

HARMONISING INVESTMENT LAWS IN THE OHADA SPACE

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DECLARATION

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ABSTRACT

The Organisation for the Harmonisation of Business Law in Africa (OHADA) was established for the purpose of restoring legal and judicial security in the region to attract more investment. The OHADA Treaty included certain areas of business law within its ambit but omitted investment law. There are several laws on investment in the region at the national, regional and sub-regional level that regulate the treatment of foreign investments such as CEMAC and UEMOA investment charters. Moreover OHADA states sign BITs to protect foreign investments. The relationship between the different sub regional laws on investment and OHADA is not yet clear but case law suggests that CEMAC and UEMOA courts recognise the supremacy of OHADA law and their lack of competence to hear matters regulated under OHADA. The standards of protection granted by OHADA states in BITs are very high thus taxing on them. This thesis suggests that OHADA states should either qualify these standards of protection or replace them with more specific provisions. The OHADA system of arbitration cannot effectively settle investment disputes arising out of a BIT leaving international arbitration systems such as ICSID as the best alternative to resolve investment disputes arising out of BITs.

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LIST OF ABBREVIATIONS

AUPSRVE	Uniform Act on Simplified Recovery Procedures and Measures of Execution
AUU	Uniform Act on Arbitration
BIT	Bilateral Investment Treaty
CCJA	Common Court of Justice and Arbitration
CEMAC	Economic Community of Central African States
COMESA	Common Market for Eastern and Southern Africa
FDI	Foreign Direct Investment
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
MNCs	Multinational Corporations
OECD	Organisation for Economic Cooperation and Development
OHADA	Organisation for the Harmonisation of Business Law in Africa
FPI	Foreign Portfolio Investment
PPIB	Promotion and Protection of Investment Bill
UEMOA	West African Economic and Monetary Union
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development

CHAPTER ONE: LEGAL AND JUDICIAL SECURITY IN OHADA

1. INTRODUCTION

Governments traditionally raise funds in several ways including taxes, fees, penalties, fines, loans and aid. The last two methods have been used primarily by developing countries. It has been argued that one of the reasons developing countries¹ are in constant need of foreign capital is because they do not have sufficient funds to finance their national projects.² The collapse of commercial banks' lending facility and the debt crisis in the 1980s led to the decline of aid from developed countries and that of lending from commercial banks and to an increase in importance of private international financial flows or foreign investment.³ Chakrabarti stated:

*'...During most of the 1980s, the majority of the developing economies were effectively shut out of the international capital markets following the borrowing binge of the 1970s and the breakdown of normal financial relations in 1982- 1983 (the so called debt-overhang). This financial constraint, particularly severe for the heavily indebted countries, quickly translated into a sharp decline in investment and growth rate in these economies. This resulted in the growing importance of FDI as a relatively reliable source of capital flows for the LDCs'*⁴

Furthermore many donor countries were experiencing 'aid fatigue'⁵ since development funds granted to developing countries were not yielding the desired results. These countries were also dealing with their own challenges related to recession and unemployment among other things.⁶ Some countries voiced the opinion that massive

¹ Developing countries in this context is one in which the majority of the population lives on far less money- with far fewer basic public services- than the population in highly industrialised countries. The United Nations and the World Bank use different terms to refer to developing countries. The United Nations also refer to them as 'least developed countries' or 'landlocked developing countries'. The World Bank designates them according to their gross national income per capita. It therefore categorises them as low income, lower middle income, upper middle income and high income.

² E Demirhan & M Masca 'Determinants of foreign direct investment flows to developing countries: A cross-sectional analysis' (2008) 4 *Prague Economic Papers* 356.

³ Ibid; R Biswas 'Determinants of Foreign Direct Investments' (2002) 6 *Review of Development Economics* 492 at 492.

⁴ A Chakrabarti 'The Determinant of Foreign Investment: Sensitivity analyses of Cross- Country Regressions' (2001) 54 *KYKLOS* 89; Demirhan & Masca op cit (n2) 356 to 357.

⁵ PL Tsai 'Determinants of Foreign Direct investment and its impact on economic growth' (1994) 19 *Journal of Economic Development* 137.

⁶ M. Sornarajah *The international law on foreign investment* 2ed (2004) 2.

increase in aid was neither practical nor the best means of ensuring sustained economic growth in the South⁷ and that private capital flow might be the solution instead.⁸

The Organisation for the Harmonisation of Business Law in Africa⁹ (OHADA) endeavoured to increase the rate of investment within the region by modernising and harmonising the business laws of its member states.¹⁰ The harmonised laws are meant to address the problem of legal and judicial insecurity which was identified as the source of OHADA countries' weak share in foreign direct investment (FDI).¹¹ However some scholars pointed out that while a stable legal framework is a factor that investors will consider when deciding to invest in a particular country, it is not the only one. Furthermore it might not be the most compelling factor. The question therefore is whether or not legal and judicial security in OHADA will be a crucial factor for foreign investors wishing to invest in the region.

1.1. Definition of foreign direct investment

Foreign capital flow manifests itself in four forms namely commercial loans, official flows or aid, foreign portfolio investment and foreign direct investment.¹² Commercial loans are credits given to governments or foreign businesses by an international financial institution. Official flows refer to aid or development assistance that developed countries extend to developing countries.¹³ Foreign Portfolio Investment (FPI) is a passive investment in securities and involves transactions in securities and shares that are highly liquid.¹⁴ It deals with assets that can be bought and sold very quickly and the investor is not involved in the management of the company. FPI generates high and quick returns

⁷ The term 'South' originates from the socio economic and political gap between developed and developing countries. It refers to the less developed region made up of Africa, Latin America and the Middle East.

⁸ Sornarajah op cit (n6)138.

⁹ Organisation for the Harmonisation of Business Laws in Africa was established by the Treaty of Port Louis signed in 1993. It is usually known by its French acronym, OHADA.

¹⁰ Preamble to the OHADA treaty; M Tumnde, IB Mohammed, JAP Matipé et al *Unified Business Laws for Africa: Common Law Perspective on OHADA* 2ed (2012) 31.

¹¹ JF Nguéjo *Le rôle des juridictions supranationales de la CEMAC et de l'OHADA dans l'intégration des droits communautaires par les Etats membres* PhD (Université Panthéon- Assas) (2011) 55 to 56.

¹² Globalisation 101 'Investment and Globalisation, available at <http://www.globalization101.org/uploads/File/Investment/invall.pdf>, accessed on 5 September 2014.

¹³ www.investopedia.com/terms/p/portfolio_investment.asp, accessed on 5 September 2014.

¹⁴ En.wikipedia.org/wiki/foreign_portfolio_investment, accessed on 5 September 2014.

but is also highly volatile.¹⁵ Foreign direct investment or FDI refers to a long term interest that an investor acquires in an enterprise in a country other than his home country.¹⁶ Sornarajah understood it as a transfer of tangible and intangible assets from one country to another for the purpose of generating wealth under the total or partial control of the owner of the assets.¹⁷ The Organisation for Economic Cooperation and Development (OECD) describes FDI as ‘*a cross-border investment by a resident entity in one economy with the objective of obtaining a lasting interest in an enterprise resident in another economy. The lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise and a significant degree of influence by the direct investor on the management of the enterprise....*’¹⁸

1.2. Advantages of foreign direct investment

Countries seek foreign investments because the domestic capital is often insufficient for purposes of economic development.¹⁹ In an ideal economic environment FDI brings in capital, infrastructure, technology and skills transfer as the foreign investor comes with its expertise and better technology.²⁰ Feldstein, Razin and Sadka contend that FDI allows the transfer of technology particularly in the form of new variety of capital input that cannot be achieved through financial investment or trade in goods and services.²¹

FDI also creates employment hence expanding the country’s tax base as the number of individuals to be taxed increases.²² However it has been argued, in the case of Southern Africa, that FDI does not necessarily come with significant employment

¹⁵ Available at <http://www.investopedia.com/terms/f/foreign-portfolio-investment-fpi.asp>, accessed on 16 October 2014.

¹⁶ <http://www.investopedia.com/terms/f/fdi.asp>; OECD Glossary of Foreign Direct Investment Terms and Definitions, available at <http://www.oecd.org/investment/investmentfordevelopment/2487495.pdf>, accessed on 16 October 2014.

¹⁷ Sornarajah op cit (n6) 7.

¹⁸ OECD glossary of foreign direct Investment terms and definitions, available at <http://www.oecd.org/investment/investmentfordevelopment/2487495.pdf>, accessed on 16 October 2014.

¹⁹ R Tiwari ‘FDI, its advantages and disadvantages’ 25 September 2013 available at <http://www.slideshare.net/RupalTiwari1/fdi-26538521>, accessed on 22 July 2014.

²⁰ E Borenstein, JD Gregorio & JW Lee ‘How does foreign direct investment affect economic growth’ (1998) 45 *Journal of International Economics* 115 at 116 to 117.

²¹ M Feldstein ‘Aspects of Global Economic Integration: Outlook for the Future’ (2000) NBER Working Paper No. 7899; L Prakash & A Razin ‘How Beneficial is Foreign Direct Investment to Developing Countries’ (2001) 38 *Finance and Development*, available at <http://www.imf.org/external/pubs/ft/fandd/2001/06/loungani.htm>, accessed on 22 July 2014.

²² E Asiedu ‘On the Determinant of Foreign Direct Investment to Developing Countries: Is Africa different?’ (2001) 30 *World Development* 107.

creation and that in fact it leads to job losses when public companies are privatised.²³ It was further argued that the quality of employments created by FDI is very low and is characterised by poor working conditions, very low wages and little job security.²⁴

The labour will acquire new skills from the technology introduced by the foreign investor. This knowledge is then transferred to local personnel as they move to other firms.²⁵ FDI therefore increases the productivity and promotes competition in the domestic market.²⁶ In addition Profits generated by FDI lead to an increase of corporate tax revenue.²⁷ However this is diluted as host countries usually grant tax holidays as an incentive to attract foreign investment.²⁸

Moreover FDI is preferred to portfolio investment because, though FPI yields quicker results in terms of profits, it is much more volatile. Changes in a country's investment conditions can lead to dramatic swing of portfolio investment with the investor withdrawing his investment as a consequence. FPI can bring about rapid development helping emerging economies more quickly to take advantage of economic opportunities.²⁹ However when a country's economic situation takes a downfall so does FPI as investors pull out. Such sudden withdrawal can produce widespread financial crises.³⁰

FDI on the other hand is more stable. Since the investor possesses ownership of the asset it is more difficult for it to pull out or sell out as quickly. The investor sinks significant funds into the asset and will be more committed to managing his investment

²³ N Mwilima 'Foreign Direct Investment in Africa' Social observatory pilot project- final draft report, Labour Resource and Research Institute, September 2003, available at http://www.sarpn.org/documents/d0000883/P994-African_Social_Observatory_PilotProject_FDI.pdf, accessed on 16 February 2015.

²⁴ Ibid.

²⁵ Sornarajah op cit (n6) 51; FH Liang 'Does Foreign Direct Investment Improve the Productivity of Domestic Firms? Technology Spillovers, Industry Linkages, and Firm Capabilities' (2008) *Haas School of Business University of California, Berkeley* 2.

²⁶ K Kalirajan & A Mottaleb 'Determinants of Foreign Direct Investment in developing countries: A comparative analysis' (2010) 4 *The Journal of Applied Economics* 370.

²⁷ L Prakash & A Razin 'How Beneficial is Foreign Direct Investment to Developing Countries' (2001) 38 *Finance and Development*, available at <http://www.imf.org/external/pubs/ft/fandd/2001/06/loungani.htm>, accessed on 22 July 2014.

²⁸ Sornarajah op cit (n6) 115.

²⁹ Available at http://www.diffen.com/difference/FDI_vs_FPI, accessed on 20 February 2015.

³⁰ Available at <http://www.investopedia.com/terms/f/foreign-portfolio-investment-fpi.asp>, accessed on 14 November 2014.

to generate profits. Unlike FPI, FDI returns are not immediate as investors will only benefit from their investment after years. FDI is nevertheless viewed as the best vehicle of economic growth to all countries but more specifically to developing. Tsai argued that:

*'According to modernisation hypothesis, FDI promotes economic growth by providing external capital and through growth spreads its benefits throughout the economy... FDI usually brings with it advanced technology and better management and organisation. FDI is in fact the other 'engine' of growth in LDCs...In the short run; any increase in FDI enables higher investment and consumption and thus creates directly and immediately economic growth...'*³¹

The dependency theory³² however finds FDI harmful to the economy of developing countries.³³ The theory developed as a result of the unequal economic relations between developing and developed countries. It argued that developing countries' underdevelopment is caused by their role as suppliers of raw materials and buyers of manufactured goods from developed countries at a higher price.

Indeed FDI is mostly undertaken by multinational corporations which have their mother companies in developed countries and operate through subsidiaries in developing countries.³⁴ The host state will devise laws and policies that will be attractive to the multinational corporations (MNCs) thus in the interest of the mother company.³⁵ As a consequence states in the Third World become peripheral economies whose role is to advance the economy of center.³⁶ The dependency theory contends that developing economies will only reach economic development if they break the bond that ties them to the central economy; that is FDI.³⁷

It has also been suggested that developing countries exclude foreigners from certain industries since their investments may stifle the emergence of an entrepreneurial class

³¹ Tsai op cit (n5) 137.

³² The dependency theory was developed in the 1950s in Latin America. It observed on the unequal economic growth of advanced industrialised countries compared to that of poorer countries. It contended that the relationship of dependency between these categories of States was the cause of underdevelopment of poor countries. Therefore poor countries will only achieve significant economic growth if they break such a relationship and device policies promoting self-sufficiency.

³³ Sornarajah op cit (n6) 57.

³⁴ Ibid.

³⁵ Sornarajah op cit (n6) 58.

³⁶ Ibid.

³⁷ Ibid.

within the state.³⁸ De Backer and Sleuwagen argued that it may be so but only in the short term and that in fact domestic companies do benefit from FDI in the long term through ‘spill over’ effect.³⁹

Developing countries are more susceptible to create conditions that will attract foreign investment. It was acknowledged that FDI is crucial for Africa as it brings with it much needed capital, employment, managerial skills and technology, and accelerates growth and development.⁴⁰ Quéré, Coupet and Mayer also observed:

*‘FDI is considered one of the most stable components of capital flows to developing countries and can also be a vehicle for technological progress through the use and dissemination of improved production technique...’*⁴¹

Similarly it was observed that developing countries are aware of the benefits of FDI as most of them compete with each other to attract FDI by liberalising their policy regimes and offering various incentive packages, such as tax rebates, trade liberalisation measures, establishment of special economic zones among others.⁴²

1.3. *Legal and Judicial security*

Investment is inherently risky and countries that wish to attract foreign investors within their territories must provide certain legal and economic guarantees. Hence it was observed that:

*‘Investing is already a risk in itself even if calculated. If the risk is increased by a fluctuating unstable and elusive legal system, there is not a lot of hope of attracting investors’*⁴³

Hausman and Fernandez suggested that countries should concentrate on improving the environment for investment and the functioning of the market. They pointed out that they [countries] will likely be rewarded with an increasingly efficient overall investment

³⁸ Sornarajah op cit (n6) 118; 326 – 327; SH Danakol, S Estrin, P Reynolds et al ‘Foreign Direct Investment and Domestic entrepreneurship: Blessing or Curse’, the Institute for the Study of Labour, December 2013, available at http://www.eea-esem.com/files/papers/eea-esem/2013/2898/FDI_Entrepreneurship_DANAKOL ESTRIN REYNOLDS WEITZEL.pdf, accessed on 7 August 2014.

³⁹ K De Backer & L Sleuwaegen ‘Does foreign investment crowd out domestic entrepreneurship?’ (2003) 22 *Review of Industrial Organization* 67 at 75.

⁴⁰ Asiedu op cit (n22)107.

⁴¹ A Benassy-Quéré, M Coupet & T Mayer ‘Institutional determinants of Foreign Direct Investment (2007) *The World Economy* 764.

⁴² Kalirajan & Mottaleb op cit (n26) 370.

⁴³ P Aregba ‘L’OHADA: Histoire, objectifs, structures’ in Philippe Fouchard (director) *L’OHADA et les perspectives de l’arbitrage en Afrique* (2000) 9.

as well as more capital inflows.⁴⁴ In other words countries that seek investment must create an environment that will motivate investors to bring in capital into their markets.

As mentioned previously developing countries will tend to benefit the most from foreign investments and the majority of African countries figure in that category.⁴⁵ In an effort to create an environment conducive to investment a group of African countries mostly from the Franc Zone⁴⁶ undertook to harmonise their business laws and established the Organisation for the Harmonisation of Business laws in Africa or OHADA⁴⁷. Indeed OHADA member states declared, in the preamble to the OHADA Treaty that:

‘...conscious of the fact that this law [OHADA Treaty and its Uniform Acts] be applied with diligence in such conditions so as to guarantee legal stability of economic activities and to favour expansion of the latter and to encourage investment’⁴⁸

Some authors were of the opinion that investors will only be prone to invest in countries with a sound legal and judicial system:

‘...Continued investment and development cannot be achieved without on the one hand a secure legal and commercial environment that will protect private property and on the other hand a strong and independent judicial system that can ensure the proper application of the law and the efficient settlement of disputes’.⁴⁹

Pierre Meyer termed it ‘*sécurité juridique et judiciaire*’ or legal and judicial security.⁵⁰ Some scholars agreed that OHADA was set up to improve legal security and predictability in order to foster international investment and trade and to promote socio

⁴⁴ R Hausmann & E Fernandez-Arias ‘Foreign Direct Investment: Good Cholesterol?’ *Inter-American Development Bank Working Paper No. 417*, 26 March 2000, available at <http://www.iadb.org/res/publications/pubfiles/pubWP-417.pdf>, accessed on 23 January 2015.

