

## **The Multilateral Legal Framework on Investment and Extractive Industries in Developing Countries: Things which African Countries Need to be Aware Of Taking Tanzania's Experience as a Case Reference**

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### **Abstract**

*This paper investigates the impact of the existing multilateral legal framework on investments in the extractive industries in developing African countries, taking Tanzania's experience as a case reference. The development of the multilateral legal framework on investment was a second stage in the development of the international legal framework governing investments, after customary international law. But customary international law on investment is known to have developed on a platform of controversy, division, disagreement and polarization mainly between former colonial powers which are also developed countries and mostly the exporters of investments, on one side, and former colonized countries, most of which are still developing countries and hosts of investment, on the other. Therefore, attempts to develop a multilateral legal framework was a move which was very much welcome because it was hoped that it would address the weaknesses which existed in customary international law. That is why the central question in this paper is whether the multilateral legal framework which is currently in place has lived to this expectation. Using a historical and analytical approach, this paper examines and analyzes the development of the multilateral legal framework on investment, and it does this from the vantage point of African countries. The findings of this examination and analysis show that, although the idea to develop the multilateral legal framework was much welcome, the resultant framework has continued, in a number of areas, to be unfavourable to developing countries, African countries inclusive. This reality is one of the challenges that African countries face and will continue to face as they attempt to use their extractive resources to bring about the much needed socio-economic change and development in their countries. These are the realities which African countries need to be aware of as they seek for solutions.*

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## 1. Background and Context

It is important to start this discourse by recalling the fact that, there are about four main areas that investment law addresses and regulates. The first area is the admission of investment and treatment of that investment once admitted, which includes the question of regulation of flow of capital, expatriation of profits, and the safeguards that a host country is supposed to grant to an investor. The second area is the management of host countries, which revolves around the things that the host country can do and cannot do vis-à-vis the investor, including nationalization, expropriation and transfer. The third area is the management of the corporations or companies involved in investment and their activities, which centres on the controls which the investment host country can lawfully exercise on the investor, including determining the way the investor should behave. The fourth area is dispute settlement in case disputes arise between the host state and the investor. It includes matters of choice of forum, institutions, and principles to be applied.

The history of development of international investment law tells us that the regulation of investments initially was done largely through the use of international customary law.<sup>2</sup> Unfortunately, international customary law on investment developed on a platform of controversy, division, disagreement and polarization, mainly between former colonial powers, which are also developed countries and mostly the exporters of capital and investments, on one side, and former colonized countries, most of which are still developing countries and recipients of capital and hosts of investments, on the other. The disagreement has always been caused by the perception on the side of investment exporting countries that the safeguards and frameworks on protection of investments have always been inadequate. On the other side countries which are recipients of investments have always perceived the existing legal framework on investment as being crafted in favour of investors and developed countries.<sup>3</sup>

In international law when certain principles of customary law appeared to have crystallized, or where there was need to bring about concordance, certainty, and stability in the law, those principles were codified either through negotiating and concluding a treaty or through adopting a code. This process has come to be known as treatization or codification of customary international law.<sup>4</sup> When codification of customary international law ends up with a code, it is usually referred to simply as a ‘code’,<sup>5</sup> and when it ends up with a treaty, that treaty is usually called a ‘codifying treaty’.<sup>6</sup> Therefore, the emerging of multilateral treaties that affect certain

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<sup>2</sup> For a detailed discussion about the development of customary international law and the impact of this framework of law in the extractive industries in developing countries, including African countries like Tanzania, See: KILANGI, Adelardus (2015), “Customary International Law and Regulation of Investments in the Mining Industry: Issues of Concern to Developing Countries Using Tanzania as a Case Reference”, *Pan African Yearbook of Law*.

<sup>3</sup> For a detailed discussion about this debate and its disagreements see: SORNAJAH, M (2004), *The International Law on Foreign Investment*, Cambridge University Press, pp. 318-321.

<sup>4</sup> For a detailed discussion on this point, see: KILANGI, Adelardus (2013), *The African Union Commission on International Law (AUCIL): An Elaboration of its Mandate and Functions of Codification and Progressive Development of International Law*, AUCIL Journal of International Law, Issue No. 1, 2013, p.2.

<sup>5</sup> Ibid.

<sup>6</sup> AUST Anthony (2013), *Modern Treaty Law and Practice*, Cambridge University Press, pp. 8-10. See also: THIRLWAY, H.W.A (1972), *International Customary Law and Codification: An Examination of Continuing*

aspects of investment is in the context of trying to codify customary international law on investment.

## **2. Development of the Multilateral Legal Framework on Investment**

### **2.1 Introductory Remarks**

We should start our discussion on this part by remarking that, scholars have not been able to agree as to whether there exists any ‘multilateral investment treaty’. That is why we speak of a ‘multilateral legal framework on investment’ instead of ‘multilateral investment treaties’ as we usually do for the case for ‘bilateral investment treaties’. One school holds that there is no any multilateral investment treaty as such except that there are multilateral treaties affecting certain aspects of investment.<sup>7</sup> However, on the other side there are scholars who are of the view that, since there are some multilateral treaties which affect certain areas of investment,<sup>8</sup> then these are multilateral investment treaties because it is not necessary that a multilateral investment treaty covers all aspects of regulation of investment.<sup>9</sup>

### **2.2 Unsuccessful Attempts to Construct a Multilateral Legal Framework on Investment**

#### **2.2.1 An Overview**

So far, there have been a number of attempts by various players in the international community to come up with a multilateral legal framework for regulating investments generally, if not an outright multilateral investment treaty. But many of these attempts did not succeed. It is important for us to explore these failed initiatives first, because by doing so, it is possible to understand better and unearth the issues that emerge. It is important also to mention that, most of the failed initiatives to construct a multilateral framework on investments came from the Organization for Economic Cooperation and Development (OECD),<sup>10</sup> a platform of developed countries.

#### **2.2.2 An Attempt to Create an ‘International Trade Organization’**

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*Role of Custom in the Present Period of Codification of International Law*, Martinus Nijhoff Publishers, pp. 125-127.

<sup>7</sup> SHERTON Dinnah (2013), *The Oxford Handbook of International Human Rights Law*, OUP Oxford, pp. 843-845.

<sup>8</sup> Refer to the four main areas of regulation of investment we have elaborated above in this treatise.

<sup>9</sup> See the totality of the discussion in: GIBSON, DUNN & CRUTCHER (2015), “Bilateral and Multilateral Investment Treaties: What All Deal-makers Need to Know”, Transnational Litigation Practice Group, Occasional Paper, 2015.

<sup>10</sup> The origins of OECD initiative date back to 1960, when 18 European countries plus the United States and Canada joined forces to create it. The purpose of OECD is to promote trade and economic growth in both member and non-member nations. It also coordinates policy among developed countries, and is a forum in which governments can compare their experiences, discuss the problems they share and seek solutions which can then be applied within their own national contexts. OECD member countries exchange economic data and create unified policies to maximize their countries' economic growth. The current members are: Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States. From its membership, it is view mostly as an organization of developed or at least high income countries.

An attempt to create an International Trade Organization came by way of drafting the Havana Charter of 1948. Some of the rules of the organization would have had relevance on matters of investment.<sup>11</sup> But the efforts failed, because, having been signed by 53 countries, the United States Congress rejected it. With the United States being the most powerful economy in the immediate aftermath of World War II, there was no way the Charter would have worked without it onboard.

### **2.2.3 OECD Draft ‘Convention on Protection of Foreign Property’**

In 1967, the OECD came up with an initiative, in which it prepared a ‘Draft Convention on the Protection of Foreign Property’.<sup>12</sup> The purpose of the draft Convention was to codify ‘recognized’ principles of customary international law relating to the protection of foreign property as at that particular time, and to make them more effective. However, the convention did not find any support among developing countries, because it was seen as having nothing to do with protection of host countries.<sup>13</sup> Therefore, it was seen as premised on the old rules of customary international law which were seen as biased in favour of investors, hence of developed countries, to the exclusion or at least disadvantage of developing countries and hosts of investments.

### **2.2.4 OECD Draft ‘Declaration on International Investment and Multinational Enterprises’**

In 1976, the OECD came up with another initiative by adopting a ‘Declaration on International Investment and Multinational Enterprises’, which had a number of attached Guidelines.<sup>14</sup> Then the OECD countries jointly recommended to multinational companies operating in their countries to observe the Declaration and the attached guidelines.

The basic premise of the OECD Declaration and Guidelines is that, multinational enterprises can bring substantial benefits to the economies of home and host countries. But their transnational activities, organizational and financial resources transcend the capacity of individual states to regulate them, and may lead to the abuse of their economic power, and their operations may conflict with policy objectives of host states.<sup>15</sup> Thus, matters that were to be covered by the Declaration and Guidelines include, among others: encouraging positive contributions to the economic and social policies of home and host countries; timely disclosure and meaningful information concerning their operations and finances; avoidance of anti-competitive policies; respect for national employment and industrial relations laws and policies; and environmental protection regimes.

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<sup>11</sup> Article 12(1)c & 12(1)(d), Draft Havana Charter. See also: SONARJAH, M (2004), *The International Law on Foreign Investment*, Op. cit., p. 87.

<sup>12</sup> Proposed in 1967.

<sup>13</sup> DAMROSCH, Lori (et al.)(2001), *International Law: Cases and Materials*, p. 1621.

<sup>14</sup> Declaration on International Investment and Multinational Enterprises, 1976, to which were annexed Guidelines for Multinational Enterprises.

<sup>15</sup> DAMROSCH, Lori (et al.)(2001), Loc.cit.

The Declaration on International Investment and Multinational Enterprises did not get universal support because it was developed exclusively by OECD countries, none of which are developing countries. But the more important argument is that, while its aspirations appeared to be very good on the face of it, the Draft Declaration was seen as an instrument for regulating investment only when a company from an OECD country invests in another OECD country. Therefore, its application would be on reciprocal basis, and therefore it did not appear to be intended for regulating activities of companies that would invest in developing countries.

### **2.2.5 UN Draft ‘Code of Conduct on Transnational Corporations’**

In around the same period, the Centre on Transnational Corporations which had been established by the ECOSOC under the auspices of the United Nations stepped in. Under the said auspices, the United Nations worked on developing the ‘UN Code of Conduct on Transnational Corporations’ from 1975 to the 1990s. The Code was intended, among other things, to regulate international investments, and to deal with legal protections against certain non-commercial risks. But the ultimate intention of the code was to regulate the activities of multinational and transnational corporations, with the view to minimize the negative effects of their operations, and to maximize their positive contributions to the economic growth and development of the home and host countries. However, by 1992, no consensus had been reached, and therefore the completion of the code was frustrated.<sup>16</sup>

There were several areas of disagreement as far as the UN Code is concerned, reflecting on the same issues in the realm of disagreement between developing and developed countries. The first issue was whether or not the code would have allowed the application of relevant rules of customary international law in matters of investment. The second issue was whether and to what extent preferential treatment would be accorded to developing countries, in view of the principle of national treatment, which requires that investors be given the same treatment as nationals of that country. For example, preferential treatment would have allowed developing countries to give special incentives to the development of domestic industry, which would be an exception or deviation from the national treatment principle, but a move that would allow domestic industries to compete fairly with foreign investments. The third issue was whether and to what extent transnational corporations and developing states would be free, in their contractual agreements, to have an unrestricted choice on the governing law and forum for settlement of disputes. The fourth issue was whether, in the case of nationalization, the compensation was supposed to be done according to international law, and not domestic law; and fifth issue was whether or not a transnational corporation should be permitted to transfer, without restrictions, all payments related to their investments. The disagreements surrounding the above issues led to the collapse of the Draft Code.<sup>17</sup>

### **2.2.6 OECD Draft ‘Multilateral Agreement on Investment’**

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<sup>16</sup> DAMROSCH, Lori (et al.)(2001), Loc. cit.

<sup>17</sup> Ibid.

When the processes towards the UN Code of Conduct on Transnational Corporations failed, the OECD came up with another initiative by proposing a Multilateral Agreement on Investment (MAI).<sup>18</sup> The purpose of the draft MAI was to develop multilateral rules that would ensure international investment was governed in a more systematic and uniform way as between states. In 1995, OECD Members began negotiations on the draft Agreement. The OECD was seen as a useful forum because its existing framework of investment codes provided a foundation for negotiations, and OECD members accounted for 85 per cent of the source of foreign direct investment in the world.

