Customary International Law and Regulation of Investments in the Mining Industry: Issues of Concern to Developing Countries Using Tanzania as a Case Reference

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Abstract

This paper investigates the impact of customary international law in regulating investments in the mining industry, taking Tanzania's experience as a case reference. The paper is interested in the issues that should concern African countries like Tanzania, all of which are developing countries. The paper is taken out of the background of development of the international legal framework governing investments, specifically focusing on the framework of customary international law, which has been developing on the platform of controversy, division, disagreement and polarization. However, we also note a transformation from customary international law to treaty law and finally to state-investor agreements which constitute contractual law. However, there is a debate as to whether in this process of transformation, principles of customary international law have adequately transformed into treaty or contractual law, or not, and that if such principles have completely transformed from customary law to treaty or contractual law, then there is no need to fall back to those principles again. In order to answer this question, it appears that the main test to be employed here is that, if there is definitiveness in these principles after their transformation into treaty or contractual law, then the answer is to the affirmative, and if there is still uncertainty in these principles after their transformation, then the answer is in the negative. This paper has found out that there is still uncertainty in these principles after their transformation, which means they have not completely transformed, and which means there will still be need to fall back into customary international law itself instead of having moved to treaty and contractual law completely. The problem is that, falling back to customary international law itself means re-navigating into the waters of controversy, division, disagreement and polarization which are things that seems to have worked negatively against developing countries like Tanzania, and will therefore continue to work in the same way. That means, falling back to customary international law per raises issues and concerns for developing countries like Tanzania.

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1. Introduction

1.1 The Issue in Question

There is a debate among international legal scholars on the role of customary international law in the regulation of investments today, and in this paper we focus on investment in the mineral sector. Customary international law is a branch of international law and one of the sources of the same.[2] Being one of the sources of international law generally, customary international law is undoubtly one of the sources of international investment law.[3]

In this debate, on one side there are those who argue, correctly, that customary international law played a big role in the formative years of development of rules of international law governing investment or international investment law.[4] However, they argue, that this source of law is not applicable now because such rules have been embedded in multilateral and bilateral treaties, also called the by some scholars as a process of treatification.[5] On the other side there are scholars who say that, despite the fact that rules of international customary international law appear to be embedded in multilateral and bilateral treaties still there is evidence of general return or falling back to customary international law proper in certain situations.[6] This is the key issue in question in this discourse. However, from the perspective of developing countries, this debate provokes another discussion which revolves around predicament of developing countries. Here the underlying question is: what is the predicament of developing countries in this process of transformation of customary international law, taking the extractive sector as a case reference?[7]

1.2 An Overview of the Framework of International Investment Law

Investment law as it stands today is known to be divided into mainly three frameworks, namely: the framework of international law, which includes customary international law, multilateral arrangements, and bilateral arrangements; the national framework; and the framework of investment agreements between investors and states. This paper focuses on the first framework, and where the main interest is the customary law segment.

So far there are about four main issues that investment law seeks to address. The first is the regulation of 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 investing company. The second is management of host countries, which revolves around the things that the host country can and cannot do vis-à-vis

[2] See: Article 38(1)(b) of the Statute of the International Court of Justice.
[3] KULICK, Andreas (2012), *Global Public Interest in International Investment Law*, Cambridge University Press, p. 115.
[4] SCHILL, Stephan (2010), *International Investment Law and Comparative Public Law*, OUP Oxford, p.3.
[5] SCHILL, Stephan (2009), *The Multilateralization of International Investment Law*, Cambridge University Press, pp. 11-18.
[6] For some insights about this debate See: JEAN d'Aspremont (2012), "International Customary Investment Law: Story of a Paradox", Amsterdam Center for International Law, Martinus Nijhoff Publishers.
[7] For a broader discussion on this proposition see: ANGHIE, Anthony (2007), *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press.

the investing company, including nationalization, expropriation and transfer. The third is the issue of management of the corporations involved in investment and its activities, which centres on the controls which the investment host country can lawfully exercise on the investing companies, and stipulation of the way they should behave. The fourth is the issue of dispute settlement in case disputes arise between the host state and the investor. It revolves around the choice of forum, institutions, and principles to be applied.

1.3 The Context and History within which International Investment Law Developed

Unlike international trade relations which are subject to a systematic legal regime under the GATT and WTO, and international monetary relations which are under a legal regime administered principally by the IMF, the framework of international investment law has not been a cohesive regime.[8] This is because the development of this regime has been marred by polarization of ideas between developed and developing countries. This polarization of ideas is known to have been contributed to by the advent of colonialism and later the division of the world into capitalist and socialist camps. Therefore, the international legal framework on investment has been developing on the platform of controversy, division, disagreement and polarization. On this point, Sornarajah[9] has this to say:

> "…few areas of international law attract as much controversy as the law relating to foreign investment. Such controversy resulted from the law on the subject being the focus of conflict between several forces released at the conclusion of the Second World War.…The ending of colonialism released forces of nationalism. Once freed from the shackles of colonialism, the newly independent states agitated not only for the ending of the economic dominance of the former colonial powers within their states but also for a world order which would permit them more scope for the ordering of their own economies and access to world markets. The cold war between the then superpowers made the law a battleground for ideological conflicts…"

Thus, we can assert that international legal framework on investment or international investment law has developed almost contemporaneously with the main three epochs in the history of colonized countries[10]. These main epochs are the pre-colonial period; the colonial period; and the post-colonial period. In the pre-colonial period, investment was mainly done through forging relations with other alien sovereign powers. Therefore the basic upheld principle for regulating investment was that the alien trader must be treated equal to the national.[11] The alternative view to this doctrine required that aliens be treated in accordance with some external standard, which was supposed to be or deemed higher than the national standard.[12]

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8 DAMROSCH, Lori (et al.)(2001), *International Law: Cases and Materials*, St. Paul Minnesota, West Publishing Company Ltd, p.1614.

9 SORNARAJAH, M., (2004), *The International Law on Foreign Investment*, 2nd Ed., Cambridge, Cambridge University Press, p.1.

10 ANGHIE, Anthony (2007), *Imperialism, Sovereignty and the Making of International Law*, Op. cit., pp. 13-28.

11 SORNARAJAH, M., (2004), *The International Law on Foreign Investment*, Op cit., pp. 18 - 19.

12 Ibid. p. 19.

In the colonial period, investment was largely made in the realm of colonial conquests. That kind of investment did not need special legal protection because the imperial system gave sufficient protection for the investments which went into their colonies. In such a situation, the need for an international law on foreign investment was minimal. Within the imperial system, the protection of investments flowing from the imperial state was safeguarded by the imperial parliament.[13] Since the imperial system controlled the flow of capital within the system, there was no need for development of a parallel system of law for the protection of foreign investments. In states which stood outside the imperial system, enclaves were created and in these enclaves, the law that was applied to European traders was the law of the home countries from which those traders hailed. This was called the system of extraterritoriality, or simply means the extension of application of a country's laws into another country. Furthermore, investment disputes were mostly settled by the use of force, both direct and indirect.[14]

In the period towards decolonization, two events shaped the direction of international investment law. The first was the developments in the relationship between the United States of America and Latin American states. Latin American countries started to embrace the principle of 'national standard of treatment' in respect of protection of foreign investors while the United States of America was advocating for the use of the 'international standard of treatment'. The difference between the two will be discussed later. The second event was the emergence of the Soviet Union as a world power, which went together with the rise of socialism and its nationalization agenda, which prompted a debate on matters of compensation and the standards to be observed in that regard.[15] Socialism was also an important propellant for decolonization.

