THE FEARS AND DOMINANCE OF FOREIGN INVESTORS AND HOST STATES IN THE LIGHT OF INTERNATIONAL LAW

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'To attract companies like yours… we have felled mountains, razed jungles, filled swamps, moved rivers, relocated towns… all to make it easier for you and your business here.' –Philippines.

Abstract

Foreign investments are important for the development of the host country. It gives employment, roads, buildings and other infrastructure thereby the living standards and the per capita income of the people will grow. Foreign investors will invest in other countries to get more returns. However, they feel that international agreements and bilateral agreements between them are not giving to the maximum extent to what they are expecting. This examines the reasons for their fears and dominance of each other with regard to foreign investments. The article has found that the laws which were made and applicable are inadequate, ineffective and multiplicity of judicial tribunals are leading to the delivery of conflicting judgments. This article advocates that a universal law has to be made and world investment court has to be established to address the challenges of both foreign investors and host countries.

***Key Words*: Foreign investment, Host States, International Laws.**

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1.0 Introduction

Every country is competing to get foreign investment with the other country. Tanzania is one of them. Tanzania investment centre (TIC) announced that it had registered 89 new major projects valued at 1,057.37 million USD (2.4 trillion TSH) between January and April 2018 and it will create more employment opportunities.[2]

According to World Investment Report, 2018, the largest receiver of Foreign Direct Investment (FDI) of $476 billion is Asia. For Latin America and Caribbean it has been increased to 8%, which has been reached to $151 billion. In case of Africa, it has decreased by 21 per cent from 2016 reaching $42 billion, whereas flows to least developed countries slide by 17 percent, to $23 billion.[3] China is the largest receiver of FDI in developing nations and the second largest one in the world after USA.[4]

The Food and Agricultural Organization (FAO) forecasts that the investment in developing countries agriculture have to be increased by 50 percent to feed the world population which is expected to cross 9 billion in 2050. The investment should be more intense for Zero Hunger target of eradication of hunger in a sustainable manner.[5]

In 2017, around 65 countries made 126 investment policies in which 84 percent were favourable to investors. These policies have liberalized the procedures for industries like transport, energy and manufacturing by providing incentives. At the same time, most of the countries are putting investment restrictions regarding national security, foreign ownership of land and natural resources.[6]

The number of investor-State dispute settlement (ISDS) cases were 855 by 2017 including 65 new cases. The investors won 60 percent of those cases on merits.[7]

Since 1980 China, Hong Kong (China), Mexico, Brazil, Singapore, Russian Federation, Chile and India have been receiving 75 percent of FDI.[8] The first batch of East Asian Countries liberalized investment regime in 1960 are Hong Kong (China), Singapore and Malaysia. The second batch consists of China and India in 1980 and African countries in 1990.[9]

The foreign investment is defined as, "A transfer of funds or materials from one country (called the capital exporting country) to another country (called the host country) in return for a direct or indirect participation in the earnings of that enterprise."[10] World Bank defined the foreign direct investment as, "the net inflows of investment to acquire

2 Katre Mbashiru, "Dar registers 2.4 Trl/- new mega investment projects." *Daily News*, May, 8th, 2018, https: www.dailynews.co.tz. (accessed May 10, 2018).

3 Key Message to United Nations Conference on Trade and Development (UNCTAD) World Investment Report, 2018, Investment and New Industrial policies, p.xi, United Nations Publications, wir2018_en_.pdf.

4 United Nations Conference on Trade and Development (UNCTAD) World Investment Report, 2018, Investment and New Industrial policies, p.4, United Nations Publications, wir2018_en_.pdf.

5 Jesper Karisson, Challenges and opportunities of foreign investment in developing country agriculture for sustainable development, *Food and Agricultural Organization of the United Nations,* Rome 2014, www.fao.org. (Accessed on May 10, 2018).

6 Key Message to *United Nations Conference on Trade and Development (UNCTAD) World Investment Report, 2018*, Investment and New Industrial policies, p.xiii, United Nations Publications, wir2018_en_.pdf.

7 United Nations Conference on Trade and Development (UNCTAD) World Investment Report, 2018, Investment and New Industrial policies, p.xiii, United Nations Publications, wir2018_en_.pdf.

8 Dirk Willem te Velde. *Foreign Direct Investment and Development An historical perspective,* Background paper for 'World Economic and Social Survey for 2006, 6.Overseas Development Institute, Commissioned by UNCTAD. 850. pdf.

9 Velde (note 8 above) p.10.

10 Article 2(I) of II SD Model International Agreement on Investment for Sustainable Development, 2005.

a management interest (10 percent or more of voting stock) in an enterprise operating in an economy other than that of the investor. It is the sum of equity capital, reinvestment of earnings, other long-term capital, and short-term capital as shown in the balance of payment."

The positive argument in FDI is that it will increase economic growth and production. The negative argument in the FDI is that it will destroy local capabilities and exploiting natural resources without adequate compensation to the host country.[11]

This article analyses two different fundamental approaches to foreign investment according to a host country view and foreign investor perspective. It draws on the concept of International Law as providing a framework for building just institution.. It argues that both fears and dominance should be reconceptualised and that a responsible understanding of National interest, human rights, sovereignty, environment, sustainable development and international cooperation should lead to a change in the relationship between states and foreign investors in the trading and investment arena.