⁴⁵ Available at <http://data.worldbank.org/region/LDC>, accessed on 21 February 2015.

⁴⁶ The Franc Zone comprises 14 countries from western and central Africa and the Comoros Islands in the Indian Ocean. Eight of them make up the West African Economic and Monetary Union (UEMOA): Benin, Burkina Faso, Ivory Coast, Guinea Bissau, Mali, Niger, Senegal and Togo. Six others make up the Central African Economic and Monetary Community (CEMAC): Cameroun, Central African Republic, Tchad, Congo, Gabon and Equatorial Guinea. Their currency is linked to the French ‘Franc’ at a fixed rate. Available at http://glossary.reuters.com/index.php?title=Franc_Zone, accessed on 24 January 2015.

⁴⁷ OHADA’s official name is “Organisation pour l’Harmonization en Afrique du Droit des Affaires”.

⁴⁸ Preamble to the Treaty on the Organization for the Harmonization of Business Laws in Africa or OHADA Treaty.

⁴⁹ B Martor, N Pilkington, DS Seller & S Thouvenot *Business law in Africa: OHADA and the harmonization process* 2ed (2002).

⁵⁰ P Meyer ‘La Sécurité Juridique et Judiciaire dans l’espace OHADA’ *Revue Penant* No 855, available at <http://siteresources.worldbank.org/INTABCDESL02007/Resources/Securitejuridique.pdf>, accessed on 26 June 2014.

economic growth in Africa.⁵¹ Similarly Leboulanger and Douajini were of the opinion that:

*‘The purpose of the Treaty on the Harmonization of Business law in Africa (OHADA Treaty) is to promote investment for the development of the contracting states, by developing a business law that is simple, modern and adaptable, in order to secure such investments within OHADA space, both at a legal and a judicial level’*⁵²

Researchers advised countries to develop credible enforcement mechanisms instead of trying to get more FDI if they wish to expand their market access to international capital markets.⁵³ Judicial security can be understood as the existence of a strong and independent judicial system that will ensure the proper application of the norms and the effective resolution of disputes. Legal security on the other hand refers to laws and advocates for clear modern and ascertainable laws.

OHADA resorted to harmonisation of the member state’s business laws to achieve legal and judicial security and incidentally attract investment within the OHADA space. The term harmony in music suggests a state of consonance and accord.⁵⁴ It depicts *‘the aesthetical coexistence of different notes which are in accordance with one another without necessarily being the same’*.⁵⁵ Harmonisation, unlike unification, preserves the diversity or individuality of the objects harmonised- in this case laws from several jurisdiction- while trying to approximate them.⁵⁶ Therefore national law may still be applicable. Unification on the other hand is radical as its purpose is to achieve sameness which implies that the existing laws of the different member states are replaced by the uniform law.

⁵¹ Tumnde, Mohammed, Matipé et al op cit (n10).

⁵² P Leboulanger & GK Douajini ‘Arbitration under the Common Court of Justice and Arbitration of the OHADA contracting states’ in Lise Bosman (ed) *Arbitration in Africa: A Practitioner’s guide* (2013) 317.

⁵³ R Albuquerque ‘The Composition of International Capital Flows: Risk Sharing through Foreign Direct Investment’ (2003) 61 *Journal of International Economics* 353 at 380.

⁵⁴ M Boodman ‘The myth of harmonization of laws, (1991) 39 *The American Journal of Comparative Law* 700.

⁵⁵ M Andenas & CB Andersen (Eds) *The theory and Practice of Harmonization* (2011) 576.

⁵⁶ C Twigg-Flesner & GV Puig (Ed) ‘Some thoughts on the harmonization of commercial law and the impact on cross border transactions’ 29 July 2011, available at, <http://ssrn.com/abstract=1957618>, accessed on 8 August 2014; S Procelli & Y Zhai ‘The challenge for the Harmonization of Law’ (2010) 17 *Transit. Stud. Rev.* 430.

Harmonisation of laws arises in the context of private extra jurisdictional transactions.⁵⁷ Consequently the process of harmonisation is aimed at reducing the divergence between the laws of several jurisdictions or reducing the problems created by such diversity.⁵⁸ Flesner is of the opinion that the very existence of harmonisation is intrinsically linked to resolving a problem.⁵⁹ Similarly Boodman argued that ‘outside the context of a legal problem and without prior justification, harmonisation of law is unintelligible as an objective or basis for law reform despite its ostensible application to inter-jurisdictional transactions’.⁶⁰ Therefore it must be ascertained that legal diversity is a problem and that legal harmonisation is best suited to solve the problem.⁶¹ It was pointed out that harmonisation implemented to solve an identified problem has better chances of success.⁶²

OHADA identified legal diversity and out-dated laws as an impediment to investment because they increase transaction costs and cause uncertainty in the area as to the outcome of a dispute or the protection of the investment.⁶³ Therefore the organisation purported to solve these issues by harmonising business laws of the different member states hence providing modern laws and an environment conducive to investment.

Stephan however found harmonisation to be a futile exercise and argued that better results would be obtained if the experiment of introducing new laws is limited at the national.⁶⁴ For instance he finds the implementation of a new law in a single country to be much easier than establishing an international consensus. This may be true when one considers the amount of time negotiations take at the international level let alone arrive at a consensus.⁶⁵ However the same danger still exists at the national level. The

⁵⁷ Boodman op cit (n54) 702.

⁵⁸ Twigg-Flesner & Puig op cit (n56) 106.

⁵⁹ Ibid.

⁶⁰ Boodman op cit (n54) 706.

⁶¹ JA Estrella Fria ‘Future direction of legal harmonization and law reform: Stormy sea or prosperous voyage’ (2009) *Unif. Law. Rev, Oxford Journals* 5 available at <http://ulr.oxfordjournals.org>.

⁶² Twigg-Flesner & Puig op cit (n56) 125.

⁶³ JF Nguesso *Le role des juridictions supranationales de la CEMAC et de l’OHADA dans l’intégration des droits communautaires par les Etats membres* PhD (Université Panthéon- Assas) (2011) 55 to 56

⁶⁴ PB Stephan ‘Futility of unification and Harmonization of international commercial law’ (1999) *Working paper No99-10 Legal Studies Working Papers Series* 36.

⁶⁵ The Doha Round of Negotiations started in 2001 and has not yet been completed up to date.

process of domestication by dualist countries is as time consuming and the implementation would be asymmetric. There would therefore be a cacophony in the implementation process. However this problem may not arise when the countries involved are monist countries like OHADA member states.

He further contended that confining the experiment to one country would limit the spill over effect within that jurisdiction alone and would thus be easier to remedy should it become a failure. Amendments to international treaties and conventions are difficult to implement since countries are very slow at ratifying and incorporating them in their legislations. It may be equally difficult to reach a consensus regarding those amendments. However OHADA addressed the issue by providing for direct applicability of Uniform Acts.⁶⁶ These Uniform Acts include a Uniform Act on arbitration.

Lastly he observed that certain groups may influence the law making process at the inter jurisdictional level making sure that the rules that are unfavourable to them are discarded and replaced by rules that protect their interest at the expense of other groups. This phenomenon occurs in the multilateral arena through power struggles between the different countries. Such a struggle would be less pronounced when countries have the same level of development as OHADA member states.

1.4. Determinants of foreign direct investment

Factors that may influence an investor's decision to invest in a country differ depending on that country's level of economic development or on the investor's motives hence the assertion that determinants of FDI are multidimensional in nature.⁶⁷

Some researchers found that the determinants of FDI in developed and developing countries are different. Others argued that determinants of FDI differ among developing countries⁶⁸ while others contend that the determinants of FDI in Africa are different from those of other developing countries.⁶⁹

Determinants of foreign direct investment are primarily economic in nature. Indeed the cost of production, the size of the economy and the level of economic

⁶⁶ Art 10 of the OHADA Treaty.

⁶⁷ Ibid.

⁶⁸ Kalirajan & Mottaleb op cit (n26) 372.

⁶⁹ Asiedu op cit (n22)116.

development, openness to trade, cheap and skilled labour, profit, infrastructure, natural resources, institutions, business environment and trade are the main factors that the investor will consider.⁷⁰ Institutions and business environment relate to the legal and judicial regime, the regulatory framework, government institutions and practices.

Asiedu, on her part, argues that Africa is different and that while some factors may increase FDI in developed and some developing countries, they may not yield the same results in Africa especially sub-Saharan Africa.⁷¹ For instance high returns on investment and better infrastructure have no significant impact on FDI in sub-Saharan Africa; openness to trade is beneficial to all countries but less so to sub-Saharan Africa. In her 2003 study she therefore found that factors determining the flow of FDI in Africa are macroeconomic stability, efficient institution, political stability and a good regulatory framework. Later on however she acknowledged that despite the many legal and regulatory improvements sub-Saharan African countries remain less attractive to FDI flow than other countries.⁷²

Morisset found that aggressive liberalisation, modern investment codes and strong economic growth are important determinants of FDI in Africa.⁷³

Legal and regulatory frameworks have a significant impact in sub-Saharan Africa but less so in developed than developing countries.⁷⁴ As far as legal and regulatory frameworks are concerned one may argue that their presence or lack thereof has not deterred investors from investing in high risk countries such as African countries.⁷⁵ The argument may be valid to a certain extent but it has also been proven that Africa's share to the total global FDI has been insignificant.⁷⁶

⁷⁰ JP Walsh & J Yu 'Determinants of foreign direct investment: A sectoral and institutional approach' *IMF Working Paper No 187*, July 2010, available at <https://www.imf.org/external/pubs/ft/wp/2010/wp10187.pdf>, accessed on 2 September 2014; See also note 37 and note 38.

⁷¹ Asiedu op cit (n22) 108.

⁷² E Loots & A Kabundi 'Foreign Direct Investment to Africa: trends, dynamics and challenges' (2012) 15 *South African Journal of Economic and Management Sciences* 129 footnote omitted

⁷³ Loots & Kabundi op cit (n72) 129 footnote omitted.

⁷⁴ Kalirajan & Mottaleb op cit (n26) 111 to 116; P Fouchard *L'OHADA et les perspectives de l'arbitrage en Afrique* (2000) 9.

⁷⁵ In its 2002 World Investment Report, the UNCTAD observed that in the period 1996 to 2000 African countries received FDI mainly in the primary sector especially natural resources; United Nations Conference on Trade and Development 'Transnational corporations and export competitiveness' *World*

Developed countries are and still remain the preferred destination of foreign direct investment.⁷⁷ In 2007 the world's total FDI inflow was \$1, 833.32 billion of which 27.3% went to developing countries and the rest to developed countries.⁷⁸ Africa's share within developing countries declined from 24.1% in the 1970s to 6.2% in the 1990s and increased to 10.3% between 2000 and 2008.⁷⁹ Loots and Kabundi observed that Africa's share to the FDI inflow decreased from 5.2% in the 1970s to 1.9% in the 1990s but later increased to 3% over the period 2000 to 2008.⁸⁰

Despite Asiedu's reservations regarding the impact of the legal and regulatory improvements undertaken by African countries Africa's share in the world's FDI seemed to increase even if ever so slightly when African countries initiated the process of improving the business environment by getting rid of archaic laws, relics of the colonial period. OHADA is an example of such an attempt.⁸¹

1.5. Conclusion

The view that legal certainty is an important determinant of foreign investment in Africa has not yet been completely accepted and has been widely criticised. Some authors contend that though African countries have undertaken legal reforms in favour of foreign investments no significant increase in the rate of FDI has been registered thus implying that legal reforms are ineffective as determinants of foreign investment.⁸² They nevertheless acknowledged that Africa is different.⁸³ Therefore having a stable legal framework figures among the many determinants even if it is not the most compelling and OHADA chose it as the foundation of its legal reforms. Moreover it is notoriously difficult to prove a negative ie in this case whether there would have been less investment in the absence of legal reforms.

Investment Report, 2002, available at http://unctad.org/en/docs/wir2002_en.pdf, accessed on 18 February 2015.

⁷⁶ Kalirajan & Mottaleb op cit (n26) 372.

⁷⁷ Kalirajan & Mottaleb op cit (n26) 371.

⁷⁸ Ibid.

⁷⁹ Loots & Kabundi op cit (n72) 130 to131.

⁸⁰ Ibid.

⁸¹ OHADA Treaty was established in 1993 then revised in 2003 primarily to modernise the laws of its member states which still used legislations transplanted during the colonial period.

⁸² Asiedu op cit (n22) 107

⁸³ Ibid.

The legal and judicial security that OHADA is trying to achieve through harmonisation may seem to be an appropriate approach for Africa. Indeed until recently African countries still, with a few exceptions, used laws that were imported from the former colonial masters. Moreover the African judiciary has a long history of abuse, corruption and partiality. Judicial and legal security may reassure the investor that its rights will be upheld and that it will have access to a reliable judicial or dispute resolution system.

This dissertation is structured in the following way: Chapter one will inquire whether or not legal and judicial security is a determinant of foreign direct investment. Chapter two will then examine the different investment laws in the OHADA region. It will further examine a number of bilateral investment treaties (BITs) signed by some OHADA member states to ascertain the type of protection OHADA countries are willing to grant to foreign investors. A comparative analysis will be undertaken in chapter three to determine whether the investment chapter of the North American Free Trade agreement (NAFTA) is a suitable model for OHADA countries in the event investment law is harmonised. Chapter four will look at the OHADA arbitration system and assess whether or not it can effectively settle investment disputes. Finally chapter five will consist of conclusions drawn from the analysis done in the previous chapters and recommendations

CHAPTER TWO: STANDARDS OF PROTECTION IN OHADA

2. INTRODUCTION

OHADA does not regulate investment law. Indeed the OHADA Treaty defines business laws as ‘regulations concerning company law, definition and classification of legal persons engaged in trade, proceedings in respect of credits and recovery of debts, means of enforcement, bankruptcy, receivership and arbitration’.⁸⁴ It further includes employment law, accounting law, transportation and sales laws and any other matter the Council of Ministers would decide unanimously as falling within the definition of business law.⁸⁵ Therefore investment law may not be covered under OHADA at present but it is not impossible for the Council of Ministers to include it since art 2 of the Treaty empowers it to do so.⁸⁶

The fact that investment law is not included among the matters governed by the Treaty⁸⁷ does not mean that OHADA space is devoid of any investment laws. In fact all OHADA member states have investment codes. Sub-regional organisations found within the OHADA geographic area such as the Economic and Monetary Community of Central Africa (CEMAC) and the Economic and Monetary Union of Western Africa (UEMOA) also have investment charters.⁸⁸ At the regional level the Common Market for the Eastern and Southern Africa (COMESA) also has an investment code.⁸⁹ Due to lack of accessible information on the UEMOA investment code this chapter will focus on CEMAC. COMESA will equally not be discussed because OHADA and COMESA only share one common member, the Democratic Republic of Congo, whereas all CEMAC member states are also members of OHADA.⁹⁰

⁸⁴ Art 2 of the OHADA Treaty adopted on 17 October 1993 at Port Louis published in the Official Journal No 4 of 01 November 1997.

⁸⁵ Ibid.

⁸⁶ Art 2 of the OHADA Treaty allows the Council of Ministers to include any matter within the ambit of business law provided it is decided unanimously to do so.

⁸⁷ OHADA Treaty.

⁸⁸ CEMAC Charte des Investissements, Règlement No 17 /99/CEMAC-20-CM-03 du 17 décembre 1999 and UEMOA code Communautaire des Investissements.

⁸⁹ Investment Agreement for the COMESA common investment area.

⁹⁰ All UEMOA member states are also OHADA members but the chapter will mainly focus on CEMAC as no information could be found on UEMOA investment code.

All these codes and charters either at the national, regional or sub regional level provide for protection of investments. Investors within the OHADA space are spoiled for choice since there are several laws they can rely on for protection. However it is precisely the multiplicity of laws and membership to regional organisations as well as the lack of a clear relationship between these laws especially on matters that are jointly regulated that create confusion and uncertainty of outcome. Such uncertainty will encourage forum shopping hence defeating ‘legal and judicial security’ which are the pillars of OHADA. Priso pointed out:

‘... Fact remains that the observation of the development of the two groups of rules - community on the one hand and harmonised on the other- dissipates little fear of a paradoxical effect radically opposed to the objective: while this double balancing, dual-scale modernisation aims to secure such foreign investment by improving legal certainty in the legal orders of the states concerned, it is at the same time source of legal insecurity resulting so much from both the competition of rules produced than from intersection of actions and jurisdictional structures ensuring their application... the security of business through legal certainty is sometimes lost in the maze of the relationship between community and harmonised law...’⁹¹

CEMAC states’ investment codes offer a few guarantees to foreign investors such as non-discrimination, freedom to invest in the country regardless of nationality, protection of intellectual property rights, national treatment, and recourse to arbitration to resolves disputes and the enforcement of arbitral awards. The protection granted under these national and sub-regional laws do not seem extensive and can hardly be said to be attractive to investors.

However BITs signed by CEMAC states with other countries guarantee a level of protection that is much higher than that found in national legislation. The formulation of these guarantees will determine the interpretation by arbitral tribunals in respect of liability and the obligations that such guarantees give rise to. Some formulations are too taxing on states especially developing states⁹² while others seem to strike a balance between the foreign investor’s rights and those of the states.

