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Balance between Investment Protection and Sustainable Development under Tanzania-Canada BITs: Need for Progressive Domestic Investment Law

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Abstract

Interactions between foreign investment and host community raise questions as to the proper approach to balance investment protection and sustainable development interests. This article examines how Tanzania balances investment protection with social and environmental concerns. Tanzania has had a mixed practice with foreign investment and Bits. Few Bits were concluded in the early years after independence. But then the country experimented with socialism and self-reliance in late 1960's and 1970's, only to reverse trend in mid-1980's. Tanzania concluded majority of her Bits in 1990s and 2000's. From 2010, Tanzania concluded Bits which are conscious of sustainable development concerns. Tanzania-Canada BIT is a case in point. These Bits not only inserted explicit sustainable development provisions but also progressive investment standard provisions which afford the government space to regulate legitimate sustainable development objectives. However, this recalibration approach still faces practical challenges due inconsistencies of

arbitral tribunals. To help fill this gap, the study considers the role of domestic investment laws in protecting sustainable development interests. In that regard, the study holds the view that domestic investment laws have to be sustainable development oriented in order to supplement other approaches of balancing investor rights with sustainable development interests of host states.

Keywords
Bilateral Investment Treaty, Sustainable Development, Investment Protection, Domestic Investment Laws

Introduction

Bilateral investment treaties (BITs) are crucial in terms of promoting investment flow between signatory states as well as sustaining investor confidence. Bits do so by establishing obligations about how states must protect investors and their investments.[1] While it is true that foreign investment has potential to impact sustainable development prospects in host countries, questions have been raised as to the proper approach of striking a balance between investment protection and sustainable development interests of host states under investment law.[2]In this study, the notion of sustainable development has been employed a term that seeks to reconcile environmental and social protection with economic development.[3]

Trends in international investment law reveal about three approaches used to balance investment protection and sustainable development. While some call for a global treaty to regulate investment and investors worldwide, others recommend use of progressive and innovative language features in drafting treaties which entail, among other things, express inclusion of sustainable

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1 Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment*, 2nd edn, Cambridge University Press, Cambridge 2004, pp. 7-18. Also see Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law,* Oxford University Press, New York, 2008, p. 211.

2 Marcus Jacob, *International Investment Agreements and Human Rights,* INEF Research Paper Series on Human Rights, Corporate Responsibility and Sustainable Development, 03, Duisburg, Essen: Institute for Development and Peace, University of Duisburg, 2010), 21.

3 SumuduAtapattu, "From Our Common Future to Sustainable Development Goals: Evolution of Sustainable Development under International Law" *Wisconsin International Law Journal*, Vol. 36, No. 2, 2019, p. 228.

development concerns.[4] In BITs concluded from 2010, Tanzania has used this approach. The treaty between Canada and the United Republic of Tanzania[5] is a case in point. In examining this BIT, the study analyzes whether the approach of rebalancing language adequately addresses sustainable development interests of host states. Such an inquiry leads to the third approach which considers the role domestic legislative acts can play in balancing investors' rights and sustainable development.[6]

The article begins by presenting a historical context of conclusion of BITs and enactment of investment act in Tanzania. The article then gives an account of BITs and their potential impact on sustainable development interests of host states. Referring to provisions of Tanzania-Canada BIT, the article highlights the approach of rebalancing language used in drafting treaties, and then analyses prospects and limits of protecting sustainable development interests. The article suggests greater role to be played by domestic legislative acts and local remedies rather than overreliance on arbitral tribunals or home state courts.

Historical Context of Investment Protection

Tanzania's practice with foreign investment has been a mixed one. In early years after independence, mainly 1961 to 1967, the government was driven by market economy policies. As such, the government pursued policy measures meant to attract foreign investors all in the hope of fostering economic development.[7] Concluding Bilateral Investment Treaties (BITs) served as an opportune policy measure to achieve that goal. In particular, the government concluded few BITs with namely; Switzerland in 1965 (which is terminated) and with Germany in 1965 (which is still in force). In addition, the government concluded BIT with United States America, but this agreement is

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4 Suzanne A Spears, "Making Way for the Public Interest in International Investment Agreements", in Chester Brown, & Kate Miles, (eds.), *Evolution in Investment Treaty Law and Arbitration*, Cambridge University Press, Cambridge, 2011, pp. 271-297.

5 Agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments, Done in duplicate at Dar es Salaam, on 16th day of May 2013, (still in force).

6 Lorenzo Cotula, *Foreign investment Law and Sustainable Development: A Handbook on Agriculture and Extractive Industries,* 2nd edn, Natural Resource Issues No. 31, the International Institute for Environment and Development, United Kingdom, 2016, i-v.

7 Peter Chris Maina and SaudinJacob Mwakaje, *Investment in Tanzania: Some Comments-Some Issues*, Friedrich Ebert Stiftung, Dar-es-salaam, 2004, p.9.

said to have been only in rudimentary character.[8] To supplement these bilateral co-operation efforts, the government also passed *the Foreign Investment (Protection) Act,* 1963[9] to regulate and monitor foreign investments.

However, due to change of political and diplomatic atmosphere between Tanzania and the very countries with which it had concluded treaties namely Germany, USA and United Kingdom, the government adopted new policy measures which were fundamentally diametrically opposed to free market ideologies. These policies came in the form of Ujamaa ideologies which ushered in socialism and self-reliance. This new dispensation characterized the shift from traditional mixed state-market model towards centralized economy. In that environment, private investments were nationalized, and parastatal enterprises established.[10] This period witnessed the conclusion of only one Bit, namely Tanzania-Switzerland Bit of 1970, which was later replaced with the Tanzania-Switzerland Bit of 2004.