2.0 Historical Background

The European Companies like the British and Dutch East India companies in the name of business looted the property of Asia and Africa. The British and Spanish empires mercilessly killed the natives of Americas, Australia, Africa and Asia in the name of colonization[12]and seized their lands for the purpose of mining and other ways of resource extraction.[13]

The British, Dutch, Portuguese and other European countries made investment for their colonial expansion in most parts of the world. The imperial powers helped them to protect their investment with arms and ammunition and military. They also made laws, which are favourable to them.[14]

Hugo Grotius propounded that foreigners are treated equally with the natives.[15]Emmerich de Vattel in his 'Law of Nations' (1758) written that the State has right to put forth certain rules and regulations to manage the entry of the foreigners into their state.[16] Once entered, the foreigners are subjected to the laws of the state and at the same time, the state is having obligations to protect the foreigners and their property, which has become one of the provisions of International law.[17]

The countries have broken the shackles of colonialism and freed themselves from the clutches of colonialist's economic dominance. These independent states including the Eastern European communist states embraced socialism and started nationalization of their economies.[18] In the process of becoming independent with nationalist fervour started entering the global market for imports and exports.[19]

President Reagan of the United States and Prime Minister Thatcher of the United Kingdom pushed for the liberalisation of foreign investment regimes in the ambience of free market economies.[20] The fast development of the small states like Japan, Hong Kong, Taiwan and Singapore with foreign investments in terms of removal of poverty, job creation, educational achievements and rising of living standards has made a path for the developing countries and they opened their doors for foreign investments.[21] The developing countries like China and India followed them by liberalizing their economies.[22]

In the year 1952, the United Nations General Assembly passed a resolution on Permanent Sovereignty over Natural Resources.[23] The UN also appointed Commission on Permanent Sovereignty over Natural resources to review the management of nations over its resources. In the year 1962, the General Assembly passed another resolution, which states that the people and nations have permanent sovereignty over its natural wealth and resources for the welfare of them and development of their states.[24]

After the breaking up of Soviet Union into smaller states, the cold war between western democracies and eastern communist states ended. It resulted in stopping of aid to the friendly nations. The wars in Iraq, Afghanistan and other gulf countries lead to recession. The developed countries stopped giving aid to the developing countries. The developing countries are in dire need of funds. This made the developing countries liberalized their policies for foreign investment.

The World Bank and International monetary fund encouraged foreign investment in the developing states with an intention that it brings technical expertise, enhancing work force skills, increasing productivity, generating business for local firms, and creating better-paying jobs.[25] Thereby enhance the competition between local firms and foreign firms and force the local firms to upgrade the productivity or perish.[26]

The developing states started signing the treaties, which guarantees the protection of foreign investment. World Bank also created the Multilateral Investment Guarantee Agency (MIGA) to promote investment in developing countries by providing guarantees to foreign investment.

The liberalization brought investments to the countries where the situations are conducive to them. If the situations turned bad for them, they started taking back their investments, which caused economic crisis in Russia, Mexico, Malaysia and Argentina. The free movement of capital in the economic liberalism has brought these woes to them. They started rethinking about that change and imposed capital controls. For example, Malaysia and Argentina resorted to capital controls to deal with the economic crisis.[27]

The flow of investment to developing countries has given birth to the Multi-National Corporations (MNCs). The MNCs in Brazil, China and India reached

11 Velde (note 8 above) p.2.
12 Adams Jones, (2006) *Genocides of Indigenous Peoples* in Genocide: A Comprehensive Introduction, Routledge, London, 2006, p. 68.
13 Maybury L.David., (2002) *Genocide against Indigenous People* in Alexander L. Hinton, Annihilating Difference: The Anthropology of Genocide, University of California Press, Berkeley, p.248.
14 Colonialism, New World Encyclopedia, www.newworldencyclopedia.org (accessed August 7, 2018).
15 Andrew N and Luis P, (2009) Law and Practice of Investment Treaties, Kluwer Law International, Netherlands,p. 4.
16 *Ibid.*
17 *Ibid.*
18 Newcombe (note 15 above) p.18.
19 Sornarajah M., (2010) The International Law on Foreign Investment, third edition, Cambridge University Press, Cambridge, p.33.
20 *Ibid,* p.34.
21 Kalim Siddiqui., *Flows of Foreign Capital into Developing Countries: A Critical Review*, Journal of International Business and Economics, 2014, Vol.2, No.1, p.30.
22 Sornarajah (note 19 above) p.34.
23 GA Res. 626 (VII), (1952) YBUN at 387.
24 GA Res 1803, 14 Dec 1962
25 How Developing Countries Can Get the Most Out of Direct Investment, October 25, 2017. www.worldbank.org (accessed August 8, 2018).
26 Chapter for Encyclopedia of International Economics and Global Trade, September 2017.
27 Sornarajah (note 19 above) p.26.

to the capacity to invest overseas. The MNCs have been spreading its tentacles over the large failing companies of North America and Europe. They bought them and became important investors in America and Europe. There was a significant change in these erstwhile capital exporting countries which earlier were claimants have been metamorphoses to respondents and claims were brought against these countries by the MNCs on the basis of laws which they themselves had created for protection of their investors.[28]

The new type of MNCs which emerged are China and India state owned oil corporations. They are entering into the arena of investments by seeking the merging of existing MNCs, which sometime faced opposition from developed states. The Chinese State owned China National Offshore Oil Corporation (CNOOC) wanted to buy American oil Company UNICOL but the USA opposed the deal on the ground of National Security.[29]

There were some more mergers. For example, China Petroleum and Chemical Corporation (SINOPEC) finalized its deal to buy Tanganyika Oil of Toronto which has exploration and production assets in Syria. The SINOPEC offer was higher than the Indian Oil and Natural Gas Corporation (ONGC)'s offer. Earlier, the ONGC beat SINOPEC over the control of Russia's Imperial Energy with a US$25bn bid.[30]

The developing nations are facing challenges from investors. The investors are facing challenges from developing nations that spread to developed nations. Therefore, the developing nations and developed nations are taking protective measures against the investors.

