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Bilateral Investment Treaty as a Force of Attraction to Foreign Investors

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ABSTRACT

A Bilateral Investment Treaty (BIT) is an agreement between two countries to promote and protect foreign investment. The objective of this paper is to examine the strength of the core substantive clauses incorporated in Bilateral Investment Treaties (BIT) which acts as an attraction to foreign investors, also an analytical and doctrinal methodology was applied to compose this paper.

The core substantive clauses in Bilateral Investment Treaty (BIT) are; National Treatment, expropriation protections. These treaties set rules on how a host government must treat foreign capital and often allow investors to sue government directly through international arbitration. Therefore, it is some sort of protection to investors who are in a foreign country.

The clauses provide them some certainty as to the security of their businesses and the possibility to take legal actions in case of violation of their rights. Additionally, profit can be repatriated to their home country without interference from the host State; all these factors are a boost to attract foreign investors in a host state, since there is that possibility to escape commercial risks.

The core substantive clauses in Bilateral Investment Treaty (BIT) have enabled foreign investors to have confidence while in a foreign country. These clauses are the back bone of this paper, they will be appraised, one after the other, for they are very important to foreign investors.

Conclusively, a State has sovereign powers to take any decision as it deems fit but the core substantive clauses in Bilateral Investment Treaties (BIT) is a protection to foreign investors against commercial risks in a host State.

Keywords: Bilateral, Investment, Treaty, Force, Attraction.

INTRODUCTION

Bilateral Investment Treaty (BIT) signed between States to promote foreign investments has influenced foreign investors to undertake business ventures in foreign countries. Reason being that, the core clauses incorporated in Bilateral Investment Treaties (BIT) are a pull factor to foreign investors. With these core clauses, foreign investors have been protected from commercial risks that may arise from the host State. They are treated same as the nationals of the host State; their properties cannot be expropriated without adequate compensation; this has made an investor to be encouraged to carry out business in a foreign country.

Furthermore, foreign investors can transfer funds to their home country, therefore, capital and profit can be transferred, thereby encouraging the foreign investors to be sure of the transfer of their profits.

Again, there is the possibility to take an action against a host State in case of a violation or breached of an agreement. A foreign investor has the right to sue a host State through international arbitration, thereby providing justice to a foreigner in case of any complaint that may be introduce for litigation. The foreign investors need not introduce their complaints in the local courts, they can bypass the local courts and seise the International Centre for the Settlement of Investment disputes out of the host State.

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These is a protection for foreign investors since such treaties are legally binding and the host State provides the promises to ensure the foreign investors of their protection against commercial risks. The agreement provides terms and conditions for private investments by nationals and companies of one State in another to undertake investments ventures in a host State and to liberalized the economy foreign direct investment (FDI) or portfolio investment. {1}

The aims of Bilateral Investment Treaty (BIT) is to provide confidence to foreign investors by the host state, thereby respecting the clauses of the agreement without infringement and also to create the regulations and the standards which govern the practice of the investment operations, the permission of entry and exit, transfer of profits by foreign investors, the protection of assets through compensation, and the handling of claims.

The National Treatment Principle

The national treatment principle is one of the cardinal substantive clause that attract foreign investors in a host State. This principle is to the effect that, the goods of foreign investors in the host state are treated equally as those of the Nationals and this is seen most often in like products. This principle eliminates hidden domestic barriers by the World Trade Organization members, The World Trade Organization (WTO) administer trade agreements internationally providing a forum for trade negotiations handling trade disputes, at international level, and monitoring national trade policies. {2} Interestingly, national treatment is provided in all the three main World Trade Organization (WTO) agreements, namely, General Agreement on Tariff and Trade (GATT)(GATS) and TRIPS.

National treatment principle prohibits discrimination between imported and domestically produced goods, with respect to internal taxation and other government regulations. Foreign investors under the national principle are entitled to the right of establishment of their enterprises, right to rent and own properties.

