

**THE ROLE OF EXPROPRIATION IN PROMOTING AND
ATTRACTING FOREIGN INVESTMENT: CASE STUDY OF RWANDA**

By

MPORANSENGA Vedaste

Reg. N°: 202110017

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DECLARATION

I, MPORANSENGA Vedaste, a student at Kigali Independent University (ULK), Masters of International Economics and Business Law declare that this thesis entitled “The Role of Expropriation in Promoting and Attracting Foreign Investment: Case study of Rwanda” is my own work and it has never been presented somewhere else for any academic qualification. Any references to other person’s works are acknowledged in the footnotes and in the bibliography.

Date...../...../.....

Signature.....

MPORANSENGA Vedaste

Reg. N^o: 202110017

APPROVAL

This is to certify that this research project has been done under my supervision and submitted to the University with my approval.

Date:/...../.....

Signature:

Dr. ASIIMWE Frank

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LIST OF ABBREVIATIONS AND ACRONYMS

AFCFTA	: African Continental Free Trade Area
BIT (s)	: Bilateral Investment Treaties
COMESA	: Common Market for Eastern and Southern Africa
EAC	: East African Community
FDA	: Food and Drug Authority
FDI	: Foreigner Direct Investment.
GATT	: General Agreement on Tariffs and Trade
GOR	: Government of Rwanda
ICSID	: International Center for Settlement of Investment Disputes
IIA(s)	: International Investment Agreements
MNC (s)	: Multinational Corporations
MNE(s)	: Multinational Enterprises
OECD	: Organization for Economic Co-operation and Development
P/PP	: Page/pages
Para.	: Paragraph
RDB	: Rwanda Development Board
RNP	: Rwanda National Police
RSB	: Rwanda Standards Bureau
WTO	: World Trade Organization

TABLE OF CONTENTS

DECLARATION.....	i
APPROVAL	ii
ACKNOWLEDGMENT	iii
LIST OF ABBREVIATIONS AND ACRONYMS	iv
CHAPTER I: GENERAL INTRODUCTION	1
I.0.Introduction	1
I.1. Background of the study.....	1
I.2. Statement of the problem.....	5
I.3. Objectives of the study	9
3.1. The main objective of the study.....	9
3.2. Specific objectives of the study	9
I.4. Research questions	9
I.5. Scope of the study.....	10
5.1. Geographical scope.....	10
5.2. Content scope.....	10
5.3. Time scope	10
I.6. Significance of study	11
I.7. Justification of the study.....	12
I.8. The structure of study	13
I. 9. Definition of key term relating to investment and expropriation	13
9.1.Investment.....	14
9.2. Foreign investment.....	14
9.3. Portfolio investment.....	15
9.4. Expropriation	15
9.5. Direct expropriation	16
9.6. Indirect expropriation.....	16
9.7. Creeping expropriation	17
9.8. Nationalization.....	17
9.9. Confiscation	17
CHAPTER II: LITERATURE REVIEW	19
II.0. Introduction	19
II.1. The requirements for a lawful expropriation.....	19
1.1. Public purpose.....	20
1.2. Non-Discrimination	21

1.3. Due process of law	21
1.4. Payment of compensation	22
II.2. Properties entitled to expropriation	22
II.5. The background of indirect expropriation clauses	23
II.3 . Steps for conducting indirect expropriation	23
3.1. The first step in determining an indirect expropriation is to decide which properties are eligible to be expropriated:	24
3.2. The second step is to assess the impact of the measure on the investment	24
3.3. The third step is to assess the justifiable grounds for an indirect expropriation.....	24
II.4. Regulatory State measures not subjected to indirect expropriations.....	25
II.5. Method of valuation	27
5.1. Open market value	27
5.2. The fair market value	28
5.3. Owner value concept.....	28
5.4. Valuation date and its impact.....	28
II. 6. Factors affecting valuation	29
6.1. Post-expropriation factors (post-valuation date).....	29
6.2. Pre-expropriation factors (pre-valuation date).....	30
II. 7. Conclusion.....	30
CHAPTER III: RESEARCH METHODOLOGY.....	31
III.0. Introduction.....	31
III.1. Research design	31
III.2. Area of the study.....	31
III.3. Population and sampling.....	32
III.4. Data collection methods and instruments	32
4.1 Research instruments	32
4.2 Research procedures	34
III.5. Quality control	34
III.6. Content validity.....	35
III.7. Reliability of the findings	36
III.8. Data management and analysis	37
III.9. Ethical consideration.....	38
CHAPTER IV: DATA PRESENTATION, ANALYSIS AND DISCUSSION.....	39
ON THE FACTORS THAT ATTRACT FOREIGN INVESTMENTS	39
IV.A. The factors that attract foreign investments.....	39

0.Introduction.....	39
1. Historical background of foreign direct investment	39
2. Source of law governing foreign investment	40
3. Factors for attracting foreign direct investment in the host country	41
4. The function of international investment agreements as factors for attracting FDI	42
4.1. Foreign direct investment protection	43
4.2. Foreign direct investment liberalization	44
4.3. Transparency, predictability and stability	44
5. The link between signing international investment agreements and attracting foreign investments	45
6. The role of international investment agreements in attracting foreigner investors	47
7. Expropriation of cross border investments vis a vis political risk	47
8. Factors attracting foreign direct investment to Rwanda	48
9. The role of Rwandan regulations in attracting foreign investments	49
10. Advantages of foreign direct investment	50
10.1. Increase employment and economic growth.....	50
10.2. Development of backward areas	51
10.3. Introduce new technology	51
10.4. Global market access	51
10.5. Creation of a competitive market.....	51
11. Disadvantages of foreign direct investment.....	52
11.1. Hindrance to domestic investment.....	52
11.2. Political changes	52
11.3. Expropriation	52
12. Conclusion	53
IV.B. Bilateral Investment Treaties Rwanda is party and the feature of domestic law	54
0. Introduction.....	54
1. Bilateral investment treaties Rwanda signed with other countries	54
2. The role of domestic law and obligation of investors to respect the law of host State.....	55
3. Position of Rwandan laws relating to investment and expropriation vis a vis indirect expropriation.....	56
4. Progress made in Treaties to promote the role of indirect expropriation clause	58
5. Dispute settlement clause in bilateral investment treaties	59
6. The role of rights to regulate in attracting foreigner investors	62
7. Separating an indirect appropriation from non-compensable regulations	63

7.1. Establishing an indirect expropriation	63
1.1 Economic impact of the measure	64
1.1.1. Decrease in value	65
1.1.2. Loss of control over the investment	65
1.1.3. Duration of the measure	66
1.2 Interference with investor's expectations	66
1.3. Nature, purpose and character of the measure	68
8. Observation from the clause of expropriation in signed bilateral investment treaties	69
8.1. Failing to differentiate direct expropriation from indirect expropriation	69
8.2. The obligation of immediate compensation for attracting foreigner investors	70
8.3. The role of date for assessing the value of the investment in attracting investors	71
9. Conclusion	73
Chapter V: GENERAL CONCLUSION AND RECOMMENDATIONS.....	74
V.0. Introduction	74
V.1. General Conclusion	74
V.2. Recommendations	78
BIBLIOGRAPHY	80

ABSTRACT

Foreign investment and International Investment Agreements have ability to help in the economic growth of host countries. But the domestic law plays great role in attracting foreigner investors. The application of some investment agreements to the protection, promotion and attraction of foreigner investment has been impacted by the absence of a clear statutory definition of indirect expropriation even at domestic level, no law or article providing indirect expropriation. The law regulating investment in Rwanda and the law regulating expropriation in public interest both of them are silent on the issue of indirect expropriation and the power of State to regulate.

This study therefore, assesses the role of expropriation in attracting foreign investments and effectiveness of Bilateral Investment Treaties, which can play the role to increase introduction of foreign investments in host countries. It urges State to consider indirect expropriation in the domestic law and to reconsider the wording of indirect expropriation clauses in Bilateral Investment Treaties, in the light of the suggested practical adjustments, which provide States greater flexibility for their legal public policy activities without reducing introductions of foreign investments. Thus, Policymakers need to understand what role domestic laws and these treaties truly play and how much they can help countries to attract more foreign investments as they are a significant tool in most countries, particularly developing countries including Rwanda.

Key word: *Direct Expropriation, Indirect Expropriation, Foreign Investment and Bilateral Investment Treaties.*

CHAPTER I: GENERAL INTRODUCTION

I.0. Introduction

This study sought to examine the extent to which expropriation is promoting and attracting foreign investment. The study was inspired by the fact that many people invested a lot of money in projects that was sometime encouraged by the government, after investment the project stopped from government measures which make investment impractical or useless, implying that investors suffered the loss. In this chapter, the researcher presents the context and insight into the research problem; the statement of the problem; the research objectives; research questions; scope of the study; significance of the study; justification of the study and definition of operational terms. This is intended to enable a clear understanding of the background and context of the study.

I.1. Background of the study

Traditionally, expropriation was considered the highest threat against foreign investment and it was the principal motivation factor for the establishment of International Investment Agreements (IIAs). Until the 1980s, the preventive attitude toward foreign investors produced a large number of expropriation of foreign capital with either little or no compensation. After the end of Cold War developing States no longer saw foreign investment as a threat to their sovereignty; As result attracting foreign investment become a central component of their strategies to promote economic growth and development.¹

International laws generally agree that foreigners' property cannot be seized without fair compensation, whether it is for public use or not. Prior to two decades ago, the debates in

¹ Ghaziani, Moosa A & Ghaziani, Mohammad A "The Role Of Expropriation Clauses In Protection And Promotion Of Foreign Investments In Renewable Energy: An Essential But Overlooked Legal Consideration," Vol. 11: No. 2, Article 6, *Indonesia Law Review*, (2021), p.193, <https://scholarhub.ui.ac.id/ilrev/vol11/iss2/6>, [4/7/2023]

scholarly literature and court cases addressed mostly on the criteria for compensation and the estimation of expropriated value. The spread of Bilateral Investment Treaties (BITs) and other investment agreements requiring prompt, adequate, and effective compensation for expropriation of foreign investments.²

Since the beginning of international investment laws, the idea of expropriation has always been surrounded by debate. Expropriation is the most extreme form of state sovereignty and a major violation of private property rights for the advantage of the State or for private parties that the State has designated. It is described in international investment law as the legal withdrawal of property rights. This definition covers formal or direct expropriation, which has been acknowledged and regulated by many national domestic laws. International investment treaties also recognize that expropriation may occur when a State takes action that is harmful to a foreign private investment, although the investor formally retains ownership of the investment. This action of state is referred to “indirect expropriation”.³

However, the majority of IIAs do not clearly distinguish between non-compensable regulatory measures and those measures that result in an indirect expropriation. In fact, contracting states failed to see the significance of leaving policy room for themselves because they wanted to be seen as attractive investment destinations or they wanted to ensure the best protection for their citizens investing abroad.

The ambiguity surrounding the definition of indirect expropriation in many IIAs, has resulted in the development of several techniques for recognizing it in investor-state law. In this sense, the lack of policy space in a number of indirect expropriation clauses combined with the

²OECD Working Papers on International Investment "Indirect Expropriation" and the "Right to Regulate" in International Investment Law, https://www.oecd-ilibrary.org/finance-and-investment/indirect-expropriation-and-the-right-to-regulate-in-international-investment-law_780155872321 [4/4/ 2023]

³ Suzy H. Nikièma, *Best Practices Indirect Expropriation*, Published by the International Institute for Sustainable Development, (2012), p.1

inconsistency and unpredictability regarding the outcome of indirect expropriation claims, create 'regulatory chill'. Regulatory chill refers to the situation where host states settle disputes of injured foreigner investors at the cost of situations where host states settle disputes of injured foreign investors at the expense of implementing their legal procedures intended to safeguard and advance public interests.⁴

In order to resolve the ambiguity of the indirect expropriation doctrine, some scholars propose that only direct expropriation, which involves the physical invasion or seizure of property, nationalization, or governmental assumption or transfer of control over property, should be compensable as expropriation.⁵ However this proposition do not answer the request of investors affected indirectly by the measures of hosting State, and it is not favoring attraction of foreign investments.

Currently, a wide range of investment treaties guarantee the rights including the right to compensation in the event of direct or indirect expropriation, to protect foreign private investors who hold investments within the territory of other States. In addition, a State may adopt or pass public interest rules that are detrimental to the financial interests of investors on its territory. The actions or measures taken by the State in the public interest that negatively impact a foreign investment, it may result in the host State to be liable under international law. Investment treaties even give foreign investors a mechanism to contest the validity of actions made by State in sensitive areas like public health, human rights, and environmental protection.⁶ However in order to avoid paying fair compensation, the hosting States especially

⁴ Maryam M , "The Chilling Effect of Indirect Expropriation Clauses on Host States' Public Policies: a Call for a Legislative Response" *International Community Law Review* 22, (2020), p.237, https://brill.com/view/journals/iclr/22/2/article-p235_5.xml?language=en&ebody=full%20html-copy1 [4/4/2023].

⁵ Peter D. Isakoff, "Defining the Scope of Indirect Expropriation for International Investments" Vol 3. 189, *Global Business Law Review*, (2013), p. 200, <https://engagedscholarship.csuohio.edu/gblr/vol3/iss2/4> [4/4/2023].

⁶ Suzy H. Nikièma, *op.cit*, p.3.

under development countries do not always consider that the measures they took has affected investors indirectly.

A State may try to hide its purpose to harm an investment behind a policy that appears to be acceptable and harmless on the surface. The current lack of clarity surrounding the definition of indirect expropriation raises concerns regarding the ability of States that host such investments to maintain their regulatory and policy space, despite the fact that current international investment treaties provide significant protection to private foreign investments. There is reason to suppose that a State would choose against taking public interest actions if it worries that they might be considered indirect expropriation and as a result necessitate the State to pay significant compensation.⁷

Meanwhile, the legal rules regulating indirect expropriation are intended to safeguard investors in situations outside of formal and evident rights violations. According to the European Court of Human Rights' explanation in the case of *Sporrong & Lönnroth v. Sweden* "Arbitrators and courts must consider the substance of the measure and not its form".⁸

The circumstances under which a State may lawfully expropriate the property of a private foreign investor are currently established in general terms in international investment treaties as a result of a number of historical conflicts. According to international investment treaties, a State has the sovereign right to expropriate foreign private investments made on its territory as long as it meets the following three requirements: The act is not discriminatory, the expropriation is intended to serve the public interest, and the investor is given compensation for their losses.

⁷ Suzy H. Nikièma, *Op.cit*, p.2.

⁸ *Sporrong & Lönnroth v. Sweden*, September 23, 1982, ECHR, Series A, No. 52, para. 63.

There is widespread consensus on the definition of direct expropriation, however the definition of indirect expropriation is still more problematic. Determining the precise circumstances in which a State's actions may be deemed to constitute an indirect expropriation and as a result require the State to reimburse the investor for the harm caused. In other words, under what circumstances may a State action be considered to be the equivalent of expropriation? In fact, a number of arbitral tribunals have acknowledged that not all State measures that are detrimental to investment activities constitute an indirect expropriation, and as a result, not all such measures grant the harmed party the right to seek redress for compensation.⁹

However, as stated above a State may attempt to hide its intention to harm an investment behind a policy or a regulation. Another issue is how does country without domestic law which define indirect expropriation, expropriate foreigner investors if there is no bilateral investment Agreement? How do local investors are compensated if states measure affects their investments indirectly?

I.2. Statement of the problem

The Government of Rwanda has taken a series of policy reforms intended to improve Rwanda's investment climate and increase foreign direct investment (FDI). It has made significant changes to reduce obstacles in the areas of establishing electricity service, construction permits, and exporters' customs processing periods. The Government of Rwanda also implemented online procedures for clearances and certificates of origin. The investment code guarantees equal treatment for foreigners and nationals in operations, and compensation for expropriation has been made.¹⁰ Also, the government of Rwanda encouraged foreign direct investment

⁹ Suzy H. Nikièma, *Op.cit*, p.1.