⁹¹ SJ Priso- Essawe ‘Les “espaces juridiques” de sécurisation des investissements en Afrique: entre droit communautaire et droit uniforme’ (2010) *Revue LAMY Droit Civil* 60.

⁹² United Nations Conference on Trade and Development ‘Fair and equitable treatment’ (2012) UNCTAD Series on issues in international investment agreements II at xiii.

2.1. RELATIONSHIP BETWEEN CEMAC AND OHADA

As mentioned above CEMAC and UEMOA each have an investment charter and though these two regional organisations do not share member states, they both share them with OHADA. All UEMOA and CEMAC countries are members of OHADA.⁹³ The confusion brought about by the existence of two investment charters, which appear to be independent, within the same geographic area can potentially create clashes in areas that are jointly regulated thus threatening the judicial and legal certainty OHADA is trying to achieve. Consequently there will be different interpretations by national and community judges as to the applicable law and the manner it is to be applied.

The question of the relationship between OHADA law and the national law of member states was resolved by the decision of the Senegalese Constitutional Council in 1993.⁹⁴ The Council explained that divesting the Senegalese ‘court of cassation’⁹⁵ and National Assembly of certain powers in favour of OHADA and the Common Court of Justice and Arbitration neither alters the international status of Senegal as a sovereign and independent state nor does it modify its institutional organisation. It pointed out that the divestment was not a total surrender of sovereignty but a limitation of competence that is incidental to every international commitment.⁹⁶ It therefore concluded that arts 14, 15, 16 and any other provision of the OHADA Treaty were not contrary to the Senegalese Constitution.

The same cannot be said of the relationship between OHADA and CEMAC law. The hierarchical relationship between these two organisations is a matter that is yet to be settled. The few decisions of the CEMAC court of justice nevertheless tend to suggest that the latter is willing to recognise the supremacy of OHADA law over that of CEMAC’s in matters regulated by OHADA. In fact the CEMAC court of Justice

⁹³ UEMOA members are Benin, Burkina Faso, Côte d’Ivoire, Guinea Bissau, Mali, Niger, Senegal and Togo; CEMAC countries are Cameroun, Central African Republic, Republic of Congo, Gabon, Equatorial Guinea and Chad; OHADA countries are Benin, Burkina Faso, Camroun, Central African Republic, Chad, Comoros, Republic of Congo, Côte d’Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Mali, Niger, Senegal, Togo and Democratic Republic of Congo.

⁹⁴ Cour Constitutionnelle du Sénégal, arrêt No 3/C/93 du 16 décembre 1993, Penant No 827.

⁹⁵ The Court of Cassation is found in countries with a Civil Law tradition. It is a quashing court that has the same jurisdiction as an English Court of appeal. It only hears matters of law and not of fact.

⁹⁶ Décision du Conseil Constitutionnel du Sénégal, Arrêt No 3/C/93 du 16 décembre 1993 para 8.

pronounced judgements on the supremacy of OHADA law over CEMAC law⁹⁷ and its lack of competence to decide on matters regulated by OHADA.⁹⁸ It is worth mentioning that CEMAC and OHADA are autonomous organisations. There is no legal nexus between their laws and their respective supranational courts. Nguelpjo, in respect of both courts, observed:

*'In addition to their independence vis-à-vis other institutions and bodies of the Community, the supranational courts of CEMAC and OHADA co-exist and run in parallel due to the independence of each of them and the supreme power that each holds'*⁹⁹

The Cooperation Agreement between CEMAC and OHADA signed in 2001¹⁰⁰ focuses more on the relationship between member states than the judicial institutions. It does not address the issue of hierarchy in the application of CEMAC and OHADA norms and incidentally the decisions of their respective courts.¹⁰¹ Art 3 of the Agreement provides mainly for reciprocal representation and participation to ministerial meetings, workshops organised by Commissions and technical bodies of each organisation when questions of common interest are addressed.¹⁰²

Though OHADA's geographic coverage is much larger than that of CEMAC and UEMOA, its scope is narrow. It focuses solely on harmonisation of business laws while UEMOA and CEMAC intend to create respectively a common market¹⁰³ and an economic and monetary union.¹⁰⁴ However these sub regional organisations pursue the same objectives as OHADA.¹⁰⁵ Thus the multiplicity of laws and lack of clear

⁹⁷ Cour de Justice de la CEMAC, Chambre Judiciaire, Avis sur l'avant projet de règlement CEMAC relatif aux systèmes, moyens et incidents de payment Rec, pp9 to19.

⁹⁸ Cour de Justice de la CEMAC, Chambre Judiciaire, Arrêt No 003/CJ/CEMAC/CJ/03 du 03/07/2003. Affaire Tasha Loweh Lawrence contre Decision COBAC D-2000/22 et Amity Bank Cameroon PLC (recourse n annulation de la decision COBAC D-2000/22. P. 7.

⁹⁹ JF Nguelpjo *Le role des juridictions supranationales de la CEMAC et de l'OHADA dans l'intégration des droits communautaires par les Etats membres* PhD (Université Panthéon- Assas) (2011) 66

¹⁰⁰ Accord de Coopération entre l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) et la Communauté Economique et Monétaire de l'Afrique Centrale (CEMAC) signé a Douala le 3 Août 2001.

¹⁰¹ JM Kobilá 'Les Rapport entre la cour de justice de la CEMAC et la cour commune de justice et d'arbitrage de l'OHADA' available at http://afrilex.ubordeaux4.fr/sites/afrilex/IMG/pdf/Communication_Mouangue_Kobila.pdf, accessed on 22 December 2014.

¹⁰² Art 3 of the CEMAC- OHADA Cooperation Agreement.

¹⁰³ Art 4 UEMOA Constitutive Treaty.

¹⁰⁴ Art 2 CEMAC Treaty of 16th March 1994 revised on 25th June 2008.

¹⁰⁵ 2nd paragraph of the preamble to the CEMAC Treaty and Art 1 of the OHADA Treaty, art 4 of the UEMOA Treaty and art 2 of the Economic and Monetary Union of Central Africa Convention; Samuel

relationship between them as well as their enforcement institutions defeat these objectives.

2.2. STANDARDS OF PROTECTION OF FOREIGN INVESTMENT

The CEMAC Investment Charter regulates foreign investments within CEMAC region and is directly applicable in all CEMAC member states.¹⁰⁶ Member states however have the possibility to enact national laws that may specify and complement the Code without contradicting or derogating from it.¹⁰⁷ The Code provides for standards of protection of foreign investment such as recourse to arbitration and enforcement of arbitral awards¹⁰⁸, uniform and equitable application of the rules of the game¹⁰⁹, administrative expediency¹¹⁰, national treatment¹¹¹, non-discrimination¹¹², transparency¹¹³, and protection of intellectual property rights¹¹⁴.

Similarly the Chadian Investment Charter¹¹⁵, which is the most recent national investment legislation in the CEMAC region, provides for uniform and equitable application of competition and consumer protection rules¹¹⁶; freedom to undertake private investment subject to the respect of economic and social policies of the state regarding health; security and preservation of the environment¹¹⁷; free transfer or repatriation of capital¹¹⁸; national treatment in respect of participation in public tenders

Jacques Priso pointed out that: ‘among the objectives of WAEMU and CEMAC, figure the strengthening of the competitiveness of economic and financial activities of the member states in a rationalized and harmonized legal environment or by harmonizing the rules that contribute to the improvement of the business environment. The issue of harmonization and modernization of law is therefore present in OHADA as well as the two economic communities’.

¹⁰⁶ Art 41 CEMAC Treaty.

¹⁰⁷ Preamble to the CEMAC Investment Charter Art 30 of the Charter provides that the Community Charter may be supplemented by national laws without derogating from its essential provisions

¹⁰⁸ Art 5 CEMAC Treaty in this context imposes an obligation on States to encourage recourse to arbitration and guarantee enforcement of awards in the framework of legal and judicial security.

¹⁰⁹ Art 6.

¹¹⁰ Art 8.

¹¹¹ Art 9.

¹¹² Art 10 (3).

¹¹³ Art 11.

¹¹⁴ Art 12.

¹¹⁵ Charte des Investissements du Tchad, Loi No 006/ PR/2008 du 3 Janvier 2008.

¹¹⁶ Art 7.

¹¹⁷ Art 11.

¹¹⁸ Art 12.

labour laws, taxes and acquisition of intellectual property rights¹¹⁹; settlement of investment disputes through arbitration¹²⁰.

The Congolese Investment Charter¹²¹ provides for the same types of treatment namely non-discrimination¹²²; equal treatment regarding competition rules¹²³; free transfer of capital by foreign investors¹²⁴; improving the quality of information given to investors on the country's economic condition and social development¹²⁵; recourse to arbitration and guarantee of enforcement of awards¹²⁶.

As a general rule a claim will arise under a BIT if the economic activity in respect of which it arose qualifies as an investment. Similarly a dispute can only be brought before the International Centre for the Settlement of Investment Disputes (ICSID) if the dispute arises out of an investment.¹²⁷ Several arbitral tribunals endeavoured to define the term 'investment'. The *Salini* tribunal identifies four elements of an investment namely: contribution in asset or money, duration, risk and contribution to the economic development of the host state.¹²⁸ Several tribunals disagreed with that assessment and narrowed the elements of investment to contribution in asset or money, duration and risk.¹²⁹ These requirements prevent investors bringing short term and potentially risky activities from claiming protection under a BIT.

The CEMAC investment Charter and the investment codes of some of its member states omitted certain standards that are found in BITs such as fair and equitable

¹¹⁹ Art 13, art 15, 16, 17 and 18.

¹²⁰ Art 30.

¹²¹ Chartre des Investissements de la Republique du Congo, Loi No 6-2003 du 18 Janvier 2003.

¹²² Art 16 (3).

¹²³ Art 6.

¹²⁴ Art 3.

¹²⁵ Art 10.

¹²⁶ Art 12 and 37.

¹²⁷ Art 25 (1) ICSID Convention

¹²⁸ *Salini Construttori S.P.A and Italstrade S.P.A v Kingdom of Morocco* (2001), ICSID case No ARB/00/4 para 52.

¹²⁹ *Romak S.A. (Switzerland) v the Republic of Uzbekistan*, PCA Case No AA28, para 207; *Quiborax S.A., Non Metallic Minerals S.A. & Allan Fosk Kaplun v Plurinational State of Bolivia*, ICSID Case No ARB/06/2 para 227.

treatment, full protection and security among others. These standards offer a higher level of protection sometimes to the detriment of developing host states.¹³⁰

The main standards of treatment found in BITs are fair and equitable treatment, full protection and security, national treatment, most favoured nation treatment, protection against expropriation, transfer or repatriation of funds and protection against arbitrary and discriminatory measures.¹³¹ The formulations of these standards differ from one BIT to another and there is no consistency of interpretation. Understanding the effect of each of these standards will help assess the position of CEMAC countries vis-à-vis foreign investors in the international arena.

2.2.1. *Fair and Equitable Treatment Standard*

Fair and equitable treatment (FET) is one of the most controversial concepts arbitral tribunals and host states have been confronted with. Fair and equitable treatment includes aspects of equity and balancing, it requires:

*'[an] attitude of governance based on an unbiased set of rules that should be applied with a view to doing justice to all interested parties that may be affected by a state's decision in question including the host state's population at large'*¹³²

The concept was introduced for the purpose of filling gaps and provides for situations that were not contemplated by more specific provisions in the BITs.¹³³

There is no consistent interpretation of the concept and issues as to the content of fair and equitable treatment are equally controversial.¹³⁴ Vandeveld, however, is of the opinion that arbitral awards have created a unified theory of fair and equitable treatment founded on the procedural and substantive dimensions of the rule of law.¹³⁵ He identified five principles that make out the concept of fair and equitable treatment namely reasonableness, consistency, non-discrimination, due process and

¹³⁰ Sornarajah observed that developing countries are prepared to accord higher standards of treatment in BITs to foreign investors than that provided for in national legislations in the hope of attracting investment.

¹³¹ The Umbrella clause will not be considered in this chapter as the majority of BITs examined did not include it. They were found in only two BITs between the United States and some of the OHADA states.

¹³² United Nations Conference on Trade and Development op cit (n92) 7.

¹³³ Rudolf Dolzer & Christoph Schreuer *Principles of international investment law* (2008) 122.

¹³⁴ Roland Kläger *Fair and equitable treatment in international law investment law* (2011) 76.

¹³⁵ KJ Vandeveld 'Unified theory of fair and equitable treatment' (2010) 43 *International law and politics* 43.

transparency.¹³⁶ He acknowledged however that though the principle of transparency has been cited in a few cases there is no coherent theory on the issue yet.¹³⁷

The United Nations Conference on Trade and Development (UNCTAD) identified five elements of the fair and equitable treatment standard namely prohibition of manifest arbitrariness in decision making, prohibition of denial of justice and disregard of fundamental principles of due process, prohibition of targeted discrimination, prohibition of abusive treatment of investors and the protection of the investor's legitimate expectations.¹³⁸

The investor's legitimate expectation is a key element of the fair and equitable treatment standard in respect of which a claim will arise when a regulatory or policy change made by the host state adversely affects the investment.¹³⁹ Some arbitral tribunals interpreted 'legitimate expectation' radically to the extent that any changes made by the host state to the legal regime that adversely affects a foreign investment would constitute a breach of the investor's legitimate expectation.¹⁴⁰ They argued that the stability and predictability of the legal and business framework was one of the essential elements of the FET standard.¹⁴¹ Legitimate expectation may arise from a specific promise made by the host state to the investor such as a stabilisation clause or from rules and regulations not directly addressed to the investor but put in place to attract investment.¹⁴²

Other tribunals, however, have taken a much more nuanced approach and found that the legitimate expectation should be based on the political, socio economic, cultural and historical conditions prevailing in the host state.¹⁴³ Moreover investors also have an obligation to enquire into the policies and legal framework of the host state before making the investment. If the investor knew the host state to be a high risk country then

¹³⁶ Vandeveldel op cit (n135) 104 to 105.

¹³⁷ *ibid.*

¹³⁸ United Nations Conference on Trade and Development op cit (n92) xv to xvi.

¹³⁹ Adverse effect here can be understood as the reduction of the economic value of the investment

¹⁴⁰ United Nations Conference on Trade and Development op cit (n92).

¹⁴¹ *Occidental Exploration and Production Co. v Ecuador*, London Court of International Arbitration case No UN 3467, Final award 1 July 2004; *PSGE Global et al v Republic of Turkey*, ICSID case No ARB/02/5 19 January 2007; *CMS Gas Transmission Co. v Argentina*, ICSID case No ARB/01/8, award 12 May 2005.

¹⁴² United Nations Conference on Trade and Development op cit (n92) 86.

¹⁴³ *Duke Energy v Ecuador*, ICSID case No ARB/04/19 award 18 August 2008.

it cannot have the same expectations had the investment been made in a stable country. The arbitral tribunal in *Parkerings- Compagniet v Lithuania* observed that ‘no expectation that the law will remain unchanged would be legitimate because Lithuania was a country in political transition. By investing in Lithuania despite its situation the investor accepts the business risk of instability’.¹⁴⁴ Tribunals have further recognised the need to balance between investors’ legitimate expectations and the host state’s regulatory powers provided the latter are exercised *bona fide* and in the public interest.¹⁴⁵

The interpretation of the liability threshold in a FET¹⁴⁶ clause has differed depending on how it has been formulated. There are two types of FET clauses that are commonly used in BITs namely the qualified and unqualified fair and equitable treatment standard.

The qualified fair and equitable treatment standard is linked to the international minimum standard. It is usually formulated in BITs as granting fair and equitable treatment in accordance with the international minimum standard. The Gabon-Turkey BIT (not in force) provides:

*‘Investments of investors [...] shall [...] be accorded treatment according to international minimum standard of treatment including fair and equitable treatment...’*¹⁴⁷

The Congo-United States BIT (in force) similarly stipulates that ‘*investments shall at all times be accorded fair and equitable treatment and shall in no case be accorded treatment less than that required by international law*’.¹⁴⁸ The tribunal in *Azurix v Argentina* observed that the sentence ‘*in no case be accorded treatment less than that required by international law*’ sets a higher standard than that required by international law. It further stated that such a sentence sets a floor and not a ceiling in order to avoid a possible interpretation of these standards below what is required by international law.¹⁴⁹

¹⁴⁴ *Parkerings- Compagniet v Lithuania*, ICSID case No ARB/05/8 award 11 September 2007 para 335 to 336.

¹⁴⁵ *Saluka Investments BV v Czech Republic*, UNCITRAL Rules, Partial award of 17 March 2006.

¹⁴⁶ Fair and equitable treatment.

¹⁴⁷ Art 3 (1) Gabon- Turkey BIT signed in 2012 not in force.

¹⁴⁸ Art 2 (2) Congo- USA BIT signed in 1990 entered into force in 1994.

¹⁴⁹ *Azurix v Argentina*, ICSID case No ARB/01/12 award of 14th July 2006 at para 361.

