Beijing Law Review, 2023, 14, 1841-1862
https://www.scirp.org/journal/blr
ISSN Online: 2159-4635
ISSN Print: 2159-4627

Sanctity of Contracts in Foreign Investment Regime: Case of Tanzania Foreign Investment Practice

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How to cite this paper: Rwechungura, G. C. (2023). Sanctity of Contracts in Foreign Investment Regime: Case of Tanzania Foreign Investment Practice. *Beijing Law Review, 14,* 1841-1862.
https://doi.org/10.4236/blr.2023.144101

Received: September 30, 2023
Accepted: December 2, 2023
Published: December 5, 2023

Abstract

This study reviews Tanzania foreign investments practice on the issue of upholding the doctrine of sanctity of contracts. The study does this by assessing general practices of foreign investment in Tanzania and again by assessing the Tanzania Natural Resources laws, which grant the National Assembly powers to review and advice the government to renegotiate investment contracts whenever they consider the terms of the contract unconscionable. The study before embarking on the issue of upholding the doctrine of sanctity to contracts, it looks at protection of foreign investment under international investment law. Here the study observes that foreign investors are faced with two risks, these risks are commercial risks and non-commercial risks. In order to minimize or even eliminate the two risks, international investment law has in place Bilateral Investment Treaties, and Multilateral Investment Treaties, to protect the interests of the investors and host state during investment venture, further to that foreign investors sign state investors contracts with countries they go to invest. Then, the study looks at what entails Sanctity of Contract Doctrine and lastly the study makes an overview of the Tanzania foreign investment practice and violation of the Doctrine of Sanctity to contract. In the overview, the study discovers that Tanzania has been having a tendency of violating such a doctrine and the reasons of violation are poor negotiation of investment contracts by the Tanzanian officials, political directives that disregard international investment law and unstable investment legal regime. The study concludes that sanctity of contract doctrine has been violated in several occasions by Tanzania practices that violate the international investment law. Further to that, sanctity of contract doctrine is jeopardized by Sections 5, 6 and 7 of the *Natural Wealth and Resources Contracts* (*Review and Re-negotiation of Unconscionable Terms*) *Act No. 2017*. Violation of sanctity to contracts doctrine has led to consequences to

Tanzania. These consequences are loss of foreign investors, the country sued and losing cases in international tribunals and foreign investors coming with strictly and harsh investment terms. The study recommends that, state investor contracts should be subject to stakeholders' scrutiny before signing. Moreover, the study recommends that the provisions of Sections 5, 6 and 7 of the law above should be implemented to contracts that are not yet signed, to avoid violation of legitimate expectations of the investor.

Keywords

Foreign Investment, Tanzania, State-Investor Contracts, Principle of Permanent Sovereignty over Natural Resources, ICSID, Bilateral Investment Treaties

1. Introduction

Tanzania is and has been a suitable country for investment basing on its geographical location, peace and harmony and the availability of resources thus natural resources and human resources. The main issue that the country has been facing is changes in the investment legal regime from time to time. These changes in the investment regime have led to unilateral cancellation or termination of investment contracts in different times and have affected the country's good reputation of being a good and secure investment destination. One thing to note is that changes in the investment legal regime and cancellation or termination of investment contracts are not a problem as it is within the country's sovereignty powers, however it becomes a problem when the country does this without observing the international law. Non-observance of international law has led to many disputes between the country and foreign investors hence cases against the country in international courts and tribunals (Lissu, 2017). For example, In July 2023 Indiana Resources limited the majority shareholders of Ntaka Hill and Nachingwea Nickel Limited (ICSID Case No. ARB/20/38) won an award amounting to USD 109 Millions as breach of contract in International Centre for Settlement of Disputes, a World Bank Tribunal against Tanzania. This case is a result of Tanzania overhauling its investment legal regime in 2017, where the country made laws, which granted her rights of renegotiating, reviewing and termination of foreign investors' contracts in the natural resources sector. Apart from that, the case country is and had faced other cases of the same nature and all these were centered on the country's failure to uphold the doctrine of sanctity of contracts with its foreign investors.

Knowing the importance of foreign investment to the development of Tanzania like acceleration of economic growth and exports through increased capital stock, increased foreign currency reserve, better access to advanced technology and others (Gonzalez & Kusek, 2018), conducting this study is inevitable to improve Tanzania legal framework on investments.

This study discusses the doctrine of sanctity of contracts under international investment law focusing on the Tanzania foreign investment legal regime. The discussion looks at various ways under which foreign investment is protected on host state. Moreover, the study looks at Tanzania investment practice on honoring investment contracts and lastly evaluating the requirement of review of investment contracts by the National Assembly and advises the government to re-negotiate such contract or if negotiation fails then expunge such the terms from the contract. This is accordance to Sections 5, 6 and 7 of the Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act No. 2017. Having discussed all the above the study will recommend ways under which Tanzanian laws can be improved to meet the international investment laws standards and balance.

2. Factors That Lead to a Good Investment Environment for Foreign Investors

A good foreign Investment Environment entails a good and balanced legal, economic, financial, and social-political conditions in a country that affect the propensity to invest.
(https://www.investopedia.com/terms/f/foreign-investment.asp). The following are some factors that influence the prosperity of investments in a country.

Macroeconomics stability, these are stabilities in the tax regime, currency convertibility and other financial and economic factors that affect investments. Thus, here the government must ensure it avoids frequent changes in its laws and policies that may affect the investor, and should there be the need to make such changes then, it should be done in mutual discussions of the two parties.

