More so, states consent to the terms of BITs while agreeing on binding enforcement mechanism in terms of breach, hence creating an admirable climate for investment.³⁹In addition, this had solved dilemma associated with situations where a particular state may prove to be geographically better in terms of investment but another state proven to be better in in relation to the treatment of foreign investors.⁴⁰

The use of BITs reduces risk and promotes confidence in investors. This is evidenced from the significant reduction in expropriation by host states. Most BITs no longer contain provisions against compensation in the event of expropriation.⁴¹ It is important to state that modern BITs do not prevent a host party from pursuing policies which promotes international investment inflow particularly in areas relating to tax incentives and custom duties. In other words, BITs present a host state with an atmosphere which gives them complete control as to whether to admit foreign investment upon desired conditions, on the other hand, it assures investors the level of protection accorded to their investment in the host state.⁴²These, in turn strengthen the notion of sovereignty on the part of the host state while holding to the terms of the BIT with other state parties.

BITs have proven to constitute the basic mechanism for the regulation of foreign investment. This is premised inter alia on the fact that an ordinary BIT defines the term “investment” to encompass all kind of assets which in all cases involves tangible and intangible properties in addition to the fact that protections are usually accorded to all investment under the ownership of foreign control. This could be seen in the BITs of Nigerian-Netherland,⁴³ United States

³⁹Ibid, p. 489

⁴⁰ibid (n 18, p. 682)

⁴¹ibid, (n 25)

⁴²ibid (n 23, p. 493)

⁴³Agreement on the Enhancement and Reciprocal Protection of Investment, of 2nd November 1992 < <http://investmentpolicyhub.unctad.org/IIA/CountryBits/153> > accessed on 7th December 2022

Cameroon,⁴⁴Argentina-United Kingdom,⁴⁵United Kingdom and Ethiopia⁴⁶and Netherlands-Zimbabwe.⁴⁷What the treaty does is to protect the investment of a foreigner in the host state. Hence, encourage foreign participation in the market of the host state. It is pertinent to state that BITs constitute the backbone to the success of the modern advance economies. This is based on the fact that there is presently no stronger or established international law mechanism available for the protection of foreign investment particularly as it affects expropriation, compensation and arbitration for redress in the relationship between two states.

The important nature of BITS has proven that it could be entered between a sovereign state and a non-sovereign entity as evidence in the Hong Kong- Netherlands agreement.⁴⁸ Hence, strengthen the argument that BITs constitute an international law mechanism for neutralizing the influence of powerful and fragile economies in reaching an agreement to achieve a common economic goal.

2.4 Challenges and Criticisms of BITs

Despite the benefits BITs present to international law as it relates to foreign investment, it is important to state that it has not been devoid of some challenges. These challenges range from inconsistencies in political structure of state parties and lack of

⁴⁴Article 1 (s) Treaty for the Enhancement and Reciprocal Protection of Investment between the U.S. and Cameroon <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/599/download> > accessed 7th December, 2022

⁴⁵Article 1 of the 11th Dec. 1990 Agreement for the Promotion and Protection of Investments, between the United Kingdom and Argentina <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/126/download> > accessed 7th December, 2022

⁴⁶Agreement for the Promotion and Protection of Investments, between the United Kingdom and the Ethiopia < <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1180/download>> assessed 10th January 2023

⁴⁷Article 1 of 12th November, 1996 Agreement on Encouragement and Reciprocal Protection of Investment, between Netherlands and Zimbabwe <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2099/download>> .accessed 7th December, 2022

⁴⁸Zeng, H “Initiative and Implications of Hong Kong's Bilateral Investment Treaties” (2010)11(5) J.W.I.T p. 695-71

transparency by the negotiating states in relation to domestic politics.⁴⁹ This statement has been made evident by the likes of Donald Trump,⁵⁰ when he vowed to quit the Trans-Pacific Partnership (TPP), asserting that he hopes to renegotiate a better deal for the US.⁵¹ However it has been opined that reasonable number of Americans are concerned and not quite happy with the deal on the fact that it was negotiated in secret, and that it favors corporations, not to mention the views that the provisions of the agreement are not well known to Americans.⁵² This position taken by him⁵³ is without regards to the benefits of the agreement. The TPP appeared to be the “most ambitious” free trade agreement ever reached and involves states with diverse economies representing 40% of the global economy.⁵⁴

A careful study of modern times BITs reveals that they are usually concluded by developing states or between a developed and developing states.⁵⁵ Apart from the fact that investors are on several occasions concerned on how friendly a host state’s policy and rules are towards foreign investment, the major factor which enhances the adoption of BITs is premised on the facts that the bargaining power and economic strength of state parties to BITs are usually not comparable.⁵⁶ With the instrument of BIT, state parties having lower economic strength find means of attracting foreign investment from stronger economic states with a view of promoting the host state’s economy. This happens because most developing states are anxious to attract foreign investments as a result, stronger economic states in such occasions demand strict protection for their investors.⁵⁷