The host state is hospitable to foreign investors, thereby eliminating discrimination to some extent. This can be illustrated in the case of America Manufacturing &Trading (AMT) (U.S) Inc. v. Democratic Republic of Congo, in this case, the International Center for the Settlement of Investment Disputes (ICSID) decided that, the Democratic Republic of Congo has to pay damages to the United States of America, for having violated the national treatment principle, because Zaire as it was called by then, failed to prevent the looting of the properties of an American Firm that is found in their territory, therefore they have failed to respect the minimum standards required of international law, this is a manifestation to protect foreign investors in a host State.

Another case of interest to demonstrate the national treatment principle are the CME (Netherlands) v. Czech Republic, here it was decided that, the foreign investor should be compensated by the host State for a breached of contract of fair and equitable treatment. This principle is very essential to attract foreign investors since, it requires the host state to treat foreign investments in a stable, predictable, and due process compliant manner without acting arbitrarily. {3}

Expropriation Clause

The expropriation clause is very important in the attraction of foreign investors in a host state. This clause is to the effect that, it prohibits direct or indirect government seizure of assets, unless done for a public purpose, under due process and with prompt, adequate, compensation {4}.Amongst the world –known commercial risks today, expropriation seems to be one of the most dreadful action that can be taken by a host State against the assets of a foreign investor.{5}Expropriation is an act of the government by taking privately owned properties against the wishes of the owners, to be used for the benefit of the public.

Nevertheless, foreign investors are protected from illegal expropriation, because for expropriation to take place against the asset of a foreign investor there must be some principles to be applicable. Under international law, the host state has the obligation to compensate foreign investors as was decided in the case of Liberia Eastern Timber Corporation v. (LETCO) v. Liberia, in this case, the government of Liberia terminated a contract when

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it was not due, and it was decided that, the government of Liberia should compensate LETCO with the sun of $ 9 million U.S dollars for wrongful termination of concession rights.

The principles of compensation are very just and fair to both national and foreign investors. These principles are prompt compensation, it should be adequate, effective and recognized by the law of expropriation. {6}

Compensation for expropriated property is prompt, meaning that, the host state has to pay the foreign investor without delay. The host State has to respect time limit for payment.

Additionally, compensation is effective; this means that, the compensation should help the foreign investors who are the beneficiary and this can be in a way that he can replace the lost asset with the compensation received from the host State, either in cash or kind.

Furthermore, compensation should be adequate, meaning that, the compensated property should reflect the real value of the property lost in monetary terms. The foreign investor is not supposed to be cheated in value of the expropriated assets. Foreign investors are attracted in a host State because the expropriation clause provides cover for their assets which are subject to compensation.

The Clause to Transfer Resources

This clause guarantees investors to freely move capital, profits, and dividends in and out of the host country. {7} The aim of any foreign investor is to maximize profit and repatriate it as well. Foreign investors have the freedom to repatriate dividends. {8}.

Again, foreign investors can transfer their capital from one country to the other without interference from the host State. Foreign investors have the possibility to transfer funds out of the host State by direct electronic transfer from one bank to the other. {9} Such guarantees in the transfer of funds motivate foreign investors to undertake investment ventures in the host state, this system eliminates fraud due to the efficient system of bank transfer. Furthermore, there is the freedom of all expatriate workers to move in and out of the host state after the termination of their contract.

Additionally, there is the head quarter theory, which is to the effect that, multi- national companies in a host state are being coordinated from their cooperate offices, which is the hub of the company and often serves as the central location where top decisions are made. The cardinal objective of all foreign investors is to make profit out of investment, be foreign investment or portfolio investment. When foreign investors make profits and capital in a host state and have the guarantee to repatriate the profit to their country of origin without restrictions, they are automatically attracted to invest in the host state.

The Clause to Settle Investment Disputes

As far as judicial protection is concerned, this clause is very imperative, since foreign investors have the avenue to lay their complaints and grievances in case of investment disputes that may arise from between the foreign investor and the host state. This clause limits the powers of the host state and limits any arbitrary action that might be taken by the host state against a foreign investor.

There is Investor –State dispute settlement which foreign investors to bypass local courts and sue host government directly before International Tribunals for treaty breaches.