In the immediate post-colonial period the former imperial powers felt the need to have a coherent system for protecting investments in their former colonies and elsewhere, because the assurances that were there when they were in control of those countries were no longer there. Thus, the first epoch of the post-colonial period was a period of intense friction between former colonized and former colonizing countries in as far as regulation of investment is concerned. This was due to development of nationalistic sentiments in the former colonies, precipitated by development of other principles of international law such as the principle of self-determination which carried in it the notion of economic self-determination. Thus, whereas the newly independent countries wanted more control over investments in their territories, as part of the right of self-determination, the former colonizing powers wanted more guarantees and safeguards to investments most of which were coming from their countries. These divergent expectations are explained better in the following words:

> "…the period immediately following the ending of colonialism witnessed hostility and antagonism towards foreign investment generated by nationalist fervour….. There was also a need felt on the part of the newly independent states to recover control over vital sectors of their economies from foreign investors, largely nationals

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[13] SORNARAJAH M., (2004), *The International Law on Foreign Investment*, Op. cit. p. 20.
[14] Ibid.
[15] Ibid. p. 22.

> of the former colonial powers. The result was a wave of nationalisations of foreign property. These nationalisations resulted in intense debates as to what the international law on foreign investment protection was… The capital-exporting nations argued for an external international law standard protecting foreign investment, whereas the newly independent nations argued for national control over the process of foreign investment, including the right of ending foreign investment by nationalisation…(if the need be)"[16] [Emphasis added].

The second epoch of the post-colonial period could be defined as a period of taking interests into consideration. It reflected what could be termed as more pragmatic approaches to issues of foreign investment as signified by a divergence between the attitudes a state would have at the international level vis-a-vis at domestic level. While at the international level, a state would join others in taking a stance as to the international law position it supports, its domestic position would be different as it sought to attract foreign investment as a strategy of economic development. It would even sign bilateral investment treaties that are at variance with its international position. This pragmatic approach was a response to the need to maintain the idea of sovereign control over foreign investment at the international level while at the same time being able to create favourable conditions that would attract corporations to invest into the state through the creation of an appropriate climate favourable to foreign investments. This explains the variance that still exists in the conflicting stances that some states have taken at different levels of interaction in this field.[17]

The third epoch of the post-colonial period has seen a big shift in the international economic scene. Developing countries have progressively introduced more open policies on foreign investment. However, on this aspect it is important to take note of the fact that this reality has not been driven by the realization of the need to embrace liberal approaches to foreign investment, but by the strategy of capital owning countries to make developing countries compete among themselves for foreign investment. These circumstances have made it very difficult to have a coherent international legal framework on investment.

2. Evolution of Customary International Law in the History of Development of International Investment Law

Principles of customary international law are said to have played a significant role in regulating investment in the formative years of development of international law generally and international investment law in particular.[18] However, it is important to take note of the sentiments of developing countries in this regard, that the development of international law in the area of investment, has sometimes been seen as influenced by power, whereby powerful states have been creating practice and norms that they termed as custom, and then wanted them followed by weaker states as binding principles of law, as observed here-below:

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16 SORNARAJAH, M., (2004), *The International Law on Foreign Investment*, Op. cit., pp. 22 – 23.
17 Ibid., p. 24.
18 SORNARAJAH, M (2010), *The International Law on Foreign Investment*, Op. cit., pp. 92-93.

> "Powerful states sought to construct rules of investment protection largely aimed at developing states by espousing them in their practice and passing them off as customary principles. They were always resisted. The Latin American states had, for example, resisted US claims to an international minimum standard of treatment of aliens and their property (as contrasted to the national standard of treatment principle they have been advocating for). Nevertheless, the norms that were supported by the developed states were maintained on the basis that they were accepted as custom though that was never the case". [19] [Emphasis added]

This shows that, the area of customary international law has been the very first battle-ground between developing countries and developed ones as far regulation of investment is concerned, and the battle has been around the determination and acceptance as to whether certain principles of custom had actually crystallized, and whether they could be used to regulate investment.

In the early phase of development of international investment law, the main concern as we have stated was the protection of alien investors in other countries. Therefore, in the absence of treaties, principles of customary international regarding the protection of aliens abroad started to develop. These went hand in hand with development of principles of international law setting standards for compensation to alien investors in situations of expropriation in the host country. After that, customary international law came to cover many other areas than the ones stated above, although some of these principles developed in a context other than investment but they came to be applied to regulate matters of investment as well. In any case, this process saw the development of the following principles of customary international law, namely: the principle of minimum standard of treatment; the doctrine of state responsibility; the principle of fair and equitable treatment; the principle of respect for acquired rights; the principle of extension of diplomatic protection to corporations; the principle of national treatment; the principle of *pacta sunt servanda*; and the principle of good faith and non-abuse of rights. Others are the principle of *clausula rebus sic stantibus* and the principle of exhaustion of local remedies.

3. Outline of Principles of Customary International Law on Investment

3.1 Principle of National Treatment

The principle of 'national treatment' or 'national standard of treatment' was propagated from the perspective of developing countries or investment host countries. The development of the principle of national treatment has its origins in the 'Calvo doctrine', named after Carlos Calvo, an Argentinean Jurist, and which was developed in 1868. The national treatment principle is considered one of the three main tenets of the Calvo doctrine.

According to the principle, foreign investors are supposed to receive the same treatment as national or local investors. Thus, national or local investors are not supposed to be given more favourable treatment than foreign ones, and vice versa. In other words, foreign investors and

[19] SORNARAJAH, M (2010), *The International Law on Foreign Investment*, Op. cit., pp. 92-93.

nationals of the state are supposed to be accorded equal treatment.[20] Currently, the national treatment principle has its anchorage in Article III of the GATT, and in the GATS and TRIPS agreements and in some BITs. However, the exact scope of application of the principle has been as subject of much discussion among jurists.[21]

3.2 Principle of Minimum Standard of Treatment

The principle of 'minimum standard of treatment' developed out of concerns of investment exporting countries regarding the legal status of foreigners abroad and the protection of the economic interests of foreigners in a host country. On this matter, jurists in Europe and in the United States craved for a principle of minimum standard of treatment which they claimed it existed in the body of jurisprudence available at the time, and by virtue of it they asserted that there is a minimum level of treatment of foreign investors in international law below which a state cannot go, even if it wanted to set lower standards in its national law.[22] As we can see, this is in direct opposition to the national standard of treatment principle. Latin American countries preferred the 'national standard of treatment' principle because the standards are set by national law.

The jurisprudence that supports the influence and application of the principle of minimum standard of treatment featured in the US-Mexico General Claims Commission in the 1920s and the US-Norway Arbitral Tribunal also in the 1920s.[23] It is noted however, that since the principle of minimum standard of treatment was objected to by developing countries, its proponents had to find other avenues to propound it, and one of them is the doctrine of state responsibility, a doctrine that still stands to date in customary international law with less controversy.[24]

3.3 Doctrine of State Responsibility

As we have noted above, the doctrine of state responsibility is an incarnation of the principle of minimum standard of treatment. Under international law, a state is held responsible if it commits what is considered as an internationally wrongful act. One of the areas where the state incurs responsibility for committing an internationally wrongful act is when there is violation of rights of alien investors lawfully present in the country.[25] So, in the context of investment, state responsibility arises out of economic injuries done by a host state to investors

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20 NEWCOMBE, Andrew Paul (2009), *Law and Practice of Investment Treaties*, Kluwer Law International, p. 13.
21 See: DICSON, Martin (2013), *Textbook on International Law*, OUP Oxford, pp. 267-273.
22 NEWCOMBE, Andrew Paul (2009), *Law and Practice of Investment Treaties*, Op. Cit., p. 11.
23 Ibid., p. 14.
24 For more discussion see: WEILER, Todd (2013), *The Interpretation of International Investment Law, Equality, Discrimination and Minimum Standards of Treatment in Historical Context*, Martinus Nijhoff Publishers.
25 For details see: CRAWFORD James, PELLET Alain, OLLESON Simon, PARLETT, Kate, (2010), *The Law of International Responsibility*, OUP Oxford, pp. 75-95.

lawfully present in the state.[26] Thus, the host state is obliged to provide protection to alien investors lawfully investing in the country, including not expropriating their property, short of which it incurs responsibility and is liable to make compensation because there is a custom that, when property is taken over by the state, otherwise than in the exercise of its regulatory powers, there must be payment of compensation, though there is still no universally agreed position on the manner in which this compensation is to be calculated, hence the exact amount that should be payable.[27]

It is important to note also that, with regard to the question of alien or foreign investors lawfully present in a country, the doctrine of state responsibility has also given rise yet to another principle in customary international law, namely the doctrine of 'fair and equitable treatment'.