Unfortunately, the mechanism of BITs as means for the promotion of foreign investment has been utilized as an instrument for

⁴⁹Alenjandro Luna, “Bilateral Treaty”, (2013)232 *Managing Intellectual Property* (2013) p. 39

⁵⁰The US President-elect, as at 9th December, 2022

⁵¹Roger, B. “President-elect Trump Vows to leave TPP for “Fair Trade Deal, blowing a hole in globalization Consensus” < <http://www.ibtimes.co.uk/president-elect-trump-vows-leave-tpp-trade-deal-blowing-hole-globalisation-consensus-1592802>.> accessed 8th December, 2022

⁵²ibid

⁵³ibid Donald Trump, (n 35)

⁵⁴ibid (n 39)

⁵⁵ibid (n 18, p. 688)

⁵⁶ibid

⁵⁷ibid

greater and stronger economies to bully small states in making them surrender their strict and cherished nature of sovereignty and national security to attract investment. It is important to note that BITs serve as a means of over-shadowing the concept of supremacy of the law and equality before the law established in various municipal laws of states. This is so because since BITs aim at protecting the nationals of a state against the laws capable of harming the investment of the foreign investor in a host state, foreign investors, even where they breach the municipal laws of the host state, may on several occasions because of the state's binding obligation in the BIT escape punitive measures under domestic legal frame work of the host state.

Another challenge associated with BITs may not be dissociated from the economic notion that the investment of capital in other countries presents difficulties in relation to the repatriation of profits back home from domestic law and politics,⁵⁸ that the transfer of technology to other states for investment may compromise the national security of states. More so that issues relating to national security of states are non-negotiable and protected to the highest level.⁵⁹

Though it has been established that developing countries encourage foreign investment and pursue policy which create conducive atmosphere for foreign investment, hence parties to BITs often go contrary to their domestic laws through BITs provision to offer greater protection to foreign investors. However, the challenges associated with the procedure of amendment of domestic laws and the political instability in most developing countries presents serious problem to the developing states in upholding some basic terms of BITs.⁶⁰ This is because the domestic legal framework of developing states are designed towards encouraging local production prompting the need for the amendment of local laws, a procedure which may create political instability.

Furthermore, BITs operate at the international level, the main problem is associated with the host state's ability to enter the agreement of a BIT, and further take steps to domesticate the agreement in its laws

⁵⁸Ibid (n 23, p.487)

⁵⁹ibid

⁶⁰Paul, O. I "Investment Treaty Arbitration And Emerging Markets: Issues, Prospects and Challenges" (2011) N.I.A.L.S p.55

and policies to facilitate the enforcement and adherence to the terms of the BIT by the domestic authorities.

Regardless of the intention of the host state, domestic laws are on several occasions insufficient to support BITs and make the terms binding on local authorities. These are risks attributable to foreign investors, and they must be assured that they will not be caught in situations where the host states commonly show interest in the investment none the less be making arrangements to pursue objectives completely in variance with the interest of the investors. One of the methods available to check this challenge in relation to BITs is retaliation. However, it is highly discouraged for developing states, as it may prove ineffective where the erring state is economically stronger thereby resulting in a self-defeating mechanism, or counter retaliation from the erring state in other areas which may damage the economy of the weaker state.⁶¹

As earlier established by the Hong Kong- Netherlands agreement,⁶² the development of BITs goes beyond state parties to include states and non-state actors, it is imperative to stress that in the event of a breach, international law has not provided any mechanism for the enforcement of agreements between states and non-state actors.⁶³ Hence, the status of such agreement has been an issue under international law. The above is made clearer where a careful look at the definition of BITs proffered by UNCTAD does not in any way reflect an agreement between a state and a non-state entity or international organization. The definition only contemplates a state-state agreement.⁶⁴

BITs apparently provide international law with concrete mechanism through which states may improve their economic strength, however, it has been criticized that it creates a medium through which states “cheats” “on the cartel of capital importers.”⁶⁵ This view is hinged on the position that host states through BITs enter into agreement enforceable under international law not to inter alia expropriate foreign investment, and hold itself binding by the contract

⁶¹Ibid at 12

⁶²ibid (n 38, p. 695)

⁶³ibid (n18, p. 660)

⁶⁴Ibid (n 4, p. 97)

⁶⁵ibid (n 18, p. 660)

in the treaty. The problem connected to this is that even though BITs are beneficial to “individual capital importing” states because it attracts foreign investment, they are detrimental to “capital importers” as a group because it creates a means in which agreement between non-states actors and host states are binding contrary to the principles of international law.⁶⁶