Political stability and security this is very important factor in attracting foreign investors to a certain country. In its study UNCTAD's *Foreign Direct Investment and the Strategies of Transnational Corporations 2005-2008 when* assessing the global prospects for FDI through surveys. The surveys discovered that a big threat to foreign investment is lack of security and political instability in a certain country (Organization for Security and Co-operation in Europe, 2006). Many respondents of this survey indicated that terrorism and "political instability and civil wars" discourages flow of foreign investment at large percentage. This is because these two threats pose great risks on the security of the investors' properties or assets and the people at large. In international law, foreign investors make use of the principle of full security and protection to shield themselves to acts like these.

Legislative stability is another important factor in the development of foreign investment in any country. No matter how high the tax law has imposed, the taxes, or tough conditions imposed by the investment law, but if such laws remain constant from the day the foreign investor signs his contract with the host state government then such laws are good. Frequent changes in the laws affect the ability of investors to project their returns especially when such adjustment goes to taxes, accounting and auditing, environmental outputs and workforce management adds to an investor's cost (European Commission, 2023).

Industrial and Economic situations are important factors that attract foreign investors to a country. For example, rapid growth of *finance technology* has attracted many investors in such an area and it has been working very well. The more investors who are interested in injecting funds into an industry, the value of their investment will also increase (https://www.okbank.co.id/en/information/news/5-factors-affecting-investment-success-or-failure).

Other factors that attract foreign investment includes; good governance, good and fair business environment, human development, and migration, government transparency and accountability, improvement of infrastructures like roads, railway line, power and many others.

The above factors can be put to work by the investment host state through making different laws and policies that will lead to the implementation of such factors. Thus, it is the duty of the government to see such issues are well implemented in their territory. However, apart from the above controllable factors, there are those factors that are naturally there for investors these factors include the natural environment, and climate.

3. Foreign Investment Protection under International Investment Law

3.1. Introduction

In simple terms foreign investment means a company from one state moves its capital to another state to establish a business venture there (Rwechungura, 2023). Foreign investment is a result of two parties thus a state and investor entering into contractual relations on the implementation of a project. This is so because a state is encompassed with many activities of serving its people like providing health services, education and others, hence do not have the resources to manage everything in the country. Therefore, the state seeks private companies to invest in such projects while the state benefits in several ways from such an investment as seen above (Rwechungura, 2023). For any state to be investment friendly it, need the following: resources; secure markets; enhancing efficiency; and establishing strategic advantages for the investors to improve their long-run competitiveness (Zoltán, 2018). In general, the previous factors objectively exist without the state influence; however, the host state can influence factors like political stability in the state, good investment policy of investors and good legal framework on investment in its boundaries. Then follows good implementation of such policy and legal framework, this includes respect of agreements and contracts that a state enters with the investor and foreign investor country.

For the investor to operate in a host state there must be a contract between the two but, any contractual relations are always faced with some risks especially on violations of obligations that the parties agreed on, but the issue of violation of contractual obligations becomes more complicated when it involves parties of different states or jurisdictions. This is why the international community has set or implemented various instruments, agreements, conventions, and even customary norms to minimize such risks or eliminate these risks, as seen here below.

3.2. Risks Foreign Investors Are Face in the Host State

The term risk maybe defined to mean a chance of something happening that has an impact on the objectives of project. In other words, risk refers to general magnitude and likelihood of unanticipated changes that have an impact on cash flows, value, or profitability (Kimaro, 2023).

Mainly foreign investment is faced with two risks; the first risk is a commercial risk; whereby under commercial risk, a foreign investor is faced with a risk of termination of investment contracts, or suspension of performance due to different reasons like insolvency. The second risk a foreign investor may face abroad is non-commercial risk, which may take the form of expropriation, or nationalization, currency inconvertibility, issues related, to the transfer of profit, currency devaluation, political violence (e.g. war, terrorism, revolution), and deterioration in investment environment.

In most cases the above two risks are normally a result of the legal regime changes or political changes in the host state, therefore the international community has in place ways under which these risks are reduced or eliminated from affecting the foreign investor. To reduce or eliminate such risks the international community agreed on establishing instruments of protection of foreign investors and investment under international investment regime. These instruments of protection are Bilateral Investment Treaties and Multilateral Investment Treaties. International law also has International Minimum Standards of Protection of Foreign Investments, which sets standards under which foreign investors should be treated. Instruments of protection will be discussed next also; the minimum standards will be discussed in this part.

3.3. Instruments of Protection under International Investment Treaties and State Investor Contracts

Instruments of protection under international investment treaties include Bilateral Investment Treaties, and Multilateral Treaties. For these instruments to work in a country the country must take part in signing such instruments, the act of signing such contracts creates obligations to a state under the doctrine of sanctity of contract. However, in the case of International Minimum Standards of Protection of Foreign Investments, these standards come to existence as soon as the state admits a foreign investor into its territory. Apart from Instruments of protection under international law there are also protection offered to foreign investors by the host state by signing of state investors contracts. The following is the brief explanation of these instruments.

3.3.1. Bilateral Investment Treaties (BITs) and Treaties with Investment Provisions (TIPs)

A Bilateral Investment Treaty (BIT) is an agreement between two countries regarding promotion and protection of investments made by investors from respective countries in each other's territory (Investment Policy Hub, 2023). According to the database there, 2827 Bilateral Investment Treaties in the world of which 2219 BITs are in force, also, there 442 Treaties with Investment Provision (TIPs) of which 366 are in force (Investment Policy Hub). BITs have rapidly been adopted around the world as a means of protecting investment in the world, this rapid growth of BITs is influenced by capital exporting states intention to protect their investments in other countries especially developing countries who after their independences terminated foreign investors contracts of their previous colonial rulers.

