Environmental Protection Under The Ugandan Model Bilateral Investment Treaty: A Call For Reform

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1. Introduction

This paper seeks to critique the Ugandan Model Bilateral Investment Treaty (BIT) for lacking provisions on the conservation of the environment. It is motivated by the worrying state of the environment in Uganda. The paper is split into six parts. Part one is this brief introduction, while part two gives a background to the discussion. Part three assesses the effect of the presence or absence of environmental provisions in interpreting a BIT. Part four argues that the Ugandan Model BIT lacks provisions for protecting the environment and, as a result, does not adequately address environmental concerns that may arise from investments. Furthermore, part five uses the Morocco-Nigeria BIT as a case study to suggest how Uganda can revise its model BIT to protect the environment adequately. Lastly, part six concludes the paper.

2. Background

In a bid to increase the inflow of Foreign Direct Investment (FDI), countries sign BITs with each other. A BIT is an agreement between two sovereigns wherein they undertake to safeguard investments made by investors from each country and businesses in each other's territories[1]. As a result, investors obtain substantive protections to facilitate investments. For instance, appropriate compensation for expropriation, freedom from unreasonable and discriminatory measures, and guarantee of national treatment[2]. These are translated into standard protection clauses such as fair and equitable treatment clauses, the Most Favoured Nation clause, and protection from expropriation[3]. BITs also provide procedural rights that permit the enforcement of substantive rights. This is through Investor-State Dispute Settlement (ISDS) provisions enabling investors to lodge claims directly against a state for violations of the treaty[4]. Some treaties require investors to choose between litigating their treaty claims in national courts and arbitrating their investment claims before an arbitral panel in a neutral forum like the International Centre for Settlement of Investment Disputes (ICSID) and the International Chamber of Commerce (ICC)[5].

The key features of investor-state arbitration are that only foreign investors, including their subsidiaries, can initiate claims against host states. The host states are not empowered to initiate claims[6]. Additionally, arbitrators can award financial damages to investors or order injunctive relief on host governments, which mandates what actions the state is allowed to take. It is noteworthy that there are limited avenues for states to challenge financial damages determined by arbitrators[7].

The primary criticisms of ISDS provisions that have been raised over the years are that those provisions seem to give investors greater power than states since only the former can lodge claims[8]. Second, ISDS provisions allow investors to challenge states through investment tribunals which may lack transparency because the resultant awards are not publicised. Moreover, investment tribunals are dominated by a few elite large firms and a group of lawyers. This makes them prone to conflicts of interest since they are for-profit lawyers and thus have a commercial interest in attracting as many cases as possible[9]. Furthermore, law firms from third-world countries do not have as much capacity as firms in western countries, and this forces the said countries to appoint arbitrators from Western countries, most of whom are very expensive to hire[10].

Investment tribunals have also been associated with inconsistency. Different tribunals, for instance, in the *Lauder* and *SGS* cases, offered divergent interpretations of similar provisions[11]. Inconsistencies generally devolve from varying permutations in commercial situations, government conduct, and the text of the specific treaty right[12].

Foreign investors protected under an investment treaty may affect the environment, encompassing air, water, land, flora, fauna, natural ecosystems, and sites[13]. Language referring to environmental concerns is rare in BITs, and where there is mention of the environment, this can exist in two ways[14]. First, generic language that establishes the protection of the environment as a concern to the parties to the treaty. Second, reserving policy space for environmental regulation for an entire treaty[15]. However, it should be noted that there is an emerging trend where there are specific sections dedicated to the environment, as will be illustrated later in this essay in the Morocco-Nigeria BIT.

3. The Effect of the Presence/Absence of Environmental Provisions in Interpreting a BIT

The jurisdiction of the investment tribunal is based on the consent between the investor and host state, as expressed in the BIT. Where there is no mention of environmental concerns in the investment treaty, it may be difficult for the host state to argue that measures affecting the investor's investment were taken in a bid to protect the environment. Article 46 of the ICSID Convention stipulates that the tribunal may consider counterclaims '*arising directly out of the subject matter of the dispute provided that they are within the consent of the parties*' (emphasis mine). This provision may be interpreted to bar environment-centred counterclaims by the host state where the BIT makes no mention of the environment[16].