Meanwhile, following economic crises in mid-1980's, the World Bank and International Monetary Fund pressured Tanzania into embracing market-oriented policies. Major economic, policy and legal reforms were made to reflect this new stance. A liberal oriented constitution was amended in 1984 to include a chapter on bill of rights. Furthermore, the National Investment (Promotion and Protection) Act of 1990[11]was passed to repeal and replace the Foreign Investment (Protection) Act of 1963 which was deemed outdated. The Investment Act of 1990 established the Investment Promotion Centre (IPC), relaxed entry restrictions for most economic sectors and safeguarded investments against nationalization.[12]

This notwithstanding, global economic changes were taking place at a very fast pace. Trade and investment changes in 1994 saw the commencement of the World Trade Organization (WTO) in 1995.As a result of the need to increase flow of capital, the National Investment (Promotion and Protection) Act of 1990 was deemed out of pace with global economic changes. Thus, the

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8 Tomasz P Milej., "Striking the Right Balance between the Interests of the Foreign Investors and the Host State–A Case Study of the Tanzania-Germany BIT 50 years After its Conclusion", *African Journal of International and Comparative Law,* Vol. 25 No.1, 2017, pp. 7-8.

9 No. 40 of 1963.

10 OECD "Overview of progress and policy challenges in Tanzania", in *OECD Investment Policy Reviews: Tanzania 2013*, OECD Publishing, 2013, available at http://dx.doi.org/10.1787/9789264204348-6-en, p. 24.

11 No 10 of 1990.

12 Peter Chris Maina, "Tanzania: National Investment Promotion and Protection Act, 1990", *International Legal Materials,* Vol. 30, No. 4, 1991, pp. 890-912.

need for a new law to that effect was necessary.[13]This witnessed the enactment of the Tanzania Investment Act, 1997[14] to repeal and replace the National Investment (Promotion and Protection) Act of 1990. This law was passed in conjunction with Financial Laws (Miscellaneous Amendments) Act of 1997[15] which contains financial aspects of investment, particularly taxation matters. Furthermore, Tanzania Investment Act, 1997 establishes a one-stop investment centre in the name of Tanzania Investment Centre (TIC) to replace the Investment Promotion Centre (IPC)as an agency mandated to only promote, but also facilitate investments in the country.[16]

The period of 1990's and new millennium witnessed mushrooming of Bits. Tanzania concluded Bits with United Kingdom (1994, in force), Egypt (1997, not in force) Republic of Korea (1998, not in force), Denmark (1999, in force), Finland (2001, in force), Italy (2001, in force), Switzerland (2001, in force, which replaced the one in 1970), Mauritius (2009, in force) and Jordan (2009, not in force).[17] These BITs did not contain sustainable development provisions. In similar vein, they did not place obligations to foreign investors to respect environmental and social development. However, a new wave of treaties was concluded after 2010. These treaties include the ones with Turkey (2011, in force), China (2013, in force), Canada (2013, in force) and Kuwait (2013, not in force).[18]Importantly, these recent treaties were made with an eye on sustainable development perspective.

Foreign Investments & Sustainable Development

It is generally believed that entering into investment treaties helps attract foreign investment. Indeed, in view of the neo-liberal investment regime in Tanzania, multinational companies began making investments, most notably in mining sector.[19]North Mara Gold Mine (formerly Afrika Mashariki Gold Mines), was opened in 2002.[20] The mine was later owned by Barrick Gold in 2006 but is now a subsidiary of Acacia Mining Plc.[21] Acacia mining also owns two other mines in Tanzania, namely Buzwagi Gold Mine (acquired by

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13 See Peter Chris Maina, *Foreign Private Investments in Tanzania: A Study of the Legal Framework*, Hartung-GorreVerlag, Konstanz, 1989, p. 191.

14 No. 26 of 1997.

15 No. 27 of 1997.

16 Section 4-6 of Tanzania Investment Act.

17 Available at http://investmentpolicyhub. unctad.org/IIA.

18 Available at http://investmentpolicyhub. unctad.org/IIA.

19 https://en.wikipedia.org/wiki/North_Mara_Gold_Mine (accessed on 24th August 2022).

20 https://en.wikipedia.org/wiki/North_Mara_Gold_Mine (accessed on 24th August 2022).

21 https://en.wikipedia.org/wiki/Bulyanhulu_Gold_Mine (accessed on 24th August 2022).

Barrick in 2000 but opened in 2009)[22] and Bulyanhulu Gold Mine (opened in 2001). Barrack had acquired Bulynhulu mine in 1999 from Sutton resources. Bulyanhulu was formerly Kahama mining. The making of these investments propelled Tanzania into becoming third highest gold producing country in Africa after South Africa and Mali.[23]It is true therefore that, after transitioning to liberal economy and concluding BITs, Tanzania has been able to attract foreign investments to different sectors and in particular, the mining sector. In this case, Tanzania has richly benefitted from foreign investments not only in terms of diversification of economy but also job creation, technology transfer and poverty reduction.[24]

However, admission or making of such investments have come with significant environmental and human rights implications. In mining sector in particular, foreign investments have sustainable development implications right from the making of investments, to operations of such investments up to closure of investments.[25]From 1990's when these companies acquired exploration rights, social and environmental rights of host communities have routinely been violated.[26]For instance, right from the making of mining investments, land rights of communities residing near mines are always at stake. Land tenure for host communities is insecure in Tanzania mainly because they do not have formal rights as in certificates of customary right of occupancy for their lands. Further, due to low capacity of district land offices to survey or formalize land, most village land is still un-surveyed or unregistered.[27]

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22 https://en.wikipedia.org/wiki/Buzwagi_Gold_Mine (accessed on 25th August 2022).

23 https://en.wikipedia.org/wiki/Bulyanhulu_Gold_Mine (accessed on 24th August 2022).

24 Siri Lange, "Benefit Streams from Mining in Tanzania: Case Studies from Geita and Mererani", CMI Report 11, Chr. Michelsen Institute, 2006, available at: www.cmi.no/publications/2398.

25 International Institute for Environment and Development (IIED), "The Mining, Minerals and Sustainable Development Project (MMSD): Local Communities and Mines", Chapter 9, World Business Council for Sustainable Development (WBCSD), 2012, available at www.iied.org/mmsd, pp. 198-204.

26 Bomani Commission, "Report of the Presidential Mining Review Committee to Advise the Government on Oversight of the Mining Sectors", Vol. 2, United Republic of Tanzania, 2008, 26, 27 and 33, 39.