The generation of these treaties is classified into the following generations; the first generation is the one of Friendship, Commerce and Navigation Treaties (FCNs). This first-time generation treaties required equal treatment of foreign investors by the host state, this treatment required that the level of treatment of investments from one country to another should be the same in the host country also this was extended to some instances treatment that was as favorable as the host nation treated its own investments. FCNs brought about terms on rights of trade and shipping between parties to conduct business and own property in host nation (https://www.law.cornell.edu/wex/bilateral_investment_treaty). The second generation of BITs is the ones that have set actionable standards; these actionable standards protect investors and their investment in the host state. The protection in these BITs is brought about by different principles under international standards such as Fair and equitable treatment (often meaning national treatment or most favored national); protection against expropriation; Free transfer of funds and full protection and security and international dispute resolution mechanism like International Center for the Settlement of Investment Disputes (ICSID) among others.

Generally, the emergence of BITs was influenced with the aim of protecting foreign investments by the host state granting foreign investors assurances of observing the agreed terms; this is done by granting foreign investors with ways under which they can hold the host state responsible should the state violate the agreed terms. Currently Tanzania has signed 19 countries (11 in force), and six investment agreements with regional economic blocs (US Department of State, 2023). In addition, most of these Treaties, the country has assured foreign investors with the rights to fair and equitable treatment, full protection, and security, for investments, foreign dispute mechanisms, protection against unfair expropriation and others.

3.3.2. Multilateral Investment Treaties

Multilateral treaties are treaties between multiple states, with a view of cooperating on some issues that in most case are trade and business, transportation, protection of human rights and others. Multilateral treaties cover practically every substantive field of international law, from human rights to inter-state agreements on matters such as trade or transportation. An example of Multilateral Treaty that is successful is the Energy Charter Treaty this treaty was launched in the beginnings of the 1990s which is composed of countries like Russia and its neighbors in the West. This treaty offered countries who had resources but could not exploit them a chance to welcome other countries to invest in their resource's extraction.

Tanzania is a member of different Multilateral Treaties the ones relevant to this study are the Multilateral Investment Guarantee Agency famously known as the MIGA Convention. MIGA Convention was created by the World Bank; this convention had a main purpose of promoting FDI in developing countries by offering investment insurance to foreign investors from member states against noncommercial risk like expropriation (Brownlie, 1998). Another important Multilateral Treaty is the International Centre for Settlement of Investment Disputes also famously known as the ICISD Convention just to mention a few.

3.3.3. International Minimum Standards of Protection of Foreign Investments

As seen previously these are norms of customary international law governing treatment of aliens, by providing them with the set of principles that states regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their properties.

In international investment law, there are various principles and these principles are like Fair and Equitable Treatment Standard in International Investment Law, National Treatment and Most Favored National Treatment of International Investment Law, Full Protection and Security and others (Walters, 2023).

3.3.4. Protection of Foreign Investment under State Investor Contracts

State investor contracts are contracts entered outside the legal system of the contracting state between the sovereign state who is the subject of international law and foreign enterprise (Du, Harrison, & Jefferson, 2011). In other words state investor contracts may be defined as a contract entered between a state and a national of another state and mainly governed by the rules and principles of international law (Schokkaert, Heckscher, & Dejonghe, 2010). State investor contracts are mainly intended to set out rights and responsibilities between the state and the investor on development, construction and operations of an investment venture. These contracts allocate responsibility for managing risks in the project, including financial and non-financial risks, and set out the fiscal arrangements for the project (Du, Harrison, & Jefferson, 2011).

The early state investor contracts in the world were signed in the 1970s which core objectives were grants of concessions for oil production to specialized firms, as days went on state investor contracts extended to other projects like road construction, dredging, mining, defense equipment and services, and others. In an attempt for foreign investors to protect their investments and the host state attracting foreign investment, most state investor contracts are composed of stabilization clauses/freezing clauses, economic equilibrium clauses and taxation provisions, among others (Quak, 2018).

Tanzania like other countries has signed these contracts with the main intention of ensuring foreign investors with protection of their investments. The following are some of the clauses of that Tanzania previously signed with foreign investors hence the country treaty practice. For example, the Agreement between Tanzania and Resolute Limited, and Samax Resources Limited, and Mabangu Mining Limited of 25th June 1997 assures foreign investor with the right to use ICSID forum in cases that have arisen from the performance of the created rights and obligations of the agreement. Foreign dispute resolution is also guaranteed in the Agreement between Tanzania and Pangea Minerals Limited of 17 February 2007, an agreement for Development of a Gold Mine at Buzwagi, Kahama on article 13 of the contract grants the foreign investor with foreign dispute resolution under rules of UNCITRAL (Magogo, 2018). This contract also assures the foreign investor with stabilisation clauses on issues of fiscal stability on their investment in the country this is as provided under article 11 of the agreement. The article assures the investor with a promise not to alter the laws that will affect profits, privileges, and responsibility throughout the agreement. When there is an essential change then the government must first consult, the company in that regard before the changes are operational (Magogo, 2018).

4. Sanctity of Contract under International Investment Law

This part presents details regarding Sanctity to Contracts for the reader to understand this doctrine.