3.0 International Investment Agreements

According to the Vienna Convention on the law of treaties, 1969, the treaties are one of the sources of International Law. The international agreements are part of treaties made among or between the states.[31] The states are not bound by treaties unless ratified by those states.[32] The investment treaties at international level are in the form of bilateral treaties, regional treaties, interregional treaties and multilateral treaties.[33]

3.1 Multilateral Investment Treaties

The developing and developed countries are liberalizing to attract FDI for getting technology and capital. There is still a gap of framework for FDI at Multilateral level. The home countries are encouraging FDI into developing countries using guarantee funds, match making and taking other relevant measures.[34] The significant multilateral treaties, which are drafted and are not adopted due to various reasons and the treaties which are in existence are discussed hereunder.

28 Sornarajah (note 19 above) p.28.
29 *Bogus Fears Send the Chinese Packing,* The Economist, last modified August 2, 2005. www.economist.com (accessed August 9, 2018).
30 "China's Sinopec to buy Tanganyika oil," accessed August 10, 2018. http://www.ft.com (accessed August 7, 2018).
31 Article 2(1) (a) of Vienna Convention on the law of treaties, 1969, No.18232.
32 Article 2(1) (b) of Vienna Convention.
33 International Investment Agreements. www.investmentpolicyhub.unctad.org (accessed August 7, 2018).
34 Velde (note 8 above) p.25.

3.1.1 International Trade Organization (ITO)

After the World War II, in the year1948 the draft charter was presented at Havana for the establishment of International Trade Organization for economic cooperation along with World Bank and International Monetary Fund. Articles 11 and 12 of ITO Charter discusses about the foreign direct investment. It was not adopted because the US Congress refused to ratify it.[35]

3.1.2 Convention on the Settlement of Investment Disputes (ICSID Convention)

ICSID Convention is a multilateral treaty which was developed on the idea of Aron Broches, the then General Counsel of World Bank, in the year 1965. It has provided the rules and procedures for conciliation and arbitration of investment disputes between investors and governments. It has created a centre called International Centre for Settlement of Investment Disputes in the year 1966, in which foreign investors, host countries and home countries submit investment disputes to Arbitrator. It also deals with the cases falling under Arbitration rules of United Nations Conference on International Trade Law (UNICITRAL).[36]The awards of ICSID have to be enforced by all parties to the convention like enforcement of a final judgment of the State's own court.[37]

3.1.3 Organisation for Economic Cooperation and Development (OECD)

In the year 1961, Big Capital exporting Countries led by US formed OECD and was in favour of liberalized investment regime. The OECD enacted two codes, one is Code of Liberalization of Capital Movement and the second one is Code of Liberalization of Current Invisible Operations to pursue member countries to liberalize the restrictions on the Trans-border movement of Capital. It did not include rights and duties of foreign investors. It attempted to bring Multilateral Convention on the protection of foreign property, but it was not adopted.[38]

In 1990s US called OECD to launch a comprehensive binding investment treaty known as Multilateral Agreement on Investment (MAI) which supported investment liberalization. The developing states and part of developed states could not agree regarding the rules on foreign investment protection. Non-US countries, NGO's, trade unions opposed MAI, since it is against the interest of poverty eradication, environment and human rights protection.[39]

3.1.4 Abs-Shawcross Convention

In the year 1957, the European business people and lawyers with the support of International Chamber of Commerce formulated a draft convention called International Convention for the Mutual Protection of Private Property Rights in Foreign Countries for the protection of private foreign investment and it

35 J.E.S. Fawcet., The Havana Charter, *Yearbook of World Affairs,* 5, 1949, p.320.
36 Rudolf D, and Christoph S., 2008 Principles of International Investment Law ,New York, Oxford University Press, pp.18-21. See also: ICSID Convention-World Bank Group, http://icsid.worldbank.org (accessed August 12, 2018).
37 Article 54(1) of the ICSID Convention.
38 OECD Codes of Liberalization of Capital Movement and of Current Invisible Operations, www.oecd.org (accessed August 12, 2018).
39 Kavaljit Singh, "Multilateral Investment Agreements in the WTO-issues and illusions." *Asia Pacific Research Network,* 2003, p.13, Manila, multi_invest_agree_july03_e.pdf.

was revised in the year 1959 as Draft Convention on Investment abroad. As it is totally favourable to the capital-exporting countries, it was not adopted.[40]

3.1.5 The United Nations Centre on Transnational Corporations (UNCTC)

In the year 1970, the Economic and Social Council of the United Nations (ECOSOC) established United Nations Commission on Transnational Corporations and UNCTC to undertake a study on investment issues on the pressure of developing countries in the UN. It led to the drafting of United Nations Code of Conduct on Transnational Corporations to mitigate abuse of corporate power and establish guidelines for corporate behaviour in the host countries. This code was an integral part of New International Economic Order (NEO), which deals with the concerns of developing world. The US and other capital exporting countries opposed this code. As a result, the UNCTC ended in the year 1992.[41]