27 Lauren Persha, "Impacts of Customary Land Use Rights Formalization on Smallholder Tenure Security and Economic Outcomes: Midline Results from a RCT Impact Evaluation of USAID's Land Tenure Assistance Activity in Tanzania", conference paper at the 2018 World Bank Conference on Land and Poverty, (The World Bank - Washington DC, March 19-23, 2018), at 2-3.2-3.

As a result, communities experience appropriation of land without adequate and timely compensation.[28]Legal and Human Rights Centre reports that villagers in Nyakabale Geita and Nyamongo Marastill owe outstanding claims for compensation despite the fact that their land was taken many years ago.[29] Indeed, Barrick reported in May 2020 that the company still has to pay 10% of outstanding compensation claims.[30] Consequently, it is argued that the law in Tanzania does not make it mandatory for mining investors to finalise compensation activities before starting up mining operations just like the compensation systems in Australia and Thailand are. In these countries compensation procedures dictate that no mining activity can begin until compensation, relocation and resettlement have been affected.[31]

Further, right of access to information and participation is important when foreign investments are made or established. Members of host communities should be equipped with necessary information regarding the project. Importantly, this will enable members to effectively participate in the on-going project. This notwithstanding, participation of people towards mining projects in form of Environmental Impact Assessment is always reactive and not consultative. Furthermore, the right to free, prior and informed consent is not effectively adhered to. In this case, members of community are not given reasonable opportunity or access to information so as to be able to effectively say yes or no to proposed projects on their land. The case of *Attorney General vs. Maalim Kadau and others*[32]illustrates that members of communities were forcefully evicted in mining areas before compensation claims had been finalized. Importantly, it was opined that tenets of natural justice dictate that before any major decision affecting life is made, public consultation should be done. This is important even where poor peasants are concerned.[33]

Another case illustrating effect of foreign investment on sustainable development interests of communities regards a petition by Lawyers Environmental Action Team Company Ltd against Afrika Mashariki Gold Mine (now North Mara Gold Mine). This petition was filed to the

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28 District Commissioner of Tarime, "The Report of the Inquiry into the Death of Five People on 16/05/2011 shot by the police at the North Mara mine", The United Republic of Tanzania, 2011, 3.

29 Legal and Human Rights Centre, "Human Rights and Business Report 2020/2021 Tanzania Mainland," Legal and Human Rights Centre, 2021, pp. 160, 166-167.

30 Barrick, "Barrick Partnership with Tanzania Government Delivers First Major Outcomes", May 25, 2020 at https://www.barrick.com/English/news/news-details/2020/barrick-partnership-with-tanzania-government-delivers-first-major-outcomes/default.aspx (accessed on 17th September, 2021).

31 Bomani Commission, (note 29) pp. 22-39.

32 [1999] TLR 69.

33 [1999] TLR 69.

Commission for Human Rights and Good Governance. The petition alleged forcible eviction and lack of community participation.[34] The complaint was brought on behalf of 1273 landowners and peasant farmers of villages in Tarime district. In particular, the complaint alleged that the mining project conducted Environmental Impact Assessment (EIA) reports without involving members of the community.[35] Another complaint was filed against Bulyanhulu Goldmine[36]where petitioners alleged forcible eviction during the start of the Mine in 1998. They also alleged absence of adequate public consultation, absence of EIA prior to evictions and lack of adequate compensation for loss of property and livelihoods.[37]

Moreover, it has been documented that local people receive fatal injuries or even extra-judicial killings due to excessive use of force by security officers who guard mines.[38]For instance, it has been documented that 65 people died while 270 people injured by police charged with my security.[39] These events normally happen when members of communities encroach into mines to conduct illegal mining.[40]

The other sustainable development impact of foreign investment concerns the environmental component. Despite domestic laws recognizing and protecting environmental rights, mining operations routinely cause damages or pollution to environment. Legal and Human Rights Centre documents

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34 Lawyers' Environmental Action Team, "Complaint Relating to Violations of Fundamental Rights and Duties Arising from Forced Evictions of Artisanal Miners from Afrika Mashariki Gold Mine, Tarime" at https://elaw.org/es/content/tanzania-complaint-relating-violations-fundamental-rights-and-duties-arising-forced-eviction (accessed on 2nd May, 2022).

35 Lawyers' Environmental Action Team

36 Compliance Advisor/Ombudsman "Assessment Report Summary Complaint Regarding MIGA's Guarantee of Bulyanhulu Gold Mine" 2002, at https://www.cao-ombudsman.org/sites/default/files/downloads/bulyfinal.Englishpdf.pdf.

37 Compliance Advisor/Ombudsman

38 Catherine Coumans, "Anger Boils Over at North Mara Mine - Barrick/Acacia Leave Human Rights Abuses Unaddressed: Field Assessment Brief", (2017) Mining Watch Canada, athttps://miningwatch.ca/sites/default/files/2017_field_report_final_anger_boils_over_at_north_mara_mine.pdf

39 Rights and Accountability in Development (RAID) and MiningWatch Canada. *Background Brief: Adding Insult to Injury at the North Mara Mine,* September 2016. Available at: http://miningwatch.ca/sites/default/files/adding_insult_to_injury_north_mara_0.pdf Also see Rights and Accountability in Development (RAID) – MiningWatch, Tanzanian Government Investigation Receives Hundreds of Reports of Violence and Deaths at North Mara Gold Mine, 2016, available athttps://miningwatch.ca/news/2016/9/22/tanzanian-government-investigation-receives-hundreds-reports-violence-and-deaths (accessed on 3rd September, 2021).