3.4 Doctrine of Fair and Equitable Treatment

The doctrine of fair and equitable treatment is an incarnation of the principle of state responsibility. 'Fair and equitable treatment' is a bundle of rights which in most cases contains the following tenets in the form of demands: stability, predictability, consistency; protection of confidence and legitimate expectations; administrative due process; transparency; and reasonableness and proportionality.[28] It is important also to note that, the principle of fair and equitable treatment is a modification and a variant of the principle of minimum standards of treatment, which was earlier on proposed by developed countries, but was rejected by developing countries as we have stated.[29] In the logic of development of customary international law, as we have noted, 'fair and equitable treatment' is an incarnation of 'state responsibility' which is also an incarnation of 'minimum standard of treatment'. Therefore, in the breath of 'fair and equitable treatment' one can see 'minimum standard of treatment'. In other words the doctrine of fair and equitable treatment has its origin within the doctrine of state responsibility, which also has its origin in the principle of minimum standards of treatment.

However, the exact bundle of obligations contained in the doctrine of fair and equitable treatment principle has been a subject of controversy and this is the problem with this principle. Reference to 'fair and equitable treatment' is found in a number of documents, including: The Havana Charter for an International Trade Organization, 1948;[30] The Economic Agreement of Bogota, 1948;[31] the OECD Draft Convention for the Protection of Foreign Property, 1969;[32] and

26 SORNARAJAH, M (2010), *The International Law on Foreign Investment*, Cambridge, Cambridge University Press, pp. 92-93.
27 Ibid. See also: SHAW, Malcolm (2008), *International Law*, 6th ed., Cambridge, Cambridge University Press, pp. 827-829.
28 BERING, Jürgen (et al.)(2009), *General Public International Law and International Investment Law: A Research Sketch on Selected Issues*, Institute of Economic Law, Transnational Economic Law Centre, pp. 14-23.
29 NEWCOMBE, Andrew Paul (2009), *Law and Practice of Investment Treaties*, Kluwer Law International, p. 11.
30 See: Article 11(2) of the Charter.
31 See: Article 22 of the Agreement.
32 See: Article 1(a) of the Draft Convention.

the World Bank Guidelines on investment.[33] The doctrine is now found also in many Bilateral Investment Treaties (BITs).

3.5 Principle of Respect for Acquired Rights

The principle of respect for acquired rights is also considered one of the principles of international law governing the treatment of aliens.[34] Under international law, the acquisition of private rights is governed entirely by municipal law. This does not, of course, preclude the possibility of aliens also acquiring rights by virtue of international law, such as through treaty.[35] That means, when aliens acquire rights under a treaty or any other source of obligation, then those rights are protected by international law. Otherwise, international law imposes obligations on states to respect rights of aliens that have been validly and legally acquired, because the respect for acquired rights is considered an established doctrine of international law.[36] In any case, this right would be invoked in matters of expropriation of alien property, and is the basis for compensation.

Under the auspices of the principle of respect for acquired rights is the 'Hull Rule' which however, has also been a subject of contention between developed and developing countries. The Hull Rule, which is named after the American Secretary of State Mr. Cordell Hull who proposed it in 1932, was a coinage that has come to be known in investment law as the rule requiring 'prompt, adequate and effective compensation'. To this rule, many developing countries were in opposition alleging that the rule infringes on their national sovereignties. Instead, they advocated for the principle of 'appropriate compensation' a standard which they advocated so strongly at the United Nations.[37] It is important to remind ourselves that, the principle of Permanent Sovereignty over Natural Resources uses the formula of 'appropriate compensation'[38], instead of 'prompt, adequate and effective compensation' as per the Hull Rule.

3.6 Extension of Application of Principle of Diplomatic Protection to Corporations

International law gives nations the right to give diplomatic protections to its nationals. While this protection is usually accorded to natural persons, it can be extended to corporations. It should be noted that, this protection extends to the corporate personality only, not to the individuals running the corporation, and it applies to the investment as such.[39]

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[33] See: Guideline III of the World Bank Guidelines on Foreign Investment.
[34] UNITED NATIONS (1962), "The Status of Permanent Sovereignty over Natural Wealth and Resources: Study Report of the Commission on Permanent Sovereignty over Natural Resources", United Nations, p. 3.
[35] Ibid.
[36] Ibid., p.4.
[37] OECD (2005), *International Investment Law: A Changing Landscape*, OECD Publishing, p. 44.
[38] See: Article 4, General Assembly Resolution 1803 (XVII), 1962, Permanent Sovereignty over Natural Resources.
[39] IGNAZ, Seidl-Hohenveldern (1987), *Corporations in and Under International Law*, Cambridge University Press, pp. 7-10. See also: TULLY, Stephen (2007), *Corporations and International Law-making*, BRILL, p. 242; INTERNATIONAL LAW COMMISSION (2003), *Yearbook of the International Law Commission* 2003, United Nations Publications, p. 34; CHITTHARANJAN, Félix Amerasinghe (2008), *Diplomatic Protection*, Oxford University Press p. 125.

However, in order for a company to enjoy that protection, there must be a proved genuine link between the corporation and the country giving diplomatic protection. In other words, the corporation must be a 'national' of the protecting state, signifying that the said corporation must have been registered there.[40] The need to establish a genuine and effective link between a person and a country was pronounced by the International Court of Justice (ICJ) in the *Nottebohm Case*.[41] Although the Court stated that it is the sovereign right of all states to determine its own citizens and criteria for becoming one is always provided in municipal law, such a process would have to be scrutinized on the international plane if the question that arises in that context is of diplomatic protection. The Court upheld the principle of 'effective nationality', (also known as the Nottebohm principle) where a person claiming links to a certain nationality must prove a genuine connection or link to that state.[42]

For the case of corporations, the personality link was articulated in the *Barcelona Traction Case*.[43] In this case, although the company had its original registration in Canada, it had Belgian shareholders, who upon being aggrieved, sued before the International Court of Justice, represented by Belgium. But the Court ruled on the side of Spain, holding that only the state in which the corporation was incorporated (Canada) can sue because this is considered as the country of nationality of the company. In its decision, the Court alluded itself to a number of connections between Barcelona Traction and Canada, which include: incorporation, the location of the registered office, the location of accounts and share registers, the holding of board meetings, and being listed in the records of Canadian tax authorities.[44]

It should also be noted that, the most effective remedy in respect of a state's diplomatic protection of its corporations is to bring a suit, on behalf of the corporation, before the ICJ because only states can appear as parties before the ICJ.

3.7 Principle of *Pacta Sunt Servanda*

Pacta sunt servanda is a Latin expression whose meaning is that agreements must be kept and are binding. It is a basic principle of international law which originates from the civil law system. In its most common sense, the principle refers to private contracts, stressing that clauses in contracts are law between the parties, and implies that non-performance of respective obligations is a breach of the pact. With reference to international agreements, the principle signifies that every treaty in force is binding upon the parties to it and must be performed by them in good faith. This entitles states to require that obligations be respected and to rely upon the obligations being respected.

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40 Ibid.
41 Liechtenstein v. Guatemala, ICJ Reports, 1955/4.
42 BOLL, Alfred Michael (2007), *Multiple Nationality and International Law*, Martinus Nijhoff Publishers, pp. 110-112.
43 Belgium v. Spain, ICJ Reports, 1970.
44 Judgement of 5th February 1970, paragraph 71.

In the context of investment the principle simply means that investment treaties and agreements must be honoured and kept.[45] It applies to support Bilateral Investment Treaties (BITs) and investment agreements between states and private investors.