¹⁰ Anon "2020 Investment Climate Statements: Rwanda"

<https://www.state.gov/reports/2020-investment-climate-statements/rwanda/> [30/04/2023].

through minimizing trade barriers.¹¹ The legislators have clearly determined ways to improve corporate legal framework in order to make Rwanda a favorable environment for the local businesses and attract more investment.

In 2020, during the spread of Covid 19, Rwanda Food and Drug Authority (FDA) issued guidelines on requirement and specification of masks, where effective date of these guidelines was 13/04/2020, while review date was considered to be on 13/04/2023. The scope of these guidelines apply to all applicants intending to manufacturer face marks, in order to limit the transmission of Covid 19.¹² Then, Rwanda Standards Bureau (RSB) and Food and Drug Authority called for manufactures of face mask in order to fill the demand gap and increase availability to personal protective equipment to fight against the spread of coronavirus epidemic. This request comes after it was discovered that the 38 approved manufacturing companies were unable to fulfill local demand, which lead some people to make their own masks, that did not match the required standards.¹³

According to Food and Drug Authority, textile companies which was engaged in production of equipment like surgical masks, face shields and cover all suits after they had their samples evaluated against global standards.¹⁴ The Rwanda Standards Bureau agrees that additional masks are needed, so that a single individual can have numerous face masks as much as possible, in order to follow the World Health Organization guidelines and change their mask every four to six hours. In addition Samuel Mporanzi from Rwanda Standards Bureau said "If

¹¹ Roberts S, *Foreign Direct Investment in Kigali's Special Economic Zone and its Impact on Rwanda's Economic Reconstruction*, (2019), p.7, https://digitalcollections.sit.edu/isp_collection/3133 [5/5/2023].

¹² Food and Drug Authority, *Guidelines on Requirement and Specification of Mask*, (2020), p. 7, https://rwandatrade.rw/media/RWANDA_FDA_GUIDELINES_ON_REQUIREMENTS_AND_SPECIFICATIONS_OF_MASKS.pdf, [28/04/2023].

¹³Sabiti D, "Rwanda Opens Market for More Face Masks", KT Press, 8/5/2020, p.1, <https://www.ktpress.rw/2020/05/rwanda-opens-market-for-more-face-masks/> [28/4/ 2023]

¹⁴ KANAMUGIRE J, "Good news as firms re-open to produce face and surgical masks" Rwanda Today (28/4/2020), <https://rwandatoday.africa/rwanda/business/good-news-as-firms-re-open-to-produce-face-and-surgical-masks-2476958>, [28/04/2023].

we obey the standards and good practices in manufacturing and good packing, we can even have these masks exported to other countries."¹⁵ This authority call for investors to invest in face masks so that they will be exported outside the country.

However, in few weeks later, the manufacturing companies that were encouraged to produce and supply enough face masks to the Rwandan population complained the lack of market. They told that they count 1.2 billion Rwandan Francs of loss. The representative of face mask manufacturers Swaib Munyawera said “We were approached and asked to provide face masks, we made heavy investments to improve the standard that was required to do the job. Now 3 million face masks that failed to get buyers are equivalent to Rwf 1.2 billion”.¹⁶ As researcher, one can ask who will bear the responsibility on this loss?

Not only the lack of the markets which affected investors in this domain, but also on 13th May 2022, the government of Rwanda through cabinet meeting resolution decided that using a face mask to prevent the transmission of COVID-19 is no longer mandatory.¹⁷ This decision also affected different investments, since Food and Drug Authority issued guidelines on requirements and specification of face masks, and these guidelines encouraged all applicants intending to manufacture face marks to limit the transmission of Covid 19, as prescribed in its scope.

Another crucial issue to be investigated in relation to international indirect expropriation is the decisions or measures taken by one state, coming from the political conflict with other State. For example in East African Community (EAC) “except Tanzania, all the other countries of

¹⁵ Sabiti D, *ibidem*

¹⁶ Tabaro J. de la Croix, “Demand Too Low Face Mask Manufacturers” KT Press, (6/6/2020), p.1, <https://www.ktpress.rw/2020/06/demand-too-low-face-mask-manufacturers/> [28/4/2023].

¹⁷ Igihe, “Rwanda Abolishes mandatory wearing of face masks” (14/5/2022), p.1, <https://en.igihe.com/news/article/rwanda-cancels-mandatory-wearing-of-face-masks> [28/4/2023]; TABARO J. de la Croix, “Wearing Face Masks no Longer Compulsory in Rwanda- Cabinet” <https://www.ktpress.rw/2022/05/wearing-face-masks-no-longer-compulsory-in-rwanda-cabinet/> [28/4/2023].

the EAC are experiencing major conflicts (directly or indirectly) that position a violent threat to many of their citizens.”¹⁸ Each of the countries in the EAC has at least three neighbors and for each country has at least one strong conflict with its neighbor.¹⁹ Consequently, cross border conflicts have created doubt on investment returns and aggravated the cost of doing business and made it less attractive.²⁰

In 2019 Uganda accused Rwanda of blocking goods on trucks and other vehicles from entering the Rwanda and of stopping its nationals from crossing into Uganda. Ugandan government spokeswoman Ofwono Opondo, told reporters that 129 cargo vehicles were stopped at Gatuna border.²¹ Rwanda's Minister of foreign affairs Richard Sezibera, contested this claim by claiming that vehicles were being redirected to Kagitumba border due construction of Gatuna border. He further said that Rwanda was preventing its citizens from entering Uganda territory because those who were crossing the border had been imprisoned, accused of being spies.²² He said that “People are coming in, people are going out except for Rwandans who have been strongly advised not to travel to Uganda because of challenges of insecurity that they are facing there”.

Note that, the same trade route assists in supplying goods to Burundi and areas in the Eastern Democratic Republic of the Congo, as well as acting as a vital conduit for Kenyan exports. Any border along the route that is closed off for an extended period of time might result in a severe regional economic crisis.²³ There was need to answer the question of what happens to trade when countries enter into conflict and what and how legal instruments could be applied

¹⁸ Chikwanha Barbara A , *The Anatomy of Conflicts in the East African Community (EAC): Linking Security With Development*, (2007), p.2.

¹⁹ Chikwanha Barbara A, *idem*

²⁰ Chikwanha Barbara A, *idem*

²¹ Biryabarema E and Uwiringiyimana C, “Uganda and Rwanda trade accusation over border crossings dispute” Reuters (1/03/2019), p.1, <https://www.reuters.com/article/uganda-diplomacy-rwanda-idUKL5N20036U> [5/5/2023].

²² Biryabarema E and Uwiringiyimana C, *idem*

²³ Biryabarema E and Uwiringiyimana C, *idem*

to help cross border investments to survive. This study provided information on how cross border investors can be covered, even when conflicts occur among countries.

I.3. Objectives of the study

The objective of this study are divided into the main and specific objectives:

3.1. The main objective of the study

This study examined how expropriation could be applied through bilateral investments treaties and adaptation of domestic laws to attract and sustain international investments.

3.2. Specific objectives of the study

1. To explore how cross border investment should be protected against political risk relating to indirect expropriation when political measures between countries take place.
2. The study explored whether Rwanda investment and expropriation laws define indirect expropriation and give the right to state to regulate and how they are applied.
3. To explore whether Bilateral Investment Treaties signed by Rwanda have clauses regulating indirect expropriation and how they are applied.

I.4. Research questions

In the lights of the above mentioned topic (The Role of Expropriation in Promoting and Attracting Foreign Investment: Case Study of Rwanda) this study intended to investigate the following question “How expropriation play role to promote and attract international investors, specifically in implementation of bilateral investments treaties and domestic law.

In order to answer this general question, a number of following specific questions will be investigated:

- (1) How can indirect expropriation on cross border investments be implemented when political measures have been taken between two countries in conflict?
- (2) How indirect expropriation is applied under Rwandan Laws?
- (3) Do Bilateral Investment Treaties signed by Rwanda, have clauses regulating indirect expropriation?

I.5. Scope of the study

The scope of the study is divided into geographical, content and time scope

5.1. Geographical scope

The study on The Role of Expropriation in Promoting and Attracting Foreign Investment was carried out in Rwanda. This area was chosen because there was political will to attract foreign investments to strengthen the economic growth as landlocked country.

5.2. Content scope

The study concentrated on how States measures relating to expropriation and how it can play the role in promoting and attracting foreign investments. The study limited itself to the aspects of investment and expropriation. Particularly it discusses the States' sovereign right under international law to take property held by nationals or foreigners through expropriation. These rights include the conditions for expropriation to be lawful, namely public purpose, nondiscrimination, due process and payment of compensation.

5.3. Time scope

The study considered a period of Rwanda after 1994 Genocide against Tutsi, where it signed many Bilateral Investment Treaties with other countries until 2023.

I.6. Significance of study

The findings will benefit people in many ways as following:

Law Reform Commission and the Parliament: The findings will be needed by the Law Reform Commission and the Parliament, to amend the law relating to investment and the law of expropriation in order to include the definition of indirect expropriation as well as to distinguish between compensable State measures and non-compensable State measures.

Drafters and negotiators of BITs: When making BIT drafters of the document can play great role in attracting foreign investments. Thus, this research supports drafters and negotiators of BITs on how they can draft and negotiate a given BIT in the way that can attract foreigner investors with confidence that their investment will not be taken away without fair compensation.

Academic Researchers: Investment studies and expropriation departments need the findings in order to understand the rights of State to regulate in public interest. In addition, scholars and practitioners should understand the level indirect expropriation plays a significant role in attracting and increasing foreign investments in the host country.

Investors and citizens: This study helps investors and citizen in general to understand the power of State to regulate in public interest. They can be able to differentiate between non compensable regulations from compensable State measures. Thus, no one could claim for compensation if State take measure in public interest affecting his/her property or investment when the measure is taken without discrimination.

I.7. Justification of the study

Many countries have enacted investment laws that usually contain guarantees against the expropriation of foreign investment without payment of compensation. Particularly, the States with a history of expropriation intend on giving such guarantees to remove any fear of expropriation that investors may have against this their investment.²⁴ However Rwandan Law on Investment Promotion and facilitation law²⁵ does not define indirect expropriation. Even the Law Relating to Expropriation in the Public Interest does not define indirect expropriation as one kind of expropriation.²⁶

Some researchers including Mudaheranwa Alex, did research on “Comparative Analysis of Investment Protection Measures in Bilateral Investment Treaties signed by Rwanda”; Nyirabagenzi M. Claire who did research on “Legal Implication of Expropriation Process under Rwandan Law” and Legal Aid Forum which did research on “Implementation of Expropriation Law in Rwanda: Challenges and Ways Forward”. These researchers contributed on how expropriation should be done; However, among these researchers’ no one provided the solution of regulating indirect expropriation as one way of attracting foreign investments. Thus, if the issue of regulating indirect expropriation is not addressed, it can discourage foreign investors from investing in Rwanda because they can fear to be affected by the government measures which can make their investment useless or impractical.

²⁴ Ghaziani, Moosa A and Ghaziani, Mohammad A, *Op.cit*, p.193

²⁵ Law N° 006/2021 Of 05/02/2021 on Investment Promotion and Facilitation, Official Gazette n° 04 bis of 08/02/2021

²⁶ Law N° 32/2015 Of 11/06/2015 Relating to Expropriation in the Public Interest, *Official Gazette n° 35 of 31/08/2015*

I.8. The structure of study

This thesis is divided into 5 chapters. Chapter One is about General Introduction, that includes introduction of the topic, background, significance of the study, problem statement, research questions, objectives of the study etc. Chapter Two discusses the Literature Review of investment, direct and indirect expropriation. Its explore the literature in the area of international investments document that details indirect expropriation, and the background of indirect expropriation in IIAs and from various arbitral award legal systems. Chapter Three discusses methodology used to attain objectives of this study. Chapter four present, analyses and discuss the data collected, which elaborate the legal status of indirect expropriation under Rwandan law, it discusses Bilateral Investment Treaties signed by Rwanda with other countries, particularly discusses the legality of agreement conducted. It also discusses whether Rwandan domestic law define indirect expropriation and its effect on attracting investment. Chapter Five of this scholarly work which is the last one, is a general conclusion and recommendations answering the major issues containing in the research, and recommendations is drawn to the parliament and BITs negotiators/drafters.

I. 9. Definition of key term relating to investment and expropriation

One cane not say investment without saying direct and indirect expropriation. They are interrelated concepts since both direct and indirect expropriation are result of the State measure which affect the property rights of investors. Thus this party aims to define some key terms relating to investment, expropriation whether direct or indirect in connection of international investments:

9.1. Investment

Investment refers to the commitment of current financial resources in order to achieve higher improvements in the future.²⁷ Adam HAYES defines an investment as “an asset or item acquired with the goal of generating income or increase. It refers to an increase in the value of an asset over time.”²⁸ Rwandan investment law define investment as “use of tangible or intangible assets for profit-making purposes with the exception of retail and wholesale activities”²⁹.

Thus investment is an asset acquired or money committed with a purpose to earn income in future. Investment is also undertaken in order to profit from a future increase in value of asset. It can also include funds allocated for starting a new business, or buying stock or shares in a company, since the purpose of investment is to make money grow.³⁰

9.2. Foreign investment

Foreign investment refer to the transfer of physical or intangible assets from one state to another state with the intention of using them to create wealth there under the full or partial control of the asset's owner.³¹

It is comparable to Foreign direct investment (FDI) which is a type of cross-border investment in which an investor from one country develops a long-term interest and a sizable amount of control over a business from another country. FDI is a crucial component of global economic integration since it creates strong, long-lasting links between countries' economy. Such a link is demonstrated by an investor from one country owning 10% or more of the voting power in

²⁷ Kingdom of Saudi Arabia Capital Market Authority “investment” https://cma.org.sa/en/Awareness/Publications/booklets/Booklet_1.pdf, [15/5/2023]

²⁸ Adam H “What is investment ?” <https://www.investopedia.com/terms/i/investment.asp>, [15/5/2023]

²⁹ Article 2 (25) Law N° 006/2021 Of 05/02/2021 on Investment Promotion and Facilitation, *Official Gazette n° 04 bis of 08/02/2021*

³⁰ Anon “Investment” <https://cleartax.in/g/terms/investment>, [15/05/2023]

³¹ Munyamahoro R, *International Investment Law*, ULK, Faculty of Law (2022), p.3

a company located in another country. It plays important role for the transfer of technology between countries, and promote international trade through access to foreign markets.³²

9.3. Portfolio investment

Portfolio investment is signified by a movement of money for the purpose of buying shares in a company functioning in another country or buying other security instruments. The distinguishing element Between foreign investment and Portfolio investment is that, in portfolio investment, there is a separation between management and control of the company and the share of ownership in it. In a portfolio investment, the risk associated with making such investments is assumed by the investor. If he loses money, he could not bring a lawsuit against the domestic stock exchange or the government agency that controls it.³³ Thus a portfolio investment is buying stocks, bonds, or other financial instruments with the expectation that they will provide income, increase in value over time. It is different from direct investing, which would need an active management role.³⁴

9.4. Expropriation

Expropriations refers to takings of property or a business, and the state retains ownership of the property rights or transfers to other person.³⁵In addition to the term expropriation, ‘dispossession’, “taking”, “deprivation” or “privation” are also used³⁶. Professor Emerich defines this term according to the Reid Dictionary, as the operation by which a public

³² OECD “Foreign Direct Investment” https://www.oecd-ilibrary.org/finance-and-investment/foreign-direct-investment-fdi/indicator-group/english_9a523b18-en , [17/8/2023]

³³ Munyamahoro R, *op.cit*, p.5

³⁴ Chen J “Portofolio Investment: Definition and Asset Classes” (2020), p.1 , <https://www.investopedia.com/terms/p/portfolio-investment.asp#:~:text=A%20portfolio%20investment%20is%20ownership,involve%20an%20active%20management%20role>. [16/6/2023]

³⁵ UNCTAD, (2012), *op.cit*, p.5

³⁶ Dolzer &Stevens “Bilateral Investment Treaties” ICSID 1995, p.98

administration forces a person to give up land that he/she owns for reasons of public utility and with just and prior indemnity.³⁷

9.5. Direct expropriation

Direct expropriation is an absolute physical seizure of the property or a required legal transfer of the title. It benefits the State directly or a third party designated by the State. In case of direct expropriation, there is a clear intentional, and unmistakable purpose to deprive the owner property by the transfer of title or absolute seizure, supported by a written statute, decree, or physical act.³⁸

9.6. Indirect expropriation

Indirect expropriation occurs when a state takes effective control, or interferes with the use, enjoyment or benefit of an investment, even without a direct taking of property.³⁹ Indirect expropriation involves total or near-total deprivation of an investment but without a formal transfer of title.⁴⁰ However there is no commonly accepted definition of indirect expropriation; Determining whether it has occurred depends on the facts and on the treaty language, and on how are interpreted by the dispute settlement body.⁴¹ In the *Starrett Housing* case the tribunal defined indirect expropriation as follow:

It is recognized under international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.⁴²

³⁷ Ghaziani, Moosa A & Ghaziani, Mohammad A "The Role Of Expropriation Clauses In Protection And Promotion Of Foreign Investments In Renewable Energy: An Essential But Overlooked Legal Consideration," Vol. 11: No. 2, Article 8, *Indonesia Law Review* (2022) p.194.