The consequence of the qualified FET will be that first the host state must not grant an investor a treatment below that provided for under international law. International law becomes the standard below which the host state cannot go.¹⁵⁰ Secondly the liability threshold of the host state will be high. The claimant carries a heavy burden to prove that a practice has risen to international standard; in other words has become state practice; and that the host state has violated it.¹⁵¹ The host state would therefore be liable for grave, egregious or shocking conduct or as the tribunal in the *Neer* case put it:

*‘...the treatment an alien should amount to an outrage, to bad faith, to wilful neglect of duty or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency.’*¹⁵²

Unqualified FET is not linked to international law and is interpreted autonomously according to its ordinary meaning.¹⁵³ The danger of such a clause is that any state conduct can be labelled contrary to the fair and equitable treatment if the tribunal is of the opinion that it is. The liability threshold is therefore much lower. The unqualified FET ties the host state’s hands and can potentially trespass its *‘domaine réservé’*¹⁵⁴. A number of BITs signed by CEMAC states favour an unqualified FET standard over the qualified one despite the fact that it would put them in a very precarious position.¹⁵⁵

¹⁵⁰ Kläger op cit (n134); Organisation for Economic Cooperation and Development ‘Fair and equitable treatment standard in international investment law’, *OECD Working Papers on International Investments*, September 2004, available at <http://dx.doi.org/10.1787/675702255435>, accessed on 25 November 2014

¹⁵¹ The UNCTAD argued that given the fact that the minimum standard of treatment of aliens forms part of customary international law a claimant would carry a heavy burden of demonstrating general and consistent state practice and *opinio juris* in order to show that the minimum standard of treatment incorporates a certain minimum requirement.

¹⁵² *L.F.H. Neer and Pauline Neer (U.S.A.) v. United Mexican States* (1926) 60, Reports of International Arbitral Awards Vol. IV; Sornarajah op cit (n6) 151.

¹⁵³ Art 3(1) Cameroun- Egypt BIT (2000) not in force; Art 2 (2) Cameroun- United Kingdom BIT (1982) in force; Art 2 (2) Central African Republic- Morocco BIT (2006) not in force; Art 3(1) Congo-China BIT (2000) not in force; Art 2 (2) Congo-Germany BIT (2010) not in force.

¹⁵⁴ *‘Domaine réservé’* here is understood as the areas that are the sole prerogative of the State; United Nations Conference on Trade and Development op cit (n92) 10.

¹⁵⁵ Gabon- Morocco BIT (2004) in force; Equatorial Guinea- Morocco BIT (2005) not in force; Congo-Germany BIT (2010) not in force; Congo-China BIT (2000) not in force; Chad-Guinea BIT (2004) not in force; Central African Republic-Germany BIT (1965) not in force; Central African Republic-Switzerland BIT (1973) in force; Cameroon-United Kingdom BIT (1982) in force, available at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/34>, accessed on 12 November 2014

While arbitral tribunals are in agreement that an investor should expect that the host state keeps a consistent legal and policy framework they also acknowledge that host states have a right to regulate provided it is done in the public interest and is not discriminatory. As the Tribunal in *Saluka v Czech Republic* pointed out it would be unreasonable for an investor to expect that the circumstances prevailing at the time the investment is made remain totally unchanged unless the State has signed a stabilisation clause or has given an explicit promise to maintain a particular state of affairs so that the investor relies on the promise when making the investment.¹⁵⁶ The tribunal in *EDF v Romania* held that:

‘... except where specific promises or representations are made by the state to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host state’s legal and economic framework...’¹⁵⁷

Some BITs like the Gabon-Turkey BIT (not in force) provide for general exceptions that allow contracting parties to make rules for the protection of human, animal or plant life; for the conservation of living and non-living exhaustible resources or again exception related to the disclosure of information that may jeopardise the security of the country.¹⁵⁸ However, generally CEMAC countries do not include exception clauses in their BITs.

2.2.2. Full Protection and Security Standard

The full protection and security clause refers to physical protection or protection from acts of government and non-government actors.¹⁵⁹ It connotes a proactive attitude of the host state to protect the investment from actions of its organs or those of third parties.¹⁶⁰ Some tribunals defined it as the ‘*taking of all possible measures to prevent the killings and destruction of the investment*’.¹⁶¹ It is not a guarantee that the investment will never,

¹⁵⁶ *Saluka v Czech Republic* supra (n145); United Nations Conference on Trade and Development op cit (n92) 67; *CMS Gas Transmission Co. v Argentina*, ICSID case No ARB/01/8, award 12 May 2005.

¹⁵⁷ *EDF v Romania*, ICSID case No ARB/05/13, award of 8 October 2009.

¹⁵⁸ Art 5 of the Gabon- Turkey BIT signed in 2012 not in force.

¹⁵⁹ Dolzer & Schreuer op cit (n133) 149.

¹⁶⁰ Ibid.

¹⁶¹ *Asian Agricultural Product Ltd v Republic of Sri Lanka* ICSID Case No ARB/87/3; The tribunal in *American Manufacturing and Trading (AMT). Inc v Zaire* (ICSID case No Arb/93/1 award 21 February 1997) found that Zaire should take all measures necessary to ensure the full enjoyment of protection and security of the investment. In other words Zaire should show that it has taken all measures of precaution to protect the investment of AMT in its territory.

in any circumstances, be occupied, disturbed or destroyed.¹⁶² In addition the majority of BITs further provide for compensation for loss during wars, civil strife and other related events.¹⁶³

The purpose of the standard, according to Schreuer and Dolzer, is the need to protect the investor against various types of physical violence including invasion of the premises of the investment.¹⁶⁴ Sornarajah sees it as a concept with two sides: on one side the state should refrain from using its forces to harm the foreign investor's property while on the other side the state should give protection from violence to the investment if such violence could be reasonably anticipated.¹⁶⁵ This provision is essential in cases where the investor is targeting high risk countries in terms of wars and civil unrest. African countries and therefore OHADA countries figure among them.

The standard of full protection and security differs from fair and equitable treatment in that while the latter restrains the state from acting in a particular way or taking certain steps, the former requires host states to take action.¹⁶⁶ The standard is qualified however. Host states do not have a strict obligation to prevent violence. They are supposed to exercise 'due diligence' and take measures that are reasonable under the circumstances.¹⁶⁷ The majority of arbitral tribunals have been unwilling to associate the level of due diligence expected from states with the resources available.¹⁶⁸ However the *Pantechniki* Tribunal conceded that the extent of a state's duty under the full protection and security clause depended, to some extent, on the resources available to the host state. It therefore held that the Albanian authorities had not breached their full protection and security obligation since they could not control the magnitude of the social unrest.¹⁶⁹ It however warned that the state's resources factor will only be considered when there has

¹⁶² International Court of Justice, Case concerning Elettronica Sicula (ELSI case), 20 July 1989, ICJ Rep (1989).

¹⁶³ Art 7 of the Gabon- Turkey BIT (2012); art 3 (3) Congo- USA BIT (1994); art 5 Chad – Lebanon (2004); art 3 (3) Central African Republic – Germany BIT (1965).

¹⁶⁴ Dolzer & Schreuer op cit (n133) 149.

¹⁶⁵ Sornarajah op cit (n6) 237.

¹⁶⁶ M Mahnaz 'Full protection and security standard comes of age: Yet another challenge for State in investment treaty arbitration' (2011) *IISD* 11.

¹⁶⁷ Dolzer & Schreuer op cit (n133) 150; *Noble Ventures v Romania* ICSID case No ARB/01/11, award of 12 October 2005.

¹⁶⁸ Dolzer & Schreuer op cit (n133) 150.

¹⁶⁹ *Pantechniki v Albania* ICSID Case No ARB/07/21, award of 30 July 2009.

been physical damage to the investment but not when the contention is based on a ‘denial of justice’ claim. In such a case lack of sufficient resources to ensure the protection of the investment is no defence.¹⁷⁰

While some arbitral tribunals have restricted the scope of the full protection clause to physical security of aliens under customary international law¹⁷¹ others have widened it to more than just physical protection and extended it to legal and commercial protection.¹⁷² The *Siemens* Tribunal based its argument on the fact that intangible assets, which are protected under BITs, cannot be protected physically.¹⁷³ The *Azurix* tribunal relied on the ordinary meaning of the word ‘full’ and argued that the use of the formula ‘full’ protection and security without qualifying it implies protection that goes beyond physical security.¹⁷⁴ The full protection and security standard, like the fair and equitable standard, can impinge on the ‘*domaine réservé*’ of the state when arbitral tribunals extend it to the state’s regulatory powers.¹⁷⁵ Other tribunals however have recognised the right of a state as a sovereign to regulate in good faith and for public interest even if such regulation is detrimental to the investment.¹⁷⁶ Therefore some BITs specifically reserve the right to introduce measures for public order even if such measures may be contrary to the full protection and security clause. For instance the Equatorial Guinea-Morocco BIT (not in force) provides for the right to full protection and security subject to measures that are strictly necessary for the maintenance of public order.¹⁷⁷

The claimant has to prove that the host state took no effective measures to prevent or redress the harm done to the investment.¹⁷⁸ The test applied for the interpretation of the full protection and security clause would therefore be whether the

¹⁷⁰ *Pantechniki v Albania* supra (n169) at para77.

¹⁷¹ *Noble Ventures v Romania* supra (n167); Gabon- Turkey BIT signed in 2012 but not in force; Congo-USA BIT in force in 1990.

¹⁷² The arbitral tribunal in *Biwater v Tanzania* (2008) stated that full protection and security implies a State’s guarantee of stability in a secure environment physical, commercial and legal. Para 729.

¹⁷³ *Siemens AG v Argentina* ICSID Case No ARB/02/8, Award of 6 February 2007.

¹⁷⁴ *Azurix Corporation v The Argentine Republic* supra (n149). The Full protection and security standard may be breached even if there was no physical violence.

¹⁷⁵ *CME Czech Republic BV (the Netherlands) v Czech Republic* UNCITRAL Rules, partial award 13 September 2001.

¹⁷⁶ *AES v Hungary* ICSID Case No ARB/02/17, award 23 September 2010.

¹⁷⁷ Art 2 (2) of the Equatorial Guinea-Morocco BIT signed in 2005 but not in force; See also art 2 (2) of the Central African Republic-Egypt BIT signed in 2000 not in force.

¹⁷⁸ *Wena hotels Ltd (UK) v Arab Republic of Egypt*, ICSID case No Arb/98/4 award December 2000 reprinted in 41 I.L.M 896 (2002).

state took reasonable measures of prevention which a *well administered* government could be expected to exercise under similar circumstances.¹⁷⁹ This standard of proof, it is submitted, is too taxing on CEMAC countries the majority of which are developing countries in crisis thus not well administered. In this context the Pantechniki test referred to above may be more appropriate.

2.2.3. *National Treatment and Most Favoured Nation Treatment*

BITs also contain provisions on national treatment and most favoured nation treatment.¹⁸⁰ The former advocates for treatment not less favourable than that accorded to nationals of the host state while the latter provides for treatment not less favourable than that accorded to third parties with whom the host state has signed BITs.¹⁸¹

The national treatment clause in a BIT implies that there can be no discrimination between foreign and domestic investors in the host state's territory even if there is an economically valid reason for such discrimination.¹⁸²

The inclusion of the MFN treatment clause in a BIT implies that any benefit that the host state extends to a third party is automatically extended to the other party to the BIT provided that investors are 'in like circumstances'.¹⁸³ The Congo-United States BIT (in force) allows parties to exclude certain sectors from the application of MFN and national treatment but cautions that such exception should be kept to a minimum.¹⁸⁴ The Congo-Germany BIT (not in force) defines treatment that is less favourable and includes an exception to the rule especially when measures are taken for security or public order purposes.¹⁸⁵

¹⁷⁹ *AAPL v Sri Lanka* supra (n161).

¹⁸⁰ Most Favoured Nation treatment is also known as the MFN treatment.

¹⁸¹ Art 3 Cameroon-United Kingdom BIT (1985) in force; art 3 (1) Cameroon-Egypt BIT (2000) not in force; art 2 of the Central African Republic-Germany BIT (1965) not in force; art 3 (2) and (3) Congo-China BIT (2000) not in force.

¹⁸² Sornarajah op cit (n6) 235.

¹⁸³ In *Bayindir v Pakistan* ICSID Case No ARB/03/29, award of 27 August 2005. the tribunal found that a MFN clause would permit the invocation of a fair and equitable treatment clause contained in another BIT.

¹⁸⁴ Art 2 (1) Congo-United States BIT (1994) in force.

¹⁸⁵ Art 3(2) Congo- Germany BIT (2010) not in force.

There is no consensus on the interpretation of the MFN clause. Some tribunals give it a wide scope and find that it has to apply to all substantive issues in a BIT¹⁸⁶ while others are of the opinion that it should be interpreted bearing in mind the intention of the parties.¹⁸⁷ A mechanical application of the MFN clause will have the effect of undermining the negotiations between the parties and their intentions.¹⁸⁸ It might grant more protection than that intended by the parties or again include certain matters that were deliberately left out.¹⁸⁹ There is also a danger that foreign investors can rely on benefits granted by multilateral or regional agreements. Parties to BITs have tried to prevent such extension of the national treatment and MFN clause by explicitly excluding their application to agreements such as those related to free trade areas, customs unions and double taxation agreements.¹⁹⁰

The MFN and national treatment clause should not be confused with the non-discrimination clause that is found in a large number of BITs.¹⁹¹ The clause usually prohibits discriminatory and arbitrary measures.¹⁹² UNCTAD pointed out that while MFN and National treatment guarantee non-discrimination on nationality grounds, the non-discrimination clause protects foreign investors against discrimination based on factors other than nationality such as religion, race, gender, political affiliation and disabilities among other things.¹⁹³ The non-discrimination clause protects foreign investors against measures taken by the host state that are specifically targeting them.¹⁹⁴ The impact of the measure or action on the investment will be the factor that will be

¹⁸⁶ Dolzer and Schreuer argued that the MFN clause will operate only to the extent that the provision in the other treaty is compatible in principle with the scheme negotiated by the parties in the basic treaty and departs from it only in a detail consistent with that broad scheme. But they also acknowledged that there would be a chance that the clause would be interpreted literally and therefore apply to all areas of other treaties regardless of the compatibility between them.

¹⁸⁷ Dolzer & Schreuer op cit (n133) 186-187.

¹⁸⁸ Ibid.

¹⁸⁹ Dolzer & Schreuer op cit (n133) 190-191. Sornarajah similarly argued: 'the inclusion of the MFN presents the difficulty that the foreign investor could latch onto more favourable treatment provided for in past or future treaties than what was bargained for'.

¹⁹⁰ Art 3(3) Equatorial Guinea-Morocco BIT (2005) not in force; art 4 (4) (b) Gabon-Turkey BIT (2012) not in force; art 1 Central African Republic-Switzerland (1973) in force; art 7 Cameroon-United Kingdom BIT (1985) in force.

¹⁹¹ United Nations Conference on Trade and Development op cit (n92) 82.

¹⁹² Some BITs prohibit discriminatory and unjustified measures or unreasonable and discriminatory measures.

¹⁹³ Op cit (n116); Dolzer & Schreuer op cit (n133) 176.

¹⁹⁴ United Nations Conference on Trade and Development op cit (n92) 82.

considered when determining whether or not it is discriminatory. The state's intention is irrelevant.¹⁹⁵ The tribunal in *LG&E v Argentina* however found that one could consider either the intent or the effect of the measure.¹⁹⁶

The International Court of Justice (ICJ) defined arbitrariness as '*a wilful disregard to due process of law, an act which shocks or at least surprises a sense of judicial propriety*',¹⁹⁷ The tribunal in *LG&E v Argentina* described an arbitrary measure as '*a measure that affects the investments of nationals of the other party without engaging in a rational decision making process. The process in question involves considering the effect of the decision on the investor and balancing the interest of the state with any burden imposed on such investment*'.¹⁹⁸

2.2.4. *Transfer of funds*

A significant number of BITs allow foreign investors to freely repatriate profits to their home state or to freely transfer funds in and out of the host state according to exchange rules in force at the time of the transfer.¹⁹⁹ Such right is formulated in absolute terms in the majority of CEMAC BITs examined.²⁰⁰ This, it has been argued, is very inconvenient because moving funds in and out of the country without control may destabilise the country's financial market.²⁰¹ Host states cannot assume or hope that financial crisis will never occur. Crises such as exchange shortfalls necessitating currency control do occur and the doctrine of necessity allows the state to intervene in such situations at the risk of infringing the investor's absolute right of repatriation.²⁰²

¹⁹⁵ *Siemens AG v Argentina* supra (n172).

¹⁹⁶ Dolzer & Schreuer op cit (n133) 178.

¹⁹⁷ ELSI case supra (n162) 15 at 76.

¹⁹⁸ *LG&E v Argentina*, ICSID case No ARB/02/1, Decision on Liability, 3 October 2006.

¹⁹⁹ The repatriation clause will usually include not only the profits that are made out of the investment but also other payments such as fees or other entitlements that are paid to foreign investors and their employees.

²⁰⁰ The majority of BITs signed by CEMAC countries have provisions such as the one found in art 4 of the Chad-Germany BIT in force since 1967 which grants the right to free transfer of funds with no exceptions.

²⁰¹ Dolzer & Schreuer op cit (n133) 91 observed that experience has shown that sudden short term capital inflows and especially capital flight may lead to instability in the domestic financial markets.

²⁰² Sornarajah argued absolute rights of repatriation cannot bind a State in times of financial stringency such as extreme balance of payment difficulties.

BITs such as the Cameroon-United Kingdom BIT (in force) provide for exceptions to the right to repatriate funds in times of exceptional financial crisis.²⁰³

2.2.5. Expropriation

Expropriation is defined as the governmental taking or modification of an individual's property rights especially by eminent domain.²⁰⁴ It '*connotes the taking by a governmental type authority of a person's property with a view to transferring ownership of that property to the authority that exercised its de jure or de facto power to do the taking*'²⁰⁵ Therefore expropriation in the context of international investment law is understood as the compulsory taking of the foreign investor's property without its consent by the state in the public interest.