3.8 Principle of Good Faith and Prohibition of Abuse of Rights

The principle of good faith also is a principle governing contracts, both at national and international levels, and it supplements the principle of *pacta sunt servanda*. The principle has developed in the realm of comparative contract law. So it started in private law. This principle requires sincerity and honesty of intention in contractual agreements,[46] as it was aptly stated by the Permanent Court of International Justice in 1934:

> "…contracting parties are always assumed to be acting honestly and in good faith. That is a legal principle, which is recognized in private law and cannot be ignored in international law."[47]

There are many obligations associated with the principle of good faith. They include the pre-contractual duty to disclose all facts that are very important for the rights of the parties and for the performance of the contract; the duty of loyalty to the contract, which consists of the duty to seek to obtain the exact goal foreseen by the contract while avoiding any behaviour that would make performance very difficult on any of the parties; and the duty of cooperation in performing and making possible achieving the objects of the contract. The principle of good faith prohibits an abuse of rights whereby a state takes arbitrary steps for its own advantage and interests that end up injuring the interests of another state or an investor.[48]

3.9 Principle of *Clausula Rebus Sic Stantibus*

In public international law, '*clausula rebus sic stantibus'* is a Latin expression which literary means inapplicability of treaties because of the standing situation. It is a legal doctrine allowing for treaties to become inapplicable because of a fundamental change of circumstances.[49] Therefore, it has its origin in private law. 'C*lausula rebus sic stantibus'* is a doctrine which stands as an exception to the general rule of *pacta sunt servanda*.[50] The doctrine

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45 SHAW, Malcolm (2008), *International Law,* Op. cit. p. 829.

46 FORTE, Angelo (1999), *Good Faith in Contract and Property*, Hart Publishing, p. 199.

47 Permanent Court of International Justice in the *Light House Case*, as quoted in: VIELLEVILLE, Daniel & VASANI, Baiju (2008), "Sovereignty Over Natural Resources Versus Rights Under Investment Contracts: Which One Prevails?", *Dispute Management*, Vol. 5, issue 2, April 2008, p.8.

48 BERING, Jürgen (et al.)(2009), *General Public International Law and International Investment Law: A Research Sketch on Selected Issues,* Op. cit., p. 35.

49 ZIMMERMAN, Reinhard (1996), *The Law of Obligations: The Roman Foundations of the Civilian Tradition*, Oxford University Press, p. 597. For a general discussion see: HUANG, Ting-Young (1935), *The Doctrine of Rebus Sic Stantibus in International Law*, Comacrib Press.

50 HOOD, Godefridus, (1983), *Rethinking the Sources of International Law*, Brill Archives, pp. 129-130. See also: WOLFGANG Peter, DE KUYPER Jean-Quentin, DE CANDOLE Benedict, (1995), "Arbitration and Renegotiation of International Investment Agreements: A Study with Particular Reference to Means of Conflict Avoidance Under Natural Resources Investment Agreements" Kluwer Law International, pp. 194-195.

is essentially part of customary international law. However, it became codified in the 1969 Vienna Convention on the Law of Treaties under Article 62 which is about Fundamental Change of Circumstance. The said Article 62 provides the main situations necessary for invocation of '*clausula rebus sic Stantibus'* that the change of circumstances must be capable of bringing about effects on the obligations of the treaty. But, 'c*lausula rebus sic stantibus'* only relates to changed circumstances that were never contemplated by the parties. This position was clarified in the *Fisheries Jurisdiction Case*.[51]

Further, although the doctrine is basically applicable to treaties which are agreements between states, it is also becoming applicable to investment agreements, which are agreements between states and persons and these persons could either be natural or legal persons.[52]

3.10 Principle of Exhaustion of Local Remedies

The principle of 'exhaustion of local or domestic remedies' is a general principle of international law governing the settlement of disputes. This principle emanates from yet another principle of international law, namely the 'principle of domestic jurisdiction'.[53] According to the principle of domestic jurisdiction, states have no right to encroach upon the preserve of other states' international affairs, as a result of the dictates of Article 2(7) of the Charter of the United Nations. Thus, emanating from the principle of domestic jurisdiction, the principle of exhaustion of local remedies permits states to solve their own internal problems in accordance with their own constitutional procedures, before accepted international mechanisms can be invoked. Thus, a natural or legal person must have recourse to all means of redress available under the domestic law before she can bring it to an international forum.[54]

So far, there is abundance of literature showing this principle to be well established in international law.[55] The principle is usually used in the context of compensation for injuries to aliens. However, the applicability of the rule is subject to qualifications such as the availability and the efficacy and efficiency of those remedies,[56] and can be modified by treaties and other international agreements.

It is important to note that, the principle of exhaustion of local remedies is also built on the Calvo Doctrine, which in this context holds that jurisdiction in international investment disputes lies with the country in which the investment is located and the dispute arises. Thus, the

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[51] United Kingdom v. Iceland, ICJ Reports, 1973.

[52] ERKAN Mustafa (2011), *International Energy Investment Law: Stability through Contractual Clauses*, Kluwer Law International, pp. 194-195.

[53] SHAW, Malcolm (2008), *International Law*, Op. cit., p. 254.

[54] Ibid., p. 254. See also: BERING, Jürgen (et al.)(2009), *General Public International Law and International Investment Law: A Research Sketch on Selected Issues,* Op. cit., p. 43.

[55] UNITED NATIONS INTERNATIONAL LAW COMMISSION, (SHABTAI, Rosenne, Ed.) (1993), *The International Law Commission's Draft Articles on State Responsibility: Part 1, Articles 1-35*, Volume 1, Martinus Nijhoff Publishers, 237. See also: GARCÍA-AMADOR (et al.)(1974), *Recent Codification of the Law of State Responsibility for Injuries to Aliens*, Martinus Nijhoff Publishers, p. 73; CHITTHARANJAN, Félix Amerasinghe (2004), *Local Remedies in International Law*, Cambridge University Press, p. 285.

[56] SHAW, Malcolm (2008), *International Law,* Op. cit., p. 255; CHITTHARANJAN, Félix Amerasinghe (2004), *Local Remedies in International Law,* Op. cit., p. 285.

activities of aliens should be governed by national laws of the host state, and that, the courts in the host state have jurisdiction over disputes involving foreign nationals. An investor, under this doctrine, has no other recourse but to use the local courts first, rather than those of their home country. [57] Calvo justified his doctrine as necessary to prevent the abuse of the jurisdiction of weak nations by more powerful nations. Thus, he thought to prevent diplomatic or military intervention in other states. In its essence, the doctrine is against the principle of diplomatic protection of companies, and the concept of minimum standard of treatment.[58] However, this assertion does not answer the question as to what should happen in countries where the judicial system is apparently very weak.

4. Incorporation of Principles of Customary International Law in the Legal Framework Governing Investments in the Mining Industry in Tanzania

4.1 An Overview

In Tanzania, principles of customary international law governing investments generally and investments in the extractive sector in particular appear to have been incorporated in the legal framework governing investments in the extractive sectors mainly in two ways, namely explicitly and implicitly. Certain principles of customary international law have been incorporated explicitly mainly through BITs that Tanzania has signed with a number of countries, and implicitly through the logic of the principles that have been incorporated explicitly. Principles that appear to have been incorporated explicitly include: the doctrine of fair and equitable treatment; the principle of national treatment; and the principle of respect for acquired rights. Principles that appear to have been incorporated implicitly include: Firstly, by virtue of the logic of the principle of fair and equitable treatment, the following principles have also been incorporated, namely the principle of minimum standard of treatment; principle of state responsibility; and principle of diplomatic protection to companies. Secondly, since the principles we said to have been incorporated explicitly were in fact incorporated mostly through BITs and MDAs, then principles of '*pacta sunt servanda'* and 'good faith' have also been incorporated.