It is debatable whether the tribunal can exercise its *Iura novit curia* powers to apply national laws of the host state on the environment. Under this principle, the tribunal can, on its own initiative, consider all rules of international law relevant to dispute settlement[17]. In *CME v Czech Republic*, the tribunal concluded that it was not allowed to research, find or apply national law, which the parties did not reference as essential to the tribunal's decision. The reasoning behind the tribunal's finding could be based on the fact that international judicial proceedings do not generally extend the *cura novit curia* power to considerations of international law[18]. From an environmental law perspective, the above position is problematic because environmental law, as a matter of practice, largely remains subordinated to investment disciplines and is mostly enforced only in the domestic arena[19]. Consequently, where the tribunal relies on *ex officio* environment considerations, it is likely that the award may be challenged under Article 52(b) of the ICSID Convention on the grounds that the tribunal exceeded its powers[20].

On the other hand, environmental considerations are inherent in the right of the state to regulate[21]. Therefore, although the host state exercises its power to regulate for a public purpose in accordance with due process and in a non-discriminatory manner, although the measure may affect a foreign investor, it does not amount to indirect expropriation. As a result, compensation does not apply[22].

The tribunal may also take into account Article 31(3)(c) of the Vienna Convention of the Law of Treaties which provides that treaties should be interpreted in accordance with the state's other obligations under international law. In *Phillip Morris International v Uruguay*, the tribunal appreciated that the host state's measures affecting the investor were taken in order to comply with international obligations (World Health Organisation Framework Convention on Tobacco Control). Therefore, the investor was not entitled to compensation, dismissing Philip Morris International's claims and awarded Uruguay $7 million as legal costs[23]. It follows that tribunals may consider environment and climate change obligations under wider treaties as defences for host state measures with a negative impact on foreign investors where such measures are non-discriminatory and are bonafide[24]. In *Parkerings v Lithuania*, the fact that the investment would have affected a World Heritage Site protected under the World Heritage Convention was a sufficient condition for distinguishing the project from another, thus precluding a claim of discrimination[25].

From the preceding, BITs need to have environmental considerations on the environment in the preamble and in specific provisions to minimise instances where the tribunal rejects environmental arguments.

4. The Untenable Silence about the Environment in the Ugandan Model BIT

Uganda is a landlocked country located in East Africa. It is bordered by Kenya in the East, South Sudan in the North, Tanzania and Rwanda to the South, and the Democratic Republic of Congo to the West[26]. Uganda is one of the preferred destinations of FDI in the East African region[27]. Uganda's FDI stood at $ 1.27 B in 2019, a 19.96% increase from 2018. For 2018, FDI stood at $1.06 B, a 31.47 % increase from 2017, which was at 0.80B. In 2016, the value of FDI amounted to $0.63B[28].

The conservation of the environment is essential to the realisation of sustainable development. The needs of the present must be met without compromising the ability of future generations to meet their own needs. The protection of the environment has been perceived as being of paramount importance to the future of mankind. FDI definitely contributes to the economies of countries, including Uganda. However, development and investments should not be achieved at the expense of the environment. Article 39 of the 1995 Constitution of Uganda guarantees the right to a clean and healthy environment. The enshrinement of this right in the supreme law of the land implies that even in BITs, Uganda should stipulate environmental considerations to protect the environment.

The 2003 Ugandan Model BIT is lacking in safeguarding and protecting the environment. It does not contain any provisions or obligations of the investor and host state towards the environment. All the said Model BIT provides is that any contracting party may take any measure of expropriation only in the public interest and subject to non-discrimination[29]. This provision may be said to be insufficient in addressing environmental and climate change concerns. This is because it might be difficult for Uganda to raise environmental concerns as defences where it takes a measure to protect the environment, which indirectly affects the investor's investment.