3.1.6 International Chamber of Commerce (ICC)

The ICC came into existence in the year 1919 to cater for the needs of World business by promoting trade and investment and to protect open market for goods and services. The ICC deals with the three basic activities. They are establishment of rules; dispute resolution; and policy advocacy.[42] The ICC Arbitration is a dispute resolution procedure that leads to a binding decision from a neutral arbitral tribunal and can be enforceable under domestic arbitration law and International treaties such as New York Convention, 1958.[43]

3.1.7 Energy Charter Treaty (ECT)

The Energy Charter Treaty (ECT) is a legally binding multilateral instrument which created a framework for cross-border cooperation in the energy sector including foreign direct investment. The object of the ECT is in reducing non-commercial risks connected with the energy-sector investments. It came into force on 16 April 1998. It was based on European Energy Charter of 1991.[44]

3.1.8 United Nations Convention on International Trade Law (UNCITRAL)

UNCITRAL develops frameworks for the facilitation of international trade and investment law. It specializes in commercial law. The UNCITRAL Model Laws provide models to the lawmakers of different states, who can adopt as part of their domestic legislation. The UNCITRAL Arbitration Rules may be selected by parties, either as a part of their contract, or after a dispute arises, to guide them to resolve dispute/disputes between themselves. In other words, the Model Law meant for States, whereas the Arbitration Rules meant for potential (or actual) parties to a dispute.[45]

40 "Draft Convention on Investment Abroad (Abs-Shawcross draft convention)," *International Investment Instruments: A Compendium,* www.unctad.org/137/voulume5.pdf.

41 Kavaljit (note 8 above) p.11.

42 International Chamber of Commerce (ICC), http://www.investopedia.com (accessed August 12, 2018).

43 International Court of Arbitration-Arbitration Rules Mediation Rules, *International Chamber of Commerce (ICC),* France, last modified 2016, www.iccwbo.org (accessed August 12, 2018).

44 "The Energy Charter Treaty and Related Documents- A Legal Framework for International Energy Cooperation." last modified September, 2004. www.ena.It.pdf (accessed August 14, 2018).

45 UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006, *United Nations*, Vienna, 2008. www.uncitral.org (accessed August 15, 2018).

3.1.9 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

The New York convention provides a legal framework to different states for the recognition and enforcement of foreign and non-domestic arbitral awards. The parties to the convention recognize arbitral awards made in any State other than the State in which recognition and enforcement sought and enforces them unless otherwise the grounds of refusal mentioned in the convention. [46]

3.1.10 World Trade Organization and Investments

The WTO main aim is not only liberalizing international trade but also deals with the investment, affects such trade.

The Singapore Ministerial Conference of the WTO of 1996 wanted to bring about comprehensive instrument on investment. It failed because of opposition from developing states but established a working group to examine the relationship between trade and investment.[47]

The Doha Declaration of ministerial meeting also tried to consider the development of investment instrument. The developing countries expressed that the instrument on investment should contain the provisions relating to the actions taken to control the harmful activities against the development of host developing states. It should also abide by all domestic laws and regulations in their operational activities and the home countries have to take responsibility for the investor behaviour in a host country.[48]

The Multilateral investment agreements still exist even though they are not used much. The multilateral agreements, which are in existence, are:

- The WTO Agreement on Trade Related Investment Measures (TRIMs) deals with performance requirements associated with foreign investment;
- The Agreement on Subsidies and Countervailing Measures (ACMs); and
- The General Agreement of Trade in Services (GATS) deals with foreign investment in service sector.[49]

Apart from that, WTO established a working group in the year 1996, which conducts analytical work on the relationship between trade and investment.

The Foreign investors having financial resources lobbied pressure to make multilateral treaties in their favour. Their attempts became futile because of the sharp disagreement from the developing countries, NGOs and to some extent developed countries.

3.2 Regional Treaties

The regional treaties, which take into consideration foreign investment, are The North American Free trade Agreement (NAFTA), Association of Southeast Asian Nations (ASEAN), and Mercosur Agreement. Another regional agreement is the Free Trade Agreement of the Americas that is among the North, South and Central America, which has become extinct because of the economic crisis of 2008.

46 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958, *United Nations,* New York, 2015. www.uncitral.org (accessed August 12, 2018).

47 Singapore WTO Ministerial 1996: Ministerial Declaration, WT/MIN/ 96/DEC, last modified December 18, 1996. www.wto.org (accessed August 17, 2018).

48 Martin Khor., The Singapore Issues in WTO:Evolution and Implications for Developing Countries Third World Network, Malaysia, 2007, p.33.

49 Velde (note 8 above) p.23.

3.2.1 The North American Free Trade Agreement (NAFTA)

NAFTA is the world largest free trade agreement between Canada, Mexico and the US. Its main purpose is to increase business investment and help North America to be more competitive in the global market place. This treaty accommodates a solid investor-state dispute settlement procedure. It gives right to investor to initiate arbitration against the host state. NAFTA has decided many arbitration cases.[50]

3.2.2 Association of Southeast Asian Nations (ASEAN)

The ASEAN consists of ten Southeast Asian states. It has reduced intraregional tariffs to attract foreign investment by creating free trade area. The ASEAN treaty on the Protection and Promotion of Foreign Investment accommodates endorsed investments protected by the treaty. The previous ASEAN treaties have now been supplanted with another treaty called the ASEAN Comprehensive Treaty on Investments.[51]

3.2.3 Mercosur Agreement

It is a regional agreement covering most of the states of South America. It is officially called officially called Southern Common Market. It grants protection of foreign investment of the member states.[52]

50 Kimberly Amadeo., History of NAFTA and Its Purpose, last modified February 16, 2018, http://www.thebalance.com (accessed August 18, 2018).