However, the MAI drew widespread criticism from developing countries and civil society groups, particularly over the following positions: Firstly, there was the possibility that it would make it difficult to regulate foreign investors, and especially transnational companies.<sup>19</sup> Secondly, the MAI did not have the support of the United States which considered that its implementation, far from providing a benefit for it, would threaten their international policies on foreign investment.<sup>20</sup> Thirdly, the selection of the OECD as a forum for carrying out the negotiations was perceived not to be proper, because the OECD is not viewed as a representative organization suitable to work out a treaty that would create a comprehensive framework for the liberalization and protection of foreign investment for the whole world. This framework would be legally binding not only on the member states of the OECD, but also on other states willing to join. Consequently, it appeared that any agreement to be reached by the OECD would reflect the policies of its member states which are developed countries, and which are the major source of outflows of investment. There was no guarantee that the framework would be acceptable to developing countries. Therefore, the MAI was seen as an instrument of developed countries to gain rapid access to markets in developing countries.<sup>21</sup> Fourthly, the goals fixed by the MAI would constrain and undermine the sovereign rights of countries to intervene in market mechanisms. The agreement appeared not to strike a sufficient balance between the push towards liberalization of investment and the capacity of countries to regulate the same.<sup>22</sup> Fifthly, the initiative also attracted a protest of the coalition of environmental and human rights activists who complained that the draft emphasized the protection of investment without pronouncing itself to the need to protect the environment and human rights from abuse by multinational corporations.<sup>23</sup>

It is not surprising, therefore, that after an intense global campaign that was waged against it, the host nation France announced in October 1998 that it would no longer support the draft agreement, effectively preventing its adoption due to the OECD's consensus procedures.

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<sup>18</sup> Draft Multilateral Agreement on Investment (MAI), 1992.

<sup>19</sup> WARDEN-FERNANDEZ, Janeth, (2000), "The Permanent Sovereignty Over Natural Resources: How It Has Been Accommodated Within the Evolving Economy", *Journal of Energy and Natural Resources Law*, Centre for Energy, Petroleum, and Mineral Law and Policy, The University of Dundee Annual Review 2000, p.13.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid., p.14.

<sup>23</sup> SORNARAJAH, M (2004), Op. cit., p. 3.

## **2.3 Successful Attempts to Construct a Multilateral Legal Framework on Investment: The Global and African Contexts**

### **2.3.1 An Overview**

While some initiatives at creating a multilateral legal framework failed, as we have seen, some succeeded as it is going to be discussed hereunder. Those that will be discussed are either global, which means they apply to the whole world, or those that are regional, which means they were concluded in the context of Africa, in which case they apply to Africa. Regional treaties which were concluded outside Africa will be left out in this discourse. However, as we have mentioned already, many scholars agree that there is no multilateral investment treaty as such,<sup>24</sup> but only multilateral treaties affecting matters of investment. In any case, some international and regional treaties fit in this category, examples being NAFTA treaties.<sup>25</sup> Therefore, once again what we discuss here-below are essentially multilateral treaties that affect certain aspects of investment.

### **2.3.2 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958**

The main purpose of the ‘Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958’ is to create a framework for the recognizing and enforcing foreign arbitral awards, which are awards made in the territory of another State, provided that the other state is also a party to the Convention. It also provides for necessary recourse to arbitration in case an investment dispute arises and where the parties will have chosen to insert an arbitration clause in their investment contract.

However, as it can be noted, this Convention applies in situation of disputes that have been arbitrated at domestic level using the domestic framework. Thus, if parties choose international arbitration instead, the convention becomes inapplicable.

### **2.3.3 Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965**

The ‘Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965’ established the ‘International Centre for the Settlement of Investment Disputes’ (ICSID). The Convention and the corresponding Centre are mechanisms under the auspices of the World Bank, and the two provide conciliatory and arbitral mechanisms for the settlement of investment disputes between states and nationals of other states. Article 25(1) of the Convention states thus:

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another

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<sup>24</sup> SHERTON Dinnah (2013), Loc. Cit.

<sup>25</sup> Ibid., p. 843.

Contracting State, which the parties to the dispute consent in writing to submit to the Centre...”

However, as per the general principles of arbitration, this mechanism presupposes the existence of a valid investment or commercial agreement between the litigants. This is an investment treaty between a state and a company. Then any country which becomes party to the treaty automatically agrees to have disputes between it and investors referred to the ICSID. Further, although the Convention is a mechanism for dispute settlement only, the arbitral proceedings carried out under the Convention have had the opportunity to develop the jurisprudence on the substantive issues of international law on investment. The Convention was concluded on 18th March 1965 under the auspices of the World Bank, and entered into force on 14<sup>th</sup> October 1966.

As we have observed already, the purpose of the ICSID is to provide a platform and facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States, in accordance with the provisions of the Convention.<sup>26</sup> The available dispute settlement mechanisms under the Centre consist of conciliation and arbitration. Before the convention came into force, investment disputes between sovereigns and companies from other states were almost impossible to undertake because only states have standing before the International Court of Justice (ICJ). But, even when states were ready to stand in for their companies at the ICJ against other states, under the principle of diplomatic protection to companies, such proceedings were usually overshadowed with politics.<sup>27</sup> Thus, it was deemed necessary to have another forum which would hear disputes between states and nationals of other states, including companies. Further, the expression ‘nationals of other states’ entails:

“...any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered”.<sup>28</sup>

The same expression also entails:

“...any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State Party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of the Convention”.<sup>29</sup>

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<sup>26</sup> Article 1(2), Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965.

<sup>27</sup> FRU, Valentine (2011), *International Law on Foreign Investments and Host Economies in Sub-Saharan Africa*, LIT Verlag Munster, p. 39.

<sup>28</sup> Article 25(2)(a), Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965.

<sup>29</sup> Ibid.

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States has its foundations on the logic of the principle of *pacta sunt servanda* in respect of investment agreements between host states and investors, as well as Bilateral Investment Treaties (BITs); the doctrine of state responsibility; the doctrine of fair and equitable treatment; the doctrine of respect for acquired rights; and the doctrine of good faith and prohibition of abuse of rights. On the other side, it contradicts the principle of exhaustion of local remedies which requires disputes to be submitted to domestic mechanisms before approaching international ones.

### **2.3.4 Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) of 1985**

The Convention Establishing the Multilateral Investment Guarantee Agency (MIGA), 1985, was also established under the auspices of the World Bank. However, unlike the ICSID which was established as a dispute settlement mechanism, the MIGA was established as an institution that provides guarantees in some form of insurance to investing companies, in respect of non-commercial risks on matters of investment. In fact, most of these non-commercial risks fall in the category of what are called ‘political risks’. Article 2 of the Convention speaks about the issuance of guarantees, including co-insurance and re-insurance, against non-commercial risks in respect of investments in a member country which flow from other member countries. The MIGA also operates on the presumption of some concluded investment or commercial agreement between the company seeking the guarantee and the country hosting the investment, which means agreement between a state and a company. The main objective of the MIGA is to encourage the flow of investment as observed hereunder:

“The objective of the Agency shall be to encourage the flow of investments for productive purposes among Member Countries, and in particular to develop member countries, thus supplementing the activities of the International Bank for Reconstruction and Development (hereinafter referred to as the World Bank), the International Finance Corporation and other international development finance institutions”.<sup>30</sup>

One of the ways of achieving the above objectives is by issuing guarantees, including co-insurance and re-insurance, against non-commercial risks in respect of investments in a member country which flow from other member countries.<sup>31</sup> The insurance guarantees provided by the MIGA cover the following situations, among others: Firstly, where the host government introduces restrictions on transfer, outside the host country, of its currency into a freely usable currency or another currency acceptable to the holder of the guarantee. This situation includes a scenario where the host government fails to act within a reasonable period of time on an application by such holder for such transfer;<sup>32</sup> secondly, in expropriation and similar measures adopted by the host country, which includes any legislative or administrative action or omission attributable to the host government, which has the effect of depriving the holder of a guarantee of

<sup>30</sup> Article 2, Convention Establishing the MIGA, 1985.

<sup>31</sup> Article 2(a), Ibid.

<sup>32</sup> Article 11(a)(i), Ibid.

his ownership or control of, or a substantial benefit from, his investment;<sup>33</sup> thirdly, in situations of or relating to breach of contract, which includes any repudiation or breach, by the host government, of a contract with the holder of the guarantee, when either the holder of the guarantee does not have recourse to a judicial or arbitral forum to determine the claim of repudiation or breach, or when a decision by such forum is not rendered within such reasonable period of time, or if such a decision cannot be enforced;<sup>34</sup> and fourthly, in situations of war or civil disturbance, and it includes any military action or civil disturbance in any territory of the host country which affects investments.<sup>35</sup>

Apart from the investment guarantees, MIGA is also seen to have a deterrence effect to countries which host investments, and this deterrence would apply even if there was change of government. MIGA is deterrent in two ways, firstly by being assisted by the World Bank to pursue ‘salvage’, and secondly by being equally supported by the World Bank members to have ‘leverage’ over lending programmes.<sup>36</sup> These salvage and leverage functions happen in a number of ways.

Firstly, MIGA is linked to the lending programmes of developed countries, hence tied to their aid and debt packages. Therefore the MIGA, being supported by developed countries, has many means at its disposal to sanction and punish countries that commit any of the actions that are regarded as constituting political risks. These means at its disposal, if applied, can affect the prospect of future investments in the affected country.<sup>37</sup> Some developed countries which support the MIGA have even adopted a practice of enacting domestic legislation in their own countries directed at certain countries with intent to take punitive measures against those other countries for having contravened certain principles of investment. These measures include instructing banks and companies not to do business with that country, or suspending certain government programmes and ceasing or suspending investment activities and development assistance to the culprit country. Therefore, the deterrence effect of the MIGA guarantees on investment in host countries is working very well, and that is why many mining companies are using the facility to guarantee mining investment activities.<sup>38</sup>

Further, for MIGA, the World Bank Group established in 1999 the Office of Compliance Advisor Ombudsman (CAO). The CAO is an independent office reporting directly to the President of the World Bank Group, and its mandate is to address complaints from people affected by International Finance Corporation/Multilateral Investment Guarantee (IFC/MIGA) supported projects, and to enhance the environmental and social outcomes of IFC/MIGA projects. So it addresses the environmental and social impacts of IFC/MIGA supported projects

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<sup>33</sup> Article 11(a)(ii), *Ibid.*

<sup>34</sup> Article 11(a)(iii), *Ibid.*

<sup>35</sup> Article 11(a)(iv), *Ibid.*

<sup>36</sup> WORLD BANK (2009), *The World Bank Group Guarantee Instruments 1990-2007: An Independent Evaluation*, World Bank Publications, p.8.

<sup>37</sup> MORAN, Theodore (et al.)(2001), *International Political Risk Management: Exploring New Frontiers*, World Bank Publications, pp. 213-215.

<sup>38</sup> *Ibid.*

as well.<sup>39</sup> So far, the Office of the CAO has three roles. The first is dispute resolution with respect to complaints submitted to the Office;<sup>40</sup> the second is overseeing compliance, which includes carrying out compliance investigations;<sup>41</sup> and the third is advisory.<sup>42</sup> Complaints to the CAO can be made by those who believe they are affected by environmental or social impact of an IFC/MIGA project.<sup>43</sup> That means complaints can be lodged by an individual, or a group.<sup>44</sup> Then the CAO will determine if the said complaint is eligible. A complaint is eligible if: it pertains to the project that IFC/MIGA is participating in; if the issues raised in the complaint pertains to CAO's mandate to address environmental and social impacts of projects that IFC/MIGA is participating in; and the complainant is already or is likely to be affected by the environmental or social impacts of the project. However, complaints deemed by the CAO to be malicious, or generated to gain competitive advantage, are ineligible for assessment.<sup>45</sup> From that stage, a complaint can either go to dispute resolution or compliance procedures, which include compliance investigations, or advisory process. It should be noted that the Office of CAO is not meant to function as a court or judicial mechanism, but it is significant in bringing to light and in 'shaming' a violator of environmental and social standards which are otherwise supposed to be observed in the implementation of projects.

### **2.3.5 Marrakesh Agreements: The Legal Framework of the World Trade Organization**

The Marrakesh Agreements of 1994 established the World Trade Organization (WTO). The legal framework essentially consists of the 'Final Act' of the Uruguay Rounds of negotiations and the 'Agreement Establishing the World Trade Organization'. Everything else is an annex to the two, and these annexes contain the Agreements of the Uruguay Rounds of negotiation.

The Main Annexes are four, namely Annex 1, Annex 2, Annex 3 and Annex 4. 'Annex 1' has a number of other sub-annexes which cover matters of investment. One of them and the first is 'Annex 1A' which covers 'Multilateral Agreements on Trade in Goods'. This annex has three agreements, but only two agreements are relevant for this discourse, namely the 'General Agreement on Tariffs and Trade' (GATT) 1994, which deals generally with matters of tariffs and trade, and the 'Trade Related Investment Measures' (TRIMS) 1994, which deals with performance requirements associated with foreign investments. The second is Annex '1B' which contains one agreement only and which is relevant for this discourse, namely the 'General Agreement on Trade in Services (GATS) 1994. The GATS 1994 deals with the services sector and covers the whole question of provision of services through a commercial presence in another country, which is foreign investment in the services sector. The third is Annex '1C' which also contains one agreement only and which is relevant for this discourse, namely the 'Trade Related

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<sup>39</sup> Guideline 1.1, CAO Operational Guidelines, 2000.