4.2 Incorporation of the Doctrine of Fair and Equitable Treatment

Beginning with the doctrine of fair and equitable treatment, this is explicitly embedded in BITs and implicitly in Mineral Development Agreements (MDAs). In this part we will consider domestication in BITs. Two of the BITs concluded between 1961 and 1979 contain an assertion regarding the need to observe the principle of fair and equitable treatment.[59] To refresh our minds, the principle of fair and equitable treatment is a subsidiary of the doctrine of state responsibility, which also is an offspring of the principle of minimum standard of treatment.

[57] NEWCOMBE, Andrew Paul (2009), *Law and Practice of Investment Treaties*, Loc. cit.
[58] Ibid.
[59] Article 1, Germany-Tanzania BIT, 1965; and Article 3, Tanzania-Netherlands BIT, 1970.

Even without being explicitly stated in the BIT itself, the principle of fair and equitable treatment generally demands: stability, predictability, consistency, protection of confidence and legitimate expectations, administrative due process, transparency, reasonableness, and proportionality in the administration of investments.[60]Further, by virtue of being a subsidiary of the doctrine of state responsibility, the principle of fair and equitable treatment necessarily leads to asserting full protection of investment against such things as arbitrary expropriation. Indeed, these elements are present in the said treaties where full protection of investments is envisaged.[61] For BITs concluded after 1979, the 'Fair and Equitable Treatment' standard continues to feature.[62] The relevant provisions prohibit the impairment, by unreasonable and discriminatory measures, of the management, maintenance, use, enjoyment or disposal of investments in the country. This goes hand in hand with the requirement of full protection and security of investments. Full protection only requires that government forces should not harm investments, and that such investments should be protected against adverse forces in the country.[63] This protection covers not only the physical security of investments, but also the broader commercial and legal stability.[64]

4.3 Incorporation of the Principle of National Standard of Treatment

The principle of national treatment or national standard of treatment is also embedded in BITs. BITs concluded between 1961 and 1979 contain an assertion of the need to observe this principle.[65] To refresh our minds, the national treatment principle requires that the nationals of the host country or receiving state are not supposed to be accorded better treatment than foreign investors, and vice versa. In other words, foreign investors and nationals of the state are supposed to be accorded equal treatment.[66] For BITs concluded after 1979, there is invocation of the National Standard of Treatment (NST) principle.[67] It is important to note that, the UK-Tanzania BIT, however, contains an exception to the national standard of treatment principle in respect of temporary special incentives aimed at stimulating local industries, provided they do not affect in a significant way the investments of the other party.[68] This provision is supposed to cover investments in mining. The same provision is in the WTO law for which Tanzania is signatory.[69]

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60 BERING, Jürgen (et al.)(2009), *General Public International Law and International Investment Law: A Research Sketch on Selected Issues*, Institute of Economic Law, Transnational Economic Law Centre, pp. 14-23.

61 Article 3, Germany-Tanzania BIT, 1965; and Article 2 & 7, Tanzania-Netherlands BIT, 1970.

62 Article 2(2), UK-Tanzania BIT, 1994; Article 3(2), Tanzania-Denmark BIT, 1996; Article 3(2), Tanzania-Korea BIT, 1998.

63 Article 2(2), UK-Tanzania BIT, 1994; Article 2, Tanzania-Denmark BIT, 1996; Article 2(2), Tanzania-Korea BIT, 1998.

64 Refer to the Award of the ICSID in the case of: Biwater Gauff Limited v. Tanzania, ICSID Case No. ARB/05/22

65 Article 2, Germany-Tanzania BIT, 1965 and Article 4, Tanzania-Netherlands BIT, 1970.

66 NEWCOMBE, Andrew Paul (2009), *Law and Practice of Investment Treaties*, Kluwer Law International, p. 13.

67 See: Common Articles 3(1) & 3(2), UK-Tanzania BIT, 1994; Tanzania-Denmark BIT, 1996; and Tanzania-Korea BIT, 1998.

68 Article 3(3), UK-Tanzania BIT, 1994.

69 See: Article III of GATT 1947; Article III:4 and xi:1 of GATT 1994; and Article 2 of Article 2 of Agreement on Trade Related Investment Measures.

4.4 Incorporation of the Principle of Respect for Acquired Rights

The principle of respect for acquired rights is incorporated in BITs and MDAs, but it operates under the ambit of the fair and equitable principle, especially in respect of matters of compensation. Under the ambit of fair and equitable treatment there is a provision in some BITs on compensation for losses in lieu of destruction during wars and national emergencies. Such emergencies include: revolts, insurrection or riots. The compensation would operate in the form of restitution, indemnification, flat compensation, or other settlement, but it should be in the same way the country offers to its nationals. However, if the property was destroyed by armed forces of the country in situations other than those arising out of absolute necessity, the host country incurs the responsibility to compensate.[70] There is also an inclusion of provisions against expropriation.[71] This follows the general position in international law in which expropriation is prohibited unless it meets the following criteria: it is done on a non-discriminatory basis; it is done for public purposes under a due process of law; and it is based upon payment of 'prompt, adequate and effective compensation'.[72] Therefore, it is evident that in matters of compensation BITs use the Hull formula (prompt, adequate and effective compensation) instead of the formula proposed under the principle of Permanent Sovereignty over Natural Resources under the auspices of the United Nations General Assembly which is 'appropriate compensation'.[73]

5. Issues which Should Concern African and other Developing Countries

5.1 Overview

Pertinent issues and concerns in this discourse arise out of the process of treatization or transformation of customary principles of international governing investments in the extractive sector form customary principles to contractual or treaty principles. As we noted at the beginning of this discourse, developments in international investment law started with development of customary law principles or principles of customary international law which became applicable to investment as well. This was followed by treatization or transformation of these principles. Then the question is whether after this treatization or transformation there has been a falling back to customary international law or not, because any of these two eventualities has its own impact and consequences. The follow up question was about the predicament of developing countries like Tanzania in that regard. In order to answer the two questions, it is important to revisit the application of the various doctrines of customary international law as they have become embedded in investment treaties or contracts.

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70 Refer: Article 4, UK-Tanzania BIT, 1994; Article 6, Tanzania-Denmark BIT, 1996; Article 4, Tanzania-Korea BIT, 1998.

71 Article 5, UK-Tanzania BIT, 1994; Article 5, Tanzania-Denmark BIT, 1996; Article 5, Tanzania-Korea BIT, 1998.

72 NORTHRUP, Cyntia Clark (et al.)(2015), "Encyclopaedia of World Trade: From Ancient Times to the Present", Routridge, pp. 286-287. For a detailed discussion on this part of the discussion see: UNCTAD (2012), "Expropriation", UNCTAD Series on Issues in International Investment Agreements II, United Nations.

73 See: Article 4, General Assembly Resolution 1803 (XVII), 1962, Permanent Sovereignty over Natural Resources.

5.2 Application of the Doctrine of Fair and Equitable Treatment

As we have indicated in this treatise, the doctrine of fair and equitable treatment in Tanzania is embedded mainly in Bilateral Investment Treaties and Mineral Development Agreements.

In BITs which invoke this doctrine, fair and equitable treatment is defined to include: stability, predictability, consistency; protection of confidence and legitimate expectations; administrative due process; transparency; reasonableness; and proportionality in the administration of investment.[74] As we have seen, under the ambit of fair and equitable treatment there is a provision in some BITs on compensation for losses in lieu of destruction during wars and national emergencies. Such emergencies include: revolts, insurrection or riots. The compensation would operate in the form of restitution, indemnification, flat compensation, or other settlement, but it should be in the same way the country offers to its nationals. However, if the property was destroyed by armed forces of the country in situations other than those arising out of absolute necessity, the host country incurs the responsibility to compensate.[75] There is also an inclusion of provisions against expropriation.[76]

In MDAs elements of the doctrine of fair and equitable treatment include: stabilization clauses;[77] enjoyment of minerals rights; guarantees with regard to banking, foreign currency and transfer of funds; liberties in labour sourcing; and importing without restriction such items as plants, machinery, equipment and parts.[78] Considering the coverage of the doctrine of fair and equitable treatment both in BITs and MDAs, mining investors can claim a plethora of protections and guarantees that could not have been contemplated by the Government of Tanzania at the time of concluding the BIT or MDA.