40 Siri Lange, "Gold and Governance: Legal Injustices and Lost Opportunities in Tanzania", *African Affairs*, Vol. 110 No. 439, 2011, pp. 233-252.

water contamination in Nyamalembo, Geitaas a result of discharge of chemical wastes, mainly mercury. This in turn causes skin diseases and diarrhea.[41]Similarly, North Mara Gold Mine is alleged to contaminate river Tighite due to discharge of chemical wastes. In addition, land degradation has also been documented as one of the environmental impacts in mining areas. It is argued that open pit mining, in contrast to underground pit mining, leads to frequent spills from its tailing dams. As such, there are claims that two of the three open pits in North Mara Gold Mine which are located along river Tighite, are mainly cause of water contamination.[42]

All these incidences clearly demonstrate the close link between foreign investment and sustainable development. Put simply, foreign investment has some serious implications on sustainable development prospects of host communities. Therefore, merely encouraging or attracting foreign investments is not just enough. The broader goal involves attracting the right type of investment that pays head to sustainable development in general and not socially and environmentally damaging ones. To that end, it is important that Bits should be drafted in a language that seeks to promote environmental and social goals of host communities.[43]

Structure of BITs & Sustainable Development

It is worth noting that investments are not regulated under a single universal instrument, rather, investment protection is mainly regulated under bilateral investment treaties [44] or customary international law.[45]However, Bits or IIA's are primary means regulating investments. Bits seek to protect investors against political risks such as change of laws, regulations or administrative measures deemed detrimental to investment. This is especially where such measures are

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41 Legal and Human Rights Centre, (note 28) p. 208.

42 Najat K. Mohamed et al, "Impact of North Mara Gold Mine on the Element Contents in Fish from the River Mara, Tanzania" *Journal of Radio analytical and Nuclear Chemistry*, Vo. 309, No. 1, 2016, pp. 421-427.

43 PAGE (2018) International Investment Agreement and Sustainable Development: Safeguarding Policy Space and Mobilizing Investment for a Green Economy, the Environment and Trade Hub (United Nations Environment Programme), and the United Nations Development Programme, available at https://archive.unpage.org/files/public/international_investment_agreements_sustainable_development_1.pdf, pp 5-6.

44 Howard Mann, "International Investment Agreements, Business and Human Rights: Key Issues and Opportunities" *International Institute for Sustainable Development,* 2008 available at www.iisd.org/investment, p. 5

45 Julius Cosmas, "Can Tanzania Adequately Fulfill its Public Health Regulatory Obligations Alongside Bilateral Investment Treaties Obligations?" *The Journal of Politics and Law,* Vol. 8 No.2, 2015, available at //www.ccsenet.org/journal/index.php/JPL/article/view/49286.

considered arbitrary, disproportional or otherwise unfair.[46] Importantly though, Bits should strike a balance between two competing objectives, namely, investment protection and normal regulatory activity of host state aiming to protect environmental or social concerns. However, the traditional content of Bits and its application or operation has not always been structured to meet this noble goal.[47]

Majority of Tanzanian Bits, especially those concluded before 2010, take after traditional first-generation treaties. These treaties were concluded before 2010 but mostly during 1990s.[48]Generally speaking, such Bits are not by themselves legal instruments meant to promote sustainable development. In particular, such Bits are silent on sustainable development in general as an umbrella term or environmental protection in particular.[49]This subordinates environmental and social concerns to investment protection.

Typically, the structure of Bits mainly consists of three components, namely, definition of investment; formulation of standards of investment protection and dispute settlement mechanism.[50]The first standard provision regarding definition of investment seeks to answer the question what assets or economic activities constitute investment. Where the definition of investment is not controlled, then any type of economic activity might amount to an investment and hence be entitled to investment protection. However, many Bits define investment broadly. For example, the Tanzania-United Kingdom Bit, which was subject of discussion in *Biwater Gauff v. Tanzania*[51]provides that investments include "every kind of asset." In this broad approach, even investments that do not meet *salini* criteria of adequate duration, regularity of

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46 Barnali Choudhury, "Democratic Implications Arising from the Intersection of Investment Arbitration and Human Rights", [2009] Vol.46 No.4, *Alberta Law Review*, 986.

47 Lorenzo Cotula, "Investment Treaties and Sustainable Development: An Overview" IIED Briefing, Issue date May 2014, download the pdf at http://pubs.iied.org/17238IIED. The briefings are based on: Lorenzo Cotula, *Foreign Investment, Law and Sustainable Development: A handbook on Agriculture and Extractive Industries*, (IIED, 2013), http://pubs.iied.org/17513IIED.

48 UNCTAD "Reform of the international investment agreement regime: Phase 2", Multi-year Expert Meeting on Investment, Innovation and Entrepreneurship for Productive Capacity-building and Sustainable Development, Fifth session, Item 3 of the provisional agenda, Investment, innovation and entrepreneurship for productive capacity-building and sustainable development, Geneva, 9–11 October 2017 available at https://unctad.org/system/files/official-document/ciimem4d14_en.pdf, p.3

49 Zaman Gheorghe, Vasile Valentina, Cristea Anca, "Sustainable Development Challenges and FDI Impact in Host Countries" *The Annals of Faculty of Economics, the University of Oradea. Economic Sciences,* Vol. I No.1, 2012, pp. 444-460.

50 Andrew Newcombe, & Lluis Paradell, *Law and Practice of Investment Treaties*, Kluwer Law International BV, The Netherlands, 2009, p.*27*.

51 *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No. Arb/05/22, (2009).

profit and return, assumption of risk, substantial commitment of resources or contribution to host state's development qualify of as an investment. In particular, these kinds of investments do not have impetus to meet sustainability criteria in order for them to be entitled to protection. Unfortunately, the *Biwater* tribunal adopted this broad approach whilst stating that *salini* criteria should not solely in themselves be regarded as fixed nor mandatory requirements.[52]

Other substantive standard provisions seek to answer the question how assets of foreign investors will not be expropriated, discriminated against or otherwise maltreated by the host state after they have established their investment. These key investor protections come in the form of expropriation clauses, fair and equitable treatment obligation, national treatment obligation, and most favoured nation treatment obligation. However, it is noteworthy that the meaning of these investment standards is too wide to separate which host state conducts should be regarded as legitimate sustainable development measures and which conducts violate investment protection.[53]While some tribunals adopt low threshold for determining government exposure to investment treatment standards, other tribunals adopt high threshold for determining liability.[54]For instance, in *Biwater-Gauff*,[55]right to water for host communities was at stake. The tribunal adopted a low threshold for determining government liability on expropriation claims. Generally, there are different factors for gauging liability for expropriation. However, in this particular case, instead of determining expropriation based on substantial deprivation of rights that essentially destroy or affect investor's assets, the tribunal regarded depriving investor of its rights to normal contract termination (which was only a small subset of investor's bundle of rights) as evidence of expropriation. The tribunal lowered the threshold for investors to prevail in expropriation claims even when sustainable development considerations are at stake. In other words, sustainable development

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52 Lise Johnson, "Biwater v. Tanzania", Investment Treaty News, October 18, 2018, International Institute for Sustainable Development, at https://www.iisd.org/itn/en/2018/10/18/biwater-v-tanzania/ (accessed on 23 August, 2022).