4.1. Introduction and General Overview of the Doctrine of Sanctity to Contract

This is a 19th century doctrine of contract law; the timing of this doctrine lies in a period when economic and political thoughts were rooted in liberalism (Gordley, 2002). The doctrine states that once two parties enter a contract, they must fulfill their obligations under the contract. Thus, the doctrine propounds for "freedom of contract" and the enforceability of such a contract. The doctrine stresses to the parties that fulfillment of contractual terms is mandatory and failure to uphold such terms the concerned party will face the consequences of such non-performance (Sangwani, 2015). The core requirement of this doctrine is that whenever parties to a contract mind meets, then such parties can enter into any agreement they wish, and it is the state's obligation to uphold such an agreement and protect them from harm of each other actions (Sangwani, 2015). The doctrine imposes a moral basis of rights and obligations to parties in a contract of social utility of "trust and confidence in promises and truthfulness. Moreover, once a party has entered a contract, such a party is expected to perform it, failure to perform the said contract makes such party acts immoral"

(Sangwani, 2015).

This doctrine is very important in the international investment law in creating balancing rights and obligations between host states and the foreign investors, who have been a victim of actions of host states terminating their legally and binding signed contracts. The doctrine has been invoked in international investment by various cases awards as follows.

In the case of *Lena Goldfields v. USSR* (Gordley, 2002) it was decided that when a state unilaterally cancels a contract, despite an agreement not to do such a state must compensate the investor. Again, in the case of *Sapphire International Petroleum Ltd. v National Iranian Oil Co* ("*NIOC*"), a case involving the nationalization of assets of the foreign investor by the Iranian government, which contravened stabilization clause stating that "the government would not take any administrative or legislative action that would adversely affect the investor." (Sapphire International Petroleums Ltd. v. National Iranian Oil Company, 35 I.L.R. 136, 1967). Nevertheless, at the end of the day the government did take the restricted actions, which led to this case. The court ordered payment of compensation, thus, compensation for loss suffered (damnum emergens), for expenses incurred in performing the contract, and the profit lost (lucrum cessans), to the company, basing on the doctrine of sanctity of contracts.

The development of sanctity of contracts doctrine continued in the case of *Saudi Arabia v Aramco*, where it was opined that a state has its sovereignty, and such sovereignty grants such a state power to use its sovereignty powers or surrender such power by way of contract with parties, waiving such sovereignty powers against that party. The same position was also observed in the case of *AGIP Company v. Popular Republic of the Congo*, (21 I.L.M. 726 1982) in this case, the arbitral tribunal rejected the sovereignty argument, on the basis that the Congolese government had freely entered and accepted these agreements. On the issue of legislative and regulatory powers, it was decided that the state was not restricted from owning such powers. However, the state powers that were restricted are those that the state could not invoke against an investor with whom they had a prior agreement not to invoke such powers laying down the principle of Pact Sunt Servanda and the doctrine of sanctity to contract.

The main argument in these cases has always been that the sanctity to contract once invoked by parties to a contract then it leads to creation of legitimate expectations, which the state cannot renege, on. Again, the cases lay down the principle of Pact Suct Servanda and protection against unfair expropriation principles to go hand in hand with the doctrine of sanctity to contract. These principles will be discussed in detail next, to create an understanding as to what they provide.

4.2. Breaking down Sanctity to Contract

Tracing from the various cases above, one notes that sanctity to contract doctrine comes to existence because of parties entering into an agreement, it brings about other principles theories and concepts. This part discusses some of those principles' theories and concepts to create a better understanding of the doctrine to the readers.

4.2.1. Legitimate Expectations

It has been a tendency of a claimant in arbitral tribunals invoking the concept of legitimate expectations on their claims especially the ones involving breaching the sanctity of contracts and to some extent, the tribunals have affirmed their decision by granting awards on cases on the concept of legitimate expectations of foreign investment (Potesta, 2013). Legitimate expectations are intended to be the entitlement of an individual to a legal protection from harm caused by a public authority pullout from a previous contract (Chester, 2009). The protection of legitimate expectation is mainly based on two considerations; thus protection of a party to a contract from the disappointment by the decision of the other party going against such a contract that may lead to considerable harm to the other party who has relied upon the fulfillment of the contract (Schønberg, 2000). The second consideration is that legitimate expectations are a central aspect of legal certainty and therefore of individual autonomy (Schønberg, 2000). Here legal certainty and the individuals' capability to foresee the consequences of their actions are a prerequisite for rational enterprise in a capitalist economy (Potesta, 2013). In the case of Tecmed v. Mexico, the tribunal said:

> "The foreign investor expects the host state to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor. So that it may be known beforehand all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. […] The foreign investor also expects the host state to act consistently, i.e. without arbitrarily revoking any pre existing decisions or permits issued by the state that was relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities."

The concept of legitimate expectations goes hand in hand with the sanctity of contracts as we have seen above that it creates obligations on parties to a contract therefore strengthens the doctrine of sanctity of contract.

4.2.2. The Principle of Pact Suct Servanda

Pact Sunt Servanda is a Latin maxim, which means; all agreements are binding on the parties who concluded such agreements. In international law, it means that every treaty is binding upon the parties, and they must be executed in good faith (Dasgupta, 2020). This principle is enshrined under article 26 of the Vienna Convention on the Law of Treaties of 1969. It is stated that parties are bound by the treaties they have signed, and they must perform them in good faith.