With this clause, foreign investors can exercise and defend their rights without depending on diplomatic protection home countries {10}. The International Centre for the Settlement of Investment Disputes (ICSID) is created to entertain disputes from parties all over the world through the New York Convention of 1958. This Tribunal entertains cases from foreign investors and the enforcement of arbitral awards is enforced.

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Once an arbitral award is issued in investor – State proceedings, the decision is final, binding and enforceable. Nevertheless, foreign investors should note that, only states that are signatory to this convention are obliged to enforce the decision of the Tribunal.

Additionally, under the settlement of investment disputes, there is also a clause on State-State investment dispute settlement by it, a state has the right to claim another State for the settlement of investment disputes and the proceedings are transparent and this is to foster State-State arbitration of international investment disputes.

Alternative Mechanisms for the settlement of Investment Disputes

There are other alternatives to be exploited by foreign investors in the settlement of investment disputes. Foreign investors can use out of Court settlement resolve their investment disputes with the host States. There are some mechanisms such as mediation, conciliation, Mini-trial, and transaction and Expert finding.

Mediation is an out of Court settlement whereby a person known as a Mediator is appointed by agreement by the parties, to assist the parties by negotiating in a dispute to have an amicable settlement between the parties. The Mediator may do so by discussing the dispute separately with each of the parties, drawing attention to the strengths and weaknesses of each case and attempting to get the process of negotiation going.

Moreover, there is conciliation, this is another type of court settlement, whereby, a third-party known as the Conciliator takes a view on what he considers would be fair to settle the dispute between the parties concerned. The conciliator view is to put the parties as a form of recommendation, which may be adopted by them or which may form the basis of further negotiations between the parties, the recommendation is binding only through agreement by both parties.

Again, mini- trial is another out of court settlement to settle disputes between investors and host states, by it, the parties to the disputes send their representatives to present their case to a panel which is made up of a senior executive of each party, who have the power to commit the parties to an amicable settlement, sometimes the panel constitute a neutral chairman.

Besides, there is also conciliation, by it, foreign investors can bring a claim against a host state and the dispute will be resolved amicably by a third party known as the Conciliator.

The settlement of investment disputes is a core substantive clause, since investors can seize a foreign tribunal out of the host state in case of dispute settlement. Such a clause has attracted foreign investors in a host State since they have some degree of certainty and predictability to invest in a foreign country, there is full protection and security, which obligates the host state to physically protect investment and protect property from harm or civil unrest. {11}

RESULTS

Bilateral investment treaties (BITs) generally increase foreign direct investment (FDI), raise equity flows, and create legal risks for host governments. The key outcome of signing these treaties include include higher investments numbers, legal dispute rights, and limits on state actions,

Ratified treaties increase bilateral foreign direct investment stocks by an average of 35% to 40%. There is a high economic impact, since lower- income and upper – middle – income countries with weak domestic institutions gain the largest increases in inward investment. {12}

There is trade expansion, since clear investment rules lower costs and help grow product export numbers between the two partner countries.

Furthermore, there is investor protection, because foreign companies gain secure rights to fair treatment, full security and proper payment if their property is taken. Treaties allow private investors to use international arbitration to sue host governments directly over policy breaches.

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Additionally, high risk nations with strict treaties can face negative impacts on sovereign bond value due to potential multi-million dollar legal claims from investors.

Limitation of the Studies

The study has some limitations, because the paper focuses entirely on the core substantive clauses of bilateral investment treaty. Several investment treaties have been signed universally between foreign investors and host States and they have different contractual engagements. The core substantive clauses may not reflect all the bilateral investment treaties in the world, since each treaty has it purpose in a host state.

CONCLUSION

Bilateral investment treaties have improved international investment because of the core substantive clauses that acts as a protector to foreign investors. The fact that foreign investors can transfer their profit and capital out of the state is an encouragement to establish their business in a foreign country.

Besides, their property is protected from illegal expropriation and they have the right to bring their claims against a host state to an international Centre for the Settlement of Investment disputes. This is a manifestation of full security and protection of their properties in a host.

Nevertheless, a state has sovereign powers; they can violate these core substantive clauses in case when state sovereignty is threatened. But the substantive clauses provide full security and protection to foreign investors.

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