53 Stephanie Schacherer in Natalie Bernasconi-Osterwalder, &**Brauch** M. D., (eds.,) *International Investment Law and Sustainable Development: Key cases from the 2010s*. International Institute for Sustainable Development (IISD). Geneva, 2018, Retrieved from https://www.iisd.org/library/international-investment-law-and-sustainable-development-key-cases-2010s, p. 1.

54 Jan Peter Sasse, *An Economic Analysis of Bilateral Investment Treaties*, GablerVerlag, Seiten,2011, p. 152

55 *BiwaterGauff (Tanzania) Ltd vs. United Republic of Tanzania*, ICSID Case No. Arb/05/22, (2009).

considerations are not given due weight by tribunals. Instead of recognizing government's obligations to broader public good, the tribunal only paid heed to investor's contractual rights.[56]

Fair and Equitable Treatment standard is equally wide in its meaning. Some tribunals demand a higher threshold of treatment which entails conduct that is outrageous, egregious or bad faith.[57] However, other tribunals only factor in legitimate expectation of investors or solely focus on economic impact of measure to investors.[58] In contrast, other tribunals such as *Glamis*[59] and *Parkerings v. Lithuania*[60] and *Phillip Morris v. Uruguay*[61]resort to proportionality approach which balances proportionality of host state interests such as protection of public health and culturally-appropriate environment and economic impacts on investors.

Non-discrimination standards like national treatment and most-favoured nation are also broad. If a tribunal interprets too broadly what 'like circumstances' are, then host state's ability to treat investors differently due to other factors such as sustainable development considerations is limited. In particular, where a tribunal gauges likeness based only on whether or not such investments are competing in the same sector rather than whether the investments affect environment, then national treatment standard might preclude differential treatment based on sustainable development interest.[62] Sustainable development interests such as cultural values, and protection of environment should be factored into when determining likeness.[63]

Thus, different approaches are used by different tribunals when gauging like circumstances. To compound this problem, investor state dispute settlement mechanisms enable tribunals to have varying approaches. Even though dispute settlement clauses entitle investors to challenge host state measures for violating investor protection obligations, there is neither application of doctrine of precedent nor appeal mechanisms in investment

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56 Johnson, (note 53).

57 See*Neer v. Mexico*, 4 Rep. of Int'l Arb. Awards 60, 61-62 (U.S.-Mex. Gen. Claims Comm'n 1926).

58 See *CMS Gas Transmission Co. v. Argentina*, ICSID Case No ARB/01/8, Award 12th May, 2005 and Metalclad which required legitimate investor expectation, transparent and predictable framework. This focused only on economic impact of the measure.

59 *Glamis Gold Ltd v. United States*, Award, IIC 380 (2009), 14TH May 2009, despatched 8th June 2009 Ad hoc Tribunal (UNCITRAL).

60 *Parkerings-Compagniet v. Lithuania*, Award on jurisdiction and merits, ICSID Case No. ARB/05/8 Award 14th August 2007.

61 *Philip Morris Brands Sàrl, Philip Morris Products S.A. and AbalHermanos S.A.* v. *Republic of Uruguay*, ICSID Case No. ARB/10/7

62 See *S. D Myers, Inc v. Canada*, 40 I.L.M 1408, 143 (NAFTA Arbitration Tribunal 2001).

63 JeswaldSalacuse, *The Law of Investment Treaties*, Oxford University Press, Oxford, 2009, p. 133

arbitration. As such, each tribunal is at liberty to adopt its own approach when it comes to determining the scope of investment standards. *Lauder v. Czech Republic*[64] and *CME v. Czech Republic*[65] had similar issues emanating from same set of facts but tribunals reached two different conclusions as to whether Czech Republic violated investment protection obligations.

Amidst uncertainty regarding scope of investment standards coupled with failure of bit to prescribe investors obligation to respect sustainable development interests, investors can challenge a series of measures taken by host state for sustainable development interest which directly or incidentally result into loss of investor profits including potential future profits.[66] These measures include government efforts to take regulatory measures for sustainable development such as banning harmful chemicals, renegotiating investment contracts, refusing to grant licenses or permits, refusing to renew licenses or revoking licenses where environmental concerns are at stake.

Tanzania-Canada BIT & Sustainable Development Provisions

Tanzania-Canada Bit[67] typifies new generation of Bits that were concluded after 2010 by Tanzania. The Bit was concluded in 2013. Tanzania-Canada Bit contains usual features of bilateral investment treaties whilst introducing new progressive features in the way investment standards or provisions are drafted. This seeks to address concerns raised over first-generation Bits, especially those pertaining to sustainable development impact or those concerns which curtail regulatory space of host states. To that end, this Bit is more sustainable development oriented as compared to first generation Bits.

Treaty innovations, adjustments or modifications done to Bits mainly come in form of change of language of provisions so as to re-set the way investment standards can be measured.[68]In particular, Tanzania Canada Bit

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64 *Ronald S. Lauder v. Czech Republic*, UNICITRAL Award, 3 Sept. 2001.

65 UNCITRAL Partial Award, 13 Sept. 2001.

66 Nathalie Bernasconi-Osterwalder, &Lise Johnson, (eds.) *International Investment Law and Sustainable Development: Key cases from 2000–2010*, (International Institute for Sustainable Development (IISD), 2011), Retrieved from https://www.iisd.org/library/international-investment-law-and-sustainable-development-key-cases-2000-2010, p. 5.

67 Agreement between the Government of the People's Republic of China and the Government of the United Republic of Tanzania concerning the Promotion and Reciprocal Protection of Investments, done in duplicate at Dar essalaam on March 24, 2013 (still in force).