As it can be noted, formulations surrounding the fair and equitable principle in the BITs that Tanzania has signed have the potential to open up to some difficulties, including multiple interpretations. The two key elements of the principle are '*fairness and equity*' each of which is a complex legal concept in law and a bundle capable of containing many things. But on top of that, the principle also has two aspects, namely the substantive aspect and the procedural aspect. In the substantive aspect, fairness and equity are supposed to be evident in the substantive laws, while in the procedural aspect, fairness and equity are supposed to be evident in the various procedures of the host country, including the procedural laws. So, while fairness and equity in the substantive aspect is easy to articulate, because all the substantive laws are known, fairness and equity in the procedural aspect may be difficult to articulate because the area of procedural law is a very broad realm that can include in a lot of things, some of which might not have been

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[74] Article 3, Germany-Tanzania BIT, 1965; and Article 2 & 7, Tanzania-Netherlands BIT, 1970.

[75] Refer: Article 4, UK-Tanzania BIT, 1994; Article 6, Tanzania-Denmark BIT, 1996; Article 4, Tanzania-Korea BIT, 1998.

[76] Article 5, UK-Tanzania BIT, 1994; Article 5, Tanzania-Denmark BIT, 1996; Article 5, Tanzania-Korea BIT, 1998.

[77] See: Written Laws (Miscellaneous Amendments) Act, Act No. 10 of 1999. See also: Clause 9.1, Tulawaka Gold Mine Agreement, 2003; Clause 11.1, Buzwagi Gold Mine Agreement, 2007.

[78] See: Clause 9.1, Tulawaka Gold Mine Agreement, 2003; Clause 11.1, Buzwagi Gold Mine Agreement, 2007.

contemplated.[79] What is alarming here is that alleged breach of fair and equitable treatment is present in almost every investor-state dispute at the international level especially in the ICSID.[80] The biggest challenge is that the exact scope of the doctrine has not been agreed either in treaty law or in practice. It should also be remembered that fair and equitable treatment is a doctrine which is sometimes said to carry in it expressions of the doctrine of minimum standard of treatment[81] a principle of customary international law that was advocated so much by developed countries led by the USA, but was objected to by developing countries led by Latin American states, which preferred the doctrine of national standard of treatment instead.

It is useful to mention here that fair and equitable treatment linked to minimum standard of treatment tend to propose that it is justifiable to accord foreign investors more favourable treatment if the treatment given to nationals appears to be below what is considered as the minimum standard at international level, thereby defeating the national standard of treatment.[82] In fact, many mining companies that invest in African countries including Tanzania have tended to insist on better treatment for them than the treatment given to nationals because that would be deemed to be below international standards. Thus, 'fair and equitable treatment' which is linked to 'minimum standard of treatment' and 'fair and equitable treatment' which is not linked to 'minimum standard of treatment' produce different results.[83] For example, the tribunal in *Deutsche Bank v. Sri Lanka* noted that the fair and equitable treatment in the Germany-Sri Lanka BIT was intended as an autonomous standard, but in the actual content of the Treaty the principle was not different from the minimum standard of treatment principle in customary international law.[84] All this shows, therefore, that 'fair and equitable treatment' is a controversial norm in international law. It should also be noted that, lack of agreement on scope and clear interpretation of the doctrine leaves interpretation to individual and *ad hoc* tribunals like the ICSID which are known to have no appellate remedies just in case a country is dissatisfied with their decisions. Indeed, lack of agreement on the precise content of the doctrine has led different tribunals to give varying interpretations of the doctrine.[85] This has opened the doctrine to inconsistent interpretations.[86]

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[79] KLAGER, Roland (2011), *'Fair and Equitable Treatment' in International Investment Law*, Cambridge University Press, p. 154.

[80] KATIA, Yannaca-Small (2010), *Arbitration under International Investment Agreements: A Guide to the Key Issues*, Oxford University Press, pp. 385-410.

[81] UNCTAD (2012), "Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II", United Nations, p. 6.

[82] KLÄGER, Roland (2011), Fair and Equitable Treatment in International Investment Law, Cambridge University Press, Introduction.

[83] OECD (2004), Fair and Equitable Treatment Standard in International Investment Law, OECD Working papers on International Investment, OECD Publishing, p. 25.

[84] Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, (ICSID Case No. ARB/09/2), 31st October 2012, para 420.

[85] OECD (2004), Fair and Equitable Treatment Standard in International Investment Law, Loc. Cit.

[86] Refer to the interpretation of the 'Fair and Equitable Treatment principle' in the following arbitration cases: Bosh International v. Ukraine (ICSID Case No. ARB/08/11) 25th October 2012; Occidental v. Ecuador (ICSID Case No. ARB/06/11), 5th October 2012; Swisslion v. Macedonia (ICSID Case No. ARB/09/16), 6th July 2012; Bureau Veritas & BIVAC v. Paraguay (ICSID Case No. ARB/07/9).

In any case, the point here is that the large number of disputes in fora like the ICSID which claim to be based on violation of fair and equitable treatment doctrine is evidence of the fact that there are often differences in expectations between governments on one side and investors on the other, regarding the scope of this doctrine as at the time of signing the BITs or MDAs. Therefore, a country is likely to loose a case before a tribunal like the ICSID because what it had in mind regarding 'fair and equitable treatment' at the time of contracting is different from what would be taken into consideration at the time of litigation, unless the precise limits of the scope of the doctrine are defined at the time of contracting. On the other side, the fact that the treatization or transformation of this doctrine from a principle of customary law to terms of a treaty or contract still does not make it a certain principle, then shows that the principle cannot be applied with certainty without falling back to customary law again.

5.3 Application of the Doctrine of National Treatment

As we have stated elsewhere in this treatise, the doctrine of 'national treatment' or 'national standard of treatment' requires that foreign investors be treated the same way as national or local ones. Thus, national or local investors are not supposed to be given more favourable treatment than foreign ones, and vice versa. In other words, foreign investors and nationals of the state are supposed to be accorded equal treatment.[87] Therefore, this is a principle whereby a host country extends to foreign investors treatment that is at least as favourable as the treatment that it accords to national investors in like circumstances. The national treatment principle is anchored in Article III of the GATT, and in the GATS and TRIPS agreements all of which Tanzania is party to. Again, as we have already noted, BITs concluded between 1961 and 1979 of which Tanzania is a party contain an assertion of the need to observe the principle of national treatment.[88] For BITs concluded after 1979, there is invocation of the National Standard of Treatment (NST) principle, combined with the Most-Favoured Nation (MFN) principle.[89]

Our first observation here is that, the principle of national treatment or national standard of treatment also has elements of relativity.[90] The issue is whether the principle covers treatment to persons and their property only as it was originally proposed in the Calvo Doctrine, or should extend to every type of treatment beyond persons and property.[91] In the World Trade Organization law,[92] the doctrine covers the following: border control measures;[93] internal conditions governing trade in goods and services;[94] intellectual property protection;[95] technical

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87 NEWCOMBE, Andrew Paul (2009), *Law and Practice of Investment Treaties*, Kluwer Law International, p. 13.
88 Article 2, Germany-Tanzania BIT, 1965 and Article 4, Tanzania-Netherlands BIT, 1970.
89 See: Common Articles 3(1) & 3(2), UK-Tanzania BIT, 1994; Tanzania-Denmark BIT, 1996; and Tanzania-Korea BIT, 1998.
90 UNCTAD (1999), "National Treatment: UNCTAD Series on Issues in International Investment Agreements", United Nations, New York and Geneva, p. 6.
91 Ibid.
92 GATT, GATS, and TRIPS.
93 The GATT framework.
94 The GATS framework.
95 The TRIPS framework.

barriers to trade;[96] and government procurement practices.[97] There is also a question as to whether national treatment should be observed both at the time of entry of investment, and at the stage of running the investment, or only during the latter.[98] In any case, the fact that arbitral tribunals sometimes come with conflicting decisions, hence becoming a subject for much criticism is also evidence of relativity in the principle.[99]As we have stated already, the national standard of treatment principle is directly opposed to the minimum standard of treatment principle in which its proponents, as we have noted, proposed that it is justifiable to accord foreign investors more favourable treatment if the treatment given to nationals appear to be below what is considered the minimum standard at international level.