This principle originates from the religious books. In the Koran it is stated as, be true to the obligations which you undertake. The principle also emerged in commerce and commercial contracts and transactions in the Middle East

(Rwechungura, 2020). The Romans also respected this principle and was an extremely important part of their judicial works. In the renaissance Pact Sunt Servanda was promoted in the theories of Machiavelli. Pact Sunt Servanda has been embodied in the general principles of international law. Not only that but also the principle has been recognized in the PCIJ and the ICJ as a general principle of international law, a good example is the case of *Norwegian loans case of 1957*. Various cases have connected this principle with the doctrine of Sanctity to Contracts. This can be observed in the case of *Texaco v. Libya* (YCA, 1979), the case involved fourteen deeds of concession concluded between 1955 and 1968 between Libya and the 2 US Companies, Texaco Overseas Petroleum Company, and California Asiatic Oil Company. In this case, the government of Libya nationalized assets belonging to Texaco. This nationalization was against the concession agreement contained a stabilization clause not allowing such an act. The government of Libya argued that upholding this clause would militate against the principle of permanent sovereignty over natural resources. The arbitrator disagreed and argued that Libya had given up its sovereign right by signing a concession agreement with a foreign investor granting the investor rights that limited Libya's sovereignty on the project. The argument was mainly based on the primarily on the principle of Pacta Sunt Servanda. The arbitrator cemented his findings by exploring the sanctity of contracts since it was recognized under Shari'a law, which is one of the sources of Libyan law.

The principle of Pact Sunt Servanda goes hand in hand with the doctrine of Sanctity to Contract as seen herein. Thus, they both call for parties to a contract to honor their obligations and promises they made while concluding such a contract.

4.2.3. The Protection against Unfair and Unlawful Expropriation Principles

Article 3 of the 1967 OECD Draft Convention on the Protection of Foreign Property defines Expropriation as a measure that lead to deprive ultimately the alien of the enjoyment or value of his property, without any specific act being identifiable as outright deprivation. Thus, expropriation involves instances, which lead to excessive or arbitrary taxation; prohibition of dividend distribution coupled with compulsory loans; imposition of administrators; prohibition of dismissal of staff; refusal of access to raw materials or of essential export or import licenses and others (Gonzalez & Kusek, 2018).

International law grants a state a right to sovereignty thus "sovereignty" involves the authority of a state to manage, protect and govern its people. This power of the state is practiced by the state by legislating different issues in the country. Again, sovereignty involves the state's ability to manage its borders.' (Jackson, 2003) These two powers of the state are respected by other states, as they are territorial integrity of a particular state, thus they are uninfringeable from other states (Shaw, 2008). In simple terms, sovereignty means the right of a state to manage regulate and protect its internal affairs and boundaries from intervention from other states. However, once a state welcomes foreign investors in its boundaries and signs agreements with such an investor then sovereignty of such state becomes limited, as we have seen under the sanctity of contracts and instruments of protection section. The tendency of states dishonouring such limitations, which was brought about by them signing binding contracts, lead to establishment of the principle of protection against unfair and unlawful expropriation (Sornarajah, 2004).

Expropriation under sanctity of contract may take different forms, these forms are administrative decisions, which are canceling of licenses and permits necessary for the foreign business to function within the state; and exorbitant taxation; which is against the agreement the parties entered (Sornarajah, 2004).

1) Proof of legal Expropriation

For Expropriation to be legally acceptable, it must meet some requirements. These requirements are that it should not be discriminatory against the investor; it must be for a public purpose, it must be done in accordance with due process of law and it must be accompanied by prompt, adequate and effective compensation to the foreign investor. Under modern international law these requirements must have happened for such expropriation to be legally acceptable and not otherwise. This requirement helps foreign investors from being taken advantage of by host states, like a host state letting foreign investors develop infrastructures and when such infrastructures start making money then the host state takes away under the umbrella of lawful Expropriation, seeing such investment is very productive compared to the compensation it will pay (Kriebaum, 2007). According to the case of Factory at *Chorzow*, *Germany v Poland ICJ*, (1923 Oxford Reports on International Law 23), the Court said in issues of unlawful expropriation that "the compensation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the act had not been committed. Restitution in-kind, or if this is not possible payment of a sum corresponding to the value which restitution in-kind would bear, the award, if need be, of damages for loss is sustained which would not be covered by restitution in kind or payment in place of it. Such are principles which should serve to determine the amount of compensation for an act contrary to international law" (Factory at Chorzow, Germany v Poland ICJ). The take here in the above-mentioned case is that compensation for unlawful expropriation must be such that the investor's position is returned to the status quo ante.

2) Compensation because of expropriation

It is unquestionable that once contract is breached, the obligation to compensate the other party to the contract arises (Francesco, 1975). However, the issue of compensation is not a smooth one because it is very controversial. In international law, compensation is propounded in the Hull Principle and the Appropriate Compensation Principle. Under the Appropriate Compensation Principle, it is determined on a case-by-case basis, considering all the relevant circumstances, and arriving at a figure that might be deemed appropriate (Hahin Shan Ebrahimi v. the Government of the Islamic Republic of Iran). On the other side, the Hull Principle states that compensation should be "prompt, adequate and effective. The difference between the two principles is that the Hull Principle calls for compensation that restores the investor position as he would have not been expropriated, thus paying full market value for the expropriated assets, including future profits (Smith, 1976). This position is extracted from the wordings, "adequate" which prescribes lost profits ("lucrum cessans") and the term "prompt" thus compensation should be made within a reasonable period. Lastly, the term "Effective" thus the currency of the compensation should be freely convertible and that there should be no restriction on its repatriation. Again, the Appropriate Compensation Principle here the value of compensation should range from full compensation to less depending on the circumstances.

4.3. Conclusion

Sanctity of contracts is a very important doctrine especially in international investment law. This importance is based on the fact it ensures reliance of promises that parties in a contract make to each other. Thus, it protects parties from backing off their contractual obligations without reasonable reasons by ensuring compensation on the party that is affected; this makes conduction of business possible between parties intending to do so (Sangwani, 2015).