³⁸ UNCTAD, (2012), *op.cit*, p.7

³⁹ International Institute for Sustainable Development "Indirect Expropriation (Regulatory Taking)" <https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/5-investment-provisions/5-4-safeguarding-policy-space/5-4-4-indirect-expropriation-regulatory-taking/> [4/4/ 2023]

⁴⁰ UNCTAD, (2012), *op.cit*, p.7

⁴¹ International Institute for Sustainable Development, *op.cit*

⁴² *Starrett Housing v. Iran*, Interlocutory Award No. ITL 32-24-1, 19 December 1983, 4 Iran-United States Claims Tribunal Reports 122, p. 154.

9.7. Creeping expropriation

Creeping expropriation is a form of indirect expropriation that takes place in series or step by step. Creeping expropriation takes place through a series of actions, none of which might qualify as an expropriation by itself, but the aggregate effect of which is to destroy the value of the investment.⁴³

9.8. Nationalization

Nationalization refers to takings of private property in all economic sectors or on an industry or sector-specific basis. Outright nationalizations in all economic sectors are generally motivated by policy considerations; The measures are intended to achieve complete State control of the economy and involve the takeover of all privately owned means of production. In these cases, the assets taken become public owned.⁴⁴ It is process by which privately owned business is transferred into government or public ownership.⁴⁵

If nationalizations and expropriations are direct, both include the transfer of ownership or the physical possession of the property. In contrast, if these actions impair investment that permanently or deny the owner the right to meaningfully manage, utilize, or control their property, these actions are referred to as indirect expropriations.⁴⁶

9.9. Confiscation

Confiscation, is word from the Latin *confiscation* joining to the *fiscus*, that means transfer to the treasury, is a legal seizure without compensation by a government or other public authority.

This is done on the one hand in favor of public use by means of forced dispossession on certain

⁴³ Christoph S, *The Concept of Expropriation under the ETC and other Investment Protection Treaties*, (2005), p.14

⁴⁴ UNCTAD, (2012), *op.cit*, p.5

⁴⁵Will K, "Nationalisation: definition in the oil industry and the U.S.

"<https://www.investopedia.com/terms/n/nationalization.asp> [7/6/2023]

⁴⁶ UNCTAD, (2012), *op.cit*, p.6

individual and particularly in cases provided by the law. On the other hand, it is done in case of particular case of conviction for crimes, misdemeanors or minor offence. In the case of such infractions, things which constitutes the body of the infraction or which served to its commission, may be confiscated.⁴⁷

⁴⁷ Nyirabagenzi M. Claire, *Legal Implication of Expropriation Process under Rwandan Law*, (Dissertation, ULK, 2012), p.15

CHAPTER II: LITERATURE REVIEW

II.0. Introduction

States have a sovereign right under international law to take property of nationals or foreigners through expropriation for economic, political, social or other reasons. In order to be lawful, the exercise of this sovereign right, the international law set conditions to be met⁴⁸. This chapter reviews in detail the conditions for expropriation to be lawful namely: public purpose, nondiscrimination, due process and payment of compensation. It elaborates the properties, economic rights that may constitute expropriation. It focuses on the essential issue of establishing an indirect expropriation by examine criteria that can facilitate the differentiation between indirect expropriation and normal exercise of regulatory powers by States, in other words it defines the types of measures that can or cannot constitute indirect expropriation. At the end, it indicates valuation methods for measuring compensation.

II.1. The requirements for a lawful expropriation

This part aims to describe the requirements needed for conducting fair expropriation, in the benefit of the state and the people/investors to be expropriated. If those requirements are not met and not respected by hosting State, most of the time the investors to be expropriated suffer the loss in terms of injustice.

Today, according to customary international law there is no doubt that States have the legal authority to expropriate the assets of foreign investors.⁴⁹It has authority to expropriate foreign property because expropriation of foreign property is not prohibited by international law, but it is subject to the following conditions: expropriation must be

⁴⁸ United Nations Conference on Trade and Development (UNCTAD), *Expropriation, UNCTAD Series on Issues in International Investment Agreements II*, New York and Geneva, (2012), p.1

⁴⁹ Fortier L. Yves & Drymer L. Stephen, "Indirect Expropriation in the Law of International Investment" Vol 19 Number 2, *ICSID REVIEW -Foreign Investment Law Journal* (2004), p. 295

done for public purpose, without discrimination, follow due process, and must be accompanied by compensation to the property owner.⁵⁰ To determine the lawfulness of an expropriation, a tribunal should examine whether these four conditions have been met. The analysis of tribunal in turn, allow to conclude whether the expropriation was lawful or not.⁵¹

1.1. Public purpose

Most legal systems and international law agree that an expropriation must be carried out for a public purpose. Property must be taken for a legitimate public benefit goal rather than personal benefits. This condition is recognized under the majority of domestic laws. Similarly, many IIAs generally refer to “public purpose”, whereas some use other formulations such as “public benefit”⁵², “public interest”⁵³, “public order and social interest”⁵⁴, “internal needs”⁵⁵, “national interest”⁵⁶, “public necessity”⁵⁷ and “public purpose related to internal needs”⁵⁸. Most of these formulations have similar scopes and have the same consequence. However, certain formulations can be interpreted as giving a narrower meaning to the requirement.⁵⁹ Even though a public purpose is a very wide term, arguments appear that a more clear commonly accepted public purpose may serve as an indicator or justification for non-compensation.⁶⁰

⁵⁰ Ying Z, “Do Clarified Indirect Expropriation Clauses in International Investment Treaties Preserve Environmental Regulatory Space?” Vol. 60, *Harvard International Law Journal* (2019), p.380, https://harvardilj.org/wp-content/uploads/sites/15/5_Zhu_60.2.pdf [4/4/ 2023]

⁵¹ UNCTAD, (2012), *op.cit*, p.27

⁵² GermanyPakistan BIT (2009),

⁵³ China-Peru FTA (2009),

⁵⁴ Canada-Colombia FTA (2008)

⁵⁵ Hong Kong, China-Thailand BIT (2006) and Israel-Slovakia BIT (2001)

⁵⁶ Chile-Philippines BIT (1997) and Malaysia-United Arab Emirates BIT (1992)

⁵⁷ Peru-Singapore FTA (2008)

⁵⁸ Angola-United Kingdom BIT (2000)

⁵⁹ UNCTAD, (2012), *op.cit*, p.29

⁶⁰ Zenkiewicz M, Compensable vs. non-compensable States’ measures. Blurred picture and changing borderlines under investment law, Society of International Economic Law (SIEL), Sixth Biennial Global Conference (2018),p.33, <https://ssrn.com/abstract=3287271> , [7/6/2023]

1.2. Non-Discrimination

Most domestic law and IIAs generally impose the requirement that an expropriation be taken “on a non-discriminatory basis”, “in a non-discriminatory manner” or “without discrimination”. Arbitral tribunals have found this requirement to have been violated when a State has discriminated against foreign nationals on the basis of their nationality. However, not all distinctions between different types or classes of investors are discriminatory. Tribunals take a nuanced approach to expropriations that affect only some foreigners if such discrimination may be the result of legitimate government policies.⁶¹ When a State discriminates against foreign nationals based on their nationality, arbitral tribunals have determined that this principle has been violated. In order for an expropriation to be considered discriminatory, it must be based on the reason, or motivated by the investor's nationality.⁶²

1.3. Due process of law

The due-process principle requires that the expropriation respect the processes established in domestic law and fundamental international principles recognized in this area, and that the affected investor have chance to lodge a claim before an independent and impartial body for review.⁶³ It is not clearly established whether giving prior notice of the expropriation is necessary as part of the due process requirement. Prior notification is not always necessary, particularly when expropriation is implemented due to an emergency. As long as the expropriation is carried out in conformity with domestic law, in a non-arbitrary way, and with a chance for the investor to have the measure reviewed, the due-process requirements should be regarded as fulfilled.⁶⁴

⁶¹ UNCTAD, (2012), *op.cit*, p.34

⁶² UNCTAD, (2012), *ibidem*, p.35

⁶³ UNCTAD, (2012), *ibidem*, p.36

⁶⁴ UNCTAD, (2012), *ibidem*, p.40

1.4. Payment of compensation

The last condition for expropriation to be lawful is that it must be accompanied by compensation. The amount of compensation may be determined by using different method of valuation discussed in last parties of this chapter. But, the recent IIAs have shown an increasing degree of uniformity with regard to the minimum amount of compensation necessary to make expropriation legal. They include the standard of prompt, adequate and effective compensation. Compensation is supposed to be prompt if paid without delay; adequate if it has a reasonable relationship with the market value of the investment concerned; and effective if paid in convertible or freely useable currency.⁶⁵

II.2. Properties entitled to expropriation

In general, the kinds of properties that can be expropriated are determined under investment agreement.⁶⁶ Definitions of the property protected against expropriation are provided in several BITS and other investment agreements, where real property is no longer the only type of property that may be expropriated; Both tangible and intangible property can be expropriated. Thus, investor is protected from expropriation with regard to a wide range of rights that are economically relevant to him or her.⁶⁷

For example article 1 (6) of The Energy Charter Treaty refers not only to tangible and intangible property but also to every kind of asset, owned or controlled directly or indirectly by an investor includes: movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges; claims for money and claims for performance of a contract having an economic value and associated with an investment; even it protect intellectual property; etc.⁶⁸

⁶⁵ UNCTAD, (2012), *idemt*

⁶⁶ Ghaziani, Moosa A & Ghaziani, Mohammad A "The Role of Expropriation Clauses In Protection And Promotion Of Foreign Investments In Renewable Energy: An Essential But Overlooked Legal Consideration," Vol. 11: No. 2, Article 6, *Indonesia Law Review*: (2021), p.197

⁶⁷ Christoph S, *op.cit*, p.19

⁶⁸ Article 1(6) The Energy Charter Treaty, with Incorporated Trade Amendment (2014)

Another example can be found in North American Free Trade Agreement (NAFTA) Article 201 (l) (g) which provides real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes.⁶⁹

II.5. The background of indirect expropriation clauses

International law recognizes two types of expropriation: direct and indirect. As described in the definition of the key concepts, direct expropriation concerns a state measure that deprives owners of title to property. By contrast, indirect expropriation occurs when a state measure renders the foreign investor's business economically useless, and even without a formal taking of title.⁷⁰

In 2004, Canada and the United States became the first countries to incorporate a relevant Annex in their model BITs. Since 2004, both the United States and Canada have been including such an annex in their FTAs and BITs. For example, the United States' FTAs with Australia (2004), Morocco (2004), Peru (2006); The Rwanda-United States BIT (2008); and Canada's BITs with Peru (2007). Most provisions on indirect expropriation found in recent FTAs and BITs are based on the United States and Canadian BIT models of 2004.⁷¹

II.3 . Steps for conducting indirect expropriation

In the course of international settlement, several international tribunals and courts have done numerous studies. Their evaluations of indirect expropriation are often conducted in the following three steps:

⁶⁹ Article 201 (l) (g) NAFTA (1994)

⁷⁰ Ying Z, *op.cit*, p.380

⁷¹ UNCTAD, (2012), *op.cit*, p.60

3.1. The first step in determining an indirect expropriation is to decide which properties are eligible to be expropriated:

International investment law does not provide expropriation protection for all foreign properties. Only "investment" is protected by the majority of expropriation clauses in investment treaties. The definition of "investment" is critical in deciding not only the coverage of substantive protection clauses, but also the jurisdiction of the arbitral tribunal based on the consent of the parties to arbitration. Many investment treaties define what qualifies as an investment at the beginning of the treaty text, typically with a general definition and an illustration of specific examples of investments.

3.2. The second step is to assess the impact of the measure on the investment

The tribunals weigh both immediate and long-term economic effects of the policy in determining whether the host state's intervention with these properties qualifies as an expropriation. Most tribunals have supposed a decrease in benefit as not constituting expropriation. There have to be a "substantive deprivation" of the property rights or values. As specified the award by the *Iran-United States Claims Tribunal*, the state's measures can be considered as expropriation if they "interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated."⁷²

3.3. The third step is to assess the justifiable grounds for an indirect expropriation

The regulation of host states for the protection of the environment, public health, and other public interests is frequently challenged as indirect expropriation. As a result, the protection of foreign investors from indirect expropriation may go against another well-recognized doctrine in international law: a state's exercise of police powers which does not constitute

⁷² Ying Z, *op.cit*, p.381

expropriation. Consequently, it is crucial to distinguish between compensable indirect expropriation and non-compensable governmental use of police power.⁷³

II.4. Regulatory State measures not subjected to indirect expropriations

In some cases, an act or measure of the State taken in the exercise of the State's police powers or its right to regulate in the public interest can lead to a significant impairment of businesses, and that act cannot be considered to be expropriated. The definition of "police powers" contained in Black's Law Dictionary says that Police power is the inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice"⁷⁴ As long as State has the right to adopt law or measure in the interest or protection of its citizen, then the question arises on how to differentiate between a State measure subjected to expropriation and non-compensable regulatory act of State.

Recent treaties have included specific clarifications in this regard. For instance, the Colombia-India BIT (2009) states:

“Non-discriminatory regulatory actions by a Contracting Party that are designed and applied to protect legitimate public welfare objectives including the protection of health, safety and environment do not constitute expropriation or nationalization; except in rare circumstances, where those actions are so severe that they cannot be reasonably viewed as having been adopted and applied in good faith for achieving their objectives.”⁷⁵

Arbitral tribunals have also recognized this category of measures as not giving rise to compensation. In *Saluka Investments v. Czech Republic*, the tribunal stated that “it is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare.”⁷⁶

⁷³ Ying Z, *ibidem*, p.382

⁷⁴ Black's Law Dictionary, 8th ed., 2004, p. 1196

⁷⁵ Article 6 (2)(c) of the Colombia-India BIT (2009)

⁷⁶ UNCTAD, (2012), *op.cit*, p.13

It is a saying that the right of foreign investors to the protection of their investment often conflicts with the right of States to regulate within their boundaries. On the one hand, the community cannot reasonably be required to bear the normal commercial risks associated with foreign investments. Furthermore, foreign investors should not unjustly enrich themselves by carrying on business in a way that is harmful to the benefit of the people. On the other hand, investors cannot be asked to suffer unreasonable regulation without compensation, and they should not be asked to pay for risks that should be socialized.⁷⁷

In addition, the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, drafted in 1961 by Professors Sohn and Baxter, recognized the following categories of non-compensable takings:

An uncompensated taking of an alien property or a deprivation of the use or enjoyment of property of an alien which results from the execution of tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health or morality; or from the valid exercise of belligerent rights or otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful.⁷⁸

Therefore, State does not commit an expropriation or it is not liable to pay compensation to dispossessed property holders when it adopts a general regulation that is normally accepted as within the police power of States.