<sup>40</sup> Guideline 1.2, Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Guideline 2.1.1, CAO Operational Guidelines, 2000.

<sup>44</sup> Guideline 2.1.2, Ibid.

<sup>45</sup> Guideline 2.2.1, Ibid.

Intellectual Property Measures’ (TRIPS), 1994, which deals with aspects of intellectual property in the course of doing business.

### **2.3.6 World Bank Guidelines on the Treatment of Foreign Direct Investment**

The World Bank adopted, since September 1992, Guidelines on The Treatment of Foreign Direct Investment.<sup>46</sup> The Guidelines, unlike treaties, are not binding on governments, but are intended to influence those governments in the formulation of new laws and treaties. The Guidelines cover three out of the four traditional main areas regulation of investment, which are: admission and treatment of investments; expropriation of foreign investments; and settlement of investment disputes.<sup>47</sup>

Guideline II deals with the issue of admission or entry of foreign investments. Section 1 of Guideline II makes an emphasis on the encouragement of foreign investments. The section states provide that foreign investments are a useful tool in financial terms and in terms of transfer of technology and managerial skills. Section 2 of the same Guideline envisages that states will facilitate the admission and establishment of foreign investment and will avoid over regulation and inception of unnecessary bureaucratic hurdles to admission. However, Section 3 of the same Guideline clearly recognizes the fact that, states have rights to regulate the entry of foreign investments, and the only thing that the Section is against is restrictive approaches such as minimum local ownership and staffing. Minimum local ownership is sometimes called local content. But, sections 4 and 5 of Guideline II state important types of exclusions that States may make, e.g.; under very exceptional circumstances states may exclude from their territories foreign investments which threaten national security or which belong to sectors legally reserved to its nationals on account of the state’s economic development objectives or national interest requirements, or exclusions against investments which are contrary to the public order, or affect the environment or public health. Section 6 of Guideline II encourages the publishing and accessibility of information about a host nation’s legislations, regulations and procedures relevant to foreign investment.

Guideline III is about general standards for the treatment of Foreign Direct Investments by host countries, particularly covering issues of transfer of capital and returns on investment capital. The section calls for fair and equitable treatment of foreign investment, in line with the national treatment principal. However, it qualifies the ‘fair and equitable principle’ even further by stating that, foreign direct investments deserve the right to full protection and security regarding ownership, control and the substantial benefits over property ownership and protection, including intellectual property. It also calls for timely and effective transfer of capital, referring to the currency and the exchange rate at which the transfer is made. Guideline III

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<sup>46</sup> In short: ‘World Bank Guidelines’.

<sup>47</sup> For an in-depth analysis of World Bank Guidelines and their drafting history see: SHIHATA I., (1993), *Legal Treatment of Foreign Investment: The World Bank Guidelines*, Chapters 4,5 and 6, pp. 61-98, 124-137 and 139-150; WORLD BANK (1992), “Legal Framework For the Treatment of Foreign Investment: Report to the Development Committee and Guidelines on The Treatment of Foreign Investment”, Vol. II: Guidelines 13, World Bank.

further recommends that, host states should permit and facilitate the re-investment of returns and liquidation proceeds. It requires all states to take all necessary measures to prevent and control corrupt business practices. The same caution is given also against granting of tax exemptions and other fiscal incentives, which very often represent unjustified sacrifices on the host states and serve as poor substitutes for appropriate investment policies. The Guideline postulates that, reasonable and stable tax rates provide better incentives to investors.

Guideline IV deals with the question of expropriation. It gives a broader interpretation of the term ‘expropriation’ to include both partial as well as total expropriation of foreign investments. Where expropriation is done it must not be discriminatory on the basis of nationality and must be in good faith and appropriate compensation must be paid, and that, compensation must be adequate, effective and prompt based on fair market value as agreed between states and foreign investors.

Guideline V deals with the question of investment disputes. The Guideline encourages conciliation or binding arbitration as a possible alternative to adjudication before national courts.

### **2.3.7 Partnership Agreements between African, Caribbean and Pacific Group of States (ACP) and the European Union**

#### **2.3.7.1 Overview**

These partnership agreements can be considered as regional treaties. The African, Caribbean and Pacific Group of States was created in 1975 by signing the Georgetown Agreement on the Organization of the African, Caribbean and Pacific Group of States (ACP), which was concluded on 6<sup>th</sup> June 1975.<sup>48</sup> In fact it was the Georgetown Agreement of 1975 which created the ACP as a regional organization.<sup>49</sup> The Group was originally created with the aim of coordinating cooperation between its members and the European Union. Its main objective was to negotiate and implement, together, cooperation agreements with the European Community. The Georgetown Agreement was amended in 1992.

However, there were two agreements which were signed between the European Economic Community (EEC) and some African countries before the Georgetown Agreement. These were the Yaoundé Convention of 1963 and Yaoundé Convention of 1969 respectively. The Yaoundé Agreements were succeeded by the Lomé I Convention which was signed on 25<sup>th</sup> March 1975. In fact, one of the objectives of the Georgetown Agreement was to realize the

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<sup>48</sup> Hereinafter ‘The Georgetown Agreement’.

<sup>49</sup> Currently, members of the ACP are: Angola, Antigua and Barbuda, Belize, Cape Verde, Comoros, Bahamas, Barbados, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Congo (Brazzaville), Congo (Kinshasa), Cook Islands, Cote d’Ivoire, Cuba, Djibouti, Dominica, Dominican Republic, Eritrea, Ethiopia, Fiji, Gabon, Gambia, Ghana, Grenada, Republic of Guinea, Guinea-Bissau, Equatorial Guinea, Guyana, Haiti, Jamaica, Kenya, Kiribati, Lesotho, Liberia, Madagascar, Malawi, Mali, Marshall Islands, Mauritania, Mauritius, Micronesia, Mozambique, Namibia, Nauru, Niger, Nigeria, Niue, Palau, Papua New Guinea, Rwanda, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Solomon Islands, Samoa, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Suriname, Swaziland – Tanzania, Timor Leste, Togo, Tonga, Trinidad and Tobago, Tuvalu, Uganda, Vanuatu, Zambia, Zimbabwe.

objectives of the Lome Convention, 1975.<sup>50</sup> The Lomé I Convention was designed to provide a new framework of cooperation between the then European Economic Community (EEC) in particular former British, Dutch, Belgian and French colonies and ACP countries. The convention was renegotiated and renewed three times, namely through: Lomé II Convention, which was signed on 31<sup>st</sup> October 1979; Lomé III Convention, which was signed on 8<sup>th</sup> December 1984, and Lomé IV Convention, which was signed on 15<sup>th</sup> December 1989. The Lomé conventions were followed by the Cotonou Agreement signed on 23<sup>rd</sup> June 2000, and this Agreement was followed by negotiations and signing of Economic Partnership Agreements (EPAs) between European Union and various sub-regional blocks of Africa.

#### **2.3.7.2 The Yaoundé I Convention of 1963**

The Yaoundé I Convention did not have provisions specific to the mining sector. However, some of its general provisions are worthy looking at. For example, the Convention made it clear that in each Associated State, nationals and companies of every Member State shall be placed on an equal basis against other Member States as regards the right of establishment.<sup>51</sup> In essence, this provision gave companies from European countries unrestricted access in ACP countries and vice versa, and this access included the right of establishment. The right of establishment, within the meaning of the Convention, included the right to engage in and carry on non-wage earning activities; to set up and manage undertakings and in particular companies; and to set up agencies, branches or subsidiaries.<sup>52</sup>

#### **2.3.7.3 The Yaoundé II Convention of 1969**

The Yaoundé II Convention of 1969 had the same objectives as the Yaoundé I Convention of 1963 in respect of freedom of establishment, in the sense that nationals and companies from all the EEC countries would be placed on an equal footing in all the ACP states and vice versa. The companies would also be equally free to supply services in their newly established place; but in any given sector the nationals and companies of the EEC countries would enjoy these rights only where the state to which they belong grants reciprocal rights in the same sector to nationals and companies of the associated state concerned.

#### **2.3.7.4 The Lomé I Convention of 1975**

The Lomé I Convention, concluded in the capita of Togo, Lomé, was an international aid and trade agreement between the ACP group and the EEC, and which was aimed at supporting the ACP states' efforts to achieve comprehensive, self reliant and self-sustained development. It was largely built on the Yaoundé Agreements. One of the most pertinent elements in the Convention was the pledge by countries of the EEC not to apply to imports of products

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<sup>50</sup> Article 2(a)&(b), Georgetown Agreement, 1975. See also: Article 2(a)&(b), Georgetown Agreement (Amendment), 1992.

<sup>51</sup> See: Article 29, Yaoundé I Convention, 1963.

<sup>52</sup> Article 31, *Ibid.*

originating in the ACP States any quantitative restrictions or measures having equivalent effect other than those which the Member States apply among themselves.<sup>53</sup>

#### **2.3.7.5 Lomé II Convention of 1979**

Lomé II Convention of 1979 had more less similar objectives like Lomé I Convention of 1975. However, of importance to this discussion is Article 57 in which the EEC committed itself to give its technical and financial assistance to help with exploitation of the ACP States' mining and energy potential in accordance with the procedure peculiar to each of the instruments at its disposal and according to the provisions of the Convention.<sup>54</sup>

#### **2.3.7.6 Lomé III Convention of 1984**

Lomé III Convention of 1984 maintained the same objectives as its predecessors. However, provisions relating to mining were expanded. Those that are relevant for this discourse are discussed hereunder. The first is article 78 which spelt out some of the aims of co-operation in mining which included the intention to help develop the mining sector of the ACP States concerned so as to ensure a satisfactory return from mining operations, for the overall development of those States. In this regard, the Contracting Parties stressed their mutual dependence in the sector and agreed to use, in a coordinated fashion, the various means of action in the field of mining contained in the Convention as well as in other EEC instruments.<sup>55</sup>

In order to achieve the above aim, the EEC pledged to co-operate, through its technical and financial assistance programmes, with the ACP States in their prospecting and exploration efforts at all stages, covering both onshore areas and the continental shelf as defined in international law. The EEC was also prepared to give its technical and financial assistance to the establishment of national or regional exploration funds in ACP States. All this was aimed at facilitating the development of the mineral resources of the ACP States concerned, but having regard to national and external economic considerations and with a view to diversification.<sup>56</sup> Another important development in this Convention was the invocation of the World Bank, in accordance with its Statute, to commit its own resources on mining and energy investment projects recognized by the ACP State concerned and by the EEC as being of mutual interest.<sup>57</sup>

#### **2.3.7.7 The Lomé IV Convention of 1989**

The Fourth ACP-EEC Convention of 1989, also known as the Lomé IV Convention, was concluded on 15<sup>th</sup> December 1989.

The Lomé IV Convention has provisions relating to mining development as one of the areas identified for cooperation. In this area of mining there are about three endeavours, out of the several endeavours of the Convention, that cannot pass without scrutiny: the first endeavour was to exploit all types of mineral resources of partner states in a way that ensures the

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<sup>53</sup> Article 3(1), Lomé I Convention, 1975.

<sup>54</sup> Article 57, Lomé II Convention, 1979.

<sup>55</sup> Article 78, Lomé III Convention, 1984.

<sup>56</sup> Article 80, *Ibid.*

<sup>57</sup> Article 83, *Ibid.*

profitability of mining operations in both export and local markets, while also meeting environmental concerns, and to enhance the potential of human resources, with a view to promoting and expediting diversified economic and social development. Also, the Convention envisaged that the contracting parties would stress on their mutual dependence in the sector and agree to use in a co-ordinated fashion, the Convention's various instruments in the field of mining.<sup>58</sup> The second endeavour was to cooperate in the prospecting and exploration efforts in ACP countries at all stages, and both onshore and on the continental shelf as defined in international law, in order to facilitate the development of the mining resources of the ACP States concerned, having regard to national and external economic considerations and with a view to diversification.<sup>59</sup> The third Endeavour consisted of invoking the Bank (World Bank), in accordance with its Statute, to commit its own resources in that regard.<sup>60</sup>

### **2.3.7.8 The Cotonou Agreement of 2000**

The Cotonou Agreement was signed in Cotonou on 23 June 2000. It was revised in Luxembourg on 25 June 2005, and revised again in Ouagadougou on 22 June 2010. The Objectives of the Agreement are stipulated under Article 1, which are:

“...to promote and expedite the economic, cultural and social development of the ACP States, with a view to contributing to peace and security and to promoting a stable and democratic political environment”.<sup>61</sup>

The Cotonou Agreement, unlike all its predecessors, appears to put more weight on matters of investment. On investment, the Agreement entrenches about four themes. The first three are on investment generally and the last one is specific and relevant to the mining sector. On investment generally, the first theme that the Agreement covers is promotion of investment generally.<sup>62</sup> Then the Agreement touts for promotion of private investment. On private investment, the Agreement calls on all parties to implement measures that would encourage participation by private investors in their development efforts.<sup>63</sup> The second theme is about creating a proper and favorable investment climate. On favourable investment climate, the Agreement calls upon the parties to take measures and actions which help to create and maintain a predictable and secure investment climate as well as enter into negotiations on agreements which will improve such a climate.<sup>64</sup> The third theme is about investment guarantees and protection. As it can be noted, this theme has two elements, namely the element of guarantees and the element of protection. On the element of investment guarantees, the Agreement notes that these are increasingly becoming important tools for development finance as they contribute to reducing project risks and inducing private capital flows.