5. Tanzania Foreign Investment Practice and Violation of the Doctrine of Sanctity to Contract

5.1. Introduction

The flow and contributions of FDI in Tanzania has been growing for the past two year for example in the year 2021 the country received USD 1,190.5 million compared with USD 943.8 million in 2020, this is a 26.1 percent increase (Tanzania Investment Report, 2022). FDI contributed a lot in the economy of Tanzania that grew by 4.9 percent in 2021 as compared to a growth of 4.8 in 2020. The major contributors to real GDP growth in 2021 were agriculture (19.6 percent), construction (13.1 percent), and mining and quarrying (8.8 percent) and trade (8.0 percent). Together, these sectors contributed almost half of the country's total growth (Tanzania Investment Report, 2022). Throughout the years, the Government of Tanzania has been taking various steps on improving its investment environment to attract more investors. These steps include maintenance of good political stability through democratic elections; maintaining stability in the macroeconomics, supply of good and skilled human capital. Further to that, Tanzania has established institution that advertises investment opportunities in the country help and register new investors. This institution is called Tanzania investment Centre; this is a one-stop centre for all investment activities (Tanzania Investment Report, 2022). Thus, a place where all activities that a foreign investor is required to do to invest in Tanzania is found here. In order to make investment registration easy in Tanzania the Centre has an online registration system, that will enables the investor to get all services of investing in Tanzania from anywhere in the world. In addition, Tanzania government through different institutions has information portals on legal and administrative procedures, enables an investor everything about starting and running a business in Tanzania. These portals can be accessed through different databases of Ministries in Tanzania, embassies, Attorney General Websites and others (Tanzania Investment Report, 2022).

Other initiatives taken by the Tanzania to promote investment in its territory is by signing different international investment agreements that offers foreign investors protection over government acts that violates the country and the investor agreements (US Department of State, 2023). These international agreements are Bilateral Investment Treaties and Multilateral Investment Treaties, and even state investor contracts that offer, high standards of protection to foreign investors, such as right against expropriation, unfair termination of investment contracts, foreign dispute resolution and others. Good examples of Bilateral Investment Treaties signed by Tanzania are agreement between China and Tanzania of 2013, agreement between Tanzania and Denmark. Again, the Multilateral Investment Treaties that Tanzania is a member is Multilateral Convention establishing the Multilateral Investment Guarantee Agency (MIGA) 1985**,** International Centre for Settlement of Investment Disputes (ICSID) Convention of 1966 just mention a few. In addition, Tanzania signed different State Investor contracts that assured different protections like stability in tax regime and the use of foreign dispute mechanisms among other assurances (US Department of State, 2023).

Despite these efforts Tanzania has found it's self in difficulty position on balancing protection of foreign investment and its right to regulate foreign investment (US Department of State, 2023). This problem has been affecting the country for a very long period now, thus a country enters into agreements with foreign investors but later such contracts are terminated by the country without following proper procedures (Biwater Gauff v. Tanzania). The problem of violation of state investor contracts has now grown in Tanzania after the enactment of the Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act 2017, this law grants the National Assembly of Tanzania to call and review any contract entered by the government and advice the government to renegotiate such a contract.

5.2. Risks That Foreign Investors Face in Tanzania

Despite the fact that Tanzania has good intentions on promoting and encouraging foreign investment in its territory, still there are risks that foreign investors face in Tanzania and these risks are mainly caused by the country's needs and determination on maximizing profits from investments and at the same time protecting the country's sovereignty. The following are some of the risks that foreign investors face in Tanzania.

Political Directives that Disregard International Investment Law: There has been a tendency of high government officials giving directives on termination of investors' contracts with disregard to the provisions of the contract the investor has signed with the government of Tanzania and International Investment Law. This act is evidenced by a dispute that arose between the *Biwater Gauff* (*Tanzania*) *Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22). In this case Tanzania was found to violate the United Kingdom–Tanzania Bilateral Investment Treaty (BIT) by failure protect the claimant against unlawfully expropriation of his properties, failure to uphold fair and equitable treatment, not impair the investment through unreasonable or discriminatory measures, and failure to grant full protection and security.

The requirement for Re-negotiating and Expunge of Terms of Contracts and its Consequences in Tanzania investment regime: Re-negotiating and expunging of terms contracts is provided under Sections 5, 6 and 7 of the Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act No. 2017. The main basis of this provision is that Tanzania implementing the Principle of Permanent Sovereignty over Natural Resources, which is a legitimate principle of international law. The introduction of this principle was spearheaded by the Tanzania need to recover lost revenues from investment in the natural resources sector especially in the oil, gas and mining industries, which have been said to be lost due to bad regulation by researches conducted by different stakeholders, academicians, legal scholars and others (Magogo, 2018). The enforcement of the provision took immediate effect, because in the same year thus 2017, the country started re-negotiating the investment contracts and those who failed to renegotiate and reach understandings with the government, their contracts were terminated. These brought about many critiques from the investment community.

Other risks are inconsistent institutions compounded by corruption and requests for "facilitation payments" at many levels of government; late payment issues; and cross-border trade obstacles. Corruption, especially in government procurement, taxation, and customs clearance remains a concern for foreign investors, though the government has prioritized efforts to combat the practice (US Department of State, 2023).