68 Eric De Brabandere, "*(Re)Calibration, Standard-Setting and the Shaping of Investment Law and Arbitration", Boston College Law Review,* Vol. 59 Issue 8, (2018), available at https://lawdigitalcommons.bc.edu/bclr/vol59/iss8/3.

embodies/encapsulates innovations done in treaty language with sustainable development outlook. The treaty incorporates provisions which explicitly refer to sustainable development issues.

Stand Alone Sustainable Development Provision

Tanzania Canada Bit contains a stand-alone sustainable development provision. Unlike first generation treaties, this is a new provision which contains environmental language as well as healthy, safety and labour language. This provision appears under article 15 and reads:

> *The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.*

This is a provision addresses sustainable development concerns in a broad manner. It does not focus on a specific component like environmental protection. In that regard, this provision contains all dimensions of sustainable development including social dimension. It thus includes public health, safety and labour with environmental components. Importantly, this type of sustainable development provision encourages contracting states not to lower standards or regulations pertaining environmental, public health, safety or labour issues during investment making and operation. In other words, this is called a non-derogation obligation.[69]

Transparency Provisions

This is another substantive provision which is sustainable development oriented. Article 12 requires parties to the treaty to publish or communicate

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[69] See Manjiao Chi, "Sustainable Development Provisions in Investment Treaties: An Empirical Exploration of the Sustainable Development Provisions in BITs of Asia-Pacific LDCs and LLDCs", United Nations, 2018, See the UNESCAP available at https://www.unescap.org/sites/default/files/Sustainable%20Development%20Provisions% 20in%20Investment%20Treaties.pdf (accessed 16 September 2022).p.62.

their investment-related laws or administrative measures in a timely and transparent manner. The aim of this provision is to ensure parties have an understanding of the investment regulatory systems. This provision reflects social dimension of sustainable development because it encourages elements of good governance in the making or operating of investments.[70]

Provisions Clarifying Scope and Understanding of Investment Protection Standards

Tanzania-Canada Bit clarifies the understanding of minimum standard of treatment. According to article 6, what conduct is fair or equitable should not be understood beyond what is required under customary international law. This threshold was described in the *Neer*[71] claims case as follows:

> *[T]he propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial.*

In that regard, reference to such standard lowers the threshold of determining liability of FET or FPS. This is mainly because the standard offers freedom to arbitral tribunals to consider whether host state measures done in good faith for legitimate sustainable development objectives amount to shocking or egregious government conduct.[72]

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70 *Ibid.*

71 *Neer (note 58).*

72 UNCTAD "Reform of the international investment agreement regime: Phase 2", Multi-year Expert Meeting on Investment, Innovation and Entrepreneurship for Productive Capacity-building and Sustainable Development, Fifth session, Item 3 of the provisional agenda, Investment, innovation and entrepreneurship for productive capacity-building and sustainable development, Geneva, 9–11 October 2017 available at https://unctad.org/system/files/official-document/ciimem4d14_en.pdf, p.

Reservations and Exceptions in Individual Substantive Provisions

This reform action involves inclusion of reservations and exceptions to individual investment protection standards so as to exempt host states from responsibilities as a result of measures which seek to promote legitimate sustainable development objectives.[73] Article 10 on expropriation provides that:

> *A Party shall not nationalize or expropriate covered investments either directly or indirectly through measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") except for a purpose which is in the public interest, in accordance with due process of law, in a non-discriminatory manner and on payment of prompt, adequate and effective compensation.*

According to this provision, non-discriminatory measures done to protect the environment or public health, or safety should not be interpreted to constitute indirect expropriation.[74]As such, the effect of this provision is to lower the threshold for finding liability in expropriation claims.

Further, Performance requirements are also formulated in a way that reserves regulatory policy space. Article 9 (2) protects regulatory state measures that force an investor to use or adopt the kind of technology that is desirable for health, safety or environmental requirements. These state measures should not be interpreted as being inconsistent with performance requirement obligations relating to transfer of technology. Furthermore, article 16 of the treaty contains further reservations and exceptions to individual substantive standards such National Treatment or Performance Requirements.

General Exceptions

General exceptions are also meant to exempt states from responsibility as a result of measures which seek to promote legitimate sustainable development

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[73] Camille Martini, "Balancing Investors' Rights with Environmental Protection in International Investment Arbitration: An Assessment of Recent Trends in Investment Treaty Drafting" *The International Lawyer*, Vol. 50, No. 3, 2017, pp. 577.

[74] Article 10 (5).

objectives.[75] Article 17 of the treaty excludes general measures which seek to protect the environment or public health. It further excludes measures which force investors' compliance with national laws and regulations. These measures should not be interpreted as being inconsistent with investment protection standards.

The above-mentioned reforms have re-inserted sustainable development concerns into the investment equation. As such, investment protection standards should be interpreted in light of sustainable development objectives. These provisions narrow scope of investment protection standards while expanding host state's regulatory space to allow room for host state's normal or legitimate regulatory activity.[76]

Limits of Recent Sustainable Development Provisions

Generally, there is hope that recent reformulated treaties will have some influence in investment arbitrations. Indeed, the case of *Al-Tamimi v. Oman*[77]appears to back this optimism. In this case, the Oman – United States Free Trade Agreement was subject of scrutiny. Article 10.10 of the treaty contained an environmental policy reservation provision. There was also an environmental clause under chapter 17. In assessing the claim, the tribunal had regard to national law environmental regulation and express sustainable development language of the treaty.[78]In particular, since thetreaty specifically refers to customary international law, in order to find liability for breach of these international minimum standards, this requires a high threshold whereby the conduct must be "gross, flagrant disregard for the basic principles of fairness, consistency, even-handedness, due process or natural justice."[79]Given

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75 OECD (2019) "Enhancing the Legal Framework for Sustainable Investment: Lessons from Jordan", Project Insights Report, Jordan Competitiveness and Investment Project, Global Relations Middle East and North Africa, available at https://www.oecd.org/mena/competitiveness/Enhancing-the-Legal-Framework-for-Sustainable-Investment-Lessons-from-Jordan.pdf, p. 83-85.

76 *Ibid.*

77 *Adel A. Hamadi Al Tamimi v. Sultanate of Oman,* ICSID *Case No. ARB/11/33,* The award of November 3, 2015 is available at http://www.italaw.com/sites/default/files/case-documents/italaw4450.pdf.