A perusal of the majority of Uganda's BITs with other countries, whether in force or not, shows an absence of environmental protection provisions[30]. The Eritrea-Uganda BIT is the only investment treaty signed by Uganda that expressly mentions the environment. Article 14 of the said BIT permits either the contracting party to adopt a measure otherwise consistent with the agreement so long as it is appropriate to ensure that the investment in its territory is undertaken in a manner sensitive to environmental concerns. The environmental measures that may be taken can include measures necessary to ensure compliance with laws and regulations. Second, measures necessary to protect human, animal or plant life and health. Third, measures relating to the conservation of living and non-living exhaustible natural resources[31]. Although different and better than the other BITs signed by Uganda, the Eritrea-Uganda BIT does not impose express environmental obligations on the investor like the Morocco-Nigeria BIT, as will be illustrated in the next section.

In the recent past, Uganda has faced many environmental hazards. For instance, extreme floods and drought have frequented Kilembe mines in Kasese District[32]. Additionally, in 2020, over 2000 people in Nakiwogo village in Entebbe District were affected by the floods[33]. Uganda's richest oil field is mostly explored by Tullow Oil Company. The Albertine region is experiencing several environmental hazards like ecological degradation and water crises resulting from extractives[34]. In order to protect the environment, there is a need to revisit Uganda's Model BIT as it is the basis of FDI inflow.

5. Towards Environment Sensitive BITS: A Case Study of the Morocco-Nigeria BIT

The Morocco-Nigeria BIT has been heralded as revolutionary in safeguarding the environment. Unlike most BITs that merely make reference to the environment in their preamble, the Morocco-Nigeria BIT gives proper guidance on the obligations of the investor and host state concerning the environment.

At the onset, each contracting party recognises and appreciates that both contracting states' environmental laws, policies and multilateral environment agreements are important in protecting the environment. Additionally, each state party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters[35]. This discretion allows either party to decide how best to protect the environment. Moreover, the BIT permits a state party to take a measure that would have otherwise been consistent with the agreement so long as the measure is considered appropriate to ensure that the investment is sensitive to environmental and social concerns[36].

The BIT further obligates investors to comply with environmental impact assessments applicable to their proposed investments[37]. The investors and host state authorities are also mandated to apply the precautionary principle to their environmental impact assessments[38]. Where an investment/investor's acts lead to significant damage, such investors are subject to civil actions for liability in the judicial process of their home state[39]. Uganda can learn from this BIT because it offers express comprehensive protection for the environment. When fully in force, the said BIT will be a good example for other countries on how to balance environmental protection and investments. Uganda can also be inspired by the Pan African Investment Code (PAIC), which entails provisions that strike a balance between FDI and sustainable development. The PAIC bars member states from relaxing or waiving compliance with domestic environmental legislation to encourage investment[40]. It also excuses member states from a breach of the National Treatment Principle, where they take regulatory measures to protect the environment[41]. The above notwithstanding, the Code is a guiding instrument and is therefore non-binding on the member states of the African Union. Moreover, it seems to be limited to intra-African BITs and trade within the region[42]. This can be seen from Article 3(4), which stipulates that member states may agree that in the case of a conflict between the Code and any intra-African BIT, investment chapter in any intra-African trade agreement or regional arrangement, the Code shall take precedence[43]. It follows, therefore, that Uganda cannot be inspired by the Code alone. Rather, it can adopt some of its provisions and redraft its Model BIT. This will ensure that all FDI in Uganda is subject to provisions geared towards safeguarding the environment.

6. Conclusion

This blog has argued that the conservation of the environment is essential to the realisation of sustainable development. Environmental conservation can be achieved by having express inclusion of environmental protection provisions in

BITs. Where such provisions are lacking, it may be difficult for a third-world country to argue that measures that directly or indirectly expropriate an investor's investment were taken to protect the environment. Worse still, it may be difficult for an arbitral tribunal to apply the environmental laws of a host state on its own motion for fear that the award will be appealed against.

Additionally, the blog has critiqued the Ugandan Model BIT for lacking provisions on the conservation and protection of the environment in FDI. Using the Morocco-Nigeria BIT as a case study and the increasing environmental degradation in Uganda, the blog has recommended that the Ugandan Model BIT be reviewed and amended to safeguard the environment.

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[19] Sarenmalm I, ‘Investment Treaty Arbitration and Environmental Sustainability’ 31. See also Article 27 of the Vienna Convention on the Law of Treaties which provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

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