If a State does not discriminate and does not intend to force the alien to give up their property to the State or sell it at a low price, State is not liable for any losses in property or other economic hardship brought on by *bona fide* general taxes regulations, forfeitures for crimes, or any other actions generally accepted as falling under state police power.⁷⁹ However, international law has yet to fully and conclusively define certain rules commonly accepted

⁷⁷ Fortier L. Yves & Drymer L. Stephen, *op.cit*, p.298

⁷⁸ Louis B. Sohn and Richard B, Draft Convention on the International Responsibility of States for Injuries to the Economic Interests of Aliens, 55 AJIL 545 (1961), p. 553

⁷⁹ Fortier L. Yves & Drymer L. Stephen, *op.cit*, p.299

as falling under the police power of States and, as a result of not compensable. In other words, international law has failed to clearly establish the difference between regulation and expropriation, particularly indirect expropriation.⁸⁰

II.5. Method of valuation

In the exercise of sovereignty over natural resources, states remain entitled to expropriate foreign property for a public purpose, provided it is done in a non-discriminatory manner and accompanied by payment of prompt, adequate, and effective compensation.⁸¹ Customary international law require States to pay compensation for expropriation, based on a formula that calculates loss from the moment of expropriation. Compensation should be equivalent to the fair market value of the expropriated investment immediately before the expropriation act was taken.⁸²

The valuation of assets and properties is not as easy task. The valuation art proves much more complex when the expropriation or nationalization of a sector of industry or natural resources for public purpose is involved. However, one may state that there exist three main concepts or method for valuation, namely: Open market value, Fair market value and Owner value (Value to the owner). But there are other subsidiary valuation method such as “replacement value” “investment value”, “liquidation or dissolution value” etc.⁸³

5.1. Open market value

Open market value is based on hypotheses, because it assumes that “ a hypothetical willing vendor and hypothetical open market is carried out between a hypothetical sale in a

⁸⁰ Fortier L. Yves & Drymer L. Stephen, *idem*

⁸¹ Robert D. Sloane & Michael W. Reisman “Indirect Expropriation and Its Valuation in the BIT Generation,” 74 *The British Yearbook of International Law* 115, (2004), p.134

⁸² Robert D. Sloane & Michael W. Reisman , *ibidem*, p.133

⁸³ Allahyar M, *The international Law of Expropriation as refrected in the work of the Iran-U.S. Claims Tribunal*, Vol 17, (Martinus Nijhoff Publishers, 1994), p.408

hypothetical willing purchaser on the hypothesis that no one is excluded from buying.⁸⁴ It is considered to be the fair price for a property if sold under normal circumstances, i.e. the seller is not in a dangerous situation and the market is working under normal condition. The predictable amount for which a property should exchange between a willing buyer and a willing seller following effective marketing.⁸⁵

5.2. The fair market value

The fair market value is considered to be more technical valuation. It is required to be certified by the expert valuer or certified auditors and its aim is to be equitable to both parties, to the end it should take into account all circumstances, in order to arrive at a value which is fair to all parties.⁸⁶

5.3. Owner value concept

The “owner value” of property is equal to the total of direct and indirect benefits that the owner could expect from a property and therefore is identical to what may be termed its deprivation value from his point of view.⁸⁷

5.4. Valuation date and its impact

The valuation of compensation or damage for an expropriated investment is highly dependent on the date of valuation.⁸⁸ Establishing a precise valuation date is important to the valuer, who need to know which of the ever-changing factors or group of factors affecting the value of a given property or property right in a given duration of time should or should not be taken into account. The valuation also have a certain bearing on at least a couple of other issues, namely

⁸⁴ Allahyar M, *ibidem*, p.410

⁸⁵ Property Finance Group “Open Market Value” <https://www.propertyfinancegroup.com/glossary/open-market-value/>, [20/6/2023]

⁸⁶ Allahyar M, *op.cit.*, p.410

⁸⁷ Allahyar M, *ibidem*, p.461

⁸⁸ UIO: Det juridiske fakultet, *Valuation of Expropriated Property under Investment Treaty Law*, (215), p.11, <https://www.duo.uio.no/bitstream/handle/10852/44579/639.pdf?sequence=7>, [15/6/2023]

the date when the compensation awarded in a foreign currency must be converted or from which interest, if awarded, upon the principal amount of compensation is to run.⁸⁹ Consequently all the award of the Tribunal has unanimously shared the view that the valuation date is the date on which, or immediately after which, expropriation acts or deprive measures could be considered as having definitively and irreversibly occurred.⁹⁰

For unlawful direct expropriations it is normally easy to determine the date of expropriation since these normally are marked by either a definitive act such as a seizure or a decree that deprives the investor of the investment. For indirect expropriations it can be a challenging process of determining the exact date valuation unless the expropriation is the result of a single act tantamount to expropriation.⁹¹ The date of valuation for indirect expropriations that do not happen at one particular moment (creeping expropriations) will be discussed in chapter IV below.

II. 6. Factors affecting valuation

6.1. Post-expropriation factors (post-valuation date)

A general rule is that post-expropriation or deprivation factors should not be taken into account, in principle, because one of the assumptions in valuation is that the valuer place himself in the time and place when and where the acts or measures with expropriatory or deprivation impact occur, and could not be reasonably expected to give positive or negative credits to any unknown future factors.⁹² The rule established by the tribunal in this connection is that factors not reasonably foreseeable at the time of valuation must be ignored.⁹³

⁸⁹ Allahyar M, *op.cit.*, p.501

⁹⁰ Allahyar M, *op.cit.*, p.501-502

⁹¹ UIO: Det juridiske fakultet, *Valuation of Expropriated Property under Investment Treaty Law*, (215), p.37

⁹² Allahyar M, *op.cit.*, p.516

⁹³ Allahyar M, *ibidem*, p.517

6.2. Pre-expropriation factors (pre-valuation date)

The Tribunals have unanimously held that the impact of all pre-expropriation or pre-valuation factors, including those known on the date of valuation, must be allowed in valuation regardless of the valuation technique used and the types of property involved.⁹⁴ Therefore the compensation should amount to the fair market value of the Investment expropriated at the time immediately before the expropriation or approaching expropriation became known in such a way as to affect the value of the Investment.⁹⁵

II. 7. Conclusion

In few word, expropriation is an unquestionable power of sovereign States. However, this right is controlled by international law and principles in the sense that the taking of investor's property must be done for a public purpose, without discrimination, in accordance with due process, and in exchange for payment of compensation. These condition, are manifested in many IIAs or BITs and some domestic laws, as requirements for expropriation to be done whether direct or indirect. However, the measure of host states taken without discrimination for the protection of the environment, public health, public security is recognized doctrine in international law where a state's exercise its rights of police powers, does not constitute expropriation.

⁹⁴ Allahyar M, *ibidem*, p.520

⁹⁵ Christoph S, *op.cit*, p.2

CHAPTER III: RESEARCH METHODOLOGY

III.0. Introduction

In order to address the problem statement and attain the objectives of this study, different techniques and methods were employed in this research. Therefore, this section discusses the design adopted by the study, the area and population of the study, the sampling procedures, as well as methods of data collection and analysis that were used in carrying out the work.

III.1. Research design

The study employed a qualitative research design. A qualitative research design is one that is used to explore diverse experiences and subjective perspectives on the issues being investigated and present them using the descriptive richness of text narratives⁹⁶. This design enabled the researcher to closely examine the current status quo, and bring in the comprehensive diversity of views from informants and documentary review. In line with Majid⁹⁷, in-depth opinions and attitudes on the research problem were collected from primary data given by selected participants and secondary data from relevant documents. This brought into the study the voice of study participants and ensured that the findings are grounded in participants' experiences.

III.2. Area of the study

Considering that Rwanda is not a huge country, the study was nationwide, covering foreign investments companies. This was to ensure that the study reflected a national character and

⁹⁶ Akaninwor G, I, Ken, *A Hand Book on Research Methods and Statistics (Paradigms in Education, Science and Technology)*, Wilson Publishing Co. Ltd, (2006), p.12

⁹⁷ Majid U, "Research fundamentals: Study design, population, and sample size" Vol 2, Issue 1, *URNCSST Journal* (2018), p.1; <https://urncst.com/index.php/urncst/article/view/16> [13/10/2023]

outlook. To avoid bias within this scope, the companies used in this study, were purposively selected.

III.3. Population and sampling

The respondents in this survey were selected from institutions concerned to investment and expropriation as well as dispute settlement bodies. They included investment companies, the Orient Chambers Ltd, Ministry of Finance and Economic Planning, Ministry of Foreign Affairs, Kigali International Arbitration Center, Commercial Court and Commercial High Court. Thus, seven respondents were purposively selected and were regarded as key informants.

III.4. Data collection methods and instruments

4.1 Research instruments

A total of three data collection tools were use in this study. They were document review, an open-ended questionnaire, and interview guide.

Document review: Information that had been collected by other researchers and organizations for other purposes and was relevant to the study, was utilized as Secondary data by the researcher for this study.⁹⁸ The inclusion included were documents that had important information about the issues that were being investigated and could appropriately be used to answer the research question.⁹⁹ Documents included: law, books, arbitral awards, journal articles, reports and newspaper articles.

⁹⁸ Maxwell J, A “Qualitative Research Design: An Interactive Approach” *Article* (2012), p.227

⁹⁹ Levy P, *Research Design; Quantitative, Mixed Methods, Arts Based and Community-Based Participatory Research Approaches*, New York: The Guildord Press, (2017)

Open-ended questionnaire: An Open -ended Questionnaire was used to obtain detailed information from Ministry of Finance and Economic planning, Ministry of Foreign Affairs, KIAC, Commercial Court and Commercial High Court. The questionnaire was used to obtain information from respondents on arbitral awards, case law or judgments talking about expropriation of foreign investment particularly indirect expropriation which makes investment to be useless. Structured questions allowed the collection of specific data. Using questionnaires also allows the respondents some time to reflect on answers to avoid quick responses.

Interview guide: An interview guide was used to collect information from key informants who were selected from institutions connected to investment and expropriation as well as investment dispute settlement institutions. Interviews were used because the study targeted respondents' real opinions on the research problem. The interview questions focused on the major themes of the study. Interviews were also used because they give an opportunity to the researcher to probe and obtain detailed information on the research question. In addition, interviews help the researcher to triangulate the information collected by questionnaires, thus giving validity to the data collected. For this particular study a semi-structured type of interview was adopted using an interview guide with open-ended questions. In a semi-structured interview, the researcher works out questions in advance but can change the wording of questions, give explanations and may leave out questions which seem inappropriate with a particular interviewee or add new ones.¹⁰⁰

¹⁰⁰ Creswell J W, *Research Design: Qualitative, Quantitative and Mixed Methods Approaches*, Thousand Oaks, CA: Sage, 4th ed, Article, Vol. 12, No. 5, (2014)

4.2 Research procedures

The legal instruments including law, books, arbitral awards, journal articles, reports etc, were assessed online on the website of respective institutions. After paraphrasing the findings, the report was written and given to the supervisor for approval. The instruments were demonstrated through references of footnotes and bibliography. Changes were made as recommended by the supervisor.

For the interview, the instruments were constructed and given to the supervisor for approval. The supervisor ascertained the face validity and language of the instrument. Changes were made as recommended by the supervisor. After the approval, the researcher went out in the field. The researcher introduced himself to the respondent, and he explained the purpose of the research and its benefits. The researcher assured the respondents of confidentiality in relation to the information they provided.

III.5. Quality control

To preserve the integrity of the data obtained during research, data quality management is essential.¹⁰¹ In order to collect reliable and valid data, the researcher ensured that good instruments were used. Good research instruments are required to be reliable and valid. Besides, they should be easy to complete so that respondents are motivated to provide honest responses.¹⁰² Therefore, the doctrinal research is aimed at the systematization and critique of a defined body of law. The general aim is to persuade other legal professionals fellow legal academics, practicing lawyers, arbitrators, judges, BITs negotiators, law maker and law reformers of the researcher's understanding of the state of the law and the seriousness of the

¹⁰¹ Anon, "What is data quality control?", <https://www.accelldata.io/article/what-is-data-quality-control>, 26/09/2023

¹⁰² Asiimwe F, *The Role of Corporate Governance in the Performance of SMES in Uganda: Case Study of Kampala District*, (Thesis, Uganda Martyrs University, 2011), p.27

gap identified¹⁰³ in Rwandan investment and expropriation laws. Legal theoretical differences about the nature of law and legal reasoning should affect assessments of the quality of doctrinal research.¹⁰⁴ In this situation, the doctrinal researcher was required to fill the gap in the law using legal reasoning.

III.6. Content validity

Because in doctrinal legal research, academicians and researchers focus on judicial decision making and other aspects of the practice of law, the study invariably engages with legal theory as the formal representation of the institutionally relevant, value-laden reasons of legal actors.¹⁰⁵ It is only when doctrinal researchers become more ambitious, and try to persuade law-makers to engage in a major piece of social reform that problems arise.¹⁰⁶

The value of doctrinal research is not always understood. Legal textbook preparation may appear to non-lawyers to be a purely descriptive effort in which the author does nothing more than summarize court judgments and arrange them in logical order. Legal textbooks and journal articles generally hide the steps involved in their development, giving the impression that they are more detailed than they actually are. This is because they do not highlight the frequently significant analytical labor that goes into their preparation.¹⁰⁷

¹⁰³ Theunis R "Judging the Quality of Legal Research: A Qualified Response to the Demand for Greater Methodological Rigour," *Legal Education Review*: Vol. 24 : Iss. 1 , Article 10, (2014), p.178; <https://epublications.bond.edu.au/ler/vol24/iss1/10> [26/09/2023]

¹⁰⁴ Theunis R, *ibidem*, p.189

¹⁰⁵ Theunis R, *ibidem*, p.179

¹⁰⁶ Theunis R, *ibidem*, p.180

¹⁰⁷ Theunis R, *ibidem*, p.185

III.7. Reliability of the findings

When an instrument is reliable, it produces consistent responses because it is interpreted well. If the desired variable is not measured reliably, the information obtained will not be correct and therefore will not be valid.

The first point goes to the form in which doctrinal research is presented. The style, like that of legal professional practice, is often very argumentative¹⁰⁸ viewpoints the very antithesis of the style most scholarly disciplines regard as necessary to the production of reliable knowledge. Initial data were used to help in enhancing the reliability of the instruments. Data from the law, books, journal articles, newspapers and reports were tested to find the gap.

On the second view point, the interview used simple language to make respondent understand questions in order to avoid ambiguity or problems related to misinterpretation. Additionally, the formulation of the statements was kept simple in order to avoid any response biases by leading the respondents to agree or disagree with the statement. By confirming that the respondents' answers are kept strictly confidential and therefore, expressed their true feelings against the statements. For this reason, no names were asked to be noted down. Therefore, the attempt of the respondents to make a good impression was minimized.