BITs guarantee against discriminatory expropriation or nationalisation and generally stipulate that such expropriation should be done for public interest reasons subject to compensation.²⁰⁶ Some of the BITs signed by CEMAC states with Germany, France and Lebanon include full protection and security clauses immediately before expropriation clauses²⁰⁷ suggesting that the standard should be applied in expropriation disputes. The formulation of compensation differs from one BIT to another. Some provide for prompt adequate and effective compensation at fair market value²⁰⁸, others provide for just compensation²⁰⁹ or just and equitable compensation²¹⁰ while others provide for compensation equivalent to the value of the investment²¹¹.

²⁰³ Art 6 of the Cameroon-United Kingdom BIT provides for repatriation of funds subject to restrictions in exceptional financial circumstances exercised in good faith. See also art 8 (3) of the Gabon- Turkey BIT
²⁰⁴ Black's Law Dictionary 7th Ed.

²⁰⁵ B El Attar, BY Li, D Kessler et al ' Expropriation clauses in international investment agreements and the appropriate room for host state to enact regulations: A practical guide for States and investors' Graduate Institute of International Development studies, June 2009, available at <http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/Research%20Projects/Trade%20Law%20Clinic/Expropriation%20clauses%20in%20International%20Investment%20Agreements%20and%20the%20appropriate%20room%20for%20host%20States%20to%20enact%20regulations,%202009.pdf> accessed on 27 January 2015 footnote omitted.

²⁰⁶ Sornarajah op cit (n6) 240; Art 6 (2) of the Gabon Turkey BIT provides that non-discriminatory legal measures designed and applied to protect legitimate public welfare objectives such as health, safety and environment, do not constitute indirect expropriation.

²⁰⁷ Equatorial Guinea- France BIT (in force); Congo-Germany BIT (not in force); Chad-Lebanon BIT (not in force); Chad-Germany BIT (in force); Central African Republic-Germany BIT (not in force).

²⁰⁸ This formulation is widely used compared to the others and is otherwise known as the 'hull formula'.

²⁰⁹ Art 4 (2) Central African Republic-Morocco BIT (2006) signed but not in force.

2.3. CONCLUSION

The majority of CEMAC states' BITs examined in this chapter have provided for unqualified fair and equitable treatment which has a low liability threshold. The interpretation of this clause by arbitral tribunals has generally been pro investor in that the standard of proof is much lower than if the fair and equitable treatment standard was linked to the international minimum standard. If linked to international law, the claimant will have to prove that a particular obligation has gained international recognition and that the state has breached that obligation. As will be discussed in chapter three below, certain states have attempted to limit the scope of the FET standard. For instance the NAFTA Free Trade Commission issued Notes of Interpretation that linked the FET standard and the full protection and security standard to the international law minimum standard of treatment.

The full protection and security standard has also given rise to wide interpretations by extending it not only to physical protection but also to legal and commercial protection. Such a standard may be too demanding on states that do not have the means to ensure both especially those countries scourged with wars and civil unrest. Most of CEMAC BITs examined except for one signed with the United Kingdom and another with Turkey²¹² grant absolute right of transfer of fund which has been criticised as impractical. Indeed such a provision may be problematic during financial crisis that may push a state to take measures that contravene it.

The MFN treatment may also prove to be problematic if interpreted too broadly and formulated without limitations. Investors may acquire advantages and protection that the state for one reason or another was not willing to give.

Hence most of the guarantees as formulated in CEMAC states' BITs examined do put these countries in a weak position vis-à-vis foreign investors, rendering them liable to investors in broad circumstances. OHADA countries could therefore provide for exceptions to the right as in the Cameroon-United Kingdom BIT (in force).

²¹⁰ Art 4 (2) Equatorial Guinea-Morocco BIT (2005) signed but not in force; Art 4 (2) Central African Republic-Egypt BIT (2000) signed but not in force.

²¹¹ Art 4 (1) Congo-China BIT (2000) not in force; Art 4 (2) Congo-Germany BIT (2010) not in force; Art 3 (2) Chad-Germany BIT (1967) in force.

²¹² Art 8 (3) Gabon-Turkey BIT 2012 not in force; art6 Cameroon-United Kingdom BIT 1982 in force.

Moreover it must be born in mind that the outcome of a case does not solely depend on treaty formulation. The interpretation given by arbitral tribunals also plays an important role. A certain trend may be observed in respect of arbitral awards but no consistency is assured because these tribunals are not bound by the principle of precedent. A very precise and predictable set of laws with clear interpretation rules like the North American Free Trade Agreement might be more beneficial to OHADA countries.

In this chapter I have analysed some of the investment laws in the OHADA region and a number of BITs signed by OHADA states to determine the type of protection they are willing to grant foreign investors and now turn to models of harmonisation of investment laws in other jurisdictions to determine whether or not they are suitable models for OHADA.

CHAPTER THREE: COMPARATIVE ANALYSIS: NAFTA AND THE SOUTH AFRICAN PROMOTION AND PROTECTION OF INVESTMENT BILL

3. INTRODUCTION

Harmonisation of investment laws is not impossible. It has been undertaken in other jurisdictions. The United States, Canada and Mexico included an investment chapter in their free trade agreement (NAFTA). South Africa on the other hand has proposed adopting a different approach by putting all investments under the national regime. It would therefore be interesting to look at how these different jurisdictions have shaped their investment laws with respect to standards of protection and how well the system is functioning in order to assess whether or not they are viable models for OHADA. NAFTA²¹³ is a trilateral arrangement between Canada, the United States and Mexico establishing a free trade area.²¹⁴ When creating a free trade area parties commit themselves to removing tariffs among them but each country retains its own tariffs against non-members.²¹⁵ Art 102 (1) (a) of NAFTA provides for elimination of barriers to trade in, and facilitation of cross border movement of goods and services between the territories of the parties.

Analysing NAFTA investment protection framework with regard to an eventual inclusion of investment law within OHADA might seem farfetched considering the category of the countries considered, their economic development and their involvement in global trade. Indeed NAFTA is an agreement between two developed countries and one developing country whereas OHADA is the result of an agreement between least developed countries, a factor that says a lot about their level of economic development and their share in the global market.²¹⁶ Moreover NAFTA is more inward looking. It

²¹³ Otherwise known as NAFTA.

²¹⁴ Art 101 of NAFTA provides that the parties to the agreement consistent with the provision of art XXIV of the general agreement on tariffs and trade hereby establish a free trade area.

²¹⁵ M Lee 'Regionalism in Africa: A part of the problem or a part of solution' (2002) 9 *Polis/ R.C.S.P/ C.P.S.R* 3.

²¹⁶ According to the UNCTAD database 13 of the 17 OHADA member states are least developed countries. These are Benin, Burkina Faso, Central African Republic, Comoros, Guinea, Equatorial Guinea, Guinea Bissau, Mali, Niger, DRC, Senegal, Chad and Togo available at <http://unctad.org/en/pages/aldc/Least%20Developed%20Countries/UN-list-of-Least-Developed-Countries.aspx>, accessed on 12 December 2014.

only applies to investments from contracting parties.²¹⁷ Investments by non NAFTA members in the NAFTA area will be subject to national laws of the country in which the investment is made. OHADA on the other hand has a more outward outlook and mainly targets foreign investors.²¹⁸

Nevertheless both OHADA and NAFTA have the common objective of increasing investments within their respective regions.²¹⁹ NAFTA could therefore be a better example to follow because it does not cover just one sector like the Energy Charter Treaty²²⁰ but trade and investment. Its provisions, though identical to those found in BITs, will thus be more precise and clear and the interpretation of standards of treatment of investment much more uniform and predictable.

Closer to home is the South African Promotion and Protection of Investment Bill (PPIB) tabled in Parliament in 2013. If adopted it will repeal all bilateral treaties signed by South Africa and submit all foreign investments to the national regime. BITs, it is submitted, were designed to remedy the shortcomings of African national legislations which left much to be desired in terms of guarantees and protection of foreign investments.²²¹ Reverting to national legislation portrays a confidence in the effectiveness and neutrality of the South African national legal framework on investment on the part of the state²²² which foreign investors may not share as the legislation emphasises protection of the state's regulatory space at the cost of protection of the

²¹⁷ Art 1101 NAFTA.

²¹⁸ M Audit 'Contrats publics et arbitrage international Administrative law, Bruylant 2011, available at <http://www.ohada.com/content/newsletters/1320/contrat-public-et-arbitrage-international.pdf>, accessed on 21 January 2015.

²¹⁹ Art 102 (1) (c) of NAFTA included the substantial increase of investment opportunities in the territories of the parties as one of the objectives of the agreement. Moreover the preamble to the Agreement provides that parties resolve to ensure a predictable commercial framework for business planning and investment. OHADA on its part recognised, in its constitutive treaty's preamble, that it is essential that the harmonized law be applied with diligence in such conditions so as to guarantee legal stability of economic activities and encourage investment.

²²⁰ The Energy Charter Treaty was signed in 1994 and legally entered into force in April 1998. It has 52 signatories mostly from eastern and western Europe. It provides a multilateral framework for intergovernmental cooperation in the energy sector; Dolzer & Schreuer op cit (n133) 27.

²²¹ E Neumayer & L Spess 'Do bilateral investment treaties increase foreign direct investment to developing countries?' (2005) 33 *World Development* 1567 at 1570 & 1582; A Perry 'An ideal legal system for attracting foreign direct investment? Some theory and reality' (2000) 15 *American University International Law Review* 1627 at 1630 to 1631.

²²² Department of Trade and Industry South Africa 'Why invest in South Africa' available at http://www.thedti.gov.za/trade_investment/why_invest_insa.jsp, accessed on 20 December 2014.

rights of foreign investors. Insistence on sovereign regulatory power may be an obstacle to foreign investors which OHADA is trying to overcome. Therefore South Africa's investment Bill may not be the best model to follow although it has tried to redress the imbalance in the investor-state relationship.

3.1. STANDARDS OF PROTECTION IN NAFTA

NAFTA grants the same types of guarantees and protections found in BITs. The difference emerges in their application and interpretation. Hence the Agreement provides for national treatment, most favoured nation treatment, fair and equitable treatment, full protection and security, non-discriminatory treatment, transfer or repatriation of funds and compensation for expropriation and loss caused by wars and other related incidents.

3.1.1. Fair and equitable treatment and full protection and security

Art 1105 (1) enunciates the parties' commitment:

'To accord to investments of investors of another party treatment in accordance with international law, including fair and equitable treatment and full protection and security'

This provision was initially interpreted to mean that, in addition to fair and equitable treatment and full protection and security, the investor of another party was entitled to the international minimum standard.²²³ Thus the tribunal in the *Pope & Talbot* case found that the 'fair and equitable treatment' and 'full protection and security' standards were additive to the international minimum standard because the language of the treaty was analogous to that found in BITs. It argued that it was doubtful that parties intended to grant investors from NAFTA countries the minimum standard of treatment while granting a higher level of protection to investors from other countries.²²⁴

This interpretation was retracted by the NAFTA Free Trade Commission which issued Notes of Interpretation of Certain Chapter 11 Provisions in 2001. The Note is a

²²³ *Pope & Talbot Inc. v Canada*, UNCITRAL Final Merits Award of 10 April 2001.

²²⁴ Kläger op cit (n134) 68.

binding document meant to guide tribunals in their interpretation of the art 1105 (1)²²⁵ and stipulated that:

'1. Article 1105 (1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investors of another party.

*2. The concept of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.'*²²⁶

The Interpretation Notes linked 'fair and equitable treatment' and 'full protection and security' to the international minimum standard thus making international law minimum standard a standard below which treatment of investments should not go.²²⁷ Canada released a statement on implementation in which it stated that art 1105 is intended to assure a minimum standard of treatment of investments of NAFTA investors and that it provides for a minimum absolute standard of treatment based on long standing principles of customary international law.²²⁸

Tribunals considered the Neer formula²²⁹ as the foundation of the international minimum standard of treatment of aliens. The tribunal in that case held that:

*'In order to constitute an international delinquency, the treatment should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency'*²³⁰

The formula was widely criticised by tribunals as being out dated and not reflecting customary international law as it is today. In response to this other arbitral tribunals argued that the components of the formula remained substantially the same and

²²⁵ Art 1131 (2) NAFTA provides that an interpretation by the Commission of a provision of this agreement shall be binding on a tribunal established under this section.

²²⁶ North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission July 31, 2001.

²²⁷ *Glamis Gold Ltd v United States*, UNICITRAL rules, award of 8th June 2009 para 615

²²⁸ Organisation for Economic Cooperation and Development 'Fair and equitable treatment standard in international investment law', *OECD Working Papers on International Investments* (2004) p 11 footnote omitted.

²²⁹ Neer formula originates from the *Neer v Mexico* case in which the tribunal defined what constituted international delinquency or a breach of the minimum standard of treatment of aliens.

²³⁰ *L.F.H. Neer and Pauline Neer (U.S.A.) v. United Mexican States* (1926) Reports of International Arbitral Awards, Vol. IV.

emphasised on the evolutionary character of customary international law.²³¹ The United States also issued a statement about customary international law and pointed out that it [customary international law] is not frozen in time and that in fact the international minimum standard evolves such that the international minimum standard referred to in the Interpretation Notes is the standard as it is known today.²³² Hence the tribunal in the *ADF group* case observed that:

*‘What customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the award in the Neer case was rendered. For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development’*²³³

Therefore for a claimant to establish a breach of art 1105 (1) of NAFTA he must show that ‘the act in question is sufficiently egregious and shocking, a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination or manifest lack of reason’.²³⁴ Claimants have a very high standard of proof because they need to prove that a particular obligation is a state practice or *opinio juris* and that the NAFTA state has reneged from such an obligation.²³⁵ Both elements are not easy to prove or are, at the very least, time consuming.

NAFTA tribunals have also acknowledged that a host state’s obligation to treat a foreign investor in a fair and equitable manner does not preclude the state from regulating in the interest of the country.²³⁶

3.1.2. National Treatment and Most Favoured nation treatment

NAFTA also provides for national treatment and the most favoured nation treatment.

The national treatment is restricted to equality of treatment between domestic and

²³¹ *Pope & Talbot Inc. v Canada*, UNCITRAL (Final Merits Award of 10 April 2001) Paras 57- 62. The Pope and Talbot tribunal argued that the principles of customary international law were not frozen in amber at the time of the Neer decision and that it is a facet of international law that customary international law evolves through state practice.

²³² Transcript of the oral hearing, Vol.II, 16th April 2002, pp 492-493; *Mondev International Ltd v United States*, ICSID case No ARB (AF)/99/2, award of 11th October 2002 para 125; Kläger op cit (n134) 75.

²³³ *ADF Group v United States*, ICSID case No ARB (AF)/00/1 , award of 9th January 2003 para 179; *Glamis Gold Ltd v United States* supra (n227) at para 613.

²³⁴ *Glamis Gold Ltd v United States* supra (n227) at para 616. *Waste Management v Mexico*, 2004 ICSID case No. ARB (AF)/00/3, award of 30th April 2004, 43 ILM 967 at para 98.

²³⁵ United Nations Conference on Trade and Development op cit (n92) xiv.

²³⁶ *S.D. Myers v Canada* UNCITRAL Rules, 1st partial award of 13 November 2000.

foreign investors within the host state's borders²³⁷ whereas most favoured nation treatment prescribes treatment no less favourable than that accorded to investors generally meaning investors from NAFTA and non NAFTA countries.²³⁸ NAFTA however precludes the enforcement of these guarantees if their application results in the derogation from national treatment obligations related to intellectual property.²³⁹

Both provisions introduced the notion of 'like circumstances' without specifying the context in which it is to be used. Sornarajah believes that the term is used to limit the effect of national treatment requirement but acknowledged the difficulty of understanding the nature of such a limitation in the context of investment.²⁴⁰ Moreover the concept of 'like product' in international trade law cannot be directly transplanted in international investment law.²⁴¹ Questions have arisen as to whether 'like circumstances' referred to the same sector or the same line of business. Some tribunals interpreted it to mean the same sector²⁴² while others viewed it as not exclusively referring to the sector in which a particular activity is undertaken but to the business in general.²⁴³

The tribunal in *SD Myers v Canada* interpreted 'like circumstances' as referring to the 'same sector' but warned that such interpretation should be broad enough to include concepts of economic sector or business sector. It further considered that:

*'the interpretation of the phrase "like circumstances" in art 1102 must take into account the general principles that emerge from the legal context of the NAFTA, including both its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns. The assessment of 'like circumstances' must also take into account circumstances that would justify governmental regulations that treat them [foreign investors] differently in order to protect the public interest. The concept of 'like circumstances' invites an examination of whether a non-national investor complaining of less favourable treatment is in the same 'sector' as the national investor...'*²⁴⁴

²³⁷ Art 1102 NAFTA.

²³⁸ Art 1103 NAFTA.

²³⁹ Art 1108 (5) NAFTA.

²⁴⁰ M Sornarajah op cit (n6) 235.

²⁴¹ Ibid.

²⁴² *Fieldman v Mexico*, 18 ICSID Review- FILJ (2003) 488 para 171, award of 16th December 2002; Dolzer & Schreuer op cit (n133) 180.

²⁴³ *Occidental Exploration and Production Co. v Ecuador* supra (n141) 173.

²⁴⁴ *SD Myers v Canada*, first partial award of 13th of November 2000, 40 ILM (2001) 1408 at para 250.