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<sup>58</sup> Article 99, Lome (IV) Convention, 1989.

<sup>59</sup> Article 101, Ibid.

<sup>60</sup> Article 104, Lome (IV) Convention, 1989.

<sup>61</sup> Article 1, Cotonou Agreement, 2000.

<sup>62</sup> Article 75, Ibid .

<sup>63</sup> Article 75(a), Ibid.

<sup>64</sup> Article 75(b), Ibid.

So far the Agreement underscores the need for availability and use of risk insurance as a risk mitigating mechanism in order to boost investor confidence in the ACP States.<sup>65</sup> To this end, the Cooperation committed itself to offer guarantees and assist with guarantees funds covering risks for qualified investment,<sup>66</sup> which includes: reinsurance schemes to cover foreign direct investment by eligible investors against: legal uncertainties and the major risks of expropriation, currency transfer restriction, war and civil disturbance, and breach of contract;<sup>67</sup> guarantee programmes to cover risk in the form of partial guarantees for debt financing;<sup>68</sup> national and regional guarantee funds,<sup>69</sup> and to provide support to capacity-building, institutional support and participation in the core funding of national and/or regional initiatives to reduce the commercial risks for investors.<sup>70</sup> On investment protection, the parties affirm the need to promote and protect either Party's investments on their respective territories, and in this context affirm the importance of concluding, in their mutual interest, investment promotion and protection agreements which could also provide the basis for insurance and guarantee schemes.<sup>71</sup> They also agree to introduce, within the framework of Economic Partnership Agreements (EPAs), general principles on protection and promotion of investments, which will endorse the best practice agreed in the competent international fora or bilaterally.<sup>72</sup>

When it comes to mining, the Agreement envisages encouraging sustainable utilization and management of natural resources and the move is aimed at supporting, among other things, specific measures and schemes which in turn are also aimed at addressing critical sustainable management issues relating to current and future regional and international commitments concerning mineral and natural resources, and these resources include, among others, coastal, marine and fisheries resources.<sup>73</sup>

## **2.4 Tanzania and the Multilateral Legal Framework on Investment**

### **2.4.1 Overview**

Tanzania is one of the developing countries and an African country for that purpose. The country is a party, through accession or signature, to a number of multilateral and regional treaties that affect investments discussed in this discourse. These include: the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958; the Convention Establishing the International Centre for the Settlement of Investment Disputes between States and Nationals of other States of 1965; the Convention Establishing the Multilateral Investment Guarantee Agency' (MIGA) of 1985; the Marrakesh Agreements of 1994; the ACP-EEC Conventions from Lome I. Further, since the ICSID and the MIGA are

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<sup>65</sup> Article 77(1), *Ibid.*

<sup>66</sup> Article 77(2), *Ibid.*

<sup>67</sup> Article 77(2)(a), the Cotonou Agreement 2000.

<sup>68</sup> Article 77(2)(b), *Ibid.*

<sup>69</sup> Article 77(2)(c), *Ibid.*

<sup>70</sup> Article 77(3), *Ibid.*

<sup>71</sup> Article 78(1), *Ibid.*

<sup>72</sup> Article 78(3), *Ibid.*

<sup>73</sup> Article 32(1)(c), *ibid.*

World Bank sponsored initiatives, any country that subscribes to the two initiatives is also considered to buy into the World Bank Guidelines. This is the case for Tanzania.

#### **2.4.2 The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958**

On 13<sup>th</sup> October 1964, Tanzania ratified, by way of accession, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and this accession came into force on 12<sup>th</sup> January 1965. To refresh our minds, the main purpose of the Convention is to create a framework for the recognition and enforcement of foreign arbitral awards, which means arbitral awards made in the territory of another State, provided that the other state is also a party to the Convention. It also provides for necessary recourse to arbitration in case of an investment dispute in situations where the parties chose to insert an arbitration clause in their investment contract. It is also important to note that, Article 1(3) of the Convention requires states to make declaration on the application of the Convention either on the basis of reciprocity and whether it would cover commercial disputes only. The relevant wording is:

“When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration”.<sup>74</sup>

We take note that, at the time of accession, Tanzania decided to make a declaration regarding reciprocity only<sup>75</sup> meaning that on the basis of reciprocity Tanzania declared that it would apply the Convention to the recognition and enforcement of awards made in the territory of another Contracting State only. Further, by not entering a declaration regarding the nature of disputes to be covered, Tanzania committed itself to have the Convention apply not only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law, but also to all other types of disputes. In any case, by acceding to the New York Convention, Tanzania gave consent to enforce, in her territory, arbitral awards made in other contracting states. This would include arbitral awards in respect of investments in the extractive industries.

#### **2.4.3 The Convention Establishing the International Centre for the Settlement of Investment Disputes between States and Nationals of other States of 1965**

In 1992, Tanzania acceded to the Convention Establishing the International Centre for the Settlement of Investment Disputes between States and Nationals of other States of 1965, which

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<sup>74</sup> Article 1(3), Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

<sup>75</sup> ASOUZU Amazu (2001), *International Commercial Arbitration and African States: Practice, Participation and Institutional Development*, Cambridge University Press, p. 188.

establishes the International Centre for the Settlement of Investment Disputes (ICSID).<sup>76</sup> It is important to note that, by acceding to the ICSID Convention, Tanzania generally gave its consent to have investment disputes between Tanzania and investors who are nationals of other states, referred to the ICSID.<sup>77</sup> This covers investors and corresponding investments in the extractive industries.

#### **2.4.4 The Convention Establishing the Multilateral Investment Guarantee Agency' (MIGA) of 1985**

In the same year, 1992, Tanzania became party to the 'Convention Establishing the Multilateral Investment Guarantee Agency' (MIGA) of 1985.<sup>78</sup> By becoming party to the Convention establishing the MIGA, Tanzania gave consent to the coercive and deterrence framework and mechanisms of MIGA including its consequences. This move has the effect of also subjecting investments in the extractive industries to the MIGA framework.

#### **2.4.5 The Marrakesh Agreements**

Tanzania has been member of GATT, by accession, since 9<sup>th</sup> December 1961, and by virtue of this accession, it is considered as a contracting party.<sup>79</sup> Tanzania is also one of the founding members of the World Trade Organization (WTO) having signed the Marrakesh Agreements on 15<sup>th</sup> April 1994 that put in force the Uruguay Rounds Agreements. It became a member officially on 1<sup>st</sup> January 1995.

#### **2.4.6 The ACP-EEC Conventions**

Tanzania has been party to the Lomé I Convention of 1975; the Lomé II Convention of 1979; the Lomé III Convention of 1984; the Lomé IV Convention of 1989; and the Cotonou Convention of 2000, which is currently in force, taking into consideration its two amendments. Being one of the signatories, Tanzania was and is a party to and subscribes to the objectives of the Conventions.

### **3. Things which African Countries Need to be Aware of**

#### **3.1 Overview**

When we look critically into some areas of the multilateral framework, we are able to make pertinent observations. These observations are important issues for developing countries, African countries included. So far, the observations relate to the following instruments: the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1966; the Convention Establishing the Multilateral Investment Guarantee Agency

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<sup>76</sup> Through signature on 10<sup>th</sup> January 1992, and deposit of instruments of ratification on 18<sup>th</sup> May 1992, and the convention became operational in Tanzania on 17<sup>th</sup> June 1992.

<sup>77</sup> Article 25(1), ICSID Convention, 1965.

<sup>78</sup> Through accession on 19<sup>th</sup> June 1992.

<sup>79</sup> WATTS, Arthur (2000), *The International Law Commission (1948-1998): Volume II: The Treaties*, Clarendon Press, p. 1162.

(MIGA), 1985; the Marrakesh Agreements of 1994; and the Fourth ACP-EEC Convention (LOME IV) of 1989.

### **3.2 The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1966**

As it has been discussed in this paper, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1966 establishes the International Centre for the Settlement of Investment Disputes (ICSID). The ICSID is a member of the World Bank Group, from which it receives funding. The Centre provides administrative and technical support for a number of international dispute resolution proceedings through alternative facilities such as the Permanent Court of Arbitration in The Hague, Netherlands, the London Court of International Arbitration, and the International Chamber of Commerce in Paris, France.<sup>80</sup>

Things which draw critical attention about the ICSID can be clustered into two. The first is the statistics and facts about what is going on in the ICSID. The second is the fact that the centre is part of the World Bank Group. Although the membership of the World Bank is global, it is known to have been dominated by developed countries. Most of the cases at the ICSID are taken there by investors from developed countries against governments, and most of the governments sued there are from developing countries, and the leading ones are the following with the number of their cases indicated in parentheses, as of 2013: Argentina (49), Venezuela (36), Egypt (17), Ecuador (12), Congo (12), Peru (11) and Ukraine (10) times. Only two states, Gabon and Romania, have ever filed ICSID case against an investor. It is also noted that, Bolivia, Ecuador and Venezuela withdrew from membership to the ICSID. Further, cases involving mining investments at the ICSID account for 25% of all the cases that ICSID has handled. In terms of costs of representation before the ICSID, between 2009 and 2012 legal representation costs ranged between US\$ 1 million and 7.6 million per case.<sup>81</sup>

All the facts stated above cement a number of perceptions about the ICSID: First, ideologically the ICSID appears to be empowering wealthy countries, hence siding more with investors at the expense of poor countries.<sup>82</sup> Secondly, its proceedings are perceived to be complex in the sense of being dilatory, difficult to manage, disruptive, unpredictable, and not subject to appeal, and on top of that they are costly,<sup>83</sup> hence not surprising to note that representation of parties to the ICSID is dominated by North American legal firms. Thirdly, ICSID proceedings are clouded with secrecy, partly because private parties are involved.<sup>84</sup> And fourthly, ICSID decisions are sometimes perceived as being inconsistent with each other,<sup>85</sup> because in its practice it wants to be guided by the case at hand and not to be guided by

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<sup>80</sup> INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (2012), “ICSID 2011 Annual Report”, World Bank Group, 2012.

<sup>81</sup> UNCTAD (2013), Recent Developments in Investor-State Dispute Settlement (ISDS), Issues Note No. 1, 2013, p. 1.

<sup>82</sup> TRAKMAN Leon (2012), The ICSID under siege, *Cornel Law Journal*, Vol. 45, p. 611.

<sup>83</sup> *Ibid.*, p. 616.

<sup>84</sup> *Ibid.*, p. 635.

<sup>85</sup> *Ibid.*, p. 642.

precedents. Fourthly, recent studies show that the roster of ICSID arbitrators is dominated by OECD countries by 75%,<sup>86</sup> and some 12 arbitrators have been appearing in 60% of all ICSID cases.<sup>87</sup> At the same time, about 50% of arbitrators in the current roster of ICSID have appeared as counsels to parties in arbitration cases elsewhere.<sup>88</sup> So it is dominated by representatives of the investor community itself, and involves a conflict of interests.

### **3.3 The Convention Establishing the Multilateral Investment Guarantee Agency (MIGA), 1985**

#### **3.3.1 Overview**

As we have discussed already in this treatise, the main purpose of the Convention Establishing the Multilateral Investment Guarantee Agency is to establish the Agency (MIGA), and the main purpose of the MIGA is to issue investment guarantees. As we have noted, these guarantees appear to be rather meant to provide a deterrence effect to countries which host investments, than providing assurance to the investors, especially in respect of: currency inconvertibility and transfer restrictions; expropriation; breach of contract; and non-honouring of financial obligations, noting that all these obligations are attributable to the state. Secondly, through the Office of Compliance Advisor Ombudsman (CAO), communities or individuals affected or likely to be affected by MIGA-guaranteed projects have recourse to some kind of mechanism for shaming the investment companies if those companies fail to adhere to the environmental and social standards associated with investments.

