

ITWEVA NOGUEIRA

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**AFRICA ARBITRATION ACADEMY by AYA**  
**“TAX AND INVESTMENT LAW IN AFRICA”**

**Introduction**

Bilateral Investment Treaty (hereinafter “BIT”) is a treaty signed between two States and is considered the most relevant source of international investment law; They ought to ensure that a State is investment-friendly.

With a BIT, expectations are created for both Parties, and for the foreign investors of each contracting State; Such expectations in the case of the latter tantamount to the substantive standards of protection of the investment, that when breached trigger the dispute settlement system established in the BIT.

However, this raises discussions around tax and investment law as set bellow.

**The BIT’s, FDI and State Sovereignty**

The increased interest on BITs goes back to the end of 1980s, as the lending of capital by international banks decreased, thus States start competing for BITs as a form of capitalization of their economies;<sup>1</sup> Hence, thousands of BIT’s focus on the attraction of Foreign Direct Investment (hereinafter “FDI”).<sup>2</sup>

The parties involved on BITs are are States typically with different economic status, which dictates that the negotiation of BITs concludes with more favourable terms for the investing State, and restrictions of action for the host State.

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<sup>1</sup> Beth A. Simmons, 'Bargaining Over Bits, Arbitrating Awards: The Regime For Protection And Promotion Of International Investment' (2013) 66 (2) World Politics 20

<sup>2</sup> Eric Neumayer and Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment To Developing Countries?' (2005) 33 (10) World Development 1567

In *Re Salini Costruttori SpA Italstrade SpA v Morocco*<sup>3</sup> the tribunal built the concept of foreign investment which requires a “contribution to the host State’s development”.<sup>4</sup>

Another ICSID Tribunal, interpreted the US-Argentina BIT and found that parties of the BIT signed it with the intention to promote greater economic cooperation.<sup>5</sup>

The majority of BIT’s define investment, investors, the standards of protection of the investment and establish the system of dispute settlement;<sup>6</sup> Unarguably a BIT has three fundamental goals, (i) the protection of the investment; (ii) the development of the economy of the Parties; (iii) and liberalization of economic environment of the host State.<sup>7</sup> As proper instrument for protection of investments against unfair expropriation,<sup>8</sup> unarguably they limit their sovereignty, in return for the attraction of foreign investment,<sup>9</sup> especially when they envisage to facilitate the investment inflows and promotion of economic prosperity of host States.<sup>10</sup>

Actuality BIT’s represent a strength of foreign investor, when seriously restrict the ability of host States to regulate over matters that contribute for its developments.<sup>11</sup> See how the USA model BIT prohibits the establishment of performance obligations beyond what is established by international law, regarding the requirements of local content.<sup>12</sup>

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<sup>3</sup> *Salini Costruttori SpA Italstrade SpA v Morocco* (2001) ICSID Case No. ARB/00/4 Decision on Jurisdiction

<sup>4</sup> Ilias Bantekas, *An Introduction To International Arbitration* (Cambridge Univ Press 2015) 286

<sup>5</sup> USA-Argentina BIT (1991), § 3 of Preamble

<sup>6</sup> Rudolf Dolzer and Christoph Schreuer, *Principles Of International Investment Law* (2nd edn, Oxford University Press 2012) 13

<sup>7</sup> Jeswald W. Salacuse and Nicholas P. Sullivan, 'Do Bits Really Work- An Evaluation Of Bilateral Investment Treaties And Their Grand Bargain' (2005) 46 (1) *Harvard International Law Journal* 79

<sup>8</sup> Fouad Alghanim & Sons Co. For General Trading & Contracting, W.L.L. And Mr Fouad Mohammed Thunyan Alghanim v Hashemite Kingdom Of Jordan (ICSID Case No. ARB/13/38) § 117

<sup>9</sup> Rudolf Dolzer and Christoph Schreuer (n 6) 14,20

<sup>10</sup> Kenneth J. Vandeveld, 'The Economics Of Bilateral Investment Treaties' (2000) 41 (2) *Harvard International Law Journal* 471

<sup>11</sup> *Ibid* 490; 499

<sup>12</sup> Eric Neumayer and Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment To Developing Countries?' (2005) 33 (10) *World Development* 1571 and Article 8 USA Model BIT (2012); Kamil Ahmed and Din Eshanov, 'The Expectations Of Developed Countries From The International Investment Regime' [2009] *SSRN Electronic Journal* <<https://ssrn.com/abstract=1480395>> accessed 27 April 2018

BIT's are not aimed to create a collision between both States, but instead to summarize the interests of the parties for a joint purpose.<sup>13</sup> Thus, is it really true?