51 Chung-in Moon.., ASEAN International Organization,http://www.britannica.com (accessed August 17, 2018).

52 Claire Felter and Danielle Renwick., Mercosur: South America's Fractious Trade Block, last modified December 26,2017. http://www.cfr.org (accessed August 19, 2018).

3.3 Bilateral Investment Treaties (BITs)

The bilateral investment treaties (BITs) increased from 500 in 1990 to around 2,400 in 2005. The developed countries made BITs with the investment associates of developing countries. Some countries are interested in making BITs and some are not but most of the developed countries prefer them.[53]The total bilateral investment treaties made until now are 2952, out of them 2358 are in force.[54]

The BIT originated from the Europe. The first bilateral investment treaty concluded between the Federal Republic of Germany and Pakistan on November 25, 1959.[55]

In the bilateral investment treaties more intellectual property rights are incorporated and enforced than in multilateral treaties.[56] The BITs are also made by those countries like China and Vietnam who are ideologically antagonist towards investment and are ready to acknowledge the investment safeguards and willing to settle the disputes through International Arbitration.[57]Basing on this treaty the Chinese foreign investor has filed a case against Peru on the grounds of Jurisdiction and Competence.[58] China would show that its treaties are fluctuated according to the changed conditions.[59] These treaties related to specific subject matters as opposed to the standards of international law.

53 Salacuse, J. and Sullivian., *Do BITs really work: An evaluation of bilateral investment treaties and their grand bargain,* Harvard Journal of International Law, 2005, Vol 46, No.1. pp. 67-130.

54 International Investment Agreements. www.investmentpolicyhub.unctad.org (accessed August 17, 2018).

55 Dolzer, R and Stevens, M., 1995 Bilateral Investment Treaties, Martinus Nijhoff Publishers, London, , p.1.

56 P.Drahos, *BITs and BIPs: Bilateralism in Intellectual Property*, Journal of World Intellectual Property, 2002. No.4, p.792.

57 Dolzer (note 55 above) p.4.

58 *Tza Yap Shum v. Peru*, ICSID Case No. ARB/07/6 (2009).

59 Norah G, and Shah., W., (2009) Chinese Investment Treaties: Policy and Practice, Oxford University Press, p.12.

The BITs are made between capital-exporting countries and capital importing countries, which are generally unequal partners. For the developing countries, it is very difficult to have expertise legal department to understand the intricacies of the terminology used in the treaties. They sign it with the expectation of getting foreign investments to their countries even some times at the expense of their sovereignty.[60]To remove the imbalance Norway brought a type of investment treaty which sought to bring about equilibrium between investor and host state. The agreement was opposed by developed countries.

The International Court of Justice observed in *ELSI* case[61] that it is the duty of the investor to exhaust local remedies before resorting to international arbitration in cases of treaties of Friendship, Commerce and Navigation (FCN) subject to the time limit for exhaustion. The *Calvo* doctrine recognizes disputes relating to foreign investments which were decided by the domestic courts.[62] Although the US earlier, opposed the *Calvo* doctrine, she now supports the doctrine in so far as it relates to national treatment and indirect expropriation.[63]To avoid the requirement of exhaustion of local remedies rule, investors are now resorting to the BITs. By this, investors rights are protected by international courts and can claim damages from the host States for the breach of BIT. In this respect BITs insulate them from the jurisdiction of Domestic Courts.[64]

60 Ingrid Detter, *The Problem of Unequal Treaties,* The International and Comparative Law Quarterly, 1966, Vol.15, No.4, p.1069.

61 *Elettronica Sicula. S.p.a. (ELSI) United States of America v. Italy,* July 20, 1989, http://www.icj-cij.org (accessed August 21, 2018).

62 Article 2(2)((c) of the Charter of Economic Rights and Duties of the States, 1974 (The General Assembly Resolution 3281 (XXIX).

63 Christopher F. Duggan, Don Wallace, Jr., Noah D. Rubins and BorzuSabahi., Investor-State Arbitration, Oxford University Press, New York, 2008, p. 488.

4.0 Foreign Investors' Fears and Dominance

The foreign investors who have surplus resources generally wanted to invest where they are likely to get more profits. The foreign investment is one of the opportunities to make profits. The foreign investor fears are on the dominance of host country and the host country fears are the dominance of foreign investor and vice versa.

4.1 Investor Powers

Some investors individually have more economic resources than those of sovereign states. Their collective resources can manipulate many things including creation of principles of law, writings of highly qualified publicists and sometimes influencing the decisions of arbitration. They can also lobby for loans, aids, and grants by developed countries including IMF and World Bank.

4.2 Partiality of Local Tribunals and Courts

The foreign investor fears are that they will not get justice from the local tribunals and courts if there is a dispute between the foreign investor and Host State regarding investment issues. They thus want the foreign investment disputes to be settled in neutral forums.

64 Barton Legum, *The Innovation of Investor-State Arbitration under NAFTA,* Harvard International Law Journal, 2002, Vol. 43, p. 531.