5.2.1. The Justification of the Re-Negotiating and Expunge of Contracts Provision

The first justification by Tanzania is that it is *enforcing the legitimate Principle of Permanent Sovereignty over Natural Resources*, thus Tanzania claims getting the right to enact and implement the provision of Sections 5, 6 and 7 of the Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act No. 2017. These require re-negotiating and expunging of terms of contracts under the principle of Permanent Sovereignty over Natural Resources. It is no doubt that truly, the principle of PSNR is a legally accepted principle under international law, but the question is, does the principle apply even to already signed contracts before its implementation. The answer to such question is no basing on the fact that states have a right to contract out their sovereignty as it has been seen previously while discussing the doctrine of sanctity of contract doctrine. In addition, in a classic case of *Texaco v. Libya*, (YCA 1979), the same claims were denied by the arbitrator stating the doctrine of sanctity of contracts. In the case of *LETCO v. Liberia*, (ICSID Case No. ARB/83/2), the tribunal in this case held that despite the legitimacy of the principle permanent sovereignty over natural resources under international law, stabilization clauses in a contract "must be respected, " because failure to do so states would be given a loophole of avoiding performing their obligations under the contract they freely signed.

Another justification was unfair dealings by foreign investors; whereby there were several claims of bribery from foreign investors to public servant who dealt with the investors in different sectors, not only that there were also claims of foreign investors disregarding the Tanzania laws in different issues like payment of taxes and others. These issues were brought out on public by the two Presidential Commissions that were formed by the then President of Tanzania the late John Pombe Magufuli. The commission investigated on economic impact of the mineral sands' exports and concentrates of Minerals Sand in the Containers in different parts of Tanzania, while another commission investigated on Economic and Legal Impact Concerning Mineral Sands Exports in the year 2017 (Roger, 2017). The commissions' investigation revealed acts of falsifying reports on the contents of the mineral sands, this is because it was found that the containers that were impounded at Dar es Salaam Port held real minerals with a value totaling up to TSh 1.4 trillion that had not been declared for tax or recorded by the Tanzania Minerals Audit Agency (TMAA). In addition, it was found that Minerals discovered in the concentrates included gold, silver, copper metal and sulphur, as well as quantities of undeclared strategic minerals like lithium. Thus, an average of 1.4 kg of gold per tonne of mineral sand in the containers was found, seven times as much as reported by TMAA. Also, the report found that the a big amount of unpaid taxes between 1998 and March 2017 through illegal exports of gold and copper concentrates is between TSh 68.59 trillion and TSh 108.5 trillion" among other discrepancies (https://www.tzaffairs.org/2017/09/the-mineral-sands-export).

5.2.2. The Consequences of the Provision to Tanzanian Investment Environment

A good investment environment must have stable legal, economic, financial, and social-political conditions in a country that affect the propensity to invest (Novik & Crombrugghe, 2018). This is very important for investors' survival in a host state; it also leads to attraction of new investors. The requirement of the provisions on the re-negotiating and expunging of terms of contracts provision has led to the disruption of Tanzania's investment regime and hence the following:

Termination of State-Investor Contracts as seen in the provisions of Sections

5, 6 and 7 that once renegotiations over such contracts failed then such terms considered unconscionable will be expunged. This saw several contracts terminated for example the TSXV-listed battery metals exploration and development company Montero Mining (Wigu Hill rare earth element project), ASX-listed resources company Indiana Resources (Ntaka Hill nickel sulphide project) and TSXV-listed junior gold explorer Winshear Gold Corp. (SMP gold project) (Kotze, 2020).

The country sued under Arbitration: this is another effect of the law as of now the country is sued under by several companies like Indiana Resources Limited the majority shareholders of Ntaka Hill and Nachingwea Nickel Limited in International Centre for Settlement of Disputes, a world Bank Tribunal (ICSID Case No. ARB/20/38). The decision of the case came in July 2023 and Tanzania lost the case and ordered to compensate the company USD 109 Millions as breach of contract.

The country has also been exposed to other cases like Winshear Gold Corp. Case (ICSID Case No. ARB/20/25) and Montero Mining and Exploration Ltd Case (ICSID Case No. ARB/21/6).

Loss of Foreign Investors to the Country the country; thus the country faced vicissitudes on the flow of foreign investments. The US Department in its survey reports that generally foreign investment in Tanzania flows were USD 1.1 billion in 2018, which is a downfall from USD 5.07 Billion in 2017
(https://www.state.gov/reports/2020-investment-climate-statements/tanzania/).
Again, the president of Tanzania on her speech pointed that the country lost many foreign investors in the preceding years of 2017 to 2020 hence actions of improving the policies and laws were inevitable (Hassan, 2021).

New Investors come with over protection terms in the agreements with the country; now the country is receiving investors from various sectors, but these investors come with very strict investment terms that are considered unfavorable to the country. A good example of strict investment terms can be seen in the Intergovernmental Agreement (IGA) Between the United Republic of Tanzania and the Emirate of Dubai Concerning the Economic and Social Partnership for Development and Improving the Performance of Sea and Lake Ports in Tanzania Dated 25th October 2022. Despite being ratified by the parliament of the United Republic of Tanzania on 10th June 2023 this IGA has received several critics from various Media, Civil Society, Faith-based organizations, Private Sector, and various other stakeholders that the contract has provisions/clauses that overlook, contradict, or contravene the national interests. Such provisions are -Article 2 of the IGA, which is opined to restrict Tanzania from negotiating agreements with other entities regarding the development of ports along the Indian Ocean coast and Lakes Tanganyika, Victoria, Nyasa, and others without first consulting Emirate of Dubai. At the same time, the issue of governing law of the contract to English Law is criticized that it contradicts various laws in the country. These laws are the ones dealing with land rights, investment incentives, environmental and occupational health issues, safety and security rights, labor and local content issues, tax matters, technical requirements, government permits, renewal rights for permits or licenses, or against the suspension or revocation of permits or licenses (TLS, 2023). Another issue is the one of restriction of amendments through Article 22. The IGA provides that amendments can only be proposed after the IGA has been ratified and the instruments of ratification have been exchanged, while at the same time the IGA comes into force only after the exchange of the ratification instruments (Article 31). This means that even the parliament of Tanzania while discussing this document did not have the powers of amending it (TLS, 2023). These are few provisions picked but there are other provisions, which have been criticized heavily by Tanzanians.