The standards of protection established in BIT's as "fair and equitable treatment – "including reasonableness, consistency, non-discrimination and transparency"<sup>14</sup> or no expropriation without a fair compensation are set for the protection of the investor and/or the investment and few refers to the development of the host State, apart from the promise of attraction of capital.<sup>15</sup>

For the foreign investor the decision to perform an investment on another State is often highly costly and long term-risky, hence the BIT and its guarantees aims to minimize every risk that may arise during the period of investment.<sup>16</sup>

For the host State, it is considered that FDI enhances sustained economic growth, creating jobs, stimulating competitiveness and entrepreneurship, transferring technology and know-how. Nevertheless, BITs do not make them measurable for balance with the guarantees of protection of investment.<sup>17</sup>

BIT's achieve the goal of investment protection while establishing a separate system of dispute resolution, submitting them to international jurisdiction, outside the control of the host State institutions.<sup>18</sup>

Consequently they often create in the host State the temptation to relax essential legislation that can guarantee their development.<sup>19</sup> This often happens with tax incentives which are non-discriminatory on profit.<sup>20</sup> They restrict State sovereignty, insofar to maintain the

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<sup>13</sup> Rudolf Dolzer and Christoph Schreuer (n 6) 21

<sup>14</sup> Julien Chaisse, 'Making Tax Dispute Resolution Mechanisms More Effective - The Base Erosion and Profit Shifting Project and Beyond' (2017) 10 Contemporary Asia Arbitration Journal 10

<sup>15</sup> Jeswald W. Salacuse and Nicholas P. Sullivan (n 7) 83

<sup>16</sup> Rudolf Dolzer and Christoph Schreuer (n 6) 21

<sup>17</sup> Tarcisio Gazzini, 'Bilateral Investment Treaties and Sustainable Development' (2014) 15 (5-6) The Journal of World Investment & Trade 936

<sup>18</sup> Jeswald W. Salacuse and Nicholas P. Sullivan (n 7) 79

<sup>19</sup> Tarcisio Gazzini (n 17) 937

<sup>20</sup> Leonardo Baccini, Quan Li and Irina Mirkina, 'Corporate Tax Cuts And Foreign Direct Investment' (2014) 33 (4) Journal of Policy Analysis and Management 1002

inflow of FDI States abstain from taking necessary legislative and administrative actions to protect national interests;<sup>21</sup> They may avoid a change on that legal structure that entitles the investor to bring claims for breach of substantive standards of protection.<sup>22</sup>

Nevertheless, it is indisputable how taxes are essential to provide public capital to invest in local infrastructures and promote the local economy. By renouncing this type of resources, the host State limits its capacity of development, creating jobs, or developing its infrastructures.<sup>23</sup> Moreover, they represent

However, if the BIT is negotiated to create a win-win situation, they ought to ensure that obligations related to investment do not limit or circumscribe the regulatory power of the host State to allow its development.<sup>24</sup> For Gazzini the provisions contained on BIT's should not create expectations of weakening the legal system of host State to accommodate investments or pressure the host State to relax legal measures that reflect the protection of sustainable development.<sup>25</sup>

Tax issues related to investment are subject to Double Taxation Treaties – “DTT”, however investors tends to use international arbitration, as they are not dependent of diplomatic interests to initiate a dispute, and the basis of the dispute is a breach of substantive rights of protection of BIT such as the FET or indirect expropriation, *p.e* with a new tax measure targeting a specific investor in a discriminatory way.<sup>26</sup>

While the DTT disputes are subject to a prior action of the States,<sup>27</sup> unarguably this system is less repressive of the State sovereignty than the one on a BIT.

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<sup>21</sup> George K Foster, 'Investors, States And Stakeholders: Power Asymmetries In International Investment And The Stabilizing Potential Of Investment Treaties' (2013) 17 (2) Lewis & Clark Law Review 366

<sup>22</sup> Ibid 364

<sup>23</sup> Ibid

<sup>24</sup> Tarcisio Gazzini (n 17) 938

<sup>25</sup> Ibid 946

<sup>26</sup> Jennifer Bird-Pollan, "The Sovereign Right to Tax: How Bilateral Investment Treaties Threaten Sovereignty" (2018) 32 NOTRE DAME JOURNAL OF LAW ETHICS & PUBLIC POLICY 114

<sup>27</sup> Ibid 113

Additionally, the assessment and collection of tax is a matter of public policy; Hence, should a private arbitral authority decide over a matter of public policy, risking the challenge of the enforcement of an award on grounds of being contrary to public policy?<sup>28</sup>

It is therefore necessary that the tribunal clarifies if the measure was for the benefit of a whole country and represents fair assessment of taxes.<sup>29</sup>

### **Conclusion**

Marxists “characterized foreign investment as the recolonization of host States”,<sup>30</sup> due to high standards of protection of foreign investor that may encourage the control of local economies and the transference of control over local assets to foreign entities.<sup>31</sup> A BIT should not only create a strong net of protection of investment, but also reinforce the host State sovereignty to adopt all policies to allow its development.<sup>32</sup>

Hence, in terms of international protection over tax disputes, whereas the DDT do not threatens the State’s sovereignty, BIT’s empowers investors to act against States even when public policy issues that are essential for their development are at the heart of the discussion.

Originality – 20

Depth - 15

Presentation – 15

**Total – 50%**

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<sup>28</sup> Ibid 118

<sup>29</sup> Ibid 115

<sup>30</sup> Kenneth J. Vandeveld, 'The Economics Of Bilateral Investment Treaties' (2000) 41 (2) Harvard International Law Journal 484

<sup>31</sup> Joshua Boone, 'How Developing Countries Can Adapt Current Bilateral Investment Treaties To Provide Benefits To Their Domestic Economies' (2011) 1 (2) The Global Business Law Review 190

<sup>32</sup> Federico Ortino, 'Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing' (2017) 30 (1) Leiden Journal of International Law 91