4.3 Nationalisation

One of the fears of foreign investors is nationalization. Generally, the developing countries, when their total economy is in the hands of foreign investors, the political leaders resort to nationalisation. The nationalization is employed as a weapon as was done by President Mugabe of Zimbabwe. Similarly, it was adopted by Iran, and resulted into driving out US companies from Iran. This led to *Anglo-Iranian oil company case*[65]and establishment of Iran-United States Claims Tribunal in the year 1981. This tribunal was the first of its kind to handle investment claims. The awards of this tribunal have widely been used as precedent by investment treaty tribunals.[66]

4.4 Changing Laws/ Agreements

The investor fears that after pouring lot of money in the investment and when it is ready to receive the fruits of it, the Government may change laws, which will cut short the returns to the minimum level as earlier expected. The petroleum prices soared up in between 2000 and 2008. Bolivia, Ecuador, Venezuela, Zambia and developed countries like Canada and UK started enhancing the taxes to get awesome offer of benefits.[67] They also cancelled contracts of mining development. The host country like Zambia asked to re-discuss the terms of the contracts and come up with new agreements according to the changed laws.[68]

5.0 Host States Fears and Dominance

All people for their own ends freely dispose of their natural wealth and resources without prejudice to any obligation arising out of international economic co-operation, based upon the principle of mutual benefit, and International law. In no case people deprived of their own means of subsistence.[69]

In the present arena of globalization, the poor local economies are flooded with the external capital. One side of the coin is that the foreign investment plays a significant role in the local development. The other side of the coin is that, it will have adverse effect on the local natural resource-dependant activities.

Foreign owned corporations thought to be a threat to sovereignty of the host state. They influence the host state's policies and as a result, they assist to continue inequalities between the states.[70]

5.1 Overthrowing the Government

The foreign investors are having money power to influence the politics of host country, when the existing regime goes against their investment. There are no hard rules regarding that except lobbying through bribery. In one case involving Kenya, the tribunal held that the agreement between the foreign investor and host country was obtained through bribery, which is against public policy of Kenya and England. Therefore, the tribunal rejected the contracts obtained by corruption.[71] They have also overthrown the government of Chile former President Salvador Allende in a *coup d etat* by the support of home state US, when he tried to nationalize copper industry.[72] In another case, they aided the government of Sudan in committing genocide crimes and crimes against humanity around certain oil fields. The motive behind was to clear the civilian population in order to secure areas for exploration in Sudan.[73]

5.2 Compensation Equal to Exploitation of Resources

The another fear host countries are worried about the foreign investor who has promised that it will provide employment, pay taxes, give royalty and give compensation equalling to the resources exploited are not complied with properly. An African Union study shows that about US$50 billion in illicit financial flows leave the continent every year without getting fair share of the revenue from the extractive industries, because of poor contractual arrangements, ill-conceived legal, policy and institutional frameworks, absence of transparency in revenue sharing and disregard for land and community rights.[74]

5. 3 Withdrawal of investment

The foreign investors invest in host country when the interest rates in their home countries are lower and having large amount of surplus capital.[75] The host country opens its doors for the foreign investors to invest. Many capital-exporting countries invested in the host country and the host country feels that now the country is moving towards development. Due to changed circumstances externally or internally then they will withdraw investments from the host country, which happened in Malaysia and Venezuela. The other reasons are higher interest rates in their home countries and demand for capital in many countries.[76]

The US and Canada after seeing the NAFTA arbitrations moved towards sovereign centred approach. They made modern treaties, which will both protect the investor interest and state interest. They made treaties in such a way that the states can claim exemption of liability under the pretext of protecting public interest, exercising regulatory powers and national security.[77]

6.0 Judicial Forums

Before 1968, the BIT had provisions to settle the dispute between state-to-state in the arbitral tribunal or ICJ. In the year 1968, Article 11 of the BIT between Indonesia and Netherland first time incorporated the clauses for investor-state arbitration.[78]

The known treaty based investor-state arbitration cases are 855. In which 297 cases are pending and 548 cases are settled. In the concluded cases 36.5 percent, cases decided in favour of the host state and 27.9 percent cases were decided in the favour of investor.[79]The

65 *The United Kingdom v. Iran* [1952], ICJ 93.
66 Christopher S. G and Christopher R. D, *Iran-United States Claims Tribunal Precedent in Investor-State Arbitration*, Journal of International Arbitration, 2006, Vol. 23, No.07-15, p. 521.
67 See, for example, the Bolivia legislated Hydro carbon Law (3058) in May 2005 and a subsequent Supreme Decree (May 2006) asking the investment companies to pay 50 percent more taxes and Royalties and sign new contracts according to the changed law. Aisha Ally Sinda, *MDAs legal regime in Tanzania: A comparative analysis*, Citizen (Dar es Salaam, Tanzania) Aug. 29, 2018.
68 *Ibid.*
69 Article 1 (2) of International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR).
70 Jennifer A. Z., Multinationals and Corporate Social Responsibility Limitations and Opportunities in International Law, Cambridge University Press, UK, 2006, pp. 9-10.
71 *World Duty Free Company Limited (WDF) v. Republic of Kenya*, ICSID Case No. ARB/00/7,IIC 277 (2006).
72 Salvador Allende (president of Chile), Encyclopaedia Britannica, http://www.brittanica.com (accessed August 16, 2018).
73 *The Presbyterian Church of Sudan, et al v. Talisman Energy, Inc. And Republic of the Sudan*, 07-0016 (2nd Circuirt.2009).
74 Eric Chinje, Will meeting result in new thinking on extractive industries?, Citizen (Dar es Salaam), Aug. 20, 2018.
75 Siddiqui (note 21 above), p.32.
76 *Ibid*
77 Bergman, M.S , *Bilateral Investment Treaties: An Examination of the Evolution and Significance of the US Prototype Treaty*" New York University Journal of International Law and Politcs, 1983, Vol.16, No.1, p.1.
78 *Indonesia- Netherland BIT (1968)*,United Nations –Treaty Series, 1971, No.11386, p. 22 , investmentpolicyhub.unctad.org (accessed August 21, 2018).
79 "Investment Dispute-Settlement," last modified December 31, 2017. Investmentpolicyhub.unctad.org (accessed August 22,