In the case of Tanzania, the national standard of treatment principle is either explicitly or implicitly absent in all MDAs that companies have signed with the Government, as well as in the Model MDA embedded in the Mining (Mineral Rights) Regulations of 2010. This means, investors have rather been pushing for an application of the version of the fair and equitable treatment principle which is founded on the doctrine of minimum standard of treatment because, as we have seen, this version holds it justifiable to accord foreign investors more favourable treatment if the treatment given to nationals appears to be below what would be considered as an ideal minimum standard internationally. Since the treatment that Tanzania is prepared to accord to its nationals in the exploitation of mineral resources would be deemed by investors to be below what they deem as internationally acceptable standards, then this fact explains the non inclusion of the national treatment principle in MDAs in Tanzania. That means, the international legal framework puts a Tanzanian national at a situation of inequality of arms vis-a-vis a foreign company.

In sum therefore, there is no doubt that the framework for managing investment in the mining sector in Tanzania mainly has the big, foreign multinational company in mind, not the local investor. This assertion gets further support when one looks at the framework of mineral rights and licencing in the legal framework of the country, specifically the current law as at the time of writing this treatise namely the Mining Act of 2010. There are three licences, namely: Primary Mining Licence, whose capital ranges from zero to USD 100,000; then the Mining Licence, whose capital ranges from above USD 100,000 to USD 100,000,000; and then the Special Mining Licence (SML) whose capital must be above 100,000,000.[100] We should take into consideration the fact that the main requirement to be observed before signing the Agreement for a SML is that, the applicant should prove to have capital not below USD 100,000,000 or its equivalent in any convertible currencies to qualify for signing this agreement.[101] By a quick calculus therefore, very few Tanzanians, if any, can access the Special

[96] Agreement on Technical Barriers to Trade, 1994, Annex 1A.
[97] Agreement on Government Procurement, 1994, Annex 4.
[98] UNCTAD (1999), "National Treatment: UNCTAD Series on Issues in International Investment Agreements", United Nations, New York and Geneva, p. 10.
[99] JURGEN Kurtz (2012), "Balancing Investor Protection and Regulatory Freedom in Investor State Arbitration: The Complex Search for State Purpose in a National Treatment Inquiry", Working Paper.
[100] See: Section 4, The Mining Act, 2010.
[101] See: Sections 10(3)(a) & 4(1), Mining Act, 2010.

Mining Licence. Then a few can access the Mining Licence, but many will be lumped up in the Small Mining Licence category, which in any event is reserved for Tanzanians only.[102] The problem is that, it is only the category of Special Mining Licence which carries with it the right to sign a Mineral Development Agreement with the Government.[103] But, as we have seen the MDA carries with it a lot of protections and guarantees that are not available to other categories of licences. Some of these protections and guarantees include: Assurance of enjoyment of mineral rights, which contain guarantees to conduct mining activities in a particular area over a particular period of time without disturbance of any kind, which goes together with a guarantee against expropriation of the mining investment; guarantee on fiscal stability by reference to the law in force at the effective date of the agreement, and with respect to rates of royalties, taxes, duties and levies, and the manner in which liability in respect of these assurances is calculated; putting in check the manner in which the Minister for Minerals or the Commissioner for the same will exercise any of their discretionary powers under the Act or the Regulations; guarantee of additional rights regarding land and water for mining activities as necessary for the proper conduct of those activities; and in the event that the mining company deems it necessary to use land lawfully owned or under the care of any third parties, to make a request to the Government of Tanzania to assist the company to acquire or use such land.

There is no doubt that these things put holders of MDAs, mostly foreigners, at a greater advantage compared to their national counterparts. This means therefore that, the local mining investor and the foreign mining investor are not put on equal footing, although the differentiation is very technical as it is based on financial qualification. That being the case the principle of national standard of treatment is being violated, because under the principle, foreigners are not supposed to be given better treatment than nationals.

5.4 Application of the Doctrine '*Clausula Rebus Sic Stantibus*' *vis-a-vis* the Doctrine '*Pacta Sunt Servanda*'

As we have noted elsewhere in this treatise, the principle of *clausula rebus sic stantibus* was originally developed in respect of treaties, which are agreements between states, of which BITs are a part of. However, application of the principle has been extended to investment agreements, which are agreements between states and investors.[104] These are not agreements between sovereign states. In essence the doctrine of *clausula rebus sic stantibus* contradicts or at least conflicts with the principle of *pacta sunt servanda*. Therefore, when a government wants to renegotiate the investment contract, it will (likely) invoke the doctrine of *clausula rebus sic stantibus,* while when the investor wants to do the same, it will (likely) invoke the doctrine of *pacta sunt servanda*.[105] Questions have been raised though, whether *pacta sunt servanda* typically cover agreements between private actors and governments or is limited only to treaties,

[102] See: Section 8(2), The Mining Act, 2010.
[103] See: Section 10, The Mining Act, 2010.
[104] ERKAN, Mustapha (2011), International Energy Investment Law: Stability through Contractual Clauses, Kluwer Law International, p. 159.
[105] Ibid.

which are agreements between states only. It is noted that some scholars from developed countries assert that the nature of investment agreements make them analogous to 'international' agreements, hence invoking strict application of *pacta sunt servanda*[106] to agreements between private actors and governments, which would include MDAs as well. This being the case, there should be no room for *clausula rebus sic stantibus.*

While the question of applicability of *pacta sunt servanda* to investment agreements between states and private actors remains controversial, the question of displacement of *clausula rebus sic stantibus* in such agreements is even more controversial as it seems to reflect the position of developed countries only. One thing is very clear that entertaining the application of the *clausula rebus sic stantibus* doctrine would open these agreements (MDAs) to renegotiation. That is why it is noted that many countries have now incorporated the doctrine of *clausula rebus sic stantibus* in their domestic laws.[107] Tanzania has not done so explicitly. In terms of developments in jurisprudence, the International Court of Justice has not been willing to use the doctrine of *clausula rebus sic stantibus* in justifying termination of treaties between states.[108] However, some tribunals have shown willingness to invoke the doctrine in the termination of investment agreements between states and private actors, including companies.[109] This development essentially covers renegotiation of mining investment contracts, namely the MDAs if the proof of fundamental change of circumstances can be provided.

In any event, when it comes to Tanzania it is noted that all the BITs and MDAs already signed do not contain a clause importing the *clausula rebus sic stantibus* doctrine in explicit terms. This implies that developed countries and investors in general did not want this provision to be contained in BITs and MDAs in order to rule out the possibility of reviewing the investment agreements including MDAs when certain circumstances change.[110] What we see instead is that we note some provisions in the Mining Act of 2010 and in the Model MDA made pursuant to the Act have been implicitly inspired by the *clausula rebus sic stantibus* doctrine [111] through imposing the requirement of subjecting MDAs to a review after every five years.[112] But, investors have not been happy with this development, because it is understandable that some of the things that could come under the ambit of the reviews include consideration of any fundamental change of circumstance. It has been argued for sometimes now that windfall gains

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106 Ibid., p. 161.
107 GIRSBERGER, Daniel (2012), Fundamental Alteration of the Contractual Equilibrium under Hardship Exemption, University of Lucerne, p.122.
108 SORNARAJAH, M., (2004), The International Law on Foreign Investment, 2nd Ed., Cambridge, Cambridge University Press, p.133.
109 For example: the Aminoil Arbitration, "Award in the Matter of Arbitration between Kuwait and American Independent Oil Company (AMINOIL), March 24th 1984, The Arbitration Tribunal".
110 MATO Hadiza Tijjani (2012), "The Role of Stability and Renegotiation in Transnational Oil Agreements", *Journal of Politics and Law*, Vol. 5, No. 1, 2012, Faculty of Law, University of Abuja, pp. 34-36. For a comprehensive discussion on this part see: YACKEE, Jasson Web (2008), "Pacta Sunt Servanda and State Promises to Foreign Investors before Bilateral Investment Treaties: Myth and Reality", *Fordham International Law Journal*, Vol. 32, Issue 5, Article No. 5.
111 Pursuant to the enactment of the Mining Act, 2010.
112 Section 12, The Mining Act, 2010.

or windfall profits are part of fundamental change of circumstances hence warranting a review of taxation and other terms of investment agreements. Windfall gains or profits are gains or profits that come about due to unforeseen circumstances in a product's market, such as unexpected demand or government regulation.[113] Since the profits were unforeseen, some jurists believe that taxing them at a higher rate, or confiscating them outright, should not hurt the company.