On the third view point, the answer to any doctrinal research question lies in resources always already present in the legal system in the practices of the relevant interpretive community, retrieved and then creatively applied to the problem at hand. Therefore, the researcher was familiar with the authoritative sources of law in the legal system concerned, and also the

¹⁰⁸ Theunis R, *ibidem*, p.185

accepted criteria for reasoning from those sources to legally defensible conclusions. However, the law in the end especially domestic law, provide no answer to the problem. In that case, the researcher went in search of the answer.¹⁰⁹

As a result, this doctrinal research is a description of the present law, but it shifts to interpretation when the law is used in practice or when experts and academics provide their judgments on the existing law¹¹⁰ i.e. the researcher described and interpreted the legislation, BITs and arbitral awards relating to investment and expropriation with critical analysis.

III.8. Data management and analysis

After data was collected, it was edited, and paraphrased. Descriptive method and qualitative responses were analyzed using content and thematic analysis in line with the study objectives. Since Doctrinal research is firstly an interpretative, qualitative analysis to prescribe what the law is for any specific situations. This doctrinal research is a mixture of interpretive and critical analysis, as well as descriptive to a specific law application .¹¹¹Therefore, this research described and interpreted the investment and expropriation laws by making critical analysis.

The main insight was that doctrinal research proceed on the back of a research question in the traditional sense, i.e. a question aimed at filling a gap in a defined body of law or academic knowledge. The method used to answer a legal-doctrinal research question is rarely a purely empirical one, although factual data may be relevant to the argument. Rather, the method is to apply the reasoning norms of the legal system concerned to arrive at a convincing statement of the law.¹¹²

¹⁰⁹ Theunis R, *ibidem*, p.189

¹¹⁰ Coetsee D, “A Doctrinal Research Perspective of Master’s Degree Students in Accounting”, *South African Journal of Higher Education*, Volume 32 | Number 1 (2018), p.75

¹¹¹ Coetsee D, *ibidem*, p.74

¹¹² Theunis R, *op.cit*, p.186

The best of this doctrinal research was able to draw conclusion on a vast field of reference, familiar with a lot of positive law both local and foreign that could be relevant to the questions they are trying to answer. This allowed researcher to recognize and to recommend effects of new legal changes that less skilled scholars would not overlook before.

III.9. Ethical consideration

For doctrinal research a very important research tool is based on underlying principles and rules developed in practice. These principles and rules are not legitimated through research, but through the sovereignty of the source. For instance, the source of legal doctrine is legislation and case law. Therefore doctrinal research provides a means of interpreting and criticizing these source of doctrines.¹¹³In this regard, doctrinal research literature and the findings raises the law reform orientated framework, which intensively evaluates the adequacy of existing law and which recommends changes to the gap found in the law. This reform orientated research is a form of critical research that demands and recommend what the law on investment and expropriation should be.

For interview, the ethical issues pertaining to the methods of data collection were observed. These involved confidentiality and informed consent. The researcher assured respondents that their responses would only be used for research purposes and that they would not be given to anybody without their express permission. The researcher also first obtained permission from the respondents themselves before conducting the research. The respondents were assured that they were free to withdraw from the study in case they felt uncomfortable about the research questions.

¹¹³ Coetsee D, *op.cit*, p.75

CHAPTER IV: DATA PRESENTATION, ANALYSIS AND DISCUSSION ON THE FACTORS THAT ATTRACT FOREIGN INVESTMENTS

IV.A. The factors that attract foreign investments

0. Introduction

Foreign direct investment (FDI) happens when the host State has an investment opportunity that it cannot exploit itself due to financial constraints, a lack of technical expertise, or an insufficiently developed market, for that reason a multinational company may be able to exploit of that opportunity because it has resources, management expertise, and technological capabilities.¹¹⁴ FDI is a significant source of funding for economic growth and helps to create jobs etc.¹¹⁵ For better understanding the role of expropriation in attracting foreign investments, this chapter discuss background of FDI, Sources of law governing foreign investment, factors for attracting foreign investments, the utility of IIAs as factors for attracting FDI, factors attracting FDI to Rwanda, as well as advantages and disadvantages of FDI, expropriation is discussed as one of disadvantages.

1. Historical background of foreign direct investment

Most developing countries have become significantly more open to FDI since the mid-1980s. In order to benefit from the development, especially high-quality FDI may create for host states, since the early 1990s, evolution economies have joined in this development. In the decades that followed World War II, countries began to perceive that transnational corporations no longer as part of the problem but as part of the solution, bringing not only much capital to

¹¹⁴ Azzimonti M, & Pierre-Daniel G. Sarte, *Barriers to Foreign Direct Investment Under Political Instability*, Volume 93, Number 3, (2007), p.287, <https://core.ac.uk/download/pdf/6993656.pdf> [29/7/2023]

¹¹⁵ World Bank Group, *Rwanda Economic Update, Inclusiveness of Foreign Direct Investment in Rwanda*, Ed. No 21, (2023), p.14

motivate progress and development, but also technology, expertise, access to international markets, and the creation of job. As a result, new institutions and policies focused on attracting FDI were introduced to replace old ones that were restrictive.¹¹⁶

Therefore, many developing States and countries in transition have removed barriers and restriction on FDI entrance, they supported standards for treating and protecting foreign investors, and decreased limitations on such investments. They frequently also establish incentive programs for Transnational corporations since they are in competition with other countries to attract FDI. The creation of export processing zones and investment promotion agencies was also another measure used to encourage FDI. The process of opening up to FDI and creating enabling frameworks for FDI greatly increased in 1990s, and has continued until this day, however recently, there have also been signals of more restrictive FDI policies in numerous countries.¹¹⁷

2. Source of law governing foreign investment

The primary source of law which regulate and manages foreign investment is ordinarily the domestic law of the state where the investment is made (i.e., the host State). They could be laws governing the establishment of such investments, taxes, expropriation, property laws, labor laws, human rights legislation, banking regulations, or environmental laws pertaining to the placement and operation of investments and their possible effects. These laws are all standard tools used by domestic governments.¹¹⁸

¹¹⁶ UNCTAD, “The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries, UNCTAD Series on International Investment Policies for Development,” New York and Geneva, (2009), p.1

¹¹⁷ UNCTAD, (2009), *idem*

¹¹⁸ Bernasconi N *et al*, *Investment Treaties & Why they Matter to Sustainable Development: Questions & Answers*, The International Institute for Sustainable Development (IISD), (2012).p.3, https://www.iisd.org/system/files/publications/investment_treaties_why_they_matter_sd.pdf, [1/8/2023]

The second source of law regulating foreign investment are international investment contracts. These are direct agreements between a foreign investor and the host government, sometimes known as host government agreements. These contracts do not always exist when there is a foreign investment treaty.

The third source of law are investment treaties between governments, which govern the promotion and protection of foreign investment. They offer specific safeguards under international law for investors from home state investing into the territory of the other State which is host State. Bilateral investment treaties (BITs) are the most popular type of investment agreement.¹¹⁹

3. Factors for attracting foreign direct investment in the host country

Strategies used to attract FDI, can vary from country to another. Generally, such strategies should consist of creating a favorable investment climate by creating a national investment regime and liberalized economy by reducing entrance obstacles by creating the relationship with the foreign countries etc.¹²⁰

There are some influential factors that can help to attract the investors. Good infrastructure, favorable government policy, tax exemption, political stability, social safety, availability of recourses these can be the influential factors to attract the FDI.¹²¹ In other words, to make attraction of FDI, one common condition is that country has to be open to receive FDI. The level of political stability is an important factor in calculating the political risk of investing in a host State. Additional factors to consider are the host nation's physical and technological

¹¹⁹ Bernasconi N *et al*, *op.cit*, p.3

¹²⁰ Balinda N. Steven, "Factors Attracting Foreign Direct Investments (FDIs) in Rwanda: The Case of Selected Companies" Vol-1, *Saudi Journal of Business and Management Studies*, (2016), p.62

¹²¹ Haudi H, Hadion W & Yoyok C, "Analysis of Most Influential Factors to Attract Foreign Direct Investment", Vol 7, *Article in Journal of Critical Reviews*, (July 2020), p.4134

infrastructure, the cost and quality of resources, as well as business facilitation measures like FDI promotion, including incentives to foreign investors.¹²²

4. The function of international investment agreements as factors for attracting investment

Many developing states appear to believe that after signing an international investment agreements or bilateral investment treaty with another State, FDI from that State will come in immediately. If this does not occur, IIAs may be criticized as being useless and there may be significant dissatisfaction over their function. However, such criticism is based on an incorrect evaluation of the function of IIAs. There is no single cause link connecting the conclusion of IIA and FDI inflows. The presence of IIAs is by no means the only factor that determines whether FDI happens or not. There are other factors, such as a host nation's economic attractiveness, market size, labor force, or availability of natural resources, may be even more significant.¹²³

The majority of BITs and IIAs in particular, protect foreign investors against some political risks in the host State and to promote foreign investment. IIAs may influence FDI inflows by enhancing certain aspects of the institutional and policy framework for FDI in the host nation, boosting the business environment. IIAs help to lower the risks of investing in developing nations by safeguarding a particular standard of treatment for foreign investors and creating a procedure for international dispute resolution.¹²⁴ In general, IIAs may help to make host State investment frameworks more transparent, predictable, and stable. They may also, in some cases, be used to make up for a host country's auxiliary institutional standards in the area of

¹²² UNCTAD, (2009), *op.cit*, p.6

¹²³ UNCTAD, (2009), *idem*

¹²⁴ UNCTAD, (2009), *op.cit*, p.14

property rights protection. In order to analyze their influence on the attractiveness of FDI, each of these three processes is further addressed as follow:¹²⁵

4.1. Foreign direct investment protection

IAs work to encourage FDI by helping to provide an environment that is stable and favorable for investment. The idea that having laws that are transparent and enforced to protect foreign investors will lower political risk and make host States more attractive. Additionally, by allowing foreign investors access to international arbitration, host country governments demonstrate a strong commitment to maintain their responsibilities, which should increase investor trust.¹²⁶

The legal protection of FDI under public international law is guaranteed by IAs. There are countless BITs, numerous multilateral investment treaties, like the Energy Charter Treaty, and certain free trade agreements (FTAs) also contain clauses safeguarding direct investment. The majority of States ratified these accords in the 1980s and 1990s. These legal documents give foreign investors substantial legal protection as well as access to dispute resolution recourse against host States for violations of such protection.¹²⁷

Among protection granted by investment agreements, include protection of foreigner investment against arbitrary expropriation. They guarantee “compensation based on international standards in case of expropriation of foreign property. They guarantee also the free transfer and repatriation of capital and profits, as well as dispute settlement, in case of

¹²⁵ UNCTAD, (2009), *idem*

¹²⁶ UNCTAD, (2009), *ibidem*, p.15

¹²⁷ University of Melbourne, “International Investment Law”, <https://unimelb.libguides.com/c.php?g=929887&p=6719573>, [31/7/2023]

investment dispute, the right of the foreign investor to challenge the host country measure before international arbitration panel.”¹²⁸

While there is a low risk of outright expropriation in today's world, there is still a risk of creeping or indirect expropriation. This risk can take many different forms, including non-payment to the investor, cancellation of investment authorizations by the government of the host country, or the denial of justice. IIAs address this issue by requiring host States to provide compensation if the foreign investor is involuntarily expropriated as a result of such government action.¹²⁹

4.2. Foreign direct investment liberalization

Most IIAs especially most BITs, even those signed recently, are limited to protect existing investments and do not contain pledges to liberalize FDI. But certain countries, like Canada or the USA, include the pre-establishment phase in their treaties. For instance, the "United States or NAFTA model" accords foreign investments both national treatment and most-favored nation treatment. Additionally, United States BITs liberalize operations of foreign investors by eliminating or relaxing some prohibitions on the recruitment of expatriate staff and by prohibiting a number of specified performance standards.¹³⁰

4.3. Transparency, predictability and stability

International investors increasingly value characteristics such as policy coherence, transparency, predictability, and stability of host States' laws and regulations as grow more welcoming to international investors and converge in crucial areas.¹³¹ Apart from the economic

¹²⁸ UNCTAD, (2009), *op.cit*, p.16

¹²⁹ UNCTAD, (2009), *idem*

¹³⁰ UNCTAD, (2009), *op.cit*, p.20

¹³¹ UNCTAD, (2009), *ibidem*, p.23

factors, macroeconomic and political stability have been found to be most significant FDI factors.¹³²

From entry and operations up to the closure of FDI project, foreign investors frequently interface with a number of authorities in the host country. Thus, it is crucial that these authorities behave in a consistent and predictable manner. Ensuring policy consistency is one of the crucial roles played by investment promotion organizations, which can be found in around 180 different countries.

Transparency means that intentions of host countries towards FDI, are known and clearly spelled out in laws and regulations. Some IIAs provide that if new policies are adopted, individuals who may be impacted must be informed as soon as possible. Stakeholders may also be consulted while developing new policies.¹³³

Furthermore, to the extent that FDI offers investments that are of a long-term nature, foreign investors also expect a certain degree of predictability and stability in the host country's FDI policies, i.e. there will be no sudden changes in the policy parameters, affecting adversely or even ruining existing business plans.¹³⁴

5. The link between signing international investment agreements and attracting foreign investments

Many governments perceive IIAs to be an essential part of a plan to attract foreign investment in developing nations. However, scholars and others writers have attempted to ascertain if signing a foreign investment treaty genuinely causes an increase in foreign investment inflows.

¹³² UNCTAD, (2009), *ibidem*, p.24

¹³³ UNCTAD, (2009), *ibidem*, p.24

¹³⁴ UNCTAD, (2009), *idem*

The reality found is that certain developing States, of which Brazil is the best example, have been quite successful in attracting foreign investment from countries which do not have IIAs. Other States have signed IIAs but haven't attracted much investments. The success of certain States in attracting investment without IIAs in place and the failure of those that have signed them just serve to highlight the reality that there are several factors that influence foreign investors' decisions over where to deposit or invest their money.¹³⁵

Signing IIAs is not the only element considered by investors. The domestic policy environment, including its openness to trade and investment, initiatives to promote investment, participation in preferential trading agreements, and its transparency, are important factors investors consider when taking a decision of where to invest their money, they also consider market size.¹³⁶

The host country factors for attracting FDI comprise of the general policy framework for foreign investment, including economic, political and social stability, the legislation affecting foreign investment and any other policies affecting FDI locational decisions, as well as business facilitation, including investment promotion. Therefore, IIAs are parts of the policy framework for foreign investment, and are only one of many factors that impact on a company's decision where to make an investment. However, IIAs alone can never be a sufficient policy instrument to attract FDI. Other host country's factors, in particular the economic factors, play a more powerful role.¹³⁷

¹³⁵ VanDuzer A, Penelope S & Graham M, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries*, (Marlborough House, 2012), p.19

¹³⁶ VanDuzer A, Penelope S & Graham M, *idem*

¹³⁷ VanDuzer A, Penelope S & Graham M, *idem*

6. The role of international investment agreements in attracting foreign investors

The idea of defending foreign investments from expropriation has always been backed by international investment law. However, conventional international law rules have typically acknowledged the host State's right to expropriate foreign property in conformity with the notion of territorial sovereignty.¹³⁸

The role of signing an IIA creates an international commitment by a host country to comply with investor protection obligations in the treaty in relation to investors from the other State party. The anticipated effect is increased investment by investors from the other party State. Furthermore, signing an IIA typically communicates to foreigner investors that a country is serious about protecting their rights and interests. The expected effect is increased investment from all countries.¹³⁹

7. Expropriation of cross border investments vis a vis political risk

This sub section, answer the first question regarding how cross border investment should be protected against political risk relating to indirect expropriation when political measures between two countries in conflict affect cross border investment.

The solution was drawn from secondary data where United Conference of Trade and Development of 2009 on The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries, said that foreign investor who worries about the political risks of investing in a host developing State could purchase political risk insurance from a variety of sources, including commercial insurers, state-supported investment agency in the home country, or host country agencies.