Generally, the provision of Sections 5, 6 and 7 are unfair to the investors especially those who had previously concluded contract which had stabilization clauses with the country not to unilaterally amend the contracts. This is because the doctrine of sanctity of contracts requires parties to uphold their rights and obligations in a contract they freely signed. Reading the *Nachingwea U.K. Limited, Ntaka Nickel Holdings Limited and Nachingwea Nickel Limited v. United Republic of Tanzania*, we see the company before suing the country in international tribunal tried to consult ways under which the country and the company could resolve the conflict amicably. However, such efforts were denied by Tanzania by not responding to the correspondences of the company. These acts of Tanzania did not only amount to breach of contract purposely, but they amounted to unfair Expropriation against the company and hence the company is entitled to compensation as the tribunal decided, this is so since the legitimate expectations of the company in Tanzania had been diminished by the act of Tanzanian government.

6. General Conclusion

It is a principle that a country is not under any legal obligation to enter an international contract on investment, and or admit foreign investment, further to that it is a general rule that once foreign investors establish their investment in the host state, they are bound by the national law (Sornarajah, 2004). However, states have a legal right to limit their sovereignty through treaties and contracts as seen above in this study (Sangwani, 2015). This is expressed very well in the doctrine of sanctity of contracts where we have seen that a country limits its sovereignty once it has entered a contract with another country or an investor to such a limit.

On question of Tanzania, it is fair to conclude that the country's practice of Tanzanian changing investment legal regime through laws and cancellation of state-investor contracts has been violating this doctrine of sanctity of contracts. This act has therefore created many conflicts between the country and its foreign investors. Further to that Sections 5, 6 and 7 of the *Natural Wealth and Resources Contracts* (*Review and Re-negotiation of Unconscionable Terms*) *Act No. 2017*, it allows mandatory renegotiations and review and or cancellation of foreign investors' contracts, violates the doctrine sanctity of contract. This violation by the said sections extends to concepts, principles and theories of investment law and of customary international law like "minimum standard" of protection of foreigners. The violation of the doctrine of sanctity of contract has come with pain to Tanzania since the country has been punished in international arbitration several times as seen in the discussion above. Further to that, the violation of the doctrine has led to the state losing new foreign investors and those taking risks to invest in the state come very cautiously especially when entering into agreements with the state something that leads to unfair investment agreements terms. This is as seen in some provisions of Intergovernmental Agreement (IGA) between the United Republic of Tanzania and the Emirate of Dubai Concerning the Economic and Social Partnership for Development and Improving the Performance of Sea and Lake Ports in Tanzania, which is discussed above.

The study recommends the following:

First, since most contracts that lead to conflicts were mainly negotiated and signed in secrecy without involving the public, then it is high time that the country should consider making such contracts public and subject them to scrutiny by the citizens especially the professionals on such areas. The system to be used here could be as the one used when making laws, which involves stakeholders' scrutiny and later the parliament. This will get rid of corruptions, bribery, and other forms of gifts that a few group of public servants maybe given to enter a contract that does not favor the country. This is because history has proved that there may be elements of corruption in negotiating state-investor contracts a good example is the TANESCO and IPTL case. This case was a result of negotiating unfavorable investment contracts by the Tanzanian officials has been a biggest problem to the country because the bad negotiated contract becomes impossible to renegotiate or terminate. The cause of this problem is corrupt and unfaithful public servants involved in negotiating such contracts (Presidential Special Committee Report Investigating Concentrates of the Mineral Sands in Containers on Different Parts of Tanzania of 2017). This is evidenced by the Tanzania Electric Supply Company (TANESCO) and Independent Power Supply Limited (IPTL) Contract signed in 1997. This is a Public Private Agreement main substance was supply of 100 MW from Diesel generators for 20 years to TANESCO by the IPTL. Despite the fact, the deal was contested by donors and consultants on the ground of cost, the choice of technology and projected demand of power still the deal went through. One shocking thing about the contract is that it had a term that, capacity charges will be paid by TANESCO to IPTL whether IPTL supplied power to the public or not. In the first year of operation, IPTL received over USD 40 Million in capacity payments alone while the company was not functioning at a 100 percent. Further to that this contract was approved by few government officials without consulting the necessary stakeholders, hence showed high corruption (Kimaro, 2023).

Second, Sections 5, 6 and 7 of the *Natural Wealth and Resources Contracts* (*Review and Re-negotiation of Unconscionable Terms*) *Act No. 2017* requiring renegotiation of conscionable terms of contracts by the National Assembly should be implemented to terms that the government has negotiated with the foreign investors thus contracts that are not yet signed. This is because once an investment contract is signed; it creates legitimate expectations on the side of the investor as such contract was signed by mutual agreement and free will of the parties, therefore binding. However, requiring such a contract to be subject to the review by National Assembly after signing is absurd, why not review before signing? This provision is unfair to the investor because the government may enter a contract strategically with many promises to the investor just to gain some benefits, knowing at some points the contract will be tabled to the National Assembly for review and even terminated later.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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