5.5 Application of the Doctrine of Exhaustion of Local Remedies in Dispute Settlement in the Context of Mining

Disputes in the realm of investment are likely to occur mostly in situations of breach of contract and expropriation, things which in many situations are associated with or are attributed to the government. The same is likely to happen in the context of mining investments. The question of possibility of breach of contract by the government as well as the associated issues such as expropriation, compensation and dispute settlement have all been given broad coverage and great weight in almost all the frameworks dealing with investment in Tanzania, including investment in mining, which as we have seen, has invoked principles of customary international law. All the principles of customary international law incorporated in Tanzania are against breach of contract and expropriation. Further, all the BITs as well as the Mineral Development Agreements to which Tanzania is a party decry breach of contract and expropriation. Further, all the frameworks above call for compensation in situations where expropriation is unavoidable, and as we have seen, all of them have used the 'Hull Formula' which requires 'prompt, adequate and effective compensation', which is different from the formula proposed in the principle of PSNR, which is 'appropriate compensation'.

The most important thing to note here is that in case of disputes arising out of investment ventures, including mining investments, the national investment legal framework proposes the use of local remedies.[114] But all the BITs to which Tanzania is a party prefer arbitration which in the case of disputes between investors and the state it should be international arbitration.[115] For the Mineral Development Agreements, disputes (between states and investing companies) are supposed to be settled through international arbitration[116] using the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), in which the International Court of Arbitration is supposed to be the forum to be used for arbitration, and each party will appoint an arbitrator, and the third will be appointed by the two arbitrators. The parties could then agree on the place the arbitration would take place and the language to be used.[117]

Therefore, in principle arbitration in dispute settlement framework for mining

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113 NAAZNEEN Barma, KAI Kaiser, TUAN Minh Le (2012), *Rents to the Riches? The Political Economy of Natural Resource-Led Economy*, World Bank Publications, pp. 129-130.

114 See: Sections 102-104, the Mining Act, 2010.

115 As we have taken note in this discourse, most BITs to which Tanzania is a party prefer that disputes involving the contracting parties (the two states) be resolved by arbitration in which the two parties appoint the arbitrators. However, for disputes involving the state and investors, BITs prefer international arbitration mostly through ICSID.

116 See for example, Section 10(4)(d), Mining Act 2010, when it stipulates some conditions for MDAs.

117 Article 15, Model Development Agreement, Third Schedule, The Mining (Mineral Rights) Regulations, 2010.

investments is supposed to be international arbitration, not domestic one, and using rules other than domestic ones. This fact is well and unambiguously articulated and underscored in the following assertion which, however, was made in the context of blanket regulation of investment dispute settlement:

> "Providing investors with recourse against governments is valuable. Governments can and do expropriate investors or discriminate against them. Domestic judicial and administrative systems provide investors with one option for protecting themselves. The threat of *international arbitration* gives substantial additional leverage to foreign investors in their dealings with host governments, especially when domestic systems are weak. At the same time, there is mounting criticism. Arbitration cases can involve challenges to the actions of national parliaments and supreme courts. As Chief Justice Roberts of the US Supreme Court wrote earlier this year, "by acquiescing to international [investment] arbitration, a state permits private adjudicators to review its public policies and effectively annul the authoritative acts of its legislature, executive, and judiciary". In a similar vein, Chief Justice French of the High Court of Australia recently noted that the judiciary in his country had not yet made any "collective input" to the design of investment arbitration and that it was time to start "catching up". This broadening interest in the system will enrich the debate on the future of investment treaties".[118] [Emphasis added]

The point we want to underscore here is that, an over-emphasis on international arbitration defeats the principle of exhaustion of local remedies which is well established in customary international law as well. While the excerpt above justifies the use of international arbitration, difficulties and controversies involved in interpreting the doctrine of fair and equitable treatment in such fora as the ICSID, as we have noted above, and the deliberate abdication of the principle of national standard of treatment as well as the doctrine of *clausula rebus sic stantibus* are matters that very much put into question the credit of international arbitration, because international arbitration appears to operate at the disadvantage of developing countries, and as the excerpt above witnesses, international arbitration gives investors leverage over states

6. Conclusion

As we took note of, right at the beginning of this discourse, determining the rules for regulating investment including mining investments has been a battleground between investment exporting and investment hosting countries, as a result of which international legal framework on this area has been developing on the platform of controversy, division, disagreement and polarization.

[118] OECD (2014), "The Growing Pains of Investment Treaties, OECD Insights, Debates and Issues", OECD Publications, October 2014.

In this paper we have noted three things: Firstly, it is evident that the perspective of investment exporting countries on regulation of investment appears to have prevailed over that of investment receiving ones, a fact which affects the mining sector too. That is why the law governing mining investments in Tanzania, as in many other African countries, gives better treatment and protection to foreign investors as compared to domestic ones. A few examples, as we have discussed them in this discourse, show that the perspective of investment exporting countries has in most issues prevailed over that of host countries. We can begin with the doctrine of 'national standard of treatment' as propounded by investment host countries and spearheaded by the Calvo thinking. In practice, 'national standard of treatment' appears to be losing against the doctrine of 'minimum standard of treatment' which has been brought into application through the backyard using the doctrine of 'fair and equitable treatment' and 'state responsibility' as well as 'respect for acquired rights'. Then the Hull formula of compensations, which requires 'prompt, adequate and effective compensation' appears to have prevailed over the formula proposed by the United Nations General Assembly through the principle of Permanent Sovereignty over Natural Resources, which requires 'appropriate compensation'. Finally, the principle of 'exhaustion of local remedies' as advocated once again by Calvo also appears to have been overruled by emphasis of recourse to international remedies.

Secondly, and building on the first assertion, while the legal framework for managing and controlling Tanzania as an investment host country is broad and comprehensive, the opposite is true in respect of the framework for managing and controlling corporations that invest in the country. The gist of matter is that, principles of customary international law appear to be geared towards muzzling investment host countries. This framework is unmatched by the framework for controlling investing corporations.

Thirdly, the whole question of invoking the existing principles of customary international law to regulate mining investments at national level raises pertinent questions and issues which cannot be ignored. For example, the controversies surrounding the scope and interpretation of the doctrine of fair and equitable treatment cannot be left unattended. They require attention. The same thing goes for the doctrine of national treatment vis-a-vis minimum standard of treatment, as well as the doctrine of *pacta sunt servanda* vis-a-vis *clausula rebus sic stantibus*.

The general conclusion here would be that, despite the treatization and transformation of customary international law governing mining investment it is still imperative to fall back to the same customary international law at least in terms of taking cognizance of state practice and opinion juris to have an understanding of those principles. In the course of doing so, developing countries like Tanzania continue to lose. It would appear therefore that, if the said treatization and transformation of customary international law on investments, specifically mining investments, does not lead to definitiveness in the law, then these processes are useless.