¹³⁸ Olajide A. Martins, "The Concept of Expropriation in International Investment Law", (2022) <https://www.linkedin.com/pulse/concept-expropriation-international-investment-law> [4/7/2023]

¹³⁹ VanDuzer A, Penelope S & Graham M, *op.cit*, p.20

Any political risk may be covered by a political risk insurance policy, including the risk of expropriation, cancellation of permissions, asset confiscation, currency inconvertibility or non-transferability, war, riots, etc. Therefore, this insurance might and does replace BITs for many investors in terms of political risks, particularly in countries with whom the investor's home country does not have a BIT.¹⁴⁰

Investments in host countries having BITs may also be covered by political risk insurance. Even though a BIT provides a similar level of protection, investors may decide to use insurance because is a better approach to deal with political risks than a long and expensive lawsuit before an international tribunal. If an insurer accepts the claim, payment is made right away and the insurer assumes control of the claim and legal proceedings against the host government.¹⁴¹

8. Factors attracting foreign direct investment to Rwanda

Increasing exports and attracting foreign direct investment are central priorities of the Government of Rwanda.¹⁴² Through a variety of initiatives to enhance the investment climate in the country, the Rwandan government has worked very hard to increase FDI. A variety of supportive mechanisms have been put in place, including a one-stop shop where new enterprises may register and where investors can obtain information, venues for dialogue between senior management and business leaders, among others. A new investment code was approved by policymakers with the intention of offering incentives to investors. The government has also created a number of special economic zones, including Kigali free zone and Kigali industrial park free-trade zone.¹⁴³

¹⁴⁰ UNCTAD, (2009), *op.cit.*, p.18

¹⁴¹ UNCTAD, (2009), *ibidem*, p.18

¹⁴² Philip E, Patrick M. Sharry, & Kasim G, *Raising exports and attracting FDI in Rwanda*, (2016), p.1

¹⁴³ Gatsinzi R, *Determinants of Foreign Direct Investment in Rwanda*, (Thesis, Umea University, 2021), p.6

The Rwandan government has pushed for a number of measures to enhance the investment environment and improvement of private investment, particularly FDI. It has a number of favorable regulation, such as exemptions from corporate income taxes, the ability to import materials duty-free, no limitations on foreign ownership, and one of the region's most liberal visa policies.¹⁴⁴

Other important factor attracting foreign investment into Rwanda is the country's strong governance record.¹⁴⁵The security on Rwandan territory played a significant role in encouragement of investor confidence because the investment refers to allocation of funds in an activity covering a specific area. Thus, foreigner investors could not send their money for loss and damage if Rwanda is politically unstable.¹⁴⁶

The investment climate is also influenced by international treaties to protect foreign investors, where Rwanda has signed 14 BITs, and broader trade agreements with other regional partners including EAC and COMESA also contain provisions on investment. It has adopted the African Continental Free Trade Area (AFCFTA) Investment Protocol, which seeks to assist member states in establishing regulations to safeguard investors from regulatory risks and enhance their investment competitiveness by establishing dispute.¹⁴⁷

9. The role of Rwandan regulations in attracting foreign investments

Rwanda has recognized and enacted three laws relating to investment promotion and facilitation. The first law promoting and facilitating investment in Rwanda was enacted in 2005. It was entitled the law N° 26/2005 OF 17/12/2005 relating to investment and export promotion and facilitation. This law was repealed in 2015 by the law N° 06/2015 of 28/03/2015

¹⁴⁴ World Bank Group, *op.cit*,p.15

¹⁴⁵ World Bank Group, *op.cit*,p.15

¹⁴⁶ Balinda N. Steven “Factors Attracting Foreign Direct Investments (FDIs) in Rwanda: The Case of Selected Companies“*Saudi Journal of Business and Management Studies*, Vol-1, (2016), p.65

¹⁴⁷ World Bank Group, *ibidem*, p.16

relating to investment promotion and facilitation. The later, was also repealed in 2021 by the law N° 006/2021 of 05/02/2021 on investment promotion and facilitation.

The investment law of 2005 last approximately 16 years, while the law enacted in 2015 last approximately 7 years. Even though those change was made to make investment climate more favorable but it should be better if the state enact the long lasting investment law which can be repealed after 50 years at least, in order to make regulation stable. As discussed above, the stability of the law may play the role in attracting more foreign direct investment.

10. Advantages of foreign direct investment

FDI play very fundamental role in the economic development of the State.¹⁴⁸It has several advantages for both investors and the host country. Thus this research mentions some significant advantages of FDI as follow:

10.1. Increase employment and economic growth

FDI supports the host state's economic development and job creation. Large organizations need a lot of human resources when they open a manufacturing or company abroad. A chance to work on a new platform is given to people. This is among other factors makes developing countries usually to welcome FDI. In Bangladesh, there are only 274 Japanese enterprises, compared to about 9,500 in India and 4,500 in Thailand. Numerous job opportunities were made available to locals by these businesses. The creation of several jobs is possible with each new investment made by a foreign firm.¹⁴⁹

¹⁴⁸ Balinda N.Steven, *op.cit*, p.59

¹⁴⁹ Haudi H, Hadion W &Yoyok C, *op.cit*, p.4132

10.2. Development of backward areas

One of the most important advantages of FDI for a developing country is that backward regions can become industrial centers from FDI. They support the growth of small industries, the development of the transportation and communication systems, and other areas.¹⁵⁰

10.3. Introduce new technology

FDI investors are normally the main investors; they control the market for that specific product. They are well-off, use the newest technology, and try out any new business idea. As a result, the host State has the chance to get used to those new technologies. Sometimes the host State can acquire that technology for free because it allows international investment.¹⁵¹

10.4. Global market access

Foreign investment necessitates the need for export and import-related operations. So when FDI in the host nation increases, it signifies that country has the chance to improve its access to the global market. Even if it is done by investors, their systematic increased export and increased import are reported as the host country's total export and import volume.¹⁵²

10.5. Creation of a competitive market

FDI helps to create competition and take down domestic monopolies by making foreign businesses to enter the domestic market. A healthy competitive environment encourages innovation by pressuring businesses to improve their procedures and product lines over time. Additionally, customers have access to many different products at low prices.¹⁵³

¹⁵⁰ Haudi H, Hadion W & Yoyok C, *idem*

¹⁵¹ Haudi H, Hadion W & Yoyok C, *idem*

¹⁵² Haudi H, Hadion W & Yoyok C, *ibidem*, p.4132

¹⁵³ Haudi H, Hadion W & Yoyok C, *ibidem*, p.4133

11. Disadvantages of foreign direct investment

Even though there are many advantage but also there are disadvantages of FDI, some of them are following:

11.1. Hindrance to domestic investment

Domestic investment face difficulties because of the impact and significant role of FDI. The domestic companies get smallest chance to expand and compete with the market's dominant force. They are incapable of thinking about expanding or taking the lead globally. Fear of competing with them or growing as FDI investors increase keeps domestic business owners from expanding.

11.2. Political changes

FDI is highly at risk because of political situations in other States can change. Furthermore, the majority of the risk elements that investors may encounter are very high. Foreigner investors may lose everything as a result of the political disorder. Both investors and the host State are harmed by it, because if investors are unable to operate their businesses, the government's ability to collect taxes from that company would suffer and the company's activities will collapse and fall down .¹⁵⁴

11.3. Expropriation

The political changes can also lead to expropriation; In such case the government would have authority over assets belongings to investors. Political crises, war, internal conflict in country can disorganized the investment. Unwanted authorities may take it away .¹⁵⁵A change in the institutional environment that lowers the value of an investment without necessarily seizing

¹⁵⁴ Haudi H, Hadion W &Yoyok C, *ibidem*, p.4133

¹⁵⁵ Haudi H, Hadion W &Yoyok C, *idem*

property is known as an indirect expropriation. Indirect expropriation is defined as excessive regulatory measures that have a de facto confiscatory effect that results in deprivation of the investor ownership, control or interests in his/her investment.¹⁵⁶

12. Conclusion

There are many factors that may help to attract foreign investments. These factors include good infrastructure, a supportive political environment, tax exemptions or other incentives, political stability, and the availability of resources. The increase of foreign investments in a given country is connected with the signature of IIAs or BITs because these agreements play role of encouraging and attracting foreign investments. They also play the role to protect foreigner investors property rights; In particular, they improve investment protection. Even though there are so many advantages of FDI, but there are some disadvantages that may affect host country or foreign investors. These advantages include political change and expropriation. The way direct or indirect expropriation is done on investment is still problem. However, expropriation should be one of the factors attracting foreign investments. This issue is going to be discussed in following party B.

However, foreigner investor who worries about the political risks of investing in a host State could purchase political risk insurance. Any political risk may be covered by a political risk insurance policy, including the risk of expropriation, cancellation of permissions, asset confiscation, war, riots, etc. Investments in host countries having BITs may also be covered by political risk insurance. Even though a BIT provides a similar level of protection, investors may decide to use insurance because is a better approach to deal with political risks than a long and expensive lawsuit before an international tribunal.

¹⁵⁶Azzimonti M & Pierre Daniel G. Sarte, *op.cit*, p.290

IV.B. Bilateral Investment Treaties Rwanda is party and the feature of domestic law

0. Introduction

Many countries have enacted investment laws that include protections against the expropriation of foreign investment without payment of compensation. These countries intend to eradicate any fear of expropriation that investors may have against their properties.¹⁵⁷ Azzimonti & Pierre-Daniel said that “the degree of protection of property rights, are key in determining the expected return to foreign investors. Countries with relatively poor legal protection of assets, and a high degree of political instability, generally show high rates of expropriation and this makes investment less attractive.”¹⁵⁸ This chapter examines the gaps in domestic law to the protection of investors’ property, which can be the barrier for attracting foreigner investors in Rwanda and obstacles that can prevent the successful execution of bilateral investment treaties in promotion and attraction of Foreign investments. Analysis of legal framework relating to expropriation and legal disputes involving investments, indirect expropriation has received particular focus.

1. Bilateral investment treaties Rwanda signed with other countries

Before detailing BIT Rwanda has signed, it could be better to recognize that “the more an agreement protects foreign investments against expropriation, the more foreign investment will be attracted.”¹⁵⁹ Thus the following are Bilateral Investment Treaty Rwanda Signed with other countries. They are arranged from the recent one to the old one, and they indicate whether is in force or not, as long as the act of signature is not enough to make treaty be binding:

¹⁵⁷ Ghaziani, Moosa A & Ghaziani, Mohammad A "The Role of Expropriation Clauses In Protection And Promotion Of Foreign Investments In Renewable Energy: An Essential But Overlooked Legal Consideration," Vol. 11: No. 2, Article 6, *Indonesia Law Review* (2021), p.193

¹⁵⁸ Azzimonti M, & Pierre-Daniel G. Sarte, *Barriers to Foreign Direct Investment Under Political Instability*, Volume 93, No 3, (2007), p.288

¹⁵⁹ Ghaziani, Moosa A & Ghaziani, Mohammad A, *op.cit.*, (2021), p.205

No	Short Title	Date of signature	Date of entry into force
1	Democratic Republic of the Congo-Rwanda BIT (2021)	26/06/2021	not in force
2	Central African Republic - Rwanda BIT (2019)	15/10/2019	not in force
3	Qatar -Rwanda BIT (2018)	15/11/2018	not in force
4	Singapore-Rwanda BIT (2018)	14/06/2018	16/10/2020
5	Rwanda-United Arab Emirates BIT (2017)	01/11/2017	17/01/2020
6	Rwanda-Turkey BIT (2016)	03/11/2016	not in force
7	Morocco-Rwanda BIT (2016)	19/10/2016	not in force
8	Korea Republic-Rwanda BIT (2009)	29/05/2009	16/02/2013
9	Rwanda-United States of America BIT (2008)	19/02/2008	01/01/2012
10	BLEU (Belgium-Luxembourg Economic Union)-Rwanda BIT (2007)	16/04/2007	not in force
11	Mauritius-Rwanda BIT (2001)	30/07/2001	not in force
12	Rwanda-South Africa BIT (2000)	19/10/2000	not in force
13	BLEU (Belgium- Luxembourg Economic Union)-Rwanda BIT (1983)	02/11/1983	01/08/1985
14	Germany-Rwanda BIT (1967)	18/05/1967	28/02/1969 ¹⁶⁰

Looking at the number of BITs mentioned above and many other which should be still in negotiation, displays how State Rwanda has political will to promote and facilitate international investment. However, among 14 BITs signed only six of them are in force, while other are not yet come into force. One can wonder what can be happen, an investor from one country which has BIT not in force if he/she met investment disputes in Rwanda particularly relating to indirect expropriation; Which law will govern this situation to resolve such disputes? The answer to this problem is discussed in the following parts of this research.

2. The role of domestic law and obligation of investors to respect the law of host State

As discussed in party A above the primary source of law that control or govern foreign investment is usually the domestic law of the State where the investment is made. All of BITs mentioned above have provisions encouraging the investors to respect the law of the country

¹⁶⁰ UNCTAD, “Rwanda Bilateral Investment Treaties (BITs)” <https://investmentpolicy.unctad.org/international-investment-agreements/countries/176/Rwanda> , [9/8/2023]

where an investment is located. For example, article 8 Belgium- Rwanda BIT (1983) provide that “all investments will be governed by the legislation in force in the territory of the Contracting Party in which the investments are made.” This entails that the domestic law plays great role in promoting and attracting foreigner investors, when they were drafted in the way protecting investments and property rights of alien.

For instance, in the case of *Bay View Group LLC and The Spalena Company LLC v Republic of Rwanda*, ICSID Tribunal motivated that the claimant failed to respect Rwandan domestic laws.

It says NRD failed to pay any taxation for the majority of years that it was operating in Rwanda, and had large amounts of unpaid taxes in respect of which enforcement action was ultimately taken. Additionally, it did not comply with local laws, and it did not treat its staff and contractors well, including failing to pay them. NRD also caused severe environmental degradation through its mining practices and acted in consistent disregard of environmental standards.¹⁶¹

3. Position of Rwandan laws relating to investment and expropriation vis a vis indirect expropriation

Currently, investment in Rwanda is regulated by the law N° 006/2021 of 05/02/2021 on promotion and facilitation of investment. Article 10 of this law protects the rights of investors to their private property whether collective or individually owned. This rights is inviolable since the article state that “investment, interest or right over a property forming part of the investment cannot be seized or confiscated, except where provided for by relevant laws.” This inviolability of property rights is fetched from Constitution of the Republic of Rwanda.¹⁶²

¹⁶¹ *Bay View Group LLC and The Spalena Company LLC v Republic of Rwanda*, ICSID, Memorial On Preliminary Objections, (ICSID Case No. ARB/18/21), 24 May 2019, para. 142

¹⁶² Article 34 Constitution of the Republic of Rwanda, *Official Gazette n° Special of 04/08/2023* says that “Everyone has the right to private property, whether individually or collectively owned. Private property, whether owned individually or collectively, is inviolable. The right to property shall not be encroached upon except in public interest and in accordance with the provisions of the law.”

Investment law does not only protect tangible property but also intangible property the fact that it protects intellectual property rights relating to investment. To mean the investor's intellectual property rights and legitimate rights related to technology transfer are protected in accordance with relevant laws.¹⁶³ The foreigner investors are also given the same rights and equal treatment with Rwandan investor concerning investment facilitation and incentives.¹⁶⁴

In addition, the same law provides that “an action to expropriate an investor's property in public interest is taken after the investor is given fair compensation in accordance with relevant laws.”¹⁶⁵ Thus, expropriation provided in this article play role in promoting investment and attraction for foreign investors as long as they believe in getting fair compensation when their property is taken for the public interest.