78 *Ibid,* para 389.

79 Stefanie Schacherer, Tribunal Dismisses all Claims by U.S. Mining Investoragainst Oman, Investment Treaty News, International Institute for Sustainable Development (IISD), at https://www.iisd.org/itn/en/2016/02/29/tribunal-dismisses-all-claims-by-u-s-mining-investor-against-oman-adel-a-hamadi-al-tamimi-v-sultanate-of-oman-icsid-case-no-arb-11-33/ (accessed on 10th September, 2022).

the conduct of Oman was to enforce national regulations in order to protect the environment, the impugned conduct was held to be in good faith.[80]

This signifies that sustainable development provisions are beginning to draw attention of arbitral tribunals. However, even though Tanzania Canada Bit contains sustainable development provisions, treaty language innovations are not in themselves enough. As Martin argues, investment treaties cannot by themselves compensate for the absence of other standards such as international binding conventional framework regulating activities of investors or national standards.[81]Moreover, the Investor State Dispute Settlement System (ISDS) still has procedural shortcomings. There is no appellate body to harmonize or check against inconsistent decision of arbitral institutions. So long as inconsistencies in interpretation of treatment standards persist, the ISDS will always be tilted in favour of investment protection.[82]

Another argument about limited role of reforming treaties concerns the soft character of new sustainable development provisions. Even though article 15 of Tanzania-Canada contains environmental language, it is noteworthy that this kind of wording is merely declaratory. This wording only calls on signatory states and investors not to lower standards. As such, it does not confer obligations to foreign investors to take necessary measures to respect environment, public safety and health.[83]Instead, the host state can only use this provision to defend herself against investor claims filed in response to environmental regulatory measures.

Therefore, despite the positive role of reforming language of Bits in influencing sustainable development, there is need to make domestic investment laws more sustainable development- oriented. As rightly observed by Chi, the practical significance of sustainable development provisions in IIA's not only relies on treaty provisions themselves, but also depends on the national law standards.[84] In similar vein, Cotula reckons that balancing investment protection and sustainable development requires a holistic approach. This involves not only systemic change beyond redesigning investment treaties but also national law reforms as well while also waiting for efforts on a binding multilateral treaty on business and human rights to bear fruits. This multifaceted approach entails taking a broad view of multiple

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80 *Ibid.*

81 Martini, (note 74), pp. 529-584.

82 Jose E. Alvarez, Why Are We Re-Calibrating Our Investment Treaties? World Arbitration &Mediation Review, Vol. 4 No. 2, 2010, pp. 143-162.

83 Barnali Choudhury "Investor Obligations for Human Rights" *ICSID Review: Foreign Investment Law Journal*, 2020, DOI: at http://dx.doi.org/10.1093/icsidreview/siaa002. pp.4-5

84 Chi, (note 70) p. 62.

bodies of law involved from local level to global level.[85]Ultimately, domestic investment law has a prominent role to promote sustainable development mainly because the conduct of investors is in the first place regulated by domestic law of host state.[86]Hence, this underscores the need to improve sustainable development through domestic law standards.

Need for Progressive Domestic Investment Law

Domestic investment law applies within a given state. This law has a pivotal role to play in balancing sustainable development and investment protection chiefly because this is where the investment takes place. Domestic law prescribes procedures how investors acquire rights to investment, land or resources. Importantly, domestic law determines applicable environmental standards. It further regulates approvals or permits for investment. Put simply, domestic law plays crucial role in investment regulation and approval.[87]

Generally, domestic investment laws mainly aim to provide an enabling environment for investment. In particular, domestic investment laws seek to protect and facilitate investment making and governance. As such, the content and structure of domestic investment laws typically involves substantive guarantees for protection of investors, mandate of investment protection agencies, rules for market entry such as sectors open for investment, minimum requirements for making investments, investment incentive regime which involves conditions for grant of fiscal or non-fiscal investment incentives and clauses for settlement of investment disputes.[88]

It is quite important that domestic investment law provide a good measure of transparency, predictability and comprehensiveness so that the law can act as a reference point for potential investors.[89] Further, domestic investment law

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85 Lorenzo Cotula, "Rethinking Investment Law from the Ground up: Extractivism, Human Rights and Investment Treaties", Investment treaty News, March 23, 2021, International Institute for Sustainable Development (IISD) available at https://www.iisd.org/itn/en/2021/03/23/rethinking-investment-law-from-the-ground-up-extractivism-human-rights-and-investment-treaties-lorenzo-cotula/ (accessed on 11th September 2022).

86 Chi (note 70) p.20.

87 *Ibid,* p. 62.

88 OECD, TowardsModernisedLegislativeFrameworks for Investment in Middle East and NorthAfrica Investment Policy Perspectives, at https://www.oecd-ilibrary.org/sites/b0e3a858-en/index.html?itemId=/content/component/b0e3a858-en (accessed on 13th September, 2022).

89 NaumiKassim Mohammed, DexiangGuo, YongyehNgalim Elizabeth, "Legal Protection of Foreign Investment (FI) in Zanzibar: Lesson for China Investments", *Beijing Law Review,* Vol.12 No.4, 2021, pp. 1191-1214.

should also include sustainable development provisions.[90]However, the Tanzania Investment Act,[91] which is the main investment code in Tanzania, is unprogressive to act as a framework for sustainable development-oriented reforms.[92]

First and foremost, the Act does not contain comprehensive set of protection standards. The law is preoccupied with promotion and facilitation of investments mainly through the mandate of Tanzania Investment Centre,[93] entry requirements[94] and investment incentives regime.[95]However, in respect of substantive protection standards, it only contains expropriation clause[96] and access to dispute resolution.[97] It does not contain other protection standards such as national treatment nor fair and equitable treatment.It is argued that even though this omission does not equate to a lesser degree of investment protection, it would nonetheless have provided not only greater clarity to investor but also supplement layer of protection in line with upgraded bilateral investment treaties.[98]

More crucially, the individual protection standards contained in the Act like expropriation clause do not contain progressive sustainable development features such as clarifications on the scope of the standard or public policy reservations.[99] While it is imperative that the Act ensure private investments are protected against adverse decisions by the government or change of policies, it is equally important that the Act preserve sufficient regulatory space for the government to adopt legitimate sustainable development objectives.[100] In this regard, The Act does not contain a right to regulate clause which would have afforded the government more leeway to impose environmental regulatory measures in order to promote sustainable development. In similar vein, the Act does not contain references to global standards such as corporate social responsibility. The Act is not in line with best practices in Africa. The

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90 Jose de Gregorio, "The Role of Foreign Direct Investment and Natural Resources in Economic Development", (2003), Central Bank of Chile, Working Papers No. 196, retrieved at http://www.bcentral.cl/Estudios/DTBC/doctrab.htm, pp. 1-3.