#### **3.3.2 Perceptions about the MIGA**

##### **3.3.2.1 General Overview**

Generally, as it is the case with the ICSID, the MIGA also suffers from some sort of negative perception in the eyes of developing countries due to a number of reasons. The first is that, although membership to the MIGA is global, being an instrument of the World Bank the MIGA is still viewed as being heavily influenced by the perspective of developed countries, which is oriented towards protection of investors and investments than host countries, or regulating the activities of multinationals. This point will be elucidated more in the subsequent expositions. Secondly, although the MIGA poses as an investment guarantee agency by way of insurance, its framework of sanctions shows that it is slowly transforming into a coercive mechanism which is also turning into some sort criminal justice system, and here we are referring particularly to its sanctions regime.<sup>89</sup> The MIGA's sanctions regime is defined in its sanctions procedures,<sup>90</sup> which are linked to the World Bank's Sanctions Board.<sup>91</sup> Under its

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<sup>86</sup> OECD (2012), *Investor State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment, 2012/3, p. 44.

<sup>87</sup> *Ibid.*, p. 45.

<sup>88</sup> *Ibid.*

<sup>89</sup> Refer to: MIGA Sanctions Procedures, Adopted by MIGA on 28<sup>th</sup> June 2013.

<sup>90</sup> *Ibid.*

<sup>91</sup> See: Article I, Section 1.02(a), MIGA Sanctions Procedures. This is the Sanctions Board for the World Bank Group established in accordance with the 'Sanctions Board Statute', which serves the following institutions:

sanctions regime, MIGA can do the following: suspend counterparts who are companies or states;<sup>92</sup> conduct proceedings against a state or investor to recommend appropriate sanctions;<sup>93</sup> refer a state to the Sanctions Board where normal hearings take place including the requirement of parties to file submissions;<sup>94</sup> and finally the possibility of the Sanctions Board issuing a decision.<sup>95</sup> Sanctions include: reprimand to the party at fault, which is essentially a written warning<sup>96</sup> and debarment, which is essentially exclusion from World Bank or MIGA projects.<sup>97</sup> The sanctions regime is not only related to the MIGA's guarantee framework, but also the World Bank's procurement framework,<sup>98</sup> the World Bank's framework for preventing and combating fraud and corruption;<sup>99</sup> and the World Bank's framework for procurement of consultancy services.<sup>100</sup> Therefore, the sanctions regime is more oriented to issues of tendering and procurement of services by fighting, among other things, corruption and fraudulent practices in these spheres. Indeed, if one peruses the decisions of the Sanctions Board of the World Bank, most of the cases border around the issues spelt out above.

However, it is noted that, while the sanctions regime of the World Bank is said to be meant to create a disincentive for corrupt or fraudulent behaviour especially by companies,<sup>101</sup> and while fraudulent and corrupt practices cannot be condoned, but the regime could be viewed as a measure to shield, protect, and ensure that companies from developed countries maintain leverage, based on capacity, skills, capital and experience over companies from developing or emerging economies when competing for tenders or consultancies. The dilemma is that, while fraudulent and corrupt practices are not acceptable, and while no one can argue for condoning them, but also requiring all companies to operate on the same level field will put companies from developing world or emerging economies at a disadvantage vis-a-vis those from developed countries for lack of leverage in terms of capacity, skills, capital and experience. Therefore, they will always be vanquished in the face of companies from developed countries. The sanctions regime is also being criticized for being modelled on United States law and not on some international framework like the WTO.<sup>102</sup> Instead, it should have been based on universal standards that are commonly understood by all stakeholders.

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International Bank for Reconstruction and Development, International Development Association, International Finance Corporation, and the Multilateral Insurance Guarantee Agency.

<sup>92</sup> Article II, MIGA Sanctions Procedures, 2013.

<sup>93</sup> Article IV, Sanctions Procedures, 2013.

<sup>94</sup> Article V & VI, Sanctions Procedures, 2013.

<sup>95</sup> Article III, Sanctions Board Statute; Article VIII, Sanctions Procedures, 2013.

<sup>96</sup> Article IX, Section 9.01(a), MIGA Sanctions Procedures, 2013.

<sup>97</sup> Article IX, Section 9.01(b & c), *Ibid.*

<sup>98</sup> This is governed by: World Bank Procurement Guidelines, approved in November 2003.

<sup>99</sup> Which is governed by: World Bank Guidelines on Preventing and Combating Fraud and Corruption in Projects financed by IBRD Loans and IDA Credits and Grants of October 2006;

<sup>100</sup> Which is governed by: World Bank Guidelines for Selection and Employment of Consultants under IBRD Loans and IDA Credits & Grants by World Bank Borrowers of January 2011.

<sup>101</sup> *Ibid.*, p. 279.

<sup>102</sup> HANS Joachim Priess (2013), "Questionable Assumptions: The Case for Updating the Suspension and debarment Regimes at the Multilateral Development Banks", *The George Washington International Law Review*, vol. 45, p. 274.

When one looks also at the framework of the Compliance Advisor Ombudsman in respect of adherence to the environmental and social standards some questions and issues arise. There are many cases from developing countries,<sup>103</sup> but in all these cases either the CAO was protective of the investment companies, or his interventions did not bear fruit.

### 3.3.2.2 Some Concrete Examples of Failures of the CAO Framework of the MIGA

#### i) The Case of Aguán Valley in Honduras

The following excerpt from the “News Notes of the Maryknoll Office for Global Concerns”, shows one of the recent cases in which the intervention of the CAO was not effective.<sup>104</sup>

“...One enigmatic case that highlights the shortcomings of the performance standards is from the Aguán Valley in Honduras, where a palm oil project developed by *Dinant Corporation* is linked to the killings of 100 farmers, forced evictions of many more, and kidnappings. Even before the project began, the area had a long standing conflict over land; the communities never gave free prior or informed consent to the corporation. The funding from the project came from the IFC as well as German Investment Development Corporation (DEG) and the Inter-American Development Bank (IDB) through a Honduran financial intermediary bank called FICOHSA. DEG and the IDB withdrew their funds in 2011 over allegations of human rights abuses and land disputes, but the IFC continued its funding. The Compliance Advisory Office (CAO), an independent watchdog for the IFC, received a complaint on behalf of the community. After investigating, the CAO issued a report in January 2014 which stated that the IFC failed compliance at every stage of the investment process: assessment, supervision, and evaluation. The CAO found that the IFC ignored news implicating Dinant in egregious crimes or did not do the proper research. It also found that the IFC continues to be in breach of disclosure and failed to consult the communities. When the IFC saw a draft CAO report, the IFC asked the CAO to remove and cover up some of its findings related to due diligence. After site visits, the IFC found inadequate implementation of its social and environmental standards but at no point penalized or compelled Dinant to come into compliance. It also inadequately supervised Dinant’s security force of 300 people. Lastly, the CAO report found that the IFC culture discouraged staff from acting or speaking up when violations occur...”

#### ii) The Case of Bulyang’hulu in Tanzania

A case resembling the above one also occurred in Tanzania in Bulyang’hulu whereby small scale miners and villages were forcibly removed from their mining area without compensation or relocation arrangements. The case of Bulyang’hulu<sup>105</sup> is one of the classic cases of conflict between large scale and small scale miners.

<sup>103</sup> See Summary of CAO Cases (of MIGA) for January 2015.

<sup>104</sup> MARYKNOLL OFFICE FOR GLOBAL CONCERNS (2014), “IFC Standards Have Subpar Outcomes”, November-December 2014 News Notes, Vol. 3 9, No. 6.

<sup>105</sup> The Case of Bulyanhulu is well documented in: LISU, Tundu (2001), “In Gold we Trust: The Political Economy of Law, Human Rights and the Environment in Tanzania's Mining Industry”, *Journal of Law, Social Justice & Global Development*, Vol. 2, 2001.

Gold exploration activities at present day Bulyang'hulu had started as far back as 1910, carried out by the German company Gold Syndicate for Precious Metals, and there were indications of gold.<sup>106</sup> However, no more work was continued in that area after that. In the middle of the 1970s, small scale miners started working the mines there, following the collapse of large scale mining in Tanzania, apparently having gotten some hint about possible existence of deposits there. In 1975, the Geological Survey of Tanzania did some exploration and survey work and they discovered big gold deposits, after which there were discussions on whether or not the government were to look for capital to invest in the area. While this was going on, small scale mining continued intermittently in four areas around Bulyang'hulu. The State Mining Corporation (STAMICO) resumed exploration activities in Bulyanhulu from 1980 to 1982. In 1982 STAMICO entered into a joint venture with a company called Outokumpu & Kone Corporation of Finland to conduct further exploration work, which ended in 1985. In December 1989, a Canadian exploration and mining company, Placer Dome, acquired the property and continued with prospecting work until 1992 when it halted its activities. However, small scale miners continued with their work uninterrupted. Indeed, the area had been officially designated to small-scale concessions, under the Mining Act of 1979, and by an explicit order of former President Ali Hassan Mwinyi, who in 1993 he is quoted to have told the Kahama District Commissioner to ensure that the artisan miners were 'free to operate in any area of Bulyang'hulu'.<sup>107</sup>

But, in a twist of events, in 1994 a Prospecting License (PL) was granted to Kahama Mining Corporation Ltd. (KMCL), a subsidiary of Sutton Resources, which was PL No. 214/94 given in respect of Butobela Area, Geita District. Its renewals in 1997 and 1998 respectively bear the same designation. This fact is pertinent, because the PL was never given in respect of central Bulyang'hulu area, a place which KMCL came to claim possession of. In fact, it was PL No. 145 of 1994 which covers the Bulyang'hulu area, and this was given to the East Africa Mines Ltd and not KMCL.<sup>108</sup> As to how the East African Mines Ltd came to change hands with KMCL in respect of Bulyang'hulu area, it remains a mystery. In June 1995, KMCL instituted legal proceedings in the High Court of Tanzania against the small-scale miners who were operating there at the time,<sup>109</sup> seeking to evict them from, and to restrain them from interfering with the Prospecting License area for what it considered as illegal mining and trespassing. But, in response the small scale miners claimed to have been in lawful occupation of the area since 1975. On September 29, 1995 the High Court of Tanzania at Tabora ruled in favour of the small scale miners. In the ruling the Court made an observation to the effect that, it did not find any provision for compensation and resettlement of indigenous people and that the case was inviting

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<sup>106</sup> RAJARAM, Vasudevan (et al.)(2005), *Sustainable Mining Practices: A Global Perspective*, Taylor and Francis, p. 248.

<sup>107</sup> SOCIETY FOR INTERNATIONAL DEVELOPMENT (2009), "The Extractive Resource Industry in Tanzania: Status and Challenges of the Mining Sector", Nairobi Kenya, SDI Publications, p. 50.

<sup>108</sup> LISSU, Tundu (2001), "In Gold we Trust: The Political Economy of Law, Human Rights and Environment in Tanzania's Mining Industry", *Law, Social Justice & Global Development Journal (LGD)*.

<sup>109</sup> *Kahama Mining Corporation Ltd v. Small Miners at Bulyanhulu* (1995), Civil Case No. 12 of 1995, High Court of Tanzania at Tabora (Unreported as at the time of writing).

human rights violation issues on the basis that some basic rights were clearly violated. The Court refused also the proposition by KMCL that the said small scale miners were illegal. On October 9, 1995, KMCL filed an appeal in the Court of Appeal of Tanzania seeking to have the High Court ruling overturned. However, before a verdict was made, KMCL decided to withdraw the case on 22<sup>nd</sup> May 1996, and seemingly decided to pursue an extrajudicial route.

Thus, on 30th July 1996, the then Minister for Energy and Minerals Dr. William Shija gave a one month notice for the miners at Bulyanhulu to leave the area. This was followed by announcement of the Regional Commissioner for Shinyanga, Lt. Gen Tumainiel Kiwelu. Large numbers of police were brought to the area and eviction started. KMCL started filling the pits, and this resulted into one of the biggest scandals in gold mining in Tanzania, because it is alleged that 52 miners were buried alive in the pits, hence killed there. On 2<sup>nd</sup> August 1996, the lawyers for the miners filed an application in the High Court at Tabora under a certificate of urgency seeking a temporary injunction to restrain KMCL and the Government from evicting the miners. The High Court issued an injunction order against the Government and KMCL. However, the order of the High Court was ignored by the officers who were conducting the evictions, and while the government later appealed to the Court of Appeal against the order, evictions continued without payment of compensation and were followed by killings in terms of miners being buried in pits. Many other social economic impacts of the event are well documented. Later on, mining was undertaken by Barrick-owned Bulyang'hulu Gold Mine.

In January 2002, the Lawyers Environmental Action Team (LEAT) lodged a complaint with CAO on behalf of the Small Scale Miners Committee of Kakola,<sup>110</sup> Tanzania, expressing concerns on the following issues, namely: The process of consultation regarding eviction and land clearance as well as resettlement and compensation of small scale miners in 1996; the transfer of concession to Barrick Gold upon its acquisition of Sutton Resources and the consequent resettlement of people in 1998; failure of MIGA to neither conduct thorough and competent due diligence nor address issues through consultation; human rights abuses as a result of the eviction process.