NAFTA tribunals have agreed that a foreign investor forfeits its right to bring a national treatment claim when its conduct contravened national law, notwithstanding that the latter was not applied uniformly.²⁴⁵

3.1.3. *Transfer of funds*

NAFTA parties have agreed to permit investors of another party to freely transfer funds and proceeds from the investment at the market rate of exchange prevailing at the time of the transfer.²⁴⁶ The right of transfer however is not absolute. NAFTA parties may prevent a transfer through an equitable, non-discriminatory *bona fide* application of their laws relating to bankruptcy, insolvency and protection of the right of creditors; the issuing, trading and dealing in securities; criminal offenses, reports of transfers of currency and other monetary instruments; ensuring the satisfaction of judgment in adjudicatory proceedings.²⁴⁷ The restriction is not directly related to a monetary crisis as formulated in BITs signed by the United Kingdom.

3.1.4. *Expropriation*

Art 1110 prohibits expropriation or nationalisation of another party investor's investment unless it is for a public purpose, is done in a non-discriminatory manner, in accordance with due process of laws and art 1105 (1) and is subject to compensation.²⁴⁸ The compensation must be equivalent to the fair market value of the investment immediately before the date of the expropriation.²⁴⁹ A non-discriminatory measure of general application will not amount to expropriation of a debt security covered by NAFTA chapter 11 simply because the investor incurs additional costs as a consequence and results in default on its part.²⁵⁰

NAFTA provides for exceptions to the application of the guarantees granted in its Chapter 11 for the protection and preservation of the environment, protection of

²⁴⁵ *Thunderbird v Mexico*, UNCITRAL rules, award of 26th January 2006, para 183.

²⁴⁶ Art 1109 NAFTA.

²⁴⁷ Art 1109 (4) NAFTA.

²⁴⁸ Art 1110 (1) NAFTA.

²⁴⁹ Art 1110 (2) NAFTA.

²⁵⁰ Art 1110 (8) NAFTA.

human, animal and plant life or health, conservation of living and non-living exhaustible resources.²⁵¹

3.2. SOUTH AFRICAN PROMOTION AND PROTECTION OF INVESTMENT BILL

In a recent policy shift, the South African government terminated or cancelled the renewal of all BITs signed by South Africa²⁵² and tabled the Promotion and Protection of Investment Bill²⁵³ in Parliament in 2013 under which all investments in South Africa will be regulated.²⁵⁴ The preamble of the Bill, on the one hand enunciates South Africa's commitment to promote and protect investment while on the other hand reaffirms the government's right to regulate in the public interest and to secure a balance between rights and obligations of investors.²⁵⁵ The Bill grants certain protections to investors in general such as compensation for loss caused by wars and other related incidents and some to foreign investors specifically such as national treatment. These guarantees are subject to the South African Constitution and the state's sovereign right to regulate in the public interest.²⁵⁶

3.2.1. National Treatment

The Bill guarantees national treatment to foreign investors and their investments in like circumstances.²⁵⁷ It does not explicitly explain what it understands by 'like circumstances' but nevertheless enumerates a number of factors to be considered when determining whether a foreign investment is in 'like circumstances' as a domestic

²⁵¹ Art 1106 (6) & art 1114 NAFTA.

²⁵² According to news sources, most BITs signed with the European Union immediately after 1994 have been cancelled as they come up renewal; C Paton 'Investment Bill marks shift in SA's trade policy' 2013 *Businessday Investors Monthly*, available at <http://www.bdlive.co.za/business/trade/2013/11/04/investment-bill-marks-shift-in-sas-trade-policy>, accessed on 2 January 2015.

²⁵³ Promotion and Protection of Investment Bill, Notice 1087 of 2013, Department of Trade and Industry, *Staatskoeran*, 1st November 2013, No 36995.

²⁵⁴ South African Institute of International Affairs 'South Africa's draft promotion and protection of investment Bill' *Gazette notice* No 36695, 1st November 2013.

²⁵⁵ Preamble to the Promotion and Protection of Investment Bill of 2013; S3 (a) PPIB.

²⁵⁶ S10 (1) of the Bill allows the South African government or any of its organs to take measures to *redress historical, social and economic inequalities; uphold the values and principles espoused in S 195 of the Constitution; promote and preserve knowledge and biological resources related thereto or national heritage; foster economic development, industrialisation and beneficiation; and achieve the progressive realisation of socio economic rights*; S3 (b) PPIB.

²⁵⁷ S6 (1) PPIB.

investment.²⁵⁸ The decision maker must consider these factors collectively and not be influenced or biased by just one factor.²⁵⁹ These factors are: the effect of the foreign investment on the republic including cumulative effects of all investments; the sector the foreign investment is in; the aim of any measure relating to foreign investment; and other factors relating to the foreign investor or the foreign investment in relation to the measure concerned.

3.2.2. *Security*

South Africa undertakes to accord foreign investors and their investments and returns equal level of security as may be generally provided to other investors and subject to available resources and capacity.²⁶⁰ Attaching the level of security of investments to the country's available resources and capacity limits the liability of the state.²⁶¹

Investors are also guaranteed equal treatment and redress in respect of compensation without any discrimination and subject to applicable domestic laws, international law and customary international law²⁶² if they suffered loss or damage as a result of war, armed conflicts, insurrections or riots, revolution and state of emergency.²⁶³ S7 therefore protects investors not only against wars and other related events but also against actions taken by the government or its organs and forces.²⁶⁴

3.2.3. *Expropriation*

The Bill prohibits expropriation or nationalization unless done in accordance with the Constitution, for public interest, under due process and subject to just and equitable compensation.²⁶⁵ The compensation should not only be just and equitable but should also reflect an equitable balance between public interest and the interest of those affected. In addition some factors such as the current use of the investment; the history

²⁵⁸ S6 (4) PPIB.

²⁵⁹ S6 (5) PPIB.

²⁶⁰ S7 (1) PPIB.

²⁶¹ In other words the State will not be liable if it could offer adequate protection due to insufficient resources; South African Institute of International Affairs op cit (n254) 8.

²⁶² This provision was found to be contradicting the interpretation clause since it refers to the application of customary international law.

²⁶³ S7 (2) PPIB.

²⁶⁴ S7 (3) PPIB.

²⁶⁵ S8 (1) PPIB.

of acquisition and use of the investment; the market value of the investment and the purpose of the expropriation must be taken into consideration when calculating the amount of compensation.²⁶⁶ The amount obtained under these conditions will be deemed as the value of the investment immediately before the expropriation or before it became known to the public.²⁶⁷ In this Bill South Africa thus moves away from the ‘full market value’ concept hence alleviating the liability of the state in respect of the amount of compensation.

3.2.4. *Transfer of funds*

Investors are allowed to transfer funds but subject to taxation and other applicable South African laws. The right of transfer is therefore not absolute.²⁶⁸ In other words the right of transfer is subject to any limitations and exceptions contained in South African legislation. Moreover the Bill empowers the government to take measures necessary for the protection of essential security interests especially in respect of the Republic’s financial stability.²⁶⁹ Transfer of funds can therefore be restricted if it jeopardises the economic stability of the country.

3.2.5. *Dispute resolution*

Under the Investment Bill aggrieved foreign investors can bring a claim not before an international arbitral tribunal, as is the practice in the area of international investment law. Instead disputes are resolved by an appointed mediator or other competent body.²⁷⁰ Parties also have the alternative to bring a claim before any court, competent and independent tribunal or statutory body.²⁷¹ Commentators have criticised the dispute resolution mechanism under the Bill as depriving foreign investors of the opportunity to submit disputes to a neutral international arbitral tribunal.²⁷² The South African government cannot be subjected to international arbitration because it did not consent to

²⁶⁶ S8 (3) PPIB.

²⁶⁷ S8 (4) PPIB.

²⁶⁸ S9 PPIB.

²⁶⁹ S10 (2) PPIB.

²⁷⁰ S11 (1) PPIB.

²⁷¹ S11 (4) PPIB.

²⁷² C Paton ‘Investment Bill marks shift in SA’s trade policy’ *Businessday Investors Monthly*, 4 November 2013, available at <http://www.bdlive.co.za/business/trade/2013/11/04/investment-bill-marks-shift-in-sas-trade-policy>, accessed on 2 January 2015.

it. Moreover the arbitration process under the Bill is regulated by the South African Arbitration Act²⁷³ which is an out dated law and perhaps not appropriate to support disputes as complex as investment disputes.

3.2.6. *Criticisms of the Promotion and Protection of Investment Bill*

The Promotion and Protection of Investment Bill has been criticised in respect of the level of protection granted to foreign investors. Some authors are of the opinion that it diminishes the rights of foreign investors since it does not provide for the ‘just and equitable treatment’, ‘full protection and security’ standards and ‘most favoured nation treatment’ found in BITs.²⁷⁴

All rights and guarantees given under the Bill are subject to the Constitution and the state’s regulatory power.²⁷⁵ Indeed the interpretation of the investor’s rights is subject to the Constitution and international law. The latter will only be considered as long as it does not contravene the Constitution.²⁷⁶ Commentators argue that the interpretation clause is contradictory as it seeks on the one hand to restrict the application of customary international law to its consistency with the Constitution while on the other hand including international agreements relevant to investments which are normally interpreted in line with customary international law.²⁷⁷

The Bill has further narrowed investor’s rights in respect of compensation in the event of expropriation by providing for ‘just and equitable’ compensation instead of the ‘full market value of the investment’ usually adopted in BITs.²⁷⁸ Expropriation is allowed as long as it is consistent with the Constitution. One of the reasons given for

²⁷³ Arbitration Act 42 of 1965.

²⁷⁴ C Paton ‘Investment Bill marks shift in SA’s trade policy’ *Businessday Investors Monthly*, 4 November 2013, available at <http://www.bdlive.co.za/business/trade/2013/11/04/investment-bill-marks-shift-in-sas-trade-policy>, accessed on 2 January 2015.

²⁷⁵ See S4 (2) of the Bill.

²⁷⁶ South African Institute of International Affairs op cit (n254); S 2 of the Bill provides that the Act must be interpreted and applied with due regard to the Constitution; International law consistent with the Constitution; international customary law consistent with the Constitution; and any other relevant Convention or international agreement to which the Republic is or becomes a party

²⁷⁷ South African Institute of International Affairs op cit (n254) 6.

²⁷⁸ P Draper & A Langalanga ‘Does the draft investment bill threaten Foreign investors’ rights?’ (2014) *South African Institute of International Affairs*, Wednesday 02 April 2014, available at <http://www.saiia.org.za/opinion-analysis/draft-investment-bill-requires-amendment>, accessed on 6 January 2015.

reverting to a national investment regime is that the protection in the South African Constitution against arbitrary expropriation is amply sufficient.²⁷⁹

Subjecting the investment regime to national legislation makes it susceptible to unilateral changes by the government and legislative bodies hence creating uncertainties and insecurities.²⁸⁰ The investor is no longer assured of a stable investment regime.²⁸¹ The South African Institute of International Affairs is of the opinion that the Bill strongly emphasises on the regulatory powers of the state in the public interest thus giving the government too much discretion and endangering the consistency and the stability of the economic framework.²⁸²

3.2.7. Lessons for OHADA

NAFTA linked ‘fair and equitable treatment’ and ‘full protection and security’ standards to the customary international minimum standard and clarified that those two concepts do not require treatment in addition to or beyond customary international standard of treatment of aliens.²⁸³ That being said it did not prevent arbitral tribunal from adopting different interpretations regarding the liability threshold under customary international law. UNCTAD identified three different interpretations of the standards²⁸⁴ namely:

- The minimum standard of treatment equated to the Neer formula which has a very high liability threshold. Host states will only be liable for very serious breaches.²⁸⁵
- The minimum standard of treatment that goes beyond the Neer formula. The liability threshold is not as high as the one linked to the Neer standard; finally

²⁷⁹South African Institute of International Affairs op cit (n254) 3.

²⁸⁰ C Paton ‘Investment Bill marks shift in SA’s trade policy’ *Businessday Investors Monthly*, 4 November 2013, available at <http://www.bdlive.co.za/business/trade/2013/11/04/investment-bill-marks-shift-in-sas-trade-policy>, accessed on 2 January 2015.

²⁸¹ South African Institute of International Affairs op cit (n254) 9; P Draper & A Langalanga ‘Does the draft investment bill threaten Foreign investors’ rights?’ (2014) *South African Institute of International Affairs*, Wednesday 02 April 2014, available at <http://www.saiia.org.za/opinion-analysis/draft-investment-bill-requires-amendment>, accessed on 6 January 2015.

²⁸²ibid. C Paton ‘Investment Bill marks shift in SA’s trade policy’ *Businessday Investors Monthly*, 4 November 2013, available at <http://www.bdlive.co.za/business/trade/2013/11/04/investment-bill-marks-shift-in-sas-trade-policy>, accessed on 2 January 2015.

²⁸³ NAFTA Free Trade Commission ‘North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11’, 31 July, 2001, available at http://www.sice.oas.org/tpd/nafta/Commission/CHI1understanding_e.asp, accessed on 2 December 2014

²⁸⁴United Nations Conference on Trade and Development op cit (n92) 76.

²⁸⁵ *Glamis v united States* supra (n227).

- The arbitral tribunal in *Merril v Canada* does not see any difference between the obligation to accord fair and equitable treatment and that of according the minimum standard of treatment if the former is interpreted literally. Therefore despite the Notes of Interpretation issued by the NAFTA Free Trade Commission there are still controversies as to the right application and interpretation of these standards.

The very foundation of OHADA is legal and judicial security which goes to suggest that neither unqualified standards of protection nor standards linked to customary international law help achieve that objective. Indeed the former are too pro investor considering that the liability threshold is low and the host state obligations too broad while the latter are too taxing on claimants and cannot encourage investors to bring in their capital because the liability threshold is too high.

UNCTAD has suggested a number of formulations of the fair and equitable treatment, advising that the best alternative for African countries and in this case OHADA countries would be to clarify or qualify the standards of protection thus replacing a broad provisions such as ‘fair and equitable treatment’ or ‘full protection and security’ with specific obligations.²⁸⁶ It did however suggest that countries could altogether omit the ‘fair and equitable’ and ‘full protection and security’ standards due to the ambiguity of their interpretation. South Africa has adopted this approach.

The same rationale applies to the ‘full protection and security’ clause. Mahnaz was of the opinion that using the classical formulation of full protection and security without qualifying it will be too taxing on host states as they will not only have to ensure the physical protection of investments but also the legal and economic protection which will have the effect of limiting the sovereign power of the state to regulate in the public interest.²⁸⁷

South Africa tied the protection of investments to the country’s available resources. This formulation is advantageous to the state since its liability is proportionate to its ability to perform its obligation. However it might discourage foreign investors

²⁸⁶ United Nations Conference on Trade and Development op cit (n92) 108-111.

²⁸⁷ Mahnaz op cit (n166) 11 to12.

since it is not guaranteed that its investment is safe. Arbitral tribunals have pointed out that it would be unreasonable for an investor to expect its investment to never suffer any damage. OHADA countries should therefore consider either clarifying the standard's scope or limiting its application to certain aspects of the agreement or not including at all.

However the limitation of the right to transfer provided both in NAFTA and the South African Bill should be adopted by OHADA countries. Granting absolute rights of transfer will put the host state in a very precarious situation in the event of a financial crisis.

An MFN clause is inherently very broad and can allow investors to use substantive rights granted under different BITs. OHADA formulation of the MFN clause should narrow it down by prohibiting its application to substantive rights in BITs signed with third parties or specify the context in which the clause is to be applied.

Lastly OHADA countries should ensure that they provide for regulatory space in the interest of the country but not overly emphasise on it the way South Africa has done in its draft Bill. Insisting too much on such discretion would scare away foreign investors as they will be vulnerable to changes in the legal regime at the pleasure of the state. Alternatively they could provide for exceptions similar to art XX of General Agreement on Tariffs and Trade (GATT). The preamble to BITs should also strike a balance between the state's right to regulate and foreign investors' rights of protection.²⁸⁸

3.3. CONCLUSION

Investment protection is a double edged sword. African countries are torn between preserving the country's national interest and attracting much needed investment. On the one hand, Pro investor BIT drafting will put host countries in a precarious position and will make them susceptible to arbitration for actions taken by the government for legitimate reasons. On the other hand, stringent measures in favour of the state would bring about legal uncertainty and discourage investors.

²⁸⁸ United Nations Conference on Trade and Development op cit (n92) 111 to 112; Sornarajah op cit (n6) 266.

Arbitral tribunals have agreed however that while states have obligations towards investors they cannot jeopardise the country's policies in favour of investments. More specific provisions would be beneficial to both parties. However there is no guarantee that arbitral tribunals will follow a specific interpretation as they are not bound by a common law system of precedent. If anything interpretations by arbitral tribunals are unpredictable as the example of NAFTA showed. It is up to an arbitrator to decide whether it will inform its decisions from previous awards. Hence drafting an investment agreement with more specific provisions does not absolutely guarantee that clauses of the agreement will be interpreted uniformly but it certainly maximises the chances of reaching the desired outcome.

I have examined whether NAFTA chapter on investment and the South African model would be a viable models in the event OHADA harmonises the investment laws of its member states. I now turn to the OHADA arbitration system to determine whether or not it can effectively settle investment disputes arising out of a BIT.