resolution of investor state disputes settled by the following courts:

a) Domestic Courts of Host State;
b) Arbitration according to the International Centre for Settlement of Investment Disputes (ICSID) Arbitration rules or the ICSID Additional facility rules;
c) *Adhoc* Arbitration tribunals according to the UNICITRAL Arbitration rules;
d) Arbitration according to the rules of International Chamber of Commerce;
e) Arbitration according to the rules of *Cour Commune de justiceet d' Arbitrage* (CCJA);
f) The settlement procedure as agreed earlier by the investor and host State;
g) Cairo Regional Centre for International Arbitration (CRCICA);
h) London court of International Arbitration (LCIA);
i) Moscow Chamber of Commerce and Industry (MCCI);
j) Stockholm Chamber of Commerce (SCC);
k) Permanent Court of Arbitration (PCA); and
l) International Court of Justice (ICJ).

7.0 Cases Relating to Investment Disputes

The earlier case regarding investment is between USA and Guatemala in which a contract made between the investor of USA and Guatemala State for extraction of chicles at the rate of five dollars gold for quintal. Later on, Guatemala enacted Legislative Decree No.1544 that disapproved the contract for the extraction of 75,000 quintals of chicle (used in chewing gum) on the ground that the technique used to extract the chicle destroyed trees. The case decided in favour of the investor and was awarded general damages.[80] A state held responsible for expropriation of alien property and compensation was to be paid for that. [81] The court held that a state is bound to give the same legal protection to foreign investment and foreign nationals, either for natural or legal persons, when it admits them to its territory.[82]

The foreign investor treated at par with domestic organization under the domestic law.[83]The Asia Pacific Economic Cooperation (APEC) non-.binding principles of 1994 also emphasised that no discrimination shown between domestic investor and foreign investor. It also stated that the foreign investor has to abide by economic laws and regulations of the host country. The foreign investors investing in host state are establishing hazardous factories in host states thereby causing danger to lives and health of the people of host countries. It amounts to environmental degradation and human rights violations.[84]The host state Canada was liable for interference on the environmental ground. It was held that such interference amount to indirect expropriation. The compensation was paid compensation through settlement.[85] It was followed in other cases including *Metaclad*, in which the tribunal held that interference by the Mexico on the ground of hazardous landfill in Mexican Municipality amounts to indirect nationalisation and expropriation of investment of foreign investor according to the Article 1110 of NAFTA and are liable to pay compensation under Article 1105 of NAFTA.[86] The US Courts are also entertaining cases against the investors from the victims of host countries under Alien Tort Claims Act. A good example is afforded by *Wiwa v. Shell petroleum Dev. Co*.[87] In this case, the shell oil company caused environmental pollution in the area of Ogoni tribe, Nigeria causing deaths of the people. Compensation was accordingly awarded. In some other cases of environmental and human rights violations, the investor was not held liable on technical grounds, even though the investor mining activities were polluting the rivers in Indonesia.[88] Torture of any person is the violation of the law of Nations as it violates United Nations declarations.[89]

The operations conducted by Sri Lanka state destructed investment of the foreign investor to suppress the civil war amounted to a violation of BIT and Sri Lanka was held liable to pay compensation.[90] The parent company of England owed a duty of care in a tort injuring a worker in respect of asbestos-related disease by a subsidiary company located in South Africa.[91]Costa Rica workers sued American company for sterility and medical problems, caused by exposure to pesticide banned in USA. The case settled outside court.[92] The killing of trade union leader by paramilitaries at their mining facilities, the claim could lie against the corporation.[93]Case concerned an oil spill off French coast, the court held parent company liable.[94]

The other cases concerning human rights violations by the investor are hereby given. The court held that torture violates the law of nations, as it is violation of UNDHR, declares on the protection of all persons from torture.[95]Drug experimentation without consent held to be violation of the law of nations.[96]The plaintiff filed suit against defendant on the ground that Talisman aided Government of Sudan in the commission of genocide crimes and crimes against humanity around certain oil fields in order to gain access to oil by displacing population living in the areas around the oil field.[97]

The cases decided against the investors for polluting natural resources where the BHP sued in tort for polluting Ok Tedi River and adjacent land. Parties settled outside the court.[98]A case filed against Free port under Alien Tort Statute for polluting rivers by operating of open pit copper, gold, and Silver in Timika, Indonesia. The court dismissed it.[99]