The highlighted articles of this law show openly how person whether natural or moral persons' property, being foreigners or national investors are protected under Rwandan law against arbitrary expropriation. However, indirect expropriation is not covered because here, regulators expressed direct taking of investors' property, while in indirect expropriation there is no taking of the property in the benefit of State, but it takes measure which lander investment to be useless.

As discussed in chapter II, expropriation refers to the taking of an investor's private property or rights by the government for a public purpose in exchange for a fair compensation. For indirect expropriation the measure taken by a government lander property rights or the whole investment useless but the measure is taken in the public interest as long as State has sovereign power to regulate.

¹⁶³ Article 11 of Law N° 006/2021 of 05/02/2021 on investment promotion and facilitation, *Official Gazette n° 04 bis of 08/02/2021*

¹⁶⁴ Article 9 of Law N° 006/2021 of 05/02/2021 on investment promotion and facilitation

¹⁶⁵ Article 10 paragraph 3 of Law N° 006/2021 of 05/02/2021 on investment promotion and facilitation

In Rwanda, the process of expropriation is regulated by the law N° 32/2015 of 11/06/2015 relating to expropriation in the public interest. This law has provisions which provide a list of activities of public interest, Organs initiating projects of expropriation in the public interest, how the request for expropriation should be done, the competent authorities to carry out expropriation, Valuation of land and property incorporated on the land to be expropriated, mode of payment of fair compensation etc. However, this law doesn't define indirect expropriation or predetermine the process of compensation of property rights to the people affected indirectly by the measures of the State.

Therefore, as long as there is no provision regulating indirect expropriation in Rwanda, the investors from the countries which BITs are not yet in force, they can seek political solution to resolve their disputes relating to indirect expropriation when their investment are affected by State measures taken in public interest. If no political solution provided or when political negotiation fails about providing fair compensation, such investor can face injustice from the loophole of the domestic law. Therefore, this situation will affect the attraction of foreign investments.

Another solution to this problem, such investor can lodge a claim to the competent court or arbitral tribunal, basing on foreigner arbitral awards, or case laws from other countries judged on the same factual situation. However, this solution cannot extinguish the gaps existing in Rwandan expropriation law, relating to indirect expropriation.

4. Progress made in Treaties to promote the role of indirect expropriation clause

All BITs Rwanda signed before 2004 with: Mauritius, South Africa, Germany, and Belgium BIT of 1983, none of them has clause or provision defining indirect expropriation. But they

define direct expropriation as one way to protect foreign investments against arbitrary deprivation.

On the other hand, as explained in the chapter II that Canada and the United States became the first countries to incorporate indirect expropriation clause in relevant Annex to their model BITs, on the side of Rwanda except article 5 of BIT between Qatar and Rwanda (2018) and article 5 of BIT between Singapore and Rwanda (2018) which do not constitute indirect expropriation, all other BITs Rwanda signed after 2004 constitute provision specifying indirect expropriation in clear term. This show the progress made, on how Rwanda understand the role of regulating indirect expropriation for attracting foreigner investors through BITs.

5. Dispute settlement clause in bilateral investment treaties

Generally, it is important to take into consideration dispute resolution before entering any agreement, whether commercial or civil agreement. Thus when making a BIT, Parties must decide how to resolve disputes in investment-related situations.

All BITs Rwanda signed have provision relating to the dispute settlement. Except article 12 of Rwanda-United Arab Emirates BIT (2017) which provides mediation and conciliation after mandatory negotiation, almost all of other BITs signed after 2004 provide that once a dispute arises, there should be negotiation between the parties and resolve the problem amicably. When, amicable settlement fails each party has rights to lodge a claim to arbitration tribunal. Most of them (BITs) provide International Center for Settlement of Investment Disputes (ICSID) as arbitral tribunal to try the disputes. If procedures are not respected the claim is not received by arbitral tribunal. For example, Article 23 -24 of the USA-Rwanda BIT provides that:

“In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of nonbinding, third-party procedures.” 24“1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation: (a) the claimant, on its own behalf, may submit to arbitration [...] (i) that the respondent has breached [...]

In the case of *Bay View Group LLC and The Spalena Company LLC v Republic of Rwanda*, ICSID Tribunal decided that it lacks of jurisdiction *ratione voluntatis* over Spalena's claims because the claimant failed to seek amicable settlement before submitting a claim to arbitration. It said that "Spalena itself did not notify Rwanda, nor seek amicably to settle, any of its disputes before submitting the Original RfA. In neglecting to do so, Spalena failed to comply with the amicable settlement requirement in Articles 23 and 24 of the USA-Rwanda BIT."¹⁶⁶

All BITs specify arbitral tribunals to be seized but none of them located in contracting State. Therefore, it should be better if investment dispute is resolved in courts or arbitral tribunal where investment is made, in order to promote domestic justice as long as parties has right to appoint neutral arbitrators from other countries. This will reduce the cost of travelling abroad, and can attract more foreigner investors since no one wants to expense much money to seek justice abroad.

On the other hand, BIT between Belgium and Rwanda (1983) says that any dispute relating to this convention will be settled by joint commission involving representative from the two contracting countries. If this commission fail to settle the dispute within six months, one contracting party can submit a claim to arbitral tribunal.¹⁶⁷ The good point of this article is to decide a commission to resolve the problem before submitting the issue to arbitration, since it reduce the cost of arbitral proceedings and if the problem is resolved amicably it makes continuation of friendship between parties.

The same article provide that each party will appoint one arbitrator and that both parties will appoint the third arbitrator who is president¹⁶⁸. Each party will bear the costs resulting from the

¹⁶⁶ *Bay View Group LLC and The Spalena Company LLC v Republic of Rwanda*, ICSID, Memorial On Preliminary Objections, (ICSID Case No. ARB/18/21), 24 May 2019, para. 186

¹⁶⁷ Article 12 (1-2) of BLEU (Belgium- Luxembourg Economic Union) – Rwanda BIT (1983)

¹⁶⁸ Article 12 (3) of BLEU (Belgium- Luxembourg Economic Union) – Rwanda BIT (1983)

appointment of its own member of the tribunal, while the costs of appointing the President and the remaining costs will be paid in equal shares by the parties [...].¹⁶⁹ If each party appoint its own arbitrator and pay him/her all expense, this arbitrator cannot be impartial or independent. He/she can act as defender of the party paid him. Particularly in the case of expropriation the hosting State want to defend its sovereignty, therefore it can pay whatever cost to win the case as long as the arbitral award against such state may cause negative effects on attraction of foreigner investors. This formulation can facilitate corruption if both parties do not share equally the cost of all arbitrators.

Historically, only a party state had standing to make a claim that another party state had not complied with its obligations under an IIA, even if it was the state's investor that had suffered a loss. The only direct recourse that foreign investors had when they were unhappy about something a host state had done, was through domestic courts or other institutions in the host state under domestic law. Most IIAs now give an investor of one party state the right to claim compensation directly against the other party State in binding arbitration if the other party State breaches the substantive standards of protection set out in the agreement causing a loss to the investor.¹⁷⁰ For BITs Rwanda signed with other countries, except Germany-Rwanda BIT (1967) all other provide that an investor himself may bring claim to the competent court or arbitral tribunal. For example article 10 of Rwanda –Turkey BIT (2016) provides:

This Article shall apply to disputes between one Contracting Party and an investor of the other Contracting Party concerning an alleged breach of an obligation of the former under this Agreement, which causes loss or damage to the investor or its investments[...]¹⁷¹

¹⁶⁹ Article 12 (7) of BLEU (Belgium- Luxembourg Economic Union) – Rwanda BIT (1983)

¹⁷⁰ VanDuzer A, Penelope S & Graham M, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries*, (Marlborough House, 2012), p .399

¹⁷¹ Article 10(1) Rwanda –Turkey BIT (2016)

6. The role of rights to regulate in attracting foreigner investors

Some recent investment treaties contain provisions that explicitly affirm that the State has the right to regulate to protect certain public interests. These clauses, some of which are inspired by article XX of the GATT of 1994, generally state that none of the provisions in the treaty will prevent any of the contracting States from taking measures that protect certain public interests (e.g., public health, the environment, national security, maintenance and improvement of labor rights, etc.).¹⁷² The issue of the rights to regulate have been addressed by States in some recent BITs Rwanda has signed that clarify applicable conditions. For example, article 21 of Democratic Republic of the Congo-Rwanda BIT provides the rights of States to regulate, in the following words:

(1) The host State has the right to take regulatory or other measures to ensure that any development within its territory is consistent with the objectives and principles of sustainable development, as well as with other legitimate social and economic policy objectives. (2) Except where the rights of a Host State are expressly stated as an exception to the obligations in this Agreement, the pursuit by a Host State of its right to regulate shall be understood to be in balance with the rights and obligations of investors and Host States as set forth in this Agreement. (3) It is understood that non-discriminatory measures taken by a State Party to comply with its international obligations under other treaties do not constitute a breach of this Agreement.¹⁷³

Not only the Democratic Republic of the Congo-Rwanda BIT provides the right to regulate but also article 9 of Rwanda-United Arab Emirates BIT provides that nothing will prevent contracting State from adopting or enforcing any measure that it considers to be appropriate. Such measures should not be applied in a manner that would result in arbitrary or unjustifiable discrimination between investments or investors, but only to the extent necessary to ensure that

¹⁷² Suzy H. Nikièma, *Best Practices Indirect Expropriation*, (Published by the International Institute for Sustainable Development, 2012), p.8

¹⁷³ Article 21 of Democratic Republic of the Congo – Rwanda BIT (2021)

an investment activity in its territory is carried out in accordance with the applicable public health, security, environmental, and labor law of the Contracting Party.¹⁷⁴

The right to regulate is not recognized by all BITs Rwanda has signed, but the fact that it was considered in the two BITs at least demonstrates a way there is political will to detail State measures amounting to indirect expropriation and the state measure not amounting to indirect expropriation. This will encourage and attract foreigner investors to come and invest their capitals in Rwanda knowing that they will not be expropriated when States take measure relating to the public health, security, and environmental protection as long as such measure is taken in due process without discrimination.

7. Separating an indirect appropriation from non-compensable regulations

The most difficult issues in recent years is how to establish an indirect expropriation without interfering States' ability of to regulate in the public interest. As discussed in this research, many BIT Rwanda has signed do not details and differentiate the measures not amounting to indirect expropriation and the measures which should be granted compensation relating to indirect expropriation. This section discusses, the criteria to determine indirect expropriation.

7.1. Establishing an indirect expropriation

If a particular treaty does not contain special provisions on indirect expropriation, tribunals may draw upon the following criteria to express and consider an indirect expropriation: The economic impact of the measure; The extent to which the measure interferes with distinct reasonable investment-backed expectations; as well as the nature, purpose and character of the measure.¹⁷⁵

¹⁷⁴ Article 9 of Rwanda-United Arab Emirates BIT (2017)

¹⁷⁵ UNCTAD, *Expropriation, UNCTAD Series on Issues in International Investment Agreements II*, New York and Geneva, (2012), p.62

1.1 Economic impact of the measure

To be qualified as expropriation, a measure or a series of measures must have a destructive and long-lasting effect on the economic value of the investment and its benefit to the investor.¹⁷⁶

As was previously said, an indirect expropriation must have effects that are comparable to those of a direct expropriation. The amount or level of interference must have an effect that makes the property rights useless, i.e., denies the owner access to the investment's benefits and economic benefits. The majority of arbitral tribunals have agreed with this fundamental idea. For example, the tribunal in *CME v. Czech Republic* stated that a deprivation occurs whenever a State takes steps “that effectively neutralize the benefit of the property for the foreign owner”.¹⁷⁷ For an expropriation to be found, the host State must have unreasonably interfered with the investor's right to use, enjoy the benefits of, or dispose of his property. One of the most well-known formulations of this principle was articulated by the Iran-United States Claims Tribunal in *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, where it wrote:

A deprivation or taking of property may occur under international law through interference by a state in the use of that property or the enjoyment of its benefits, even where legal title to that property is not affected.¹⁷⁸

¹⁷⁶ UNCTAD, *ibidem*, (2012), p.63

¹⁷⁷ UNCTAD, *op.cit.*, (2012), p.63

¹⁷⁸ *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, Award No. 141-7-2, reprinted in 6 [Iran-United States Cl. Trib. 219 (1984) [hereinafter *Tippetts v. TAMS-AFFA*], p.225

1.1.1. Decrease in value

To be considered as expropriation, the investment's economic value must be completely destroyed or close to total destruction. In *Pope & Talbot v. Canada*, the test used by the arbitral tribunal to establish indirect expropriation was “whether the interference is sufficiently restrictive to support a conclusion that the property has been taken from the owner”. This strategy has been used in other cases. In *Vivendi v. Argentina II*, the tribunal noted that “the weight of authority ... appears to draw a distinction between only a partial deprivation of value (not an expropriation) and a complete or near complete deprivation of value (expropriation)”.¹⁷⁹

1.1.2. Loss of control over the investment

An expropriation claim may not be recognized due to the decrease in investment value but rather due to the loss of control that prohibits the investor from utilizing or disposing of its investment. Even though the formal title is unaffected, investors may lose control over the investment if they lose their ownership or management rights. Loss of control is a factor that is considered to be an alternative to value destruction.¹⁸⁰

The expulsion of a company's key executives officer from the host State, may also be viewed as an act of expropriation that results in the loss of control over the investment. In *Biloune v. Ghana*, the expulsion of Mr. Biloune, who played a critical role in promoting, financing and managing a company engaged in a restaurant project, effectively prevented the company from following the project. The tribunal saw this act as result of creeping expropriation.¹⁸¹

¹⁷⁹ UNCTAD, *op.cit.*, (2012), p.65

¹⁸⁰ UNCTAD, *ibidem*, (2012), p.67

¹⁸¹ UNCTAD, *ibidem*, (2012), p.68

1.1.3. Duration of the measure

In order to be considered as expropriation, the measure should be definitive and permanent. A measure that leads to a temporary decrease in value or loss of control would generally not be seen as expropriation.¹⁸² Generally, a measure that have a destructive and long-lasting effect on economic value of an investment and its benefits to the investor, are considered expropriation. These include indirect expropriation another term for actions that have the same effects of direct expropriation, such as de facto expropriation, and creeping expropriation.¹⁸³

Some of the de jure temporary measures may also be considered as expropriation depending on the specific situations of the case. As noted in the explanatory note to Article 10(3) of the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (1961), whether an interference might amount to indirect expropriation will depend on its extent and duration, but “there obviously comes a stage at which an objective observer would conclude that there is no immediate prospect that the owner will be able to resume the enjoyment of his property”.¹⁸⁴ For this reason, Iran-United States Claims Tribunals determined that the appointment of "temporary" managers constituted a taking on the basis that the circumstances surrounding the Islamic revolution left no realistic chance for the investors to resume their business activity.¹⁸⁵

1.2 Interference with investor’s expectations

Regarding the existence of expectations on the side of investor that a particular category of act or measure will not be done by the host State, this is another pertinent aspect utilized in IIAs

¹⁸² UNCTAD, *ibidem*, (2012), p.69

¹⁸³ Ghaziani, Moosa A & Ghaziani, Mohammad A "The Role Of Expropriation Clauses In Protection And Promotion Of Foreign Investments In Renewable Energy: An Essential But Overlooked Legal Consideration," Vol. 11: No. 2, Article 8, *Indonesia Law Review* (2022) p.194

¹⁸⁴ Article 10(3) of the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (1961)

¹⁸⁵ UNCTAD, *op.cit.*,(2012), p.70

to determine whether a measure or set of measures amounts to an indirect expropriation. A determination of whether the measure interferes with an investor's legitimate investment-backed expectations is necessary, especially where those expectations are the result of State guarantees.