CHAPTER FOUR: OHADA ARBITRATION AND INVESTMENT DISPUTES

4. INTRODUCTION

The OHADA system is entirely founded on the concept of ‘legal and judicial security’. This entails on the one hand providing harmonised, simple, modern and adaptable business laws while ensuring the conscientious application of these laws through an effective judicial system on the other hand.²⁸⁹ For that purpose Uniform Acts²⁹⁰ were enacted and the Common Court of Justice and Arbitration (CCJA)²⁹¹ created to ensure their proper and consistent application.²⁹² Consequently the CCJA has powers to review in cassation decisions made by courts of Appeal of OHADA states.²⁹³ The court also acts as a Centre of arbitration.²⁹⁴

Arbitration has become the preferred mode of dispute resolution for foreign economic operators for several reasons the most cited being that it is less time consuming, cheaper, confidential, neutral and more importantly parties have control over the arbitration process.²⁹⁵ In other words parties to an arbitration agreement have the autonomy to choose the forum and the arbitrators. Cuperlier argued that international commercial operators would prefer arbitration to national courts ‘*to avoid being confronted with a national justice system which they fear, rightly or wrongly, will favour its nationals, disregard the principles of international trade; or can only be source of*

²⁸⁹ Preamble to the OHADA Treaty adopted on 17th October 1993 at Port Louis published in Official Journal No 4 of 01/11/1997.

²⁹⁰ Art 5 of OHADA Treaty stipulates that acts enacted for the adoption of common rules as provided for in art 1 of the treaty are to be known as ‘uniform Act’.

²⁹¹ The Common Court of Justice and Arbitration is also known as the CCJA.

²⁹² Art 14 of the Treaty provides that the Common Court of Justice and Arbitration will ensure a uniform interpretation and application by Contracting States of the rules as laid down for their application and that of Uniform Acts.

²⁹³ Art 14 (3) OHADA Treaty; The court of Cassation or ‘Cour de Cassation’ is the highest court in countries with a Civil Law tradition. It only ensures that the law has been properly interpreted and applied by the court of Appeal and if it determines that it has not, the case will be referred back to the latter. In other words it only hears matters of law and not of facts. Black’s law dictionary defines ‘court of cassation’ as the highest court of France. It derives its name from its power to quash the decrees of inferior courts.

²⁹⁴ Art 21 of the OHADA Treaty.

²⁹⁵ A Mouloul ‘L’arbitrage dans l’espace OHADA’ Conférence International sur le droit des affaires de l’OHADA. Maison du droit Vietnamo-française Hanoi Vietnam le 28 Janvier 2010, available at <http://www.ohada.com/doctrine/categorie/4/arbitrage.html>, accessed on 9 January 2015; L Cadiet *Droit et attractivite economique: Le cas de l’OHADA* IRJS eds (2013) 99.

slowness and negative publicity; such fear is accentuated when dealing with public entities'.²⁹⁶ Most importantly, foreign arbitral awards can be enforced with ease across borders more effectively than foreign court judgment, through enforcement conventions such as the New York Convention.²⁹⁷

Several international arbitration conventions and arbitration rules have been designed to regulate arbitration and its incidental matters such as the Convention on the Settlement of Investment disputes between states and national of other states²⁹⁸, the New York Convention²⁹⁹ and the International Chamber of Commerce Arbitration Rules (ICC Rules)³⁰⁰, to cite a few.

All CEMAC states' investment charters invariably include OHADA arbitration to settle contentions arising out of their provisions. The same cannot be said in the case of BITs which generally refer to international arbitration systems such as the International Centre for the Settlement of Investment Disputes (ICSID), United Nations Commission on International Trade law (UNCITRAL) and International Chamber of Commerce arbitration among others with ICSID being the most frequently used. The question then remains whether the OHADA arbitration system is effective enough to settle investor-states arbitration like ICSID arbitration in the event that OHADA harmonises investment laws, bearing in mind that ICSID arbitration system has the advantage of experience in these matters.

4.1. OHADA ARBITRATION SYSTEM

The perceived advantages of arbitration by foreign investors have raised the status of arbitration to being the mode of dispute settlement of choice in the OHADA region.

²⁹⁶ O Cuperlier 'Arbitrage OHADA et personnes publiques' available at

<http://www.ohada.com/doctrine/categorie/4/arbitrage.html>, accessed on 9 January 2015 p.5

²⁹⁷ Emmanuel Gaillard & John Savage (ed) *Fouchard, Gaillard, Goldman on international commercial arbitration* (1999) 885; GK Douajini 'The recognition and enforcement of arbitral awards in OHADA member states' (2003) 20 *Journal of International Arbitration* 205 at 205.

²⁹⁸ Convention on the settlement of Investment Disputes between States and Nationals of other States, 1965 (ICSID Convention).

²⁹⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention).

³⁰⁰ International Chamber of Commerce Rules of Arbitration 2012 or ICC Arbitration Rules.

CEMAC states have included it not only in their national investment laws³⁰¹ but also in BITs to assure investors of a neutral forum in which they can assert their rights. In line with this idea CEMAC countries have therefore expressed their intention to encourage recourse to arbitration and guarantee the enforcement of arbitral awards.³⁰²

OHADA provides for two types of arbitration namely ad hoc arbitration under the Uniform Act on Arbitration (UAA)³⁰³ and institutional arbitration under the aegis of the Common Court of Justice and Arbitration.³⁰⁴ This chapter will look at each type of OHADA arbitration especially the provisions on recognition and enforcement of arbitral awards and determine the strengths and weaknesses of the OHADA system of arbitration vis-à-vis foreign investors.

4.1.1. Arbitration under the Uniform Act on Arbitration

OHADA Uniform Acts are directly applicable and overriding in the OHADA member state notwithstanding conflicting national laws, either previous or subsequent.³⁰⁵

Consequently Uniform Acts take precedence over national laws in respect of matters governed by them. They do not repeal national legislation but merely render ineffective those provisions that are contrary to them.³⁰⁶ Thus the Uniform Act on Arbitration is the law governing arbitration in the OHADA member states.³⁰⁷

³⁰¹ Art 11 & art 12 Charte des Investissements du Cameroun Loi No 2002-004 du 19 Avril 2002 modifiée par la Loi No 2004-20 du 22 juillet 2004 et par l'Ordonnance No 2009-001 du 13 Mai 2009; art 22 Charte des Investissements de la République Centrafricaine, Loi No 01-010 du 16 Juillet 2001; art 11 & art 37 Loi No 6-2003 du 18 Janvier 2003; Art 2 & art 5 Loi No 15- 1998 instituant la Charte des investissements; Arts 8 & 30 Loi No 006/PR/2008 du 3 Janvier 2008.

³⁰² Art 5 of the CEMAC Investment Charter, Règlement No 17/99/CEMAC-20-CM-03 du 17 Décembre 1999.

³⁰³ The Uniform Act on Arbitration adopted on 11/03/1999

³⁰⁴ CCJA arbitration is governed by the Arbitration Rules of the Common Court of Justice and Arbitration, available at <http://www.ohada.com/reglements/666/arbitration-rules-of-the-common-court-of-justice-and-arbitration.html>, accessed on 14/01/2015.

³⁰⁵ Art 10 of the OHADA Treaty.

³⁰⁶ At the request of Cote d'Ivoire's court of Appeal in 2000, the CCJA gave an interpretation of art 10 of OHADA Treaty in its *advisory opinion No 001/2001/EP of 30th April 2001*. It held that Art 10 has the effect of abrogating and prohibiting future national legislations on matters regulated by Uniform Acts and domestic provisions that do not conflict with a Uniform Act remain applicable; MS Tumnde 'The applicability of the OHADA Treaty in Cameroun: Problems and Prospects' (2002) Université de Dschang. *Annales de la faculté des science juridiques et politiques. Tom 6 Numéro special* 26.

³⁰⁷ Art 35 Uniform Act on Arbitration or UAA.

As mentioned above arbitration under the UAA³⁰⁸ is *ad hoc*. Therefore it does not benefit from administrative support by an arbitration centre and all questions surrounding the arbitration are handled by the parties, the arbitrators and national courts. Parties to arbitration proceedings have the autonomy to choose the forum of arbitration, the applicable law and the arbitrators. Moreover ad hoc arbitration has the additional advantage of flexibility as parties can derogate from non-mandatory arbitration rules if they wish to do so.³⁰⁹

UAA arbitration will only be resorted to when the seat of the arbitral tribunal is in one of the OHADA member states³¹⁰ and in respect of rights of which a party has free disposal.³¹¹ Rights that can be freely disposed of are rights which parties can freely enjoy and enforce in a forum other than national courts.³¹² Therefore they do not require the involvement of public authorities.³¹³ Investment disputes can therefore be settled by UAA arbitration provided the seat of the arbitral tribunal is in an OHADA state.³¹⁴

Moreover the UAA allows states and other public entities to participate in arbitration proceedings without the possibility of invoking national law to contest *the arbitrability of the claim, their capacity to sign arbitration agreements or the validity of the arbitration agreement*.³¹⁵ Therefore when an OHADA state signs an arbitration agreement it waives its immunity from jurisdiction.

4.1.1.1. *Arbitral awards*

Arbitral awards once issued have a *res judicata* effect.³¹⁶ They are not subject to appeals on the merits but can nevertheless be annulled on application by one of the

³⁰⁸ Uniform Act of Arbitration will be referred as the UAA.

³⁰⁹ Martor, Pilkington, Seller et al op cit (n49) 261.

³¹⁰ Art 1 of UAA.

³¹¹ Art 2 of UAA.

³¹² Hence disputes related to status such as divorce disputes cannot be included in that category because they must be settled in national courts.

³¹³ Martor, Pilkington, Seller et al op cit (n49) 262; JM Tchakoua 'L'arbitrabilité des différends dans l'espace OHADA' in A Feneon *les grands articles de doctrine de l'OHADA* editions Juris Africa (2013) 345 to 346.

³¹⁴ O Cuperlier 'Arbitrage OHADA et personnes publiques' available at <http://www.ohada.com/doctrine/categorie/4/arbitrage.html>, accessed on 9 January 2015.

³¹⁵ Art 2 UAA.

³¹⁶ Art 23 UAA.

parties.³¹⁷ The petition for annulment is heard by the competent national court of the member state where the seat of arbitration is located³¹⁸ and has the effect of suspending recognition and enforcement of the award until the matter is settled.³¹⁹ The petitioning party should lodge the petition as soon as the award is made or within one month of notification of the award³²⁰ and must prove one of the following grounds:

- The arbitral tribunal has ruled without an arbitration agreement or based on an agreement which is void or has expired;
- The arbitral tribunal was irregularly constituted or the sole arbitrator was irregularly appointed;
- The arbitral tribunal has exceeded its mandate;
- The principle of *audi alteram partem*³²¹ or adversary procedure has not been observed;
- The tribunal violated an international public policy rule of the states signatories to the OHADA Treaty;
- If no reasons are given for the award.³²²

The judge hearing the petition however does not review the award on its merit. He is only allowed to do so to the extent necessary to determine a violation of public policy. He/she is therefore not allowed to issue a new judgment but can either reject the application or declare the award null and void.³²³ The annulment order can be set aside by the CCJA³²⁴ but in the event it is upheld, parties can initiate fresh arbitration proceedings. It has been argued that the annulment process may have a dissuading effect on foreign investors as it gives a malicious party an opportunity to use the arbitration system to frustrate or delay enforcement of an arbitral award.³²⁵ However one should

³¹⁷ Art 25 UAA.

³¹⁸ Ibid.

³¹⁹ Art 28 UAA; The same does not apply if the arbitral tribunal had already ordered provisional enforcement of the award.

³²⁰ Art 27 UAA.

³²¹ Audi alteram partem is one of the principles of natural justice and means 'hearing the other party'. Both parties to arbitration have the right to present their case to the arbitrator.

³²² Art 26 UAA.

³²³ Martor, Pilkington, Seller et al op cit (n49) 269.

³²⁴ Art 25 UAA.

³²⁵ A Epie 'Recognition and enforcement of international arbitration awards: Comparative analysis of the New York Convention and the UNCITRAL model law on International Commercial Arbitration and the

also consider that such a mechanism, on the one hand, protects parties against fraud and on the other hand protects the state's right of oversight of arbitrations carried out within its borders.

4.1.1.2. *Enforcement and recognition under the Uniform Act of Arbitration*

Enforcement and execution of awards are the most important aspects of arbitration because they give the arbitration process meaning. Douajini argued that 'the effectiveness of arbitration transpires through the ease with which arbitral awards can be executed'.³²⁶ Meuke and Konate found execution of arbitral awards to be a natural consequence of an effective arbitration and noted that:

*'The arbitral award must be executed for the party that benefits from it to concretely obtain what it is entitled to expect'*³²⁷

Epie similarly observed that *'the soundness of the view that arbitration is a viable alternative to court proceedings can only be judged by the legal arsenal available to the victorious party to enforce the arbitral award'*³²⁸ He considers enforcement of awards to be *the fulcrum, the quintessence of international arbitration.*³²⁹ Epie further pointed out that *'it would make no sense to resort to arbitration if an award is not worth the paper on which it is written'*.³³⁰

When a court recognises a foreign judgement, it 'domesticates' it thus giving it the same status and authority as a national judgement. Zeynalova noted that *'a recognised judgement is considered res judicata upon other actions in the recognizing jurisdiction because it is seen as producing the same effect and having the same*

OHADA Regimes', available at <http://www.ohada.com/doctrine/categorie/4/arbitrage.html>, accessed on 9 January 2015 .

³²⁶ GK Douajini 'L'exécution des sentences arbitrales dans l'espace OHADA' (2010) *Revue Camerounaise de l'arbitrage Numéro spécial* 100.

³²⁷ BY Meuke & MI Konate 'Breves observations sur l'exécution des sentences arbitrales rendues contre un Etat partie au Traité de l'OHADA' *Jurifis Info* Decembre 2010 available at <http://www.ohada.com/doctrine/categorie/4/arbitrage.html>, accessed on 9 January 2015.

³²⁸ A Epie 'Recognition and enforcement of international arbitration awards: Comparative analysis of the New York Convention and the UNCITRAL model law on International Commercial Arbitration and the OHADA Regimes', available at <http://www.ohada.com/doctrine/categorie/4/arbitrage.html>, accessed on 9 January 2015.

³²⁹ Ibid.

³³⁰ Ibid.

*authority as a case originally decided in the jurisdiction*³³¹ Though recognition was analysed in the context of foreign judgments the meaning and effect of recognition remain the same as far as arbitral awards are concerned.

Enforcement on the other hand can be understood as ‘the act or process of compelling compliance with a law, a mandate or a command- in this case an arbitral award’³³². In other words the help of the courts of the enforcing jurisdiction is required to execute the recognised judgment or award.³³³

An arbitral award under the UAA can only be enforceable after an exequatur has been granted by the national court of the member state where enforcement is sought.³³⁴ An exequatur is not in itself an enforceable act but makes the arbitral award binding and therefore enforceable.³³⁵ It is a pre requisite to execution of an arbitral award.³³⁶ It therefore should be understood as a ‘leave to enforce an award’.³³⁷

The exequatur will only be granted by the competent court upon proof of existence of the award and if it is not contrary to the international public policy of member states.³³⁸ Existence of the arbitral award is established by the presentation of the award together with the arbitration agreement or certified copies thereof. Therefore the national judge does not examine the award on its merit but simply verifies the authenticity of the documents presented.³³⁹

³³¹ Y Zeynalova ‘The law on recognition and enforcement of foreign judgements: Is it broken and how do we fix it?’ (2013) 31 *Berkeley Journal of international law* 150 at 155.

³³² Black’s Law Dictionary 6ed.

³³³ Zeynalova op cit (n331) 155.

³³⁴ Art 30 UAA; A Dieng ‘L’arbitrage dans l’OHADA: Regionalisme ou Universalisme’ *Séminaire International Conjoint UIA ordre des avocats du Sénégal*, from 19 to 20 February 2010, available at <http://www.ohada.com/doctrine/categorie/4/arbitrage.html>, accessed on 9 January 2015.

³³⁵ A Dieng ‘Panorama pratique du droit OHADA: Quels enjeux pour les avocats? L’Exequatur des decisions et sentences CCJA. *Colloque OHADA de Barreau Pluriel* 26 Novembre 2009, available at <http://www.ohada.com/doctrine/categorie/4/arbitrage.html>, accessed on 9 January 2015; P Leboulanger ‘L’immunité d’exécution des personnes morales de droit public’ (2010) *Revue Camerounaise de l’arbitrage* Numéro spécial 127 at 129.

³³⁶ Art 30 UAA provides that the award can only be subject to compulsory enforcement by virtue of an exequatur awarded by the competent judge in the member state. Compulsory enforcement is also referred to as ‘exécution forcée’.

³³⁷ L Bosman (Ed) *Arbitration in Africa: A practitioner’s guide* (2013) 327.

³³⁸ Art 31 UAA; It has been argued that international public policy of member states refers to OHADA international public policy. The CCJA is yet to determine its meaning.

³³⁹ Dieng op cit (n334) 130.

The exequatur can however be denied if contrary to the international public policy of the member states.³⁴⁰ Several authors have argued that international public policy of member states refers to the public policy of the Community.³⁴¹ The CCJA however has not yet issued guidelines as to what constitutes a breach of the community public policy and the courts of member states which were confronted with the issue referred to their national public policy.³⁴² Until the CCJA interprets the provision the uncertainty of such a provision and the reliance on national law by default does not reassure the foreign investor that states will not misuse the public policy defence to deny enforcement of an award.

Moreover the fact that the exequatur under the UAA is state specific will not encourage foreign parties to resort to OHADA arbitration under the UAA in comparison to the community exequatur of the CCJA.³⁴³ A foreign investor will have to go through the process of enforcement and recognition all over again if it decides to have the judgement enforced in another member state. This is the practice in all commercial arbitrations and is not necessarily a problem.