80 *Guatemala v. USA*, U.N. Reports of International Arbitration Awards, Vol.II, 1079 (1930).
81 Chorzow Factory Case, *Germany v. Poland*, Ser.A no. 9(PCIJ. 1927).
82 *Barcelona Traction, Light and Power Company ltd, Belgium v. Spain*, [1970] ICJ.3.
83 *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1 (2007).
84 Human rights violations and environmental degradation by Union Carbide Limited in Bhopal gas tragedy causing deaths of about 3,787 and non-fatal injuries of about 558,125 people in India; Unicol in Myanmar where Unocol violated human rights violation against Karen ethnic group of South Burma causing murders, forced labour, rapes while laying pipeline to Thailand. The US Supreme Court in *Doe v. Unocal* upheld the right of foreigners toseek compensation for Human rights violations under the provisions of 1789 Alien Tort Statute; Human rights and Environmental violations against the people of Niger Delta, Nigeria from 1994 by Multinational oil corporations like Chevron and Mobil of US, Elf of France and Agip of Italy.
85 *Ethyl Corporation v. Government of Canada*, NAFTA (1998).
86 *Metaclad Corporation v. Mexico*, ICSID Case no. ARB (AF)/97/1 (NAFTA), Award.
87 2009 WL 1560197 (2D Cir. June 3,2009)
88 *Beanal v. Freeport Mc MoRan, Inc*., 197 F. 3d 161 (5th Cir.1999).
89 *Filartiga v. Pena-Irala*, 630 F.2d 876, 1980, US App. (2nd Cir. Ny. June 30, 1980).
90 *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3. 1990)
91 *Lubbe v. Cape Plc* [2000] UKHL 41, 4 All ER 268.
92 *Dow Chemicals Co. v. Castro Alfaro* 786 SW 2d 674 (SC Texas 1990).
93 *Estate of Rodriquez v. Drummond Co* 256 F Supp 2d 1250 (WD A1 2003).
94 In the matter of oil spill by the *Amoco Cadiz* [1984] 2 Lloyds Law Reports 304, (ND III 1984).
95 *Filartiga v. Pena-Irala*, 630 F.2d 876, US App (2nd Cir. Ny. June 30, 1980).
96 *Abdullahi v. Pfizer*, No.01 CIV 8118, 2002, US District Court, New York.
97 *Presbyterian Church of Sudan, et al. v. Talisman Energy Inc. And Republic of Sudan*. US Court of Appeals, (2nd Cir.2009).
98 *Dagi v. BHP* [1995] 1 VR 428, Supreme Court of Victoria.
99 *Benal v. Freeport-Mc Moran Inc*. 197 F.3d 161. US Court of Appeals. (5th Circuit.1999).

2018).

The state can modify power requirements of future;[100] interfere in the insolvency proceedings of the investor;[101]revocation of exclusive rights for mining activities;[102]and sale of company to another without including tax assessment levied on the investor.[103]

The States not allowed revoking the concessions[104] and subsidies promised to investor.[105] The claim arising out of the alleged destruction of claimant's investment during a military operation conducted by Sri Lanka security forces, the court awarded compensation to investor on 27 June of 1990.[106]Failing to give required land to a Malaysian Investment Company by Chilean government, which invested $17 million for development of a satellite city on the land earmarked for agriculture use. The company filed a case for breach of BIT. The tribunal awarded damages based on expenditure made by claimants.[107]

8.0 Analysis of the Issues of Foreign Investment

Many international treaties like ITO, OECD, Abs-Shawcross convention, UNCTC so on which are drafted on investments have not come into force because of lack of consensus between investors, host states and home states. Only few are left to decide disputes are ICSID, ICC, ECT, UNICITRAL and WTO's TRIMS which are not fully catering to the needs of investors and host states.

The foreign investors and host states fears and dominance was discussed which elicit both are not believing each other.

Different judicial forums like ICSID, UNICITRAL, ICC and Domestic Courts of host state etc., have jurisdiction to try and dispose of investment disputes. It leads to contradictory judgements and destroys the concept of 'Precedent'.

The consequences of foreign investments are human rights violations, environmental pollution, deforestation, compensation for expropriation or nationalization, health hazards and other issues which are reflected in the cases dealt.

These different issues are creating the stumbling blocks in the harmonious relations of both host states and foreign investors which are not good for either.

9.0 Conclusion and Recommendation

As the economy is growing internationally, new challenges are cropping up. To solve them the general International law is not sufficient. The specialization has to grow and more in-depth study made so that the foreign investor and host states face the challenges easily. Whatever may be the fears and dominance of foreign investor or host country? They should trust each other and maintain a balance between them for mutual growth and sustainable development of host country. In the global economy, the investor state relations governed by BITs, Regional treaties but so far no multilateral treaty formed. The problem is that these BITs do not set precedents and do not refine legal norms, even though the provisions of BITs are capable of forming multilateral treaties. It makes the investor and state not to have uniform and predictable judgments thereby they can change accordingly. It also fails to develop arbitral jurisprudence, which can facilitate the investor and state to prevent abuse of powers against each other.

Under these circumstances it is recommended for the formation of 'World Investment Law' and establishment of 'World Investment Court' to sort out the fears and dominance of both of them.

100 *Blusun v. Italy* (ICSID Case No.130/2014).
101 *CEAC v. Montenegro* (ICSID Case No. 132/2014).
102 *EuroGas and Belmont v. Slovakia* (ICSID Case No.137/2014).
103 *Alghanim v. Jordan* (ICSID Case No.158/2013).
104 *Bear Creek Mining v. Peru* (ICSID Case No.128/2014), the Supreme Decree 032 revoked where the claimants' concessions to operate the Santa Ana mining project in Peru.
105 *Eiser and Energia Solar v. Spain* (ICSID Case No.165/2013), where the subsidies for renewable energy producers removed and tax imposed on power generators.
106 *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka* (ICSID Case No. ARB/87/3).
107 *MTD Equity Sdn. Bhd and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/07) 2004.