In the Assessment Report, completed in October 2002,<sup>111</sup> the CAO highlighted that it did not believe that the project merited a compliance audit and it was impressed with the way in which the mine was developing its social and environmental capacity. Following a site visit in March 2001, CAO determined that the available evidence indicated that the mine was not in fact culpable for the deaths of 52 miners. Furthermore, the CAO found that the claims concerning the extent of forcible relocation were distorted. Finally, it was determined that the mining activities by the big company at Bulyang'hulu were in conformity with best practice as applicable to the mining industry. The CAO stressed the unique opportunity posed by this project for all relevant parties to strengthen their partnership in order to achieve greater investment in local peoples. The complainants' response to CAO's assessment showed great dissatisfaction.<sup>112</sup> LEAT's

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<sup>110</sup> Available at: <http://www.cao-ombudsman.org/cases/document-links/documents/bulyfinal.Englishpdf.pdf>.

<sup>111</sup> Ibid.

<sup>112</sup> Available at: <http://protestbarrick.net/downloads/leat.response.to.cao.pdf>.

conclusion was that, the report of CAO was simply intended to cover MIGA. This might have sent a signal that MIGA stands for investors, and not for investment hosts. In any event, the case was closed in January 2005.

### **3.4 Marrakesh Agreements of 1994 and the Prohibition of Local Content Requirements**

#### **3.4.1 The Question of Local Content in the Marrakesh Agreements**

As we have noted in this paper, one of the Annexes to the Marrakesh Agreements is the TRIMs 1994, which deals with trade related investment measures; and the GATT 1994, which deals with issues of tariffs and trade. Some provisions in these two instruments affect investments including prohibition of local content measures as we are going to see later.

But it important to start the discussion on this part by noting that some countries receiving foreign investments as from the late 1970s started a practice of imposing numerous restrictions on investments with the view to protect and foster domestic industries and domestic labour force, and to prevent the outflow of foreign exchange reserves. One of these restrictions is local content requirement, usually containing a directive that locally-produced goods be purchased or used in an investment venture, or that the ownership of supplying firms must have a certain percentage of local membership. These are called ‘local content requirements’. As we are going to see later, local content requirements have become a standard practice in extractive industries in many countries in Africa including Tanzania. Local content requirements have their reasons. On these reasons, Hestermeyer<sup>113</sup> has this to say:

“...local content measures condition the grant of a benefit on the use of local goods and/or services in producing goods and/or services. They are quite diverse, encompassing local content conditions for such important benefits as obtaining a governmental or state trading enterprise contract, market access or access to financial stimuli. Their immediate effect is to force foreign companies to cooperate closely with local industry in their procurement, set up a subsidiary or engage in local production. The country adopting such measures hopes to develop its industry by forcing the foreign company to buy from the local industry or even invest in the country...”<sup>114</sup>

According to the same author, local content measures are usually implemented through the following avenues, among others: The first avenue is licencing,<sup>115</sup> which includes: licencing in things that have a cultural content;<sup>116</sup> licencing in the exploitation of resources;<sup>117</sup> import licences;<sup>118</sup> and permissions for investment.<sup>119</sup> The second avenue is government

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<sup>113</sup> HESTERMAYER, Holger, & NIELSEN, Laura (2014), “The Legality of Local Content Measures under WTO Law” University of Copenhagen Faculty of Law, Legal Studies Research Paper Series, Paper No. 2015-4, *Journal of World Trade*, Kluwer Law International.

<sup>114</sup> Ibid., p. 554.

<sup>115</sup> Ibid., p. 557

<sup>116</sup> Ibid., p. 558

<sup>117</sup> Ibid., p. 560

<sup>118</sup> Ibid., p. 561

<sup>119</sup> Ibid., p. 562

procurement.<sup>120</sup> The third avenue is financial incentives,<sup>121</sup> which include: feed-in tariffs;<sup>122</sup> direct financing;<sup>123</sup> and other financial incentives like tariffs.<sup>124</sup> The fourth avenue includes other informal requirements.<sup>125</sup>

### **3.4.2 Local Content Provisions in the Extractive Sector**

#### **3.4.2.1 An Overview and Theoretical Considerations**

Regarding local content provisions in the extractive sector, we take note of the fact that, developing countries, including African ones, are turning to local content requirements to maximize the reaps from their extractive industries as observed hereunder:

“Developing countries are placing an increasing emphasis on the need to derive more benefits from their resource wealth. To do so, a series of reforms have been undertaken to capture more gains from extractive resources. These include, among others, industrial policies to foster better sourcing of local content and job creation, fiscal reforms, and more collaborative partnerships with the extractive industry...”<sup>126</sup>

Another author has this to add about the rationale behind the idea to introduce local content requirements especially in the extractive industries:

“Local content and value addition strategy is one of the methods which resource-rich countries are adapting to increase the benefits from resource extraction to their economies, beyond securing optimal rents (royalties, taxes, shares, and other revenues). The goal is to promote linkages with other sectors of the economy through four main pillars: local employment opportunities, in-country spending and procurement of local goods and services, technology and skills transfer, and local participation through equity and management. Value addition promotes further opportunities for processing of the extracted resource”.<sup>127</sup>

At International law, local content requirements have their foundation in the principle of Permanent Sovereignty over Natural Resources (PSNR). The principle has been built through a number of United Nations General Assembly resolutions as well as treaties and other international instruments.<sup>128</sup> When one analyzes the above instruments, they assert four rights for

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<sup>120</sup> Ibid., p. 562

<sup>121</sup> Ibid., p. 563

<sup>122</sup> Ibid., p. 563

<sup>123</sup> Ibid., p. 564

<sup>124</sup> Ibid., p. 564

<sup>125</sup> Ibid., p. 565

<sup>126</sup> RAMDOO Isabelle (2015), “Unpacking Local Content Requirements in the Extractive Sector: What Implications for the Global Trade and Investment Frameworks?”, E15 Expert Group on Trade and Investment in Extractive Industries, International Centre for Trade and Sustainable Development (ICTSD), Abstract.

<sup>127</sup> TUFFOUR Joe Amoako, AUBYNN Tony, QUAYSON Alhassan Atta (2015), “Local Content and Value Addition in Ghana’s Mineral, Oil, and Gas Sectors: Is Ghana Getting It Right?”, African Center for Economic Transformation, p.4.

<sup>128</sup> General Assembly Resolution 523 (VI) 1952, Integrated Economic Development and Commercial Agreements; General Assembly Resolution 626 (VII), 1952, Right to Explore Freely Natural Wealth and Resources; General Assembly Resolution 1314 (XIII), 1958, Recommendations Concerning International Respect for the Rights of Peoples and Nations to Self-determination; General Assembly Resolution 1515 (XV), 1960, Concerted Action

countries owning natural resources, namely: the right to assert the ownership of natural resources which a country is endowed with; the right to manage and control the exploitation of a country's natural resources; freedom of a country to exploit its natural resources; and the right of a country to benefit from the exploitation of its natural resources.

So far, it is the right of freedom of a country to exploit its natural resources which forms the foundation for local content requirements. The main element of the freedom to exploit natural resources is the endeavour to strengthen the ability of resource owning countries to undertake the development of natural resources by themselves, so that they may exercise the freedom to decide the manner in which they are going to develop and market those resources.<sup>129</sup> The principle of PSNR clearly shows that this right can only be realized if there are arrangements for facilitation of transfer of equipment and technology, which implies transfer or supply of machinery, equipment and industrial raw materials needed by the underdeveloped countries to help in the development of their natural resources.<sup>130</sup> As such it is envisaged that the exercise of PSNR by developing countries should be linked to the acceleration of industrial development in those countries, especially the industries dealing with or involved with natural resources available in that country.<sup>131</sup> Further, under this right commercial agreements should not contain conditions, either economic or political, which could violate the sovereign rights of underdeveloped countries, including the right to determine their own plans for economic development.<sup>132</sup>

### **3.4.2.2 A Survey of Local Content Requirements in Select African Countries**

When it comes to the actual practice on the ground as we have noted earlier on, many countries, including African ones, have local content requirements in place, and a few examples would suffice here.

In South Africa, both the Mining Charter as well as the Liquid Fuels Charter seek to substantially expand opportunities for historically disadvantaged South Africans to enter the mining industry. Thus, companies are required to procure certain percentages of capital and

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for Economic Development of Economically Less Developed Countries; General Assembly Resolution 1803 (XVII), 1962, Declaration on Permanent Sovereignty over Natural Resources; General Assembly Resolution 1995 (XIX), 1964: Establishment of the United Nations Conference on Trade and Development as an Organ of the United Nations; General Assembly Resolution 2158 (XXI), 1966, Permanent Sovereignty over Natural Resources of Developing Countries; International Covenant on Civil and Political Rights, 1966; International Covenant on Economic, Social and Cultural Rights, 1966; General Assembly Resolution 2692 (XXV), 1970, Permanent Sovereignty over Natural Resources of Developing Countries and Expansion of Domestic Sources of Accumulation for Economic Development; General Assembly Resolution 3201(S-VI), 1974: Declaration on the Establishment of the New International Economic Order; General Assembly Resolution 3202 (S-VI), 1974: Programme of Action on the Establishment of the New International Economic Order; General Assembly Resolution 3281 (XXIX), 1974: Charter of Economic Rights and Duties of States; Vienna Convention on Succession of States in Respect of Treaties, 1978; African Charter on Human and Peoples' Rights, 1981.

<sup>129</sup> Article 3, General Assembly Resolution 2158 (XXI), 1966, *supra*; Preamble to the United Nations General Assembly Resolution 626 (VII), *supra*.

<sup>130</sup> Article 1(b), General Assembly Resolution 523 (VI) 1952, *supra*.

<sup>131</sup> Article 3, General Assembly Resolution 2158 (XXI) 1966, *supra*.

<sup>132</sup> Proviso under Article 1(b), General Assembly Resolution 523 (VI) 1952, *supra*.

consumer goods as well as services locally. The Mining Charter requires certain levels of demographic representation at management levels.<sup>133</sup>

In Ghana, the Minerals and Mining Law, 2006 (Act No. 703) seeks to promote a localization policy and facilitate production linkages. Clause 50(3) of Act 703 calls for eventual “localization” of mining staff.<sup>134</sup> The law requires holders of mineral rights to hire a minimum proportion of local staff in various employment categories (subject to some exemptions, e.g., small companies, regional offices, etc.), with the MC working with mining companies to identify staff positions that can be filled in by Ghanaians, local candidates who can be trained to replace foreign staff, a training program, and timing for local staff to replace foreign staff.<sup>135</sup> The law also clearly states a preference for local products to the maximum extent possible. It enjoins holders of mineral rights to give preference to materials and products made in Ghana; service agencies located in the country and owned by citizens; and companies or partnerships registered under the Ghanaian Company Code or Partnership Act.<sup>136</sup>

When it comes to Tanzania, and starting with the mining industry, provisions relating to local content started appearing in the Mining Act of 1979.<sup>137</sup> The Act required prospective miners to include a provision about training and employment of Tanzanians in their plan of work in the various applications relating to mineral rights, and the government would look into such plans and endorse them only if it was satisfied that the plans were adequate.<sup>138</sup> For the goods and services too, the prospective miners were obliged to show in their plans, the goods and services they were going to need in their mining operations which would be obtainable in Tanzania. The government would look into such plans and endorse them only if it was satisfied that such plans were adequate.<sup>139</sup> On its part, the Mining Act of 1998, which repealed the Mining Act of 1979, put a requirement only with regard to employment and training of Tanzanians and in respect of the Special Mining License only,<sup>140</sup> and its rigour was reduced significantly compared to that of the 1979 Act, because the government did not give itself the obligation to satisfy itself on the adequacy of such proposals before endorsing the application. Further, it is noted that there was no obligation in the Act with regard to procurement of goods and services locally as it was the case with the Mining Act of 1979.

The Mining Act of 2010, which repealed the 1998 Act, and which is currently in force, empowers the Government to negotiate with any mineral right holder in order to acquire free-carried interests and state participation in any mining operations under a Special Mining License

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<sup>133</sup> COLUMBIA CENTRE ON SUSTAINABLE DEVELOPMENT, *Local Content in South Africa: Mining & Petroleum Industries*, p. 4.

<sup>134</sup> TUFFOUR Joe Amoako, AUBYNN Tony, QUAYSON Alhassan Atta (2015), *Local Content and Value Addition in Ghana’s Mineral, Oil, and Gas Sectors: Is Ghana Getting It Right?*, Op. cit., Paragraph 9 at p. 7.

<sup>135</sup> *Ibid.*, Paragraph 10 at p. 7.