It is disheartening to note that despite the adoption of BITs as a means to curb the fear of expropriation of foreign investment by host states, domestic legislations of states still contain provisions for compulsory acquisition for public purposes after payment of compensation. Reasonable number of BITs also contain provisions regulating expropriation for compelling reasons while recognizing the rights of an investor to seek redress in the domestic court of the host states.⁶⁷The problem associated with this is that in the case of some compulsory acquisitions, no amount of compensation will in most cases satisfy the losses suffered by investors. The political instability in the global and local politics of states may provoke expropriation of foreign assets even though the state in question negotiated the treaty in good faith while trying to comply with the terms of the treaty.⁶⁸This is more so that the rate of compensation required in BITs and domestic laws are often described in vague terms like “fair”, “just”, “equitable” and “full”⁶⁹

However, despite the above-mentioned criticisms about the BITs, many countries continue to sign more agreements to date and the agreements remain popular in regulating the relationships between investors and host countries at the international level⁷⁰. this is so because international Law on its own cannot provide for all the nuances that exist from state to state especially when it comes to terms of agreements in cases of investments, how investors are to be treated and the crux of this matter which is expropriation and promotion of

⁶⁶ibid, p. 679

⁶⁷ibid (n3, p. 222)

⁶⁸ibid

⁶⁹ibid.

⁷⁰ See the most recent BITs [Kazakhstan - Qatar BIT \(2022\)](https://investmentpolicy.unctad.org/international-investment-agreements) <<https://investmentpolicy.unctad.org/international-investment-agreements>> accessed 12 January 2023; [Indonesia - United Arab Emirates CEPA \(2022\)](https://investmentpolicy.unctad.org/international-investment-agreements) <<https://investmentpolicy.unctad.org/international-investment-agreements>> accessed 12 January 2023

business according to their various political, social, and economic needs and expectations.

3. Conclusion/Recommendation

Although it has been proven throughout this article that BITs are a reliable international law mechanism for the regulation of foreign investment and restoration of confidence of states in relation to the treatment of foreign investors, particularly as it affects expropriation of investment, compensation in appropriate cases and arbitration for redress; The adoption of BITs as a uniform instrument with the consequent consistency in the various terms of BITs will unavoidably create an avenue for further development of customary international law on the treatment of foreign investors.⁷¹

The nature of BITs as tools for the promotion of foreign investment is hinged on the basis that BITs enhance and encourage foreign investment while minimizing political risk and disputes between states, and protect foreign investors against expropriation and bias actions by host states.⁷² This had definitely solved the dilemma relating to situations where a particular state may prove to be geographically better in terms of investment but another state proven to be preferable in relation to the treatment of foreign investors.⁷³

However, the benefits of BITs are not without challenges which include but are not limited to inconsistencies in political structure of state parties and lack of transparency by the negotiating states in relation to domestic politics.⁷⁴ This on several occasions result to the affected state reneging on its obligations and terms of the BIT. Even though the development of BITs resulted from the objections by states to the Hull Rules in relation to expropriation, compensation and arbitration, the adoption of BITs does not completely terminate the concept of expropriation, compensation and arbitration as virtually all the BITs contain provisions regulating same. Hence the motive behind earlier objections to the rules of expropriation rests on the notion of sovereignty and the idea that states find it more comfortable to directly

⁷¹ibid

⁷² Ibid, p. 488

⁷³ibid (n 18, p. 682)

⁷⁴ibid (n 39, p. 39)

involve in negotiating agreements that may directly conflict with their domestic laws, this brings the notion of sovereignty to play.

The mechanism of BITs has no doubt appeared to be used as instrument for greater and stronger economies to bully small states in making them surrender their strict and cherished nature of sovereignty and national security to attract investment. It is disturbing to state that BITs could be employed as a means of over-shadowing the rules of supremacy of the law and equality before the law established in various municipal laws of states. This is because BITs aim at protecting the nationals of a state against the laws capable of harming the investment of the foreign investor in a host state, foreign investors even where they breach the municipal laws of the host state, may on several occasions because of the state's binding obligation in the BIT escape punitive measures under domestic legal frame work of the host state. It is premised on the above submissions that the author recommends as follows;

Parties especially on the part of investors should ensure that the BITs make provisions that will ensure their protection against political risks. this can be done by structuring the BITs to run for specified periods of time to allow them renegotiate the terms as the government in the host state changes to accommodate any peculiarities that come with each government, this recommendation is specific to host which practice democratic system of government as the case of monarchies the case may not necessarily be the same. The government is always more stable.

Also, before entering into any BIT, the Investor should ensure that the negotiators of the BITs have carefully explored and considered any political and economic risks that may affect their investments and the prospective host should be thoroughly investigated to ensure that the host has a good record of dealing with foreign investors and no records of previously expropriating investment of foreign investors.

Similarly, there must be a reform in the BITs structure which allows the developed countries to take advantage of the LDCs through the use of BITs as a shield and excuse to abuse domestic laws of the host. Reform must also be made to the investment disputes settlement to ensure responsible investment and enhance systemic consistency.