An interesting feature of UAA is found in art 34 which recognises as binding in OHADA member states arbitral awards made on the basis of different rules and conventions to which OHADA states are members, subject to conditions spelled out in an international agreement. The UAA in that case will only be applied to fill gaps.³⁴⁴ Thus the UAA coexists and complements the New York Convention and ICSID Convention in the OHADA space.³⁴⁵ A problem might arise when an award has to be enforced in a state not member to these international agreements. The foreign investor is

³⁴⁰ Art 32 UAA allows a party to appeal a ruling denying an exequatur to the CCJA while at the same time forbidding such a recourse if the exequatur has been granted. In other words once an exequatur has been granted it is final.

³⁴¹ Douajini op cit (n326) 101; Mouloul op cit (n295).

³⁴² Ibid.

³⁴³ Art III of the New York Convention.

³⁴⁴ Similarly art VII (1) of the New York Convention acknowledges multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by its contracting parties and allows parties to enforce any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such an award is sought to be relied on.

³⁴⁵ UAA enforcement mechanisms are available to awards rendered under other Arbitration rules and conventions provided the enforcement mechanisms under these arbitration rules and conventions are not applicable in the OHADA member state because that state is not a contracting party.

nevertheless not left without any avenue as he can rely on the UAA in the alternative. However Cuperlier was of the opinion that:

*‘...Its [UAA] multiple references to the competent judge in the member state has confined the application of the Uniform Act to local arbitration and do not allow it to answer in its own capacity to the concerns of international investors’*³⁴⁶

4.1.2. Arbitration under the Common Court of Justice and Arbitration

Institutional arbitration in OHADA is conducted under the auspice of the CCJA.³⁴⁷ The CCJA does not act as an arbitral tribunal but offers administrative support to the arbitration.³⁴⁸ CCJA arbitration is only possible if there is a link between OHADA member states and the matter in dispute or the parties. Thus parties to a contract can only use CCJA arbitration if one of the parties has its domicile or its habitual residence in a member state or if the contract in respect of which there is a dispute was to be performed wholly or partially in one or more OHADA states.³⁴⁹ The dispute however has to be of a contractual nature.

Art 21 excludes investment disputes within its scope. Investment disputes under investment treaties differ from contractual disputes as they arise out of a BIT signed between the host state and the investor’s home state. Investors are not direct parties to such a treaty but benefit from its provisions. It has been argued that contractual claims differ from claims under BITs in respect of their legal source, the content of the rights and the parties to the dispute.³⁵⁰ Investment disputes may also arise out of investment contracts (eg long term concessions) concluded between an investor and a state.

³⁴⁶ O Cuperlier ‘Arbitrage et personne publique’ available at

<http://www.ohada.com/doctrine/categorie/4/arbitrage.html>, accessed on 9 January 2015.

³⁴⁷ All CCJA arbitrations are governed by the Arbitration Rules of the Common Court of Justice and Arbitration.

³⁴⁸ Art 21 OHADA Treaty.

³⁴⁹ Ibid.

³⁵⁰ Mariel Dimsey *The resolution of international investment disputes: Challenges and solutions* (2008) 46.

4.1.2.1. *Arbitral awards*

Limiting the scope of CCJA arbitration to disputes of a contractual nature is unfortunate since it is the better system in comparison to UAA arbitration.³⁵¹ For instance, in addition to the *res judicata* effect of an award³⁵², an exequatur delivered by the CCJA has authority in the whole of the region rather than just in the country where an exequatur petition is lodged.³⁵³ This compares favourably to the ICSID and the New York Convention systems.

Under ICSID parties are under an obligation to recognise an award rendered pursuant to the convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that state.³⁵⁴ The winning party in ICSID arbitration does not need an exequatur but merely has to present a certified copy of the award to the designated court or authority for the award to be recognized.³⁵⁵ The recognition is however country specific.

Similarly the New York Convention conditions recognition and enforcement of an award upon presentation of a duly authenticated arbitral award together with the arbitration agreement to the competent court of the recognising state and is only applicable in that state.³⁵⁶

The CCJA system does, however, have its weaknesses. Art 25 of the OHADA Treaty does not include improper constitution of the arbitral tribunal as one of the exceptions to the grant of an exequatur. Moreover the CCJA Arbitration rules provide that an exequatur may be denied if the arbitrator ruled without any arbitration agreement or based on a void arbitration agreement; if the arbitrator exceeded its mandate; when the principle of adversary procedure was not respected; and if the award is contrary to public policy.³⁵⁷ Some authors pointed out that:

³⁵¹ Art 30 (2) of the CCJA Arbitration Rules provides that once an exequatur has been granted by the court it is enforceable in all OHADA States and not just the State where the party applied for an exequatur.

³⁵² Art 27 CCJA Arbitration Rules.

³⁵³ Ibid.

³⁵⁴ Art 54 (1) ICSID Convention.

³⁵⁵ Art 54 (2) ICSID Convention.

³⁵⁶ Art IV New York Convention.

³⁵⁷ Art 30 (6) CCJA Arbitration Rules

*‘the absence of a provision allowing the parties to contest the validity of an award if the tribunal has been improperly constituted is more troubling because it presupposes the infallibility of the CCJA in such matters which may not always be the case’.*³⁵⁸

4.1.2.2. *Enforcement and recognition under the CCJA arbitration rules*

Despite the fact that recognition of arbitral awards has been made easier in OHADA member states through the community exequatur, execution remains problematic. The Uniform Act on Simplified Recovery Procedures and Measures of Execution (AUPSRVE) prohibits forced execution and conservatory measures on persons benefiting from immunity from execution and offers compensation in the alternative provided the debt is certain and liquidated.³⁵⁹ In other words consent to arbitration in OHADA amounts to a waiver of immunity from jurisdiction³⁶⁰ but not of immunity from execution.

The CCJA supported this position in its judgment of 7th July 2005 in which it held that Togo Telcom, a Togolese public company liable to pay its employees certain sums of money, was covered by immunity from execution as provided for in art 30 of the AUPSRVE and consequently quashed the judgement issued by the Lomé court of Appeal.³⁶¹ Commentators observed that the CCJA interpretation of art 30 is contrary to the OHADA objective of legal and judicial security.³⁶²

The ICSID encounters the same difficulties when issues of execution arise. Art 55 of the ICSID Convention provides that nothing in art 54 shall be construed as derogating from the law in force in any contracting state relating to immunity of that state or of any foreign state from execution. Therefore execution of an ICSID award is subject to the laws on execution of the state in which execution is sought.³⁶³

³⁵⁸ Martor, Pilkington, Seller et al op cit (n49) 281.

³⁵⁹ Art 30 of the Uniform Act on simplified recovery procedures and measures of execution adopted on 10/04/1998.

³⁶⁰ Art 2 UAA.

³⁶¹ CCJA judgment No 043/2005 of 7th July 2005.

³⁶² O Cuperlier ‘Arbitrage et personne publique’ available at <http://www.ohada.com/doctrine/categorie/4/arbitrage.html>, accessed on 9 January 2015

³⁶³ Art 54 (3) ICSID Convention.

Some jurisdictions like France have acknowledged that consent to arbitration waives both immunity from jurisdiction and immunity from execution.³⁶⁴ The ICC equally specifies in its arbitration rules that:

*'...By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.'*³⁶⁵

4.2. CONCLUSION

OHADA has created an arbitration system of international standard. Arbitration under the UAA may, however, be less attractive to investors because of the constant referral to national jurisdiction when compared to CCJA arbitration. Yet national court involvement is important as a check and balance mechanism to protect the interest of the state.

The UAA also acknowledges the existence of other international arbitration systems and ensures the enforcement of arbitral awards from such arbitration. Therefore a foreign investor with an arbitral award under the ICSID Convention or a commercial or investment award rendered outside the OHADA space will be enforceable under the ICSID or the New York Convention provided the member state is also a party to these international conventions. Where the member state in which recognition and enforcement is sought is not party to any of these conventions the foreign investor can rely on the UAA in the alternative. The fact that the exequatur is only applicable in the recognising state can be less appealing when one considers the CCJA arbitration which offers a simplified and more effective recognition system.

One of the more significant innovations of OHADA arbitration is the community exequatur which makes an award enforceable in all OHADA states once it has been issued by the CCJA. This mechanism however is only available when the dispute to be settled by arbitration is of a contractual nature. Investment disputes arising out of a BIT do not benefit from the community exequatur because such disputes are not resolved through CCJA arbitration. ICSID (or investor-state arbitration administered under

³⁶⁴ Civ. 1ere, 6 juillet 2000, Société Creighton c/ Ministre des Finances Etat du Qatar et autre, Rev Arb 2001; Leboulanger op cit (n335) 129; Art 19 of the United Nations Convention on Jurisdictional Immunities of States and their Property, New York, 2nd December 2004.

³⁶⁵ Art 34 (6) of ICC Arbitration Rules 2012.

another set of rules such as the UNCITRAL rules) is therefore the only available alternative to parties.

Execution of arbitral awards is the Achilles' heel of OHADA arbitration system. The fact that the CCJA chose to interpret art 30 of the AUPSRVE in a restrictive manner renders the community exequatur ineffective and defeats the 'legal and judicial security' objective of the OHADA Treaty. One of the consequences of the objective would be to have an effective system of enforcement of decisions. Thus OHADA should adopt France's approach of assuming that consent to arbitration waives both immunity from execution and immunity from jurisdiction and put restrictions on the type of property against which execution may be levied.³⁶⁶

I have analysed the OHADA arbitration system in order to determine whether or not it would effectively settle investment disputes and now I turn to the last chapter which will consist of the conclusions drawn from the analysis carried out from chapter one to four and my recommendations.

³⁶⁶ Cadiet op cit (n295) 120.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5. INTRODUCTION

The purpose of this dissertation was to assess whether investment laws could be harmonised in OHADA space and if so what would be the appropriate protection to grant foreign investors. Moreover we had to determine whether or not OHADA has the proper mechanisms to resolve investment disputes should they arise.

5.1 CONCLUSIONS

The process of harmonisation and modernisation of business laws in OHADA space was initiated to achieve legal and judicial security and at the same time encourage investments in the region. Legal and judicial insecurity was identified as the main cause of the drop of investments in the region.³⁶⁷ Hence the concept of legal and judicial security was adopted not only in national investment laws of certain OHADA countries but also in sub regional investment codes such as the CEMAC investment charter.³⁶⁸

Some researchers however have argued that legal stability of a country does not really influence an investor's decision to invest³⁶⁹, others have argued that it is one of several factors an investor will consider when making its decision³⁷⁰ while others pointed out that no significant increase of investment was registered despite the legal changes done by developing countries.³⁷¹ The majority of researches reviewed show that legal stability may be one of the factors investors will consider but not the most compelling one. Moreover it is difficult to prove that there would be less investment in the absence of legal reforms.

OHADA countries all have national investment codes. Six of the seventeen OHADA states have the CEMAC investment charter to which their national codes must conform. Moreover the UEMOA, which shares members with OHADA, also has an investment code that was not analysed due to lack of accessible information. The

³⁶⁷ JF Nguembo *Le rôle des juridictions supranationales de la CEMAC et de l'OHADA dans l'intégration des droits communautaires par les Etats membres* PhD (Université Panthéon- Assas) (2011) 55 to 56

³⁶⁸ Art 4 Règlement No 17/99/CEMAC-20-CM-03 du 17 Décembre 1999 or CEMAC Investment Charter; Art 11 Loi No 6-2003 du 18 January 2003; Art 8 Loi No 006/PR/2008 of 3 January 2008; Art 1 Loi No 01/010 of 16 July 2001

³⁶⁹ Walsh & Yu op cit (n70)

³⁷⁰ Dolzer & Scheuer op cit (n133)

³⁷¹ Asiedu op cit (n22)

harmonisation of investment laws by OHADA would therefore be repetitive if not problematic because there would be several investment codes running simultaneously in the region. The relationship between CEMAC and OHADA has not yet been clarified but decisions of the CEMAC court of Justice and that of UEMOA suggest that these courts are willing to recognise the supremacy of OHADA law and their lack of competence to hear matters regulated by OHADA Uniform Acts.³⁷² In addition to that CEMAC States, through the Investment Charter, reiterated their adherence to the OHADA Treaty; undertook to abide by the procedures and decisions of the CCJA and to adapt their national laws to OHADA judicial framework and rules.³⁷³ Hence despite the vague relationship between OHADA and CEMAC law, case law and investment laws in the region suggest that if OHADA decides to include investment law within its ambit the Uniform Act on investment will supersede all existing investment laws in the region.

National and sub-regional investment codes are not the only instruments governing investment within the region. OHADA states also sign BITs with capital exporting States for the purpose of protecting investments. The classical standards of protection are fair and equitable treatment; full protection and security; most favoured nation treatment; national treatment; free transfer of funds and prohibition of expropriation. The majority of BITs analysed were signed and not enforced but they provided an idea of the type of protections OHADA countries are willing to concede. Generally CEMAC countries offer protections without qualifying them which implies that the liability threshold is quite low making them liable to investors in broad circumstances.³⁷⁴ Some arbitral tribunals have tried to qualify such obligations by arguing that BITs are not insurance policies but that is not the trend.³⁷⁵

NAFTA included a chapter on investment and seem to have a precise and predictable set of laws with clear interpretation rules. Indeed the NAFTA Free Trade Commission has issued Notes of Interpretation of certain chapter 11 provisions to guide arbitral tribunals in their interpretation of the fair and equitable treatment and full protection and security standards. The Notes however did not prevent differing

³⁷² Cour Constitutionnelle du Sénégal, arrêt No 3/C/93 du 16 décembre 1993.

³⁷³ Op cit (n367).

³⁷⁴ United Nations Conference on Trade and Development op cit (n92) 13

³⁷⁵ Andrés Rigo Sureda *Investment Treaty Arbitration* (2012) 78

interpretations from being adopted by NAFTA arbitral tribunals.³⁷⁶ The interpretation of standards of protection in BITs is unpredictable due to the lack of clear definition of the content of these standards.³⁷⁷ Moreover the ad hoc nature of arbitral tribunal makes consistency of decisions impossible because tribunals are not bound by a system of precedent.³⁷⁸ The South African model may not be the best example to follow because it emphasises more on the state's regulatory space than on investment protection leaving foreign investors vulnerable to unilateral changes by governments.

OHADA provides for both ad hoc and institutional arbitration. The question that begged to be answered was whether OHADA had the proper mechanisms to resolve investment disputes effectively. The ad hoc arbitration under UAA is suitable to commercial and not investment disputes. It nevertheless has the advantage of recognising arbitral awards outside OHADA. Arbitration under the CCJA would have been the best avenue to foreign investors³⁷⁹ but is not available to them because investment disputes are not resolved under the CCJA. Parties to an investment disputes arising out of a BIT who choose OHADA arbitration can only resort to ad hoc arbitration which does not have an appealing enforcement mechanism to foreign investors. In the current situation, therefore, international systems such as the ICSID arbitration remain the best option despite all criticisms levelled against it.³⁸⁰

Execution of arbitral awards remains problematic within the region. Judicial security, one of the fundamental objectives of OHADA, entails on the one hand proper application of the law and on the other hand, effective enforcement mechanisms. Allowing states to rely on immunity from execution is contrary to that objective.³⁸¹ Since the OHADA Treaty and the CCJA rules on arbitration stop member states from

³⁷⁶ United Nations Conference on Trade and Development op cit (n92) 76

³⁷⁷ Surena op cit (n374) 139

³⁷⁸ Ibid.

³⁷⁹ The community exequatur makes an award enforceable in all OHADA member states. The winning party is not required to go through the process of recognition in the recognizing country.

³⁸⁰ JD Mortenson 'The meaning of "Investment": ICSID Travaux and the Domain of International Investment Law' (2001) 51 *Harvard International Law Journal* 259; AK Hoffman 'Protection of Foreign Investment through Modern Treaty Arbitration: Diversity and Harmonization', (2010) ASA Special Series No 34 at p 71

³⁸¹ Art 30 of the AUPSRVE

interfering with the recognition of arbitral awards, they should also eliminate any opportunity for States to avoid execution of awards.

5.2. RECOMMENDATIONS

Based on the analysis conducted from chapter one to four I will make a number of recommendations.

My first recommendation is that the investment codes in CEMAC and UEMOA be synced in an OHADA Uniform Act. Multiplicity of laws is a source of judicial and legal uncertainty. Creating one investment law in the region would have the double benefit of enhancing legal security and reassuring foreign investors

My second recommendation is that it will be in the interest of OHADA countries when signing BITs to make sure that the standards of protection are specific enough to curb arbitral tribunals' broad interpretation. Santiago Montt, on his part, suggested that if arbitral tribunals persist in adopting a pro investor stance to their interpretation, developing states should abandon the BITs scheme altogether.³⁸²

My third recommendation regarding CJJA arbitration is that the OHADA Treaty can expand the scope of institutional arbitration and adopt the language in art 7 of the UNCITRAL Model law on arbitration which subjects to arbitration disputes in respect of defined legal relationships whether contractual or not.

Lastly on the issue of execution I recommend that the Council of Ministers rephrases the provision of the Uniform Act on execution in such terms as to prevent states from avoiding execution. It can therefore adopt the language of art 34 (6) of the ICC Arbitration Rules and France's approach in respect of the question of property against which execution can be levied.

³⁸² Santiago Montt *State liability in investment treaty arbitration* (2009) 160

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