<sup>136</sup> *Ibid.*, Paragraph 13, at p. 8.

<sup>137</sup> Its predecessors are the Mining Ordinance, 1920 (repealed) and Mining Ordinance 1929 (repealed).

<sup>138</sup> See: Sections 27(f), 29(4)(c), 31(2)(b), 36(1)(e), 39(3)(d), 41(2)(b) & 44(1)(b), Mining Act, 1979.

<sup>139</sup> See: Sections 37(2)(i) & 39(3)(e), Mining Act, 1979.

<sup>140</sup> Sections 38(4)(f) & 41(2)(c), Mining Act, 1998.

if it is deemed strategic to do so.<sup>141</sup> The Act also places a requirement on the part of mining entities to give preference to procure goods and services locally.<sup>142</sup> Further, the Act requires mining companies to make a plan for employment and training of Tanzanians, and to implement a succession plan on expatriate employees and in accordance with the Employment and Labour Relations Act.<sup>143</sup> It also places a requirement for mining companies to list with a domestic stock exchange market.<sup>144</sup>

Further to the Mining Act, some Mineral Development Agreements (MDAs) signed between mining companies and the Government of Tanzania compel mining companies to utilize as much as possible locally-produced materials and supplies in the course of its mining activities, especially when such local goods or services are competitive in terms of quality, service delivery and price. In some MDAs, there is obligation of the mining company in consultation with the Government of Tanzania, to set-up appropriate procurement processes to implement the company's obligation in this regard and taking into account the Tanzanian circumstances and to enable local suppliers to bid for the supply of such goods and services.<sup>145</sup>

In the Model MDA,<sup>146</sup> which was made pursuant to the Mining Act of 2010, the mining company is enjoined to give preference to the purchase of goods and services available in Tanzania, but based on timely availability, quality, quantity and competitive pricing.<sup>147</sup> It also enjoins the mining company: to promote the employment of skilled and unskilled Tanzanians, and to provide training to Tanzanians in all skills in respect of the operations of the mining projects and to participate in all endeavours that will build the skills of Tanzanians in the mining industry.<sup>148</sup> Further, the Model MDA compels the mining company to involve local communities, through their local government authorities at village, ward and district levels, in setting priorities for community development projects and other socio-economic aspects for the life span of the project. The company also has to give preferential consideration to the local surrounding community in the employment of personnel, especially the unskilled one. The company can enter into a separate agreement with local authorities for purposes of implementing the corporate social responsibility obligations.<sup>149</sup>

When it comes to the petroleum industry, which for Tanzania is younger than the mining industry, the Petroleum Act, 2015<sup>150</sup> contains explicit provisions on local content. They cover: government participation in oil and gas activities;<sup>151</sup> provision of goods and services by

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<sup>141</sup> Section 10(1)&(2), *Ibid.*

<sup>142</sup> Sections 10(4)(e), 44(v) and 49(h), *Ibid.*

<sup>143</sup> Sections 47(b), 48(1)(b), 49(2)(f), 52(d), and 52(e), Mining Act, 2010.

<sup>144</sup> Section 110, *Ibid.*

<sup>145</sup> See for example: Clause 7, Buzwagi Agreement, 2007; Clauses 6.1 and 6.2, Geita Gold Mine Agreement, 1999.

<sup>146</sup> Model Development Agreement, Third Schedule, Mining (Mineral Rights) Regulations, 2010.

<sup>147</sup> Article 7, *Ibid.*

<sup>148</sup> Article 8, *Ibid.*

<sup>149</sup> Article 9, *Ibid.*

<sup>150</sup> Its predecessors are the Mining (Mineral Oil) Ordinance, 1958 (repealed); Petroleum (Exploration and Development) Act, 1980 (repealed); and the Petroleum Act, 2008 (repealed).

<sup>151</sup> Section 219, Petroleum Act, 2015.

Tanzanian businesspeople and entrepreneurs;<sup>152</sup> training and employment of Tanzanians;<sup>153</sup> training and technology transfer;<sup>154</sup> and provisions relating to corporate social responsibility.<sup>155</sup> On its part, the Model Production Sharing Agreement (PSA), which was made under the 1980 Act, and modified pursuant to the 2008 Act,<sup>156</sup> and which is now applicable under the 2015 Act, also contain explicit provisions relating to local content. They cover: purchase of goods and services locally and unskilled manpower is reserved for Tanzanians only and giving preference to Tanzanian companies as well as employment, training and transfer of technology.<sup>157</sup>

### **3.4.3 Instruments of the Marrakesh Agreements which Prohibit Local Content Requirements: The TRIMS 1994 and the GATT 1994**

#### **3.4.3.1 Overview**

The GATT 1947 prohibited investment measures which would violate the principle of national treatment<sup>158</sup> and called for the general elimination of quantitative restrictions to trade.<sup>159</sup> Its scope, however, had not been very clear. The TRIMS 1994 and GATT 1994 were intended to clarify the pre-existing GATT 1947 obligations because of its lack of clarity as we have stated above. On its part, the TRIMS Agreement prohibits any Trade Related Investment Measures that are inconsistent with the provisions of Article III and Article XI of GATT 1994.<sup>160</sup> These are measures that explicitly advocate for, among other things, local content requirements. As far as local content is concerned, the relevant paragraph of Article III of GATT 1994 is paragraph 4 which is about national treatment of imported products, and the relevant paragraph for Article XI is paragraph 1 which is about quantitative restrictions on imports or exports. Therefore the relevant provisions of the GATT 1994 that prohibit local content restrictions are Articles III:4 and XI:1.

#### **3.4.3.2 Article III:4 of GATT 1994**

Article III:4 of GATT 1994 provides as follows:

“The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded *treatment no less favourable* than that accorded to *like products* of national origin in respect of *all laws, regulations and requirements* affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the

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<sup>152</sup> Section 220, *Ibid.*

<sup>153</sup> Section 221, *Ibid.*

<sup>154</sup> Section 222, *Ibid.*

<sup>155</sup> Section 223, *Ibid.*

<sup>156</sup> Initially it was prepared in 2004 and was amended in 2008 and finally in 2013. In 2010 an Addendum for the Gas Sector was prepared, namely the MODEL PSA ADDENDUM FOR NATURAL GAS, Addendum to Existing PSA between GOT, TPDC and Contractor ABC for Deep Sea Operations.

<sup>157</sup> Article 20, Model Production Sharing Agreement between the Government of the United Republic of Tanzania and Tanzania Petroleum Development Corporation and ABC Ltd For Any Area, 2013.

<sup>158</sup> Article III, GATT 1947.

<sup>159</sup> Article XI, *Ibid.*

<sup>160</sup> Article 2, TRIMS 1994.

economic operation of the means of transport and not on the nationality of the product.<sup>161</sup> [Emphasis added].

In terms of trade related investment measures (TRIMs) which are inconsistent with the national treatment obligation of Article III:4 of GATT 1994, the Agreement (GATT) contains an illustrative list of examples. Paragraph 1(a) of the Illustrative List covers local content TRIMs, which require the purchase or use by an enterprise of products of domestic origin or domestic source (local content requirements) while paragraph 1(b) covers trade-balancing TRIMs, which limit the purchase or use of imported products by an enterprise to an amount related to the volume or value of local products that it exports. In both cases, the inconsistency with Article III:4 of GATT 1994 results from the fact that the measure subjects the imported products (to be purchased or used by an enterprise) to less favourable conditions than domestic products (to be purchased or used by an enterprise). In interpreting Article III:4, the Appellate Body of WTO<sup>162</sup> in the case of ‘*Korea: Various Measures on Beef*’, stated that:

“...for a violation of Article III:4 to be established, three elements must be satisfied: that the imported and domestic products at issue are ‘like products’; that the measure at issue is a ‘law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use’; and that the imported products are accorded ‘less favourable’ treatment than that accorded to like domestic products”.<sup>163</sup>

The same body in its decision in the case of ‘*Turkey: Rice*’ said that the imported rice and domestic rice (in Turkey) were considered “like products”; further that the domestic purchase requirement affected the internal sale, offering for sale, purchase and use of imported rice; and Turkey’s requirement that importers must purchase domestic rice in order to be allowed to import rice at reduced-tariff levels under the tariff quotas accorded less favourable treatment to imported rice than that accorded to like domestic rice, all of which were inconsistent with the meaning of Article III.4.<sup>164</sup>

### 3.4.3.3 Article XI:1 of GATT 1994

Article XI:1 of GATT 1994 provides as follows:

“No *prohibitions* or *restrictions* other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party”. [Emphasis added].

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<sup>161</sup> Article III:4, GATT 1994.

<sup>162</sup> Which is part of the dispute settlement framework of the WTO.

<sup>163</sup> See: paragraph 113 of the Decision.

<sup>164</sup> See: paragraphs 215, 225, 233 and 234 of the Decision.

As it is the case for Article III: 4, the GATT 1994 contains an illustrative list of examples of TRIMs which are inconsistent with the prohibition on imposition of quantitative restrictions of Article XI:1 of GATT 1994. Paragraph 2(a) of the Illustrative List covers measures which limit the importation by an enterprise of products used in its local production, generally or to an amount related to the volume or value of local production exported by the enterprise. It should be noted that, there is a conceptual similarity between this paragraph and paragraph 1(b) in that they both cover trade-balancing measures. The difference is that paragraph 1(b) deals with internal measures that affect products after they have been imported, while paragraph 2(a) deals with border measures affecting the importation of products. Measures identified in paragraph 2(b) of the list involve a restriction of imports in the form of a foreign exchange balancing requirement. Importation by an enterprise of products used in or related to local production is limited by restricting the enterprise's access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise.

When it comes to interpretation of Article XI:1, obviously the attention gathers around the concept of “restrictions” or “prohibitions”. The WTO dispute settlement Panel in the case of *India: Quantitative Restrictions* set out the scope of the concept of “restrictions” as follows:

“...the text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions ‘other than duties, taxes or other charges’. ...the wording of Article XI:1 is comprehensive as it applies ‘to all measures instituted or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges’.<sup>165</sup> The scope of the term ‘restriction’ is also broad, as seen in its ordinary meaning, which is ‘a limitation on action, a limiting condition or regulation’.<sup>166</sup> [Emphasis added].

It seems therefore that the TRIMS 1994 and GATT 1994 prohibit local content measures mainly relating to procurement of goods and services.

### **3.5 The ACP-EEC Conventions**

#### **3.5.1 The Yaoundé Conventions: Yaoundé I & II**

As we have noted in this paper, one of the main purposes of the two Yaoundé Conventions was to place all Member States on an equal basis as far as access to market opportunities in each other's countries is concerned, including the right of establishment. Yaoundé I was focused on the right of establishment, while Yaoundé II expanded it to the freedom to supply services. As we have noted also in this paper, this move amounted to giving unrestricted access to companies from European countries to have access in ACP countries and vice versa, and this includes right of establishment and supply of services. However, this reciprocal treatment in terms of giving each side unhindered access to markets of the other for Africa was a gimmick. The reason for this assertion is simple and clear, that while the capacity of companies from European countries to establish themselves in Africa was unquestionable, the

<sup>165</sup> See: Decision of the WTO Panel in *Japan: Trade in Semiconductors*, Para. 104.

<sup>166</sup> Para. 5.129.

capacity of African companies to reciprocate by similarly establishing themselves in Europe was almost non-existent, and the situation is not much different today. So, while this was considered as a reciprocal arrangement, in practice it was a one-sided arrangement which worked in favor of the European side only.

### **3.5.2 The Lomé Conventions: Lomé I, II, III & IV**

As we have seen in this Paper, Lomé I Convention of 1975 contained a pledge by countries of the European Economic Community not to apply to imports of products originating in the ACP States any quantitative restrictions or measures. However, the pertinent question here is as to what extent were these countries able to produce to the saturation of the market? In Lomé II Convention of 1979, provisions relating to mining were crafted in a more explicit way, including the pledge to help with exploitation of the ACP States' mining and energy potential in accordance with the procedure peculiar to each of the instruments at disposal to the Parties and according to the provisions of the Convention. In Lomé III Convention of 1984, provisions relating to mining were expanded, including the intention to further help develop the mining sectors of the ACP States and the pledge to co-operate in the prospecting and exploration efforts, covering both the onshore areas and areas on the continental shelf as defined in international law. The EEC also expressed its readiness to give its technical and financial assistance to the establishment of national or regional exploration funds in ACP States. Further, this desire to exploit mineral resources was to be informed by external economic considerations and the need for diversification. Otherwise, another interesting development was to see the World Bank weighing in by committing its own resources in mining and energy investments. Lomé IV Convention, as we have seen in this Paper, also contained provisions relating to mining. Provisions that attract attention include those that envisage exploiting all types of mineral resources in a way that ensures the profitability of mining operations. It also continues the endeavours of its predecessor namely covering resources both in onshore and continental shelf areas.