91 No. 26 of 1997.

92 OECD, (note 10) 28-33.

93 Sections 4, 5 and 6 of Tanzania Investment Act.

94 Section 19 on sectors open for investment.

95 Section 20.

96 Section 22.

97 Section 23.

98 OECD, (note 87).

99 Chi, (note 70) pp. 59-61.

100 Ying Zhu, "Corporate Social Responsibility and International Investment Law: Tension and Reconciliation," *Nordic Journal of Commercial Law,* No. 1, 2017, pp. 90-119.

2017 Egyptian Investment Law,[101] in contrast, contains explicit references to sustainable development in preamble, objects clause, principles of investment and contains corporate social responsibility standards.

Furthermore, the Tanzania Investment Act does not impose investor obligations in a bid to regulate responsible investor conducts or behavior. There are no provisions obliging investors to respect sustainable development concerns like the environment.[102] In this respect, the Act does not reflect standards enshrined in the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises.[103]

It is noteworthy to mention here that the *Environmental Management Act*,[104] being part of domestic investment law, contains sustainable development language. It guarantees the "right to clean and healthy environment."[105] Tanzania has a strict liability regime for environment. Importantly, it also provides for Environmental Impact Assessment.[106] More importantly, The Natural Wealth and Resources (Permanent Sovereignty) (Code of Conduct for investors in Natural Wealth and Resources) Regulations of 2020[107]*impose obligations to mining investors to respect human rights.* The regulations provide that:

> *due care shall be exercised by an investor to avoid being complicit in basic rights violations committed by third parties or affiliate of the investor, and where there is reasonable suspicion that a third party or affiliate of the investor is committing basic rights violations, the investor shall endeavour to promptly address the situation and report to government authorities.*[108]

This signifies that there is significant scope for domestic investment laws to play in attempting to balance between investment protection and sustainable development. Hussein sees value in reforming domestic investment

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[101] No. 72 of 2017, published in the Official Gazette on May 31, 2017. Retrieved from http://www.gafi.gov.eg/English/StartaBusiness/Laws-and Regulations/PublishingImages/Pages/BusinessLaws/Investment%20Law%20english%20ban.pdf

[102] OECD, (note 10) p. 15.

[103] Peter Chris Maina, "Tanzania: National Investment Promotion and Protection Act, 1990", *International Legal Materials,* Vol. 30, No. 4, 1991, pp. 890-912, 891.

[104] Act No. 2 of 2004.

[105] Section 4 (1) of Environmental Management Act.

[106] See The Environmental Management (Environmental Impact Assessment and Audit) (Amendment) Regulations, 2018, G.N No. 474 published on 31-8-2018.

[107] *G.N NO.58 OF 2020.*

[108] See regulation 9 (3).

laws so as to complement or conform to investment treaty standards.[109]This is an important step especially so where arbitral tribunals are beginning to at least refer to domestic investment laws when assessing liability of host government in investor claims. *The Burlington* award[110] broke new ground in terms of this approach. In this case, a counterclaim by the host state was successful because the tribunal assessed environmental impact of investor conduct in reaching the decision. More importantly, the tribunal made an analysis of national environmental regulations and in particular referred to the Ecuadorian strict liability regime.[111] An orbiter dictum of the *Bilcon*[112] award is relevant in this regard:

> *environmental regulations, including environmental impact assessments, will inevitably be of great relevance for many kinds of major investments in modern times."*[113]*It further stressed that "[the Laws of Canada and Nova Scotia, as well as the NAFTA itself, expressly acknowledge that economic development and environmental integrity can not only be reconciled but can be mutually reinforcing.*[114]

Therefore, this signifies that national environmental regulations are beginning to attract attention of investment tribunals. As such, it is imperative that domestic investment laws should be tailored in a way that meets sustainable development perspectives.[115]

Conclusion

Investment protection is a cherished and long-established goal of investment law meant to spur economic growth. Just as important, however, is the need

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109 Moataz M. Hussein, « New Egyptian Investment Law: Eyes on Sustainability and Facilitation », Investment Treaty News, International Institute for Sustainable Development, October 17, 2018 at https://www.iisd.org/itn/en/2018/10/17/new-egyptian-investment-law-eyes-on-sustainability-and-facilitation-moataz-hussein/ (accessed 16th September, 2022).

110 *Burlington Resources Inc. v. Republic of Ecuador,* ICSID Case No. ARB/08/5 (Burlington v. Ecuador).

111 Schacherer (note 54) pp. 19- 24.

112 William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and *Bilcon* of Delaware Inc. v. Government of *Canada,* UNCITRAL, Permanent Court of Arbitration (PCA) Case No. 2009-04 (Clayton/Bilcon v. Canada). Award available at https://www.italaw.com/sites/default/files/case-documents/italaw4212.pdf.

113 para. 597.

114 paras. 595–601.

115 OECD (note 76) p.88.

to promote environmental protection and social protection. To link these competing goals, investment law is redesigning its provisions or norms. While Tanzania has embarked on this endeavour by including sustainable development language in its Tanzania-Canada Bit, the study argues that these treaty efforts alone are not enough to spur sustainable development prospects. The study has demonstrated that there is need to supplement these efforts with equally progressive domestic investment laws to strike balance between investment protection and sustainable development. In this regard, The Tanzania Investment Act, as the main investment code in Tanzania, is falling short of progressive features. The Tanzania Investment Act does not effectively cater for sustainable development needs of the country. As such, there is need to make the Act more attuned to sustainable development perspective in line with common international standards.

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