The idea of legitimate expectations has become more prominent in IIA arbitrations when viewed in light of the fair and equitable treatment criteria. However, both on a national and international scale, this idea is important when taking expropriation allegations into account. Recent research, which focused on a number of national jurisdictions and on experiences of the European Court of Human Rights and the EU, has concluded that “one important factor for the court’s assessment of an expropriation claim is whether the individual has some form of legitimate expectation that his or her rights will not be regulated or restricted in a certain way”. A number of recent investment treaties mention legitimate expectations as a factor that must be considered when deciding a claim of indirect expropriation.¹⁸⁶

Indeed, legitimate expectations are inseparable from the concept of private property rights essentially the rights to use, enjoy the fruits of, and alienate one's property and are part and parcel of the legal order. As with the effect of a regulatory measure on the investment, its level of interference with the legitimate expectations of the investor is a question of degree. Acknowledging legitimate expectations in the determination of the compensable nature of a measure is largely a question of fairness. Indeed, commentators have noted that the expectations of the investor are of particular importance.¹⁸⁷

Referring to the BITs Rwanda has signed, except the Annex B of USA- Rwanda BIT that provides investor's legitimate investment-backed expectations as one way of getting

¹⁸⁶ UNCTAD, *ibidem*, (2012), p.73

¹⁸⁷ Fortier L. Yves and Stephen L. Drymer, “Indirect Expropriation in the Law of International Investment” Vol 19 Number 2, *ICSID REVIEW -Foreign Investment Law Journal* (2004),p.306

compensation from indirect expropriation; Other BITs do not constitute any provision talking about this issue. This annex says that:

The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by case, fact-based inquiry that considers, among other factors: (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations.¹⁸⁸

1.3. Nature, purpose and character of the measure

The nature of the measure refers to whether it is a bona fide regulatory act. The purpose focuses on whether the measure genuinely pursues a legitimate public-policy objective. The character of a measure includes features such as non-discrimination, due process and proportionality.¹⁸⁹

When determining whether an indirect expropriation has taken place, it is important to evaluate the nature, purpose, and character of the relevant measure. They are crucial in determining whether a regulatory action is exempt from paying compensation or considered as indirect expropriation act. Numerous recent treaties have clearly introduced these criteria in the assessment of State conduct that is challenged as constituting an indirect expropriation .¹⁹⁰ However, except Annex B of USA- Rwanda BIT which talks about character of the government action¹⁹¹ other BITs Rwanda signed are silent on nature, purpose and character of the measure.

In performing this analysis, different questions may need to be answered: What is the intent of the measure? Does it pursue a genuine public purpose? Is there a reasonable nexus between the purpose and the effect of the measure, i.e. is the measure proportionate? Has it been implemented in a non-discriminatory manner and in compliance with due-process principles? In the end, it needs to be decided whether the measure at issue is targeted and irregular or a

¹⁸⁸ Para 4, (a) (ii) of Annex B of USA –Rwanda BIT

¹⁸⁹ UNCTAD, *op.cit.*, (2012), p.78

¹⁹⁰ UNCTAD, *op.cit.*, (2012), p.76

¹⁹¹ Para 4, (a) (iii) of Annex B of USA –Rwanda BIT

common and normal exercise of regulatory powers of the State. Certain arbitral courts stated that the lack of intent to expropriate is not a key factor in determining whether a measure constitutes an indirect expropriation. However, intent forms part of the analysis concerning the nature, purpose and character of the measure.¹⁹²

8. Observation from the clause of expropriation in signed bilateral investment treaties

The article 5 of Korea Republic -Rwanda BIT; Article 6 of the Rwanda-USA BIT, Democratic Republic of the Congo-Rwanda BIT and Rwanda-Turkey BIT; Article 7 of Central African Republic- Rwanda BIT and article 8 of Rwanda-United Arab Emirates BIT provide for expropriation and compensation. These article states that no party to the treaty may expropriate a covered investment directly or indirectly through measures equivalent to expropriation except: For a public purpose; in a non-discriminatory manner; in accordance with due process of law and on payment of fair and adequate compensation within a reasonable period of time. All BITs Rwanda signed provide those four conditions for expropriation. Even they say that compensation should be paid without delay and equivalent to the fair market of the expropriated investment immediately before the expropriation took place.

8.1. Failing to differentiate direct expropriation from indirect expropriation

A common observation is that expropriation clauses in BITs sometimes fail to distinguish between the methods of determining compensation for direct and indirect expropriation. Even though both types of expropriation are addressed, the treaties do not take into account the particularities and challenges of indirect expropriation. But the definition of direct expropriation poses less challenge.

¹⁹² UNCTAD, *op.cit.*, (2012), p.78

As explained in chapter II of this research, direct expropriation is State measure that expressly withdraws legal title of ownership over an investment for the benefit of the State or a third party designated by the State. In contrast, the notion of indirect expropriation, is still problematic or unclear. Indirect expropriation is generally defined as a State measure which causes serious injury to an investment without legal title to the investment being affected. The investor still retains legal title over the investment, but its investment no longer has any financial value or no longer effectively exists. The lack of precise guidelines in BITs for each type of compensation for expropriation creates a challenge. Based on most BITs Rwanda signed, it is difficult to know what types of State measures can be categorized as indirect expropriation.

In direct expropriation the host State gains economic benefit, because there is a real transfer of private property ownership to the general public, which benefits the state financially. Therefore, it is fair that the State pay for what it has taken in these circumstances. But in cases of indirect expropriation the State often does not generate any financial gain from the relevant measure taken. Instead, it may result in a loss of tax revenue due to the closure of an investment. Therefore, it difficult to justify the criteria for compensation.

8.2. The obligation of immediate compensation for attracting foreigner investors

The majority of BITs Rwanda do not state the exact date for paying compensation, but require payment “immediately,” or “without undue delay”, but it may be unrealistic in certain situations. This means that it must foresee and evaluate the harm that its act of expropriation would cause to the foreign investor and pay compensation in advance or at the moment the relevant measure is adopted. This condition provided in BITs is reasonable, it can play essential role in attracting foreigner investors if it is respected accordingly. But it may be impractical, since payment of compensation can take a long period. “The timeframe should be assessed in

light of the specific experience of each State and the normal procedures in place to make an effective payment. In many countries, a normal time to make such payment would be between three and six months.”¹⁹³ According to Rwanda expropriation law, compensation should be paid within a period not exceeding one hundred and twenty (120) days from the day of its approval by the competent organs,¹⁹⁴ 4 months approximately. However, in practice the payment can take more than one year.

In addition, as provided in BITs mentioned above in this chapter, the requirement to pay before or at the moment of expropriation may not be possible in the case of indirect expropriation because indirect expropriation is not predictable. The host State may not be able to know harmed parties and it cannot be able to estimate amount to pay for compensation before taking measure relating to indirect expropriation.

8.3. The role of date for assessing the value of the investment in attracting investors

In compliance with the due date for compensation specified in the BITs, the amount of compensation should be calculated and paid in the time frame prior to or no later than the date of expropriation. For example, USA- Rwanda BIT says that compensation will be paid without delay; and be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place.¹⁹⁵ In addition, the majority of BITs state that the calculation of compensation “shall not reflect any change in value occurring because the intended expropriation had become known”.

The reference date is important for two reasons: first, the investment's value can change over time, especially if the tribunal considers market value and market fluctuations; second, the

¹⁹³ UNCTAD, *ibidem*, (2012), p.48

¹⁹⁴ Article 36 of law n° 32/2015 of 11/06/2015 relating to expropriation in the public interest

¹⁹⁵ Article 6 (2) (a)-(b) Rwanda-United States of America BIT (2008)

amount of interest can change significantly depending on the reference date chosen.¹⁹⁶ If expropriation date is respected and investor given adequate calculated compensation, normally it play significant role in attracting more investors.

In *Marion and Reinhard Unglaube v. Costa Rica*, about the wrongful direct expropriation of a plot of land some years after placing this plot in an environmentally protected area, the tribunal held that the market value of the land could be assessed at a date subsequent to the date of the direct expropriation. The second situation is when a series of governmental acts over time harm an investment. This is referred to as progressive expropriation, often known as creeping expropriation. Determining the exact time of expropriation is extremely difficult with gradual indirect expropriation.¹⁹⁷

¹⁹⁶ Suzy H. Nikièma, *Compensation for Expropriation Best Practices Series*, (2013), p.11

¹⁹⁷ Suzy H. Nikièma, *ibidem*, (2013), p.11

9. Conclusion

Rwanda adopted domestic laws relating to expropriation and investment. It has signed numerous BITs with other countries to ease and to protect investments of its citizen investing abroad and the foreigners who invest in Rwanda because BIT govern the investment relationship between the two countries in the benefit of their development. However, as long as domestic laws are primary laws which govern foreign investments, this research found that there is a gap in domestic laws relating to the definition of indirect expropriation. Likewise, BITs signed before 2007 do not define indirect expropriation. However, a good regulation of expropriation could play role in attracting foreign investments. The way to resolve these problem is proposed in the following chapter five below in the part of recommandations.

CHAPTER V: GENERAL CONCLUSION AND RECOMMENDATIONS

V.0. Introduction

This is the last concluding chapter which comprise two sections including the general conclusion providing summary of results detailing how expropriation, particularly indirect expropriation should play role in attracting foreign investments and the section of recommendations where the researcher proposed solution and potential course of action that should be taken into considerations for attracting more foreigner investors in Rwanda.

V.1. General Conclusion

In few word, expropriation is an unquestionable power of sovereign States. However, this right is controlled by international law and principles in the sense that the taking of investor's property must be done for a public purpose, without discrimination, in accordance with due process, and in exchange for payment of fair compensation.

These condition, are manifested in many IIAs or BITs and some domestic laws, as requirements for expropriation to be done whether direct or indirect. Discrimination, breach of due process, a lack of a public purpose, lack of fair and equal treatment, the abuse of rights, and the transfer of advantage to the State are all signs that a State measure is irregular. But, no one should be taken as definitive or used in isolation to determine whether a measure constitute expropriation or not.

International law requires States to pay compensation for expropriation, based on calculates loss from the moment of expropriation, and should be equivalent to the fair market value of the expropriated investment. The valuation of compensation for an expropriated investment is dependent on the date of valuation. For direct expropriations it is normally easy to determine the date of expropriation since it is marked by either a definitive act such as a seizure or a decree that deprives the investor of the investment. For indirect expropriations it can be a

challenging process of determining the exact date of valuation unless the expropriation is the result of a single act. A general rule is that factors not reasonably foreseeable at the time of valuation must be ignored. However, all pre-valuation factors, including those known on the date of valuation, must be considered in expropriation.

The notion of indirect expropriation came into existence from 2004 due to the regulatory involvement of the modern State such as United State of America and Canada. From that time many other States imitate and incorporated the clause of indirect expropriation in their agreements relating to international investments.

As long as the legal requirements are satisfied, States are allowed to expropriate foreign investment. But, States can interfere economic operations of investor, in order to promote the public health, environmental protection, and national security. The measures taken in these cases and affect investor's property, are not considered to be expropriated, since the Sate have the sovereign power to regulate. Generally, States are legally permitted to enact regulations in the public interest without having to make any form of payment.

If there is no law, assessment of indirect expropriation requires relevant factors namely: The degree of interference or economic impact of the measure; The interference with legitimate investment backed expectation of investor; And the nature, purpose and character of such measure. Analyzing a measure in the lights of these three relevant factors assist in identifying whether the measure constitute indirect expropriation, or whether it is normal exercise of State police power to regulate, which is commonly aimed at the general welfare. Therefore, in order to constitute an indirect expropriation, the measure should be definitive and permanent. A measure that leads to a temporary decrease in value or loss of control for specific period would normally not be viewed as indirect expropriation.

For the factors of investment attraction, Foreign investment can take a place in many different forms, including creating a company or a new business or the expansion of an already existing company in other country. Whatever the procedure, FDI refers to investment made outside investor's home country. As discussed, there are many factor that may help to attract foreign investors, including good infrastructure, a supportive political environment, tax exemptions or other incentives, political stability, and the availability of resources.

In addition, the increase of investment into a country is positively connected with the signature of IIAs or BITs. Even though their role is minor, but they help in attracting foreign investment. A host country's policies that attract foreign investors are likely to benefit from the influence of IIAs as well. IIAs and BITs play role of encouraging and attracting FDI. They also play the role to protect foreign investors property rights. In particular, they improve investment protection and add to the security, transparency, stability and predictability of the investment framework. Therefore, policymakers must know factors which influences FDI inflows in order to attract more investors.

On the issue of advantage between investors and host state, both of them have benefit from FDI. Investors may have the chance to profit from it. They may take up the new market share, they can gain lower cost production, develop their firm, profit from tax exemptions and other incentives, etc. Normally, investors won't invest in another country unless they believe that there will be a greater opportunity than the one exists in their home country.

On other side, FDI is also beneficial for the host country. Most of the cases by welcoming FDI, host country is getting more benefits. It can generate huge employment, it can grow its economy by large volume of business activity, get more income from tax and related issues, and have more opportunity in export and import, host country gets support for infrastructural

development. So there are lots of opportunities for host country to create flexible environment or opportunity for FDI.

Even though there are so many advantages of FDI, but there are some disadvantages that may affect host country or investors. These advantages include political change and expropriation. The way direct or indirect expropriation is done on investment is still problem. However, expropriation should be one of the factors attracting foreigner investors, if it is well regulated and respected.

Like many other countries Rwanda adopted domestic law relating to expropriation and investment. It has signed numerous BITs with other countries to ease and to protect investment of its citizen investing abroad and the foreigners who invest in Rwanda. The commitment in the majority of these investment treaties is to treat foreigner investors fairly, and to protect their property against arbitrary expropriation; It is reciprocal obligations with any other country signed BIT with Rwanda. The respect of those commitments to the side of each country play great role in attracting foreigner investors.

However, as long as domestic law are primary law which govern foreigner investment, this research found that there is a gap in domestic law relating to the definition of indirect expropriation. Therefore, it is the duties of Rwandan legislators to fill this gap in order to attract many more investors. Likewise, BITs signed before 2007 do not define indirect expropriation, and those BITs signed after 2007 defining indirect expropriation fail to details the measures amounting to indirect expropriation, as well as the state measures which are not considered to be taken as indirect expropriation.

Therefore, it is obligation of the States to include indirect expropriation in domestic law and to make annex of BITs clearly detailing State measures resulting to indirect expropriation and differentiate them with the rights of State to regulate. It will play the role in attracting more

foreigner investors. On the other hand, it will benefit Rwandese investing abroad in the form of reciprocal obligations resulted in BITs.

V.2. Recommendations

It is in the lights of above findings, that to attract more foreigner investors, on the side of domestic law, it should be better if Rwanda amend the law regulating investment or expropriation to include the provision which define indirect expropriation. This will help to attract more investors as long as they will believe to be compensated once their investment is affected indirectly by the State measures. It will serve to make them be confident about the protection of their investment against indirect expropriation.

To attract more investors, it should be better to underline that when it comes to expropriation, the most crucial advice for BITs Rwanda has signed with other states, especially those signed before 2008, they should adopt annex which clearly define indirect expropriation more precisely. Also to all BITs it should be better to include the stand alone provision or clause which talks about the rights of State to regulate, and details those measures not amounting to indirect expropriation.

When drafting BIT clauses relating to compensation, drafters and State negotiators are strongly recommended to adopt more specific language when writing sections relating to compensation for expropriation in order to solve certain existing issues. While it is hard to come up with a perfect formula that works in every circumstance, it is possible to provide tribunals some guidance when they determine how much compensation is owed in expropriation cases. This clarification of the criteria for determining compensation is especially important in the situation of indirect expropriation because it might be difficult to evaluate it.

Furthermore, the drafters and negotiators of BITs when drafting the clause relating to dispute settlement, should be better to mention arbitral tribunal, or Commercial Courts working where investment is made. This will serve to the development of domestic justice, and it can attract more investors as long as it can reduce the cost of travelling abroad to seek justice.

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