The endeavours of the Lomé conventions raise a number of questions. On the endeavour to make mining profitable, the question is whether this profitability is to mining companies from countries members to the European Economic Community, or to host countries like Tanzania, or both! This question is very pertinent in the midst of the outcry that agreements for exploitation of extractive resources in developing countries, African ones inclusive have not benefited much the developing countries.

The second notable thing in the Lomé conventions is putting emphasis on doing prospecting and exploration work, and that this exploration should cover both onshore and continental shelf areas as defined in international law. The suspicion here is that, by inserting this provision, European countries wanted to get unlimited access to all types of resources of African and Caribbean countries regardless of where they are located. While realizing that resources on land are being depleted, then it is necessary to move to marine resources.

The third notable thing is that all the above endeavours should happen having regard to national and external economic considerations, and with a view to diversification. External

economic considerations mean consideration of interests of countries that do not have natural resources. On the question of economic interdependence, we should pause here and remark that, in the development of the principle of Permanent Sovereignty over Natural Resources that we talked about in this Paper, two schools of thought developed, one of them advocating for resource nationalism approach and the other for resource liberalism approach.

The resource nationalism school promotes the idea of using resources for national development, and which encourages: putting restrictions on the exploitation of natural resources; putting strict controls over the development, processing and marketing of natural resources; putting strict controls over the import of capital and over the corporations that would be involved in the exploitation of natural resources; allowing nationalizations; and insisting on the use of national law in dispute settlement. The totality of these measures is considered as resource-nationalism, which can also be pursued with varied degrees of emphasis.<sup>167</sup>

The resource liberalism school, on the other side, favours opening the doors for investors, and it encourages: withdrawal from the use of fiscal control measures, and shifting reliance to monetary policies; creating flexibility in the labour market, with the view that this will significantly reduce unemployment, and driven by the view that unemployment is caused by ‘inflexibility’ in the labour market. So, unemployment should be tackled by labour market reforms, rather than through macroeconomic demand management policies and through industrial policies, while at the same time reducing the power of trade unions because of their perceived rigidity on such things like length of working contracts and the welfare of workers; and the third is liberalization and de-regulation of markets, especially financial markets, particularly on the movement of capital and profits.<sup>168</sup>

On the same line of thinking, a country which follows a neo-liberal approach is expected to favour strong individual private property rights, the rule of law, and the institution of freely functioning markets and free trade. The legal framework should be based on freely negotiated contractual obligations between juridical individuals in the market place. Thus, the sanctity of contracts and the individual’s right to freedom of action, expression, and choice, must be broadly protected. By extension, the freedom of corporations and businesses to operate within the above framework must be guaranteed. As such, the state is expected to use its monopoly of the means of violence, to preserve the above-mentioned freedoms at all costs.<sup>169</sup>

In fact, supporters of the resource-liberalism school contend that, in the very first permanent-sovereignty resolution, namely Resolution 523(VI), it was considered that ‘the underdeveloped countries must utilize such [natural] resources.... to further the expansion of the

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<sup>167</sup> POGORETSKY, Vitaliy & BEHN Daniel (2010), *The Tension between Trade Liberalization and Resource Sovereignty: Russia-EU Energy Relations and the Problem of Natural Gas Dual Pricing*, A Paper Presented to the Political Economy of Energy in Europe and Russia (PEER) Conference, University of Warwick, 3 September 2010.

<sup>168</sup> ARESTIS, Philip & SAWYER, Malcolm (2004), *Neo-Liberal Economic Policy: Critical Essays*, Edward Elgar Publishing, pp. 1 and 228.

<sup>169</sup> HARVEY, David (2007), *A Brief History of Neo-liberalism*, Oxford University Press, p. 64. See also: LEE Simon & McBride Stephen (2007), *Neo-Liberalism, State Power and Global Governance*, Springer, p. 94.

world economy’.<sup>170</sup> Also, a number of resolutions speak of ‘obligations arising out of international cooperation’.<sup>171</sup>

The explanation given by resource-liberalism proponents is that there is so much interdependency in the world economy such that no country would live in isolation. The interdependence is caused by the fact that there is a fragmentation of industries in the world, which causes a disconnection between centres of production and centres of consumption due to the arbitrary location of natural resources. Therefore, resource-rich countries should not close their resources to exploitation by resource-seeking countries.<sup>172</sup> On top of this, the other notable thing here is the invocation of the World Bank in the financing of mining projects.<sup>173</sup> It should be known that the World Bank has in fact been the staunch supporter of resource liberalism, a policy which was ordained in the Washington Consensus, under the guise of what it calls best practice.<sup>174</sup> So in allowing this provision to creep into the text of the Lome (IV) Convention, developing countries of Africa and Carribea were undoing some aspects of the principle of PSNR.

However, while the ‘interdependency’ argument appears plausible on the face of it, and while developed countries have urged developing ones to open up their resources for exploitation by developed countries under this argument, the same developed countries have chosen to close access to their technological achievements to developing countries by using intellectual property rights protection mechanisms such as patents. For example the TRIPs<sup>175</sup> Agreement 1994, which is also part of the Marrakesh framework, ensures that the technologies being developed in the industrialized countries will enjoy protection through patents. This means that if there are advanced technologies developed for the mining industry, they cannot be accessed easily by local mining bodies unless they have the capacity to pay the price and royalties for the patent rights. The advanced technologies being developed and given protection are also the very ones which are causing unemployment and enhancing further the concentration of wealth to the transnational corporations.

### 3.5.3 The Cotonou Agreement of 2000 and its Amendments

The Cotonou agreement, as we have seen, puts much weight on promotion and protection of investment than its predecessors. It encourages private investors and private investment. Therefore, it discourages public investors and investment. In the context of extractive industries, this Convention therefore discourages state mining and petroleum companies. In the case of

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<sup>170</sup> HARVEY, David (2007), *Op. Cit.*, p. 64. See also: LEE Simon & McBride Stephen (2007), *Op. Cit.*, p. 319.

<sup>171</sup> For example: General Assembly Resolutions 837(IX) of 1954, 1314(XIII) of 1958, and 1515(XV) of 1960.

<sup>172</sup> JEFFREY, Wilson (2010), “Resource Nationalism or Resource Liberalism: Explaining the Australian Approach to Chinese Investment in its Minerals Sector”, *Occasional Papers*, Department of International Relations, Australian National University, p.3.

<sup>173</sup> Article 104, Lome (IV) Convention, 1989.

<sup>174</sup> LEON, Peter (2010), “International Best Practice and Resource Nationalism: the International Bar Association's Model Mining Development Agreement”, *Working Paper*, Mining Law Committee, International Bar Association, p.3.

<sup>175</sup> The long form is: Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994.

Tanzania for example the Agreement does not encourage and support the idea of having the State Mining Company (STAMICO) which is a public company that caters for the mineral sector in the country, and the Tanzania Petroleum Development Corporation (TPDC) which is also a public company and which caters for the petroleum sector canvassing both oil and gas.

The Cotonou Agreement also craves for creating a proper and favorable investment climate as well as putting in place investment guarantees and ensuring protection of investment. These are accompanied by the pledge to provide funding in order to build or improve frameworks on the ground which would serve the above goals. While these endeavours are again well understood in today's investment climate, they are not equally reciprocated in the same Agreement when it comes to protection of investment host countries as well as in the regulation of activities of the multinational or transnational companies. In the context of the extractive industries, the Agreement follows the footsteps of its predecessor, namely to extend the exploitation of resources to coastal and marine areas.

#### **4. General Observations and Conclusions**

As we have observed right at the beginning of this discourse, there are about four main areas that investment law addresses. The first is the regulation of admission of investment, and treatment of that investment once admitted. The second is the management of host countries. The third is the management of the corporations involved in investment and its activities, and the fourth is dispute settlement. We have also seen in this Paper that, the initial stages in the process of development of principles of international law for governing investments was the development of principles of customary international law. But, as we have seen, these principles developed on the platform of controversy, division, disagreement and polarization mainly between former colonial powers, which are also developed countries, and mostly the exporters of investments, on one side, and former colonized countries, most of which are still developing countries and importers of investments, on the other. This fact necessitated the world community to start endeavouring to develop a multilateral framework on investment by adopting what is called treatization and codification of customary international law with the hope to bring about concordance, certainty, and stability in the framework of the law which is supposed to govern investments.

So far, this discourse has shown clearly that if we look at the unsuccessful attempts in the process of trying to constructing a multilateral legal framework on investment, we learn a lot in terms of identifying the fundamental issues that form the basis of controversy, division, disagreement and polarization between developed countries and developing ones. On the other side, when we equally look at the successful attempts in the process of trying to construct a multilateral legal framework on investment, especially the implantation aspect of it, we equally see issues that still divide developed and developing countries. So in either side there are issues, which we can look at in totality using the four main areas of regulation of investment.

Thus, starting with the first area which is regulation of admission of investment, and treatment of that investment once admitted, we see that there has been a tendency by investors supported by developed countries to demand to have great leeway in establishing investments in

investment destinations, if possible without being constrained by any rules or any competition. On competition, the biggest problem has been with regard to efforts by developing countries to seek to protect domestic industry. Investors from developed countries want to be put on equal footing with domestic investors in a developing host country. This is problematic because investors in developing host countries cannot compete if they are not given some kind of preferential treatment. Investors supported by their home countries therefore have been vehemently fighting any efforts by developing host countries to provide preferential treatment or to use incentives to their local industries in order to enable them to grow.

When it comes to the second area which is the management of host countries, we see that investors and their home countries have always been craving for unlimited guarantees, including guarantees on free transfer of profits, protection against expropriation, and protection against other risks. Therefore, investors, who are always being supported by their home countries, have always been pushing for unlimited protections which require the constraining of investment host countries. Therefore, the biggest issue here has been the demand from the investor's side to have overprotection of foreign property, without equally emphasizing on protection of host countries. So rules have always been crafted in a biased way towards investors, without reciprocating vis-à-vis host countries. As we have seen, the framework of the MIGA is a remarkable milestone here, in terms of having a deterrence effect. But as we have seen in this Paper, the MIGA has an image problem because it is a creature of and operates under the World Bank. But most of the multinational investing companies come from countries which are main contributors to the World Bank. So the MIGA cannot save itself from the perception of bias in favour of investors and against developing countries, and in fact the record of the work of the office of CAO proves this contention. We have also seen that the anti-corruption measures that are being enforced under the MIGA framework, while appearing to be very welcome on the surface of them, they have the effect of giving companies from developed countries leverage over companies from developing countries. Investors have also wanted to strip host countries of the power to intervene in market mechanisms if the need appears to be apparent. We have also seen in this regard that while the Marrakesh Agreements were another remarkable achievement, the prohibition of local content measures has the potential to inhibit domestic growth, and negate the intentions of the principle of PSNR vis-à-vis developing countries. The same effect is brought about by the Lome IV Convention.

Thus, and venturing into the third area of our discussion in this part, while the framework for management of host countries is broad, the framework for management of the corporations involved in investment and its activities, most of which are multinational or transnational companies, is so thin. The first thing we see here is that in most cases initiatives to develop a multilateral framework for regulating corporations, have been frustrated. This has left individual states hosting investments to figure out the best way to regulate multinational or transnational companies operating within their boundaries. It is the question of how much to regulate transnational corporations. Some of the issues that host developing countries have been struggling and grappling with include the protection of the environment and prevention of human

rights abuses including violation of labour rights in the course of investment. It should be noted that, developed countries have leverage when it comes to regulate multinational companies operating in their countries compared to developing countries which lack this leverage.

Regarding the fourth issue, namely the issue of dispute settlement, the main areas of disagreement have been mainly three, namely the question of expropriation and compensation; the choice of governing law; and the forum for dispute settlement. The conclusion of the New York Convention of 1958 in this regard was a milestone achievement. However, as we have seen, the New York Convention operates rather in the realm of private international law because it covers arbitral awards made in the territory of other states. Therefore it does not cover arbitral awards made by international bodies. The Convention establishing the ICSID is also another milestone achievement in this regard especially in respect of disputes between an investing company and a state. But as we have seen in this treatise, like the MIGA, the ICSID also has an image problem because it is a creature of and operates under the World Bank. But most of the multinational investing companies come from countries which are main contributors to the World Bank. So the Centre cannot save itself from the perception of bias in favour of investors and against developing countries.

Therefore, while the use of customary international law to regulate investments was marred by many difficulties, and while the move to try to develop a multilateral legal framework for governing investments was a welcome move in order to bring about certainty, stability and concordance, the experience shows that this move has brought with it other problems. These problems are serious drawbacks to developing countries, especially African countries, as they try to use investments, especially investments in the extractive sector, to bring about social economic change and progress in their countries. Therefore, to counter this challenge, all African countries need to forge a united front because no African country can face powerful developed